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Nursing Home Tort Reform and Ohio House Bill 412: Why Have We Abandoned Our Neglected and Abused Elderly Population

Robin P. Bravchok

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NURSING HOME TORT REFORM AND OHIO HOUSE BILL 412:
WHY HAVE WE ABANDONED OUR NEGLECTED AND
ABUSED ELDERLY POPULATION?

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I. INTRODUCTION

Nursing home residents in this country are plagued by a crisis of abuse and neglect. Sadly, our elderly are often physically beaten, attacked, verbally assaulted, sexually molested, starved, ignored, and left to rot in their own waste by nursing home staff.¹ This abuse and neglect is epidemic in our nation's nursing homes and is only increasing at an alarming rate.² In fact, statistics show that nearly one in every twenty elderly residents in a nursing facility suffers from abuse, with the total number increasing annually by 500,000.³ Yet, even more alarming is that seven out of every eight instances of abuse are not even reported because many of these elderly residents are unable to report this abuse due to their frail health, mental and physical disabilities, and lack of family support.⁴

¹See Abuse of Residents Is a Major Problem in U.S. Nursing Homes, Minority Staff Spec. Investigations Div. Comm. on Gov't Reform, U.S. H.R. (July 30, 2001) (prepared for Rep. Henry A. Waxman), at http://www.house.gov/reform/min/pdfs/pdf_inves/pdf_nursing_abuse_rep.pdf (last visited Aug. 8, 2003).

²*Id.*

³Martin Ramey, Comment, *Putting the Cart Before the Horse: The Need to Reexamine Damage Caps in California's Elder Abuse Act*, 39 SAN DIEGO L. REV. 599, 602 (2002) (citing Elder Abuse: What Can Be Done?: Hr'g Before the House Subcomm. on Human Serv. of the Select Comm. on Aging, 102d Cong. 6 (1991) (statement of Rep. Wayne Owens)).

⁴See Ramey, *supra* note 3, at 602; see also Angela Snellenberger Quinn, Comment, *Imposing Federal Criminal Liability on Nursing Homes: A Way of Deterring Inadequate Health Care and Improving the Quality of Care Delivered?*, 43 ST. LOUIS U. L.J. 653, 678-80 (1999) (citations omitted).

Despite this crisis of abuse and neglect, states are passing new laws in the name of tort reform that limit our elders' rights to bring suit.⁵ In particular, Ohio recently passed House Bill 412, which took effect in November, 2002. This law, among other things, specifically limits who can bring suit and what evidence can be used in court, shortens the statute of limitations, cuts punitive damages, and almost completely eliminates awards for attorney fees.⁶ Supposedly, this law was passed due to fears that Ohio would become the next state to see a rise in lawsuits against nursing homes and as an attempt to curb escalating insurance costs.⁷ Apparently, the Ohio Legislature and Governor Bob Taft believed that something needed to be done to protect nursing home owners from going out business. However, in this battle of tort reform, the rights and needs of our abused and neglected elders have simply been overlooked. Nursing home residents need to be able to bring suits for abuse and neglect, and these nursing homes that inflict such abuse and neglect need to be held accountable.

This Note will show that nursing home tort reform statutes, like Ohio's, have totally missed the mark by disregarding our elders' rights and ignoring the problem of abuse and neglect in nursing facilities. Part II of this Note will look at our nation's elderly population and the poor state of our country's nursing homes. Part III will briefly look at Florida's lawsuit reform act that was passed in May of 2001. Florida, with its large elderly population, was plagued by increasing insurance costs allegedly due to rising litigation and damage awards.⁸ Its new law, which has led to strict reductions in a plaintiff's ability to bring suit against a nursing facility, has resulted in other states following suit and initiating their own tort reform laws.⁹ Ohio's law in particular is extremely restricting, and it will be the focus of part IV of this Note. Both in Ohio and nationally, more reform is expected.¹⁰ However, most reform has not addressed the real issue facing our nursing homes today—poor care and abuse. The real concern in nursing home reform should be on improving care standards, not on protecting nursing home owners. If nursing homes and our government are truly concerned about the increased prevalence of lawsuits in Ohio and throughout the country, their focus should be on improving care standards in these nursing facilities. If nursing homes were forced to, and actually did provide adequate care, it is not unreasonable to assume that lawsuits, and eventually insurance premiums, would decline.

⁵*Three States Seek Nursing Home Reforms*, 3 No. 11 ANDREWS NURSING HOME LEGAL INSIDER 8 (2002).

⁶See Armond Budish, *Regulation Restricts Lawsuits Filed Against Nursing Homes*, THE COLUMBUS DISPATCH, Sept. 6, 2002, at 02F.

⁷OHCA Position of H.B. 412, OHCA Online (Jan. 2002), at <http://www.ohca.org/public-statements.asp?Page=1&ID=449> (last visited Aug. 8, 2003).

⁸*Florida Passes Reforms on Nursing Home Liability*, 3 No. 23 ANDREWS NURSING HOME LITIG. REP. 11 (2001).

⁹*New Florida Law Levels the Playing Field for Nursing Home Litigants*, 9 No. 6 ANDREWS HEALTH L. LITIG. REP. 15 (2001).

¹⁰See Spencer Hunt, *Proposal May Hurt Nursing Home Care*, TIMES RECORDER, Nov. 25, 2002, at A3; see also *New Congress Is a New Start for Bush Agenda*, USA TODAY, Dec. 26, 2002, at A.09.

II. OUR NATION'S NURSING HOME RESIDENTS: A LