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SHORTS ON LONG TERM CARE

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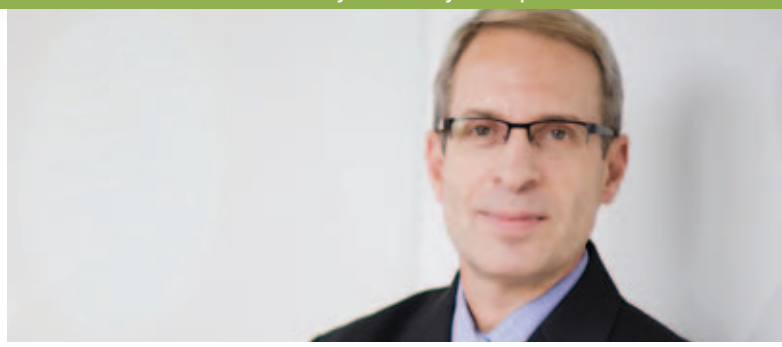

2013 Will Be a Slow Growth Year For Long Term Care in North Carolina

by Ken Burgess

The NC State Health Coordinating Council (SHHC) recently released the draft 2013 State Medical Facilities Plan (SMFP), which identifies all health services "needed" in the state and for which providers can apply to obtain a Certificate of Need (CON), including skilled nursing facility (SNF) beds and adult care home (ACH) beds. For providers looking to grow their business, 2013 will be slow slogging.

The draft 2013 SMFP indicates that no additional nursing facility beds will be needed in NC, and thus there will be no new beds awarded by the CON Section. For ACH providers, the news isn't much better. The draft 2013 SMFP identifies a need for only 210 new beds statewide, but most of those are in small allocations not sufficient to support the development of a new facility. ACH beds identified as needed in 2013 are Alexander County (20 beds); Graham County (20 beds); Polk County (30 beds); Davidson County (40 beds); Hyde-Tyrell Counties (40 beds); Jones County (30 beds); and Pamlico County (30 beds).

These 2013 projections continue a trend from the past several years of very few SNF and ACH beds being available and then only in numbers sufficient for small additions to existing facilities. The notable exceptions to this trend were the 2011 SMFP, which allocated a massive 240 SNF beds for Wake County, and the 2010 SMFP, which allocated 340 ACH beds for Mecklenburg County.

Many people who watch NC demographics have wondered how a state that is poised to remain one of the fastest-growing states in the 65-and-over category can continue to project so few long term care beds year after year. But these numbers derive directly from the mathematical need computations contained in the SMFP, which have not changed materially for either SNF or ACH beds in many years.

So in the absence of a meaningful inventory of new long term care beds of any sort, providers do what they do best – look for alternatives for growth. That has translated into a fairly robust market for sales and acquisitions of existing facilities. In our practice, we see this particularly with some of the smaller, older ACH facilities that cannot compete with newer, nicer "assisted living" facilities or independent living facilities that bring in personal care and some health services via contract with other providers. So they want to sell. There's a market for these beds, and we routinely bring together motivated sellers and buyers; help them navigate the transaction; and then assist the buyer with a change of ownership for licensure purposes, a noncompetitive CON application to relocate the beds, and then licensure and certification (for SNFs) of the new facility.

It looks like 2013 will be another year of buy, sell and trade for long term care providers.

Ken's Quote of the Month

"Do not be a magician, be magic."

~ Leonard Cohen

CHARLOTTE RALEIGH ROCKY MOUNT
SOUTHERN PINES WILMINGTON

WWW.POYNERSPRUILL.COM

301 Fayetteville St., 1900, Raleigh, NC 27601 / PO Box 1801, Raleigh, NC 27602-1801

P: 919.783.6400
F: 919.783.1075

Fences

By Ken Burgess

It's a funny thing about fences. We build `em to keep things in and keep things out. We build them to separate us from our neighbors, to keep our kids from wandering too far and the neighbors' kids from coming too close. We build `em to secure our manicured yards from the weeds next door or the street out front. We build them to divide.

But for me and my sister, fences didn't divide. We grew up in a small town in Nash County, NC, called Battleboro – population: Mama and Daddy; the two of us; our neighbor, Mrs. Alston and her little dog, Skipper; the nice lady at the post office; and our Aunt Thelma and cousin Nellie who lived across the railroad tracks five minutes away by foot. Oh, there were others there I'm sure, but our world was pretty small.

Our house was a little wooden frame house. It sat on an eighth of an acre at most, and on a good day, our little house might have been 400 square feet. It had a living room, a kitchen, two bedrooms and a bathroom. There was no central heat and air back then. Instead, we had window fans in the summer and a gas stove in the living room to heat the whole house in winter. When the hot water didn't work so good, which was most of the time, Mama would heat a big pan of water on the living room stove and bathe us there before sending us off to school, usually in clothes she made for us from a Simplicity pattern she picked up at the local J.C. Penney.

I don't remember having a TV in the house. But we did have an enormous stereo cabinet that took up a whole wall of the tiny living room. It was brown, with two burlap-looking speakers on either end and a record player and it was full of Porter Wagner and Loretta Lynn records that Daddy loved.

At the back of our house was a screened porch. It seemed huge back then, but I'm sure it was tiny. Just off the porch, down the steps, was the backyard. Mrs. Alston's house was just next door to the left, close enough to spit and hit it. Her little dog, Skipper, would come flying out her back door like a bullet to play with us. To the right of our porch was a huge old maple tree where we played and swung. Just beyond that, two houses down, was the volunteer fire station, full of huge red trucks and the site of many a mouthwatering fish fry. Behind it was the pride of our street, an enormous silver water tower that seemed a thousand feet tall. Up the side of the tower was a steel ladder that must have had a hundred rungs. My sister and I used to climb up to the top where there was a big round open hole in the side of the water tower. If you shouted into it, the sound rang and rang. We'd scurry up there fearlessly and shout at the top of our lungs into the water tower:

> "Help, murder, police. My wife fell in the grease. I laughed so hard I fell in the lard. Help, murder, police."

To this day, neither of us knows where we learned that little ditty or ever met anyone else who knew it. Maybe we made it up. Life was a little slow in Battleboro.

At the back of our little yard was a really tall chain-link fence. Beyond it were rows and rows of tractors, combines and hay balers. Some new, waiting to be sold. Some old and rusted, put out to pasture. And some waiting to be fixed by Daddy. Daddy worked for the Allis-Chalmers garage in town, which serviced farmers from three counties. He could fix anything, and every farmer around wanted him when the combine broke down during wheat season or the hay baler stalled in the middle of a hot summer field. Many's the time our party-line phone rang before dawn on cold winter nights or boiling summer Saturdays and off went Daddy to fix someone else's farm equipment.

In the summers when we were out of school, that little backyard was our universe. Every day, once or twice, we'd look up from playing and see Daddy coming through the rows of tractors, sidling up to that tall fence, covered in grease smudges from his balding head to the bottom of his green mechanic's overalls. He'd stick his greasy fingers through the fence and grab our eager little hands and say in his meanest voice, "Now you young `uns better mind Aunt Annie or I'll whip you when I get home."

Aunt Annie was our housekeeper. She must have been a hundred years old when I was seven and my sister was nine. But she loved us and we loved her. Mama worked in Rocky Mount, eight miles away, as a bookkeeper for an office equipment company, and every day Aunt Annie left her own babies to come raise Mama's.

One day Aunt Annie ran to the phone in our little house and called Mama at work. "Miss Elsie," she screamed, "you gotta come home right now. Robin done killed Kenneth. She done closed his head in the car trunk, and he's bleedin' to death." It was true; somehow I and my sister got into the trunk of our old Chevy Impala with the big tail fins and were tussling over a coloring book we found back there while Aunt Annie hung clothes on the clothesline. Neither of us really wanted that coloring book; we just didn't want the other one to have it. Somehow, I'm sure by accident, my sister slammed the trunk lid on my head. There ain't much meat on a seven-year-old shaved head, so I bled like there was no tomorrow. Turned out, I was fine, but I don't think Aunt Annie ever really recovered from the fright.

ASSISTED LIVING COMMUNITIES

That was 1964. I was seven and my sister nine. We eventually left the little white frame house and moved to a nicer brick house Mama and Daddy built for us, where we lived until we grew up and moved away. After that, I mainly remember waiting for the day I could leave Battleboro and hit the big city. I eventually did. But Daddy used to take me with him to the wheat fields to fix a tractor or combine and he'd say, "Son, you cain't wait to leave now but the day will come when you wanna' feel Nash County soil between your toes."

Like in most things, Daddy was right. Last year, I went back to Battleboro. I'd moved away first to Raleigh, then to Washington, DC, and then San Francisco. Then I came back to Nash County, a 50-something man.

I went to the old house, not the new brick one they built for us, but the old white frame house by the water tower. Standing on the road in front of where we used to live, I realized how small that little plot of land was. The old house was long gone, like the other houses on our street. The volunteer fire department had become the town hall and was later abandoned after the big city of Rocky Mount annexed our little town.

As I walked across the spot where our little house used to stand and stopped where the screened-in back porch used to be, I saw that the old maple tree was still there. It was about the only thing left. Off to the right, the silver water tower, not nearly as big as I remembered, still stood.

I suppose we all have those moments when memory and nostalgia sweep over us like a tidal wave, and I had one of those moments. So I closed my eyes and gave in to it completely. I could hear Skipper racing out of Mrs. Alston's house barking like crazy. I saw my sister off to the right swinging under the old maple tree, her auburn curls blowing in the wind and the dress Mama made her hitched up around her waist.

Behind me, through the screen door on the back porch, I heard Mama coming in from a long day's work, starting her second full-time job: taking care of us. I smelled chicken frying in the old black cast iron skillet and heard Mama setting our cheap plastic plates on the white-and-red-speckled table with the big aluminum rim all around the sides. I saw our old dog, Woman (Lord knows why we named her that), arthritis and all, ambling up to the porch, waiting for the table scraps that would come her way after supper. Woman lived outside through rain, snow, hot and cold because Mama didn't like animals in her clean house. Everybody knew old Woman. She lived so long and got so old that all the neighbors on our street would stop their cars while she ambled across the street to our house. I loved that old dog.

When I opened my eyes, I saw that the old, tall chain-link fence at the back of the yard was still there. All the tractors, combines and hay balers were gone. The old Allis-Chalmers garage had long since disappeared, like most other things in the town, replaced by a coin-operated laundry. Daddy was buried about a mile away in the Battleboro cemetery in the highest-elevation plot we could buy, not far from Aunt Thelma. He always said, "Don't bury me where water can get in my face." Mama moved to Rocky Mount, remarried and was now 75 years old. My sister lived in Atlanta and became a minister. Our younger sister, born after we left that old house, lived with me in Raleigh.

As I closed my eyes again and smelled Mama's fried chicken cooking through the screen door on the back porch and heard old Woman whimpering for some supper, I swear I saw two greasy fingers poke through that old, tall chain-link fence. Behind those fingers were rows of shiny new tractors, combines and hay balers, and some old ones put out to pasture, and some waiting for Daddy to fix them. And I felt myself running with my sister to that old fence to grab those greasy fingers. I felt him grab my little hand, and my sister's, and say in his meanest voice, "Now, you young`uns better mind your Mama or I'll spank you when I get home."

I saw him walk back through the rows of tractors to tackle another hard, greasy job as the sun set behind him. I heard Mama calling us to supper, a plate for Daddy stuck in the oven for whenever he could finally get home.

It's a funny thing about fences. We build `em to keep us apart, but I happen to love fences.

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NLRB Attacks Employment At-Will Disclaimers

by Kevin Ceglowski

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The National Labor Relations Board (NLRB) recently challenged employment at-will disclaimers in employee handbooks. This is another example of the NLRB's expansion of its enforcement efforts beyond the traditional unionized workplace setting. The NLRB has also recently taken issue with employers' social media policies and sought to require employers to post notices to employees informing them of their right to join a labor union and other rights under the National Labor Relations Act (NLRA). The agency is clearly becoming more active and looking for ways to regulate a broader group of employers than it has in the past.

At-will employment disclaimers are a staple of employee handbooks. It is common to define what at-will employment means, explain that an employee's at-will status cannot be changed except in a writing signed by the company president, and require that an employee sign an acknowledgment of his or her at-will status. This approach protects employers from claims that employees have employment contracts, and it is now under attack by the NLRB.

Two recent actions demonstrate the NLRB's new scrutiny of these employment at-will disclaimers. In February, an NLRB administrative law judge (ALJ) ruled the American Red Cross Arizona Blood Services Region violated Section 8(a)(1) of the NLRA by having a provision in its employee handbook acknowledgment saying, "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way." The ALJ ruled this provision could be interpreted to limit employees' rights to engage in concerted activity in an effort to change their at-will status. The NLRA protects employees' rights to engage in "concerted activity" to seek changes to the terms and conditions of their employment. The Red Cross revised its disclaimer, but the ALJ nonetheless required the Red Cross to inform its employees that the disclaimer had been revoked and removed from its handbook acknowledgment and post a notice to employees assuring them that it would not violate their NLRA rights.

Also in February, the NLRB filed a complaint against Hyatt Hotels Corporation arguing the company's required employee handbook acknowledgment form violated the NLRA's protection of concerted activity. The NLRB alleged that several provisions in Hyatt's handbook acknowledgment were overly broad and unlawfully limited employees' rights to engage in concerted activity. Those provisions were:

- "I understand my employment is 'at will.'"
- "I acknowledge that no oral or written statements or representations regarding my employment can alter my at-will employment status, except for a written statement signed by me" and Hyatt's president or executive vice president/COO.
- "[T]he at-will status of my employment … can only be changed in a writing" signed by the employee and one of the two Hyatt executives.

This matter was settled before there was a hearing on the complaint, with Hyatt agreeing to delete these at-will disclaimers from its handbook acknowledgment form, notify employees that the disclaimers had been revoked and removed from its handbook acknowledgment, and post a notice to employees assuring them that it would not violate their NLRA rights.

The NLRB's focus on employment at-will disclaimers is another example of the agency's increased enforcement efforts that can affect all employers – even those that don't have unionized workplaces. The complaints against the Red Cross and Hyatt are the first attacks the NLRB has ever made against these common at-will disclaimers in handbook acknowledgments. These enforcement actions are an alarming development for employers due to the prevalence of such disclaimers in handbooks and handbook acknowledgment forms and their importance in defending against employee claims. Employers should have their employment at-will disclaimers in employee handbooks, handbook acknowledgment forms and other personnel documents reviewed by counsel to be sure they do not unlawfully limit employees' rights to engage in concerted activity under the new analysis being used by the NLRB.

Kevin Ceglowski may be reached at 919.783.2853 or kceglowski@poynerspruill.com.

Is The Deck Stacked In Nursing Facility Survey Appeals?

By Ken Burgess

For several years now, you've heard me say how tough it is for providers to win appeals of survey deficiencies and related sanctions, such as civil money penalties. New data prepared by Healthcare Case Law, LLC, an online research database of all nursing facility survey appeals, proves the point. According to the data, between January 1, 1995, and July 10, 2012, the administrative law judges (ALJs) who hear these appeals ruled in favor of the Centers for Medicare & Medicaid Services (CMS) 89% of the time and ruled for providers only 11% of the time. Of the 15 ALJs who currently hear these cases, all but one of them ruled for CMS in 80% or more of the cases. One ALJ who has heard and decided roughly 118 cases has ruled for CMS 116 times and for providers only twice.

Worse still, when an ALJ decision is appealed to the Departmental Appeals Board (DAB), a three-judge panel set up for such appeals, the DAB has reversed the ALJ only 15 times. In 10 of those cases, the reversal was in favor of CMS, and in only five cases did the DAB reverse the ALJ in favor of a provider. So the odds are not good, and these data are consistent with what we see in our own practice and hear from our colleagues around the country. That is not to say that appeals are pointless. In some of the cases reported as being decided for CMS, an ALJ or the DAB did reverse some original CMS findings and some sanctions, but the case, on the whole, was not decided in favor of the provider.

The ALJs and the DAB both consider themselves to be part of the CMS enforcement system, not the type of objective judicial body most Americans think of when they think about appealing a government decision. Perhaps it's no real surprise that CMS wins more often than it loses. However, with multiple published studies over many years consistently criticizing the CMS survey and enforcement system as inconsistent from state to state and within CMS regions, it is surprising that these data show such an overwhelming history of cases being decided for CMS and against providers.

The takeaway from all this is that providers faced with serious deficiencies and stiff sanctions or fines should still carefully review their survey results and consider whether to challenge them, including at an informal dispute resolution. But providers should go into these appeals with their eyes wide open, realizing that it's a tough slog and an uphill battle. ■

Supreme Court Upholds Health Reform Coverage Mandate

by Hugh Davis

In July, we all heard the big news. The 2010 health care reform law survived its encounter with the Supreme Court virtually intact.

With the constitutionality of the individual coverage mandate now settled, employers should be taking a close look at what they still need to do to comply with the various health care reform requirements. For example:

- Employers must start providing the new "summary of benefits and coverage" to applicants and enrollees starting with open enrollments conducted this fall. We will be covering this topic in a future alert.
- For many employers, W-2 reporting of the cost of employer-sponsored health coverage will be required starting with the 2012 tax year.
- The $2,500 annual cap on health flexible spending accounts goes into effect for plan years beginning on or after January 1, 2013. Employers will need to amend their plans to comply with this requirement.
- "Play or pay" penalty tax provisions go into effect starting in 2014. Employers subject to these provisions will have to pay IRS penalties if they fail to provide affordable health coverage to full-time employees.

Of course, it is possible that the health care reform law will be repealed. Come November, we might even conclude that repeal of the law seems likely. Nevertheless, it is all but impossible to predict what will happen in Washington, and for that reason, employers should not make implementation decisions based on the expectation of any provisions of the law being repealed.

Hugh Davis may be reached at 919.783.2908 or hwdavis@poynerspruill.com.

"Heck No, I Won't Go"

by Ken Burgess

My office phone rings and it's one of my favorite clients. We just finished working on an appeal of a resident discharge and were expecting the Division of Medical Assistance hearing officer decision any day. I felt pretty good about it.

"Hey, Ken," he said, "I've got some good news and some bad news." "Well," I said, "give me the good news first." "We just got the decision on the discharge appeal from DMA and we won." "That's super," I said, "so what's the bad news?" I knew what was coming. My client said, "Well, the resident and his family say he's not leaving and there's nothing we can do about it."

This situation is occurring more and more in both adult care homes and nursing facilities in NC. Recall that while adult care homes are governed only by state licensure laws for purposes of transfer/discharge criteria and nursing homes are governed by federal regulations, the substance of the state law and federal law governing discharges from both settings is virtually identical and the same hearing officers at DMA hear both types of discharge appeals.

So how is it that residents can be properly discharged, file an appeal, lose that appeal and still stay in your facility? The answer is this. Both the state law governing adult care homes and the federal law governing nursing facilities define the bases for a proper discharge, the documentation that must be in place to support the discharge, the orientation and discharge planning requirements, and the appeal rights of residents and families who disagree with a decision to discharge the resident. However, both state and federal law seem to presume that having been properly issued a discharge notice and having appealed and lost, residents will simply cooperate and relocate home or to another facility or setting. Neither applicable state law for adult care homes nor federal law for nursing homes includes a mechanism to actually make the resident leave the facility once they have been properly discharged and all appeals have been lost or no appeal is filed by the resident.

We are increasingly seeing certain "elder lawyers" and even local ombudsmen tell residents that they don't have to leave the facility even if they've lost their discharge appeal and that the facility cannot force them out. That's wrong.

There are tools available under NC law to deal with these situations. The most obvious one is a complaint for summary eviction from the facility, filed normally in small claims court or district court, just like any landlord would do with a tenant who breached the lease. Some magistrates and district court judges are initially unsure whether NC's landlord-tenant law applies in such situations, but the federal regulations governing SNFs and state law governing adult care homes (as well as the reimbursement for both settings) make it clear that payments to these facilities include a room-and-board component, which makes them at least in part residential agreements.

The other tool available, which is far less appealing to either side, is a criminal warrant for trespass. Surprisingly, some judges are more willing to issue these types of warrants than to issue a summary eviction order. The problem with both tools, however, is that when an order is issued by a magistrate or judge in favor of the facility, the sheriff has to execute the order. That means, at a minimum, that law enforcement has to escort the resident out of the facility and, in criminal trespass cases, may arrest the resident for criminal trespass.

No one – provider, resident, family or government – wants this sort of outcome. That said, attorneys, ombudsmen or anyone else who tells a resident the person can stay at a facility after having been properly discharged under state or federal law does a real disservice to the resident and family. The discharge processes and related appeals that apply to long term care are set up to ensure that residents are discharged only when the law permits it and that they are discharged in a safe and orderly manner. However, once that process is navigated, and the facility has prevailed, the resident has no legal right to remain on the premises and telling residents that they do puts the facility in the uncomfortable, but necessary, position of having to force the resident to leave.

It's also important to realize that the requirement that a discharging facility take steps to ensure a "safe and orderly" discharge does not make the discharging facility a guarantor of payment by or on behalf of the resident to the receiving facility. We routinely encounter family members, ombudsmen and attorneys for residents who try to argue that until the discharging facility finds a new facility the resident can afford, it's not a safe and orderly discharge. This is also incorrect. Ultimately, it is the resident's or family's obligation to work out payment arrangements, and the discharging facility's obligation is to get the resident safely to the new location, whether it's home or another facility, once the resident or the resident's surrogate work out those arrangements.

Ken Burgess advises clients on a wide variety of legal planning issues arising in the skilled nursing facility setting, assisted living setting, and other aspects of long term care. He may be reached at 919.783.2917 or kburgess@poynerspruill.com.

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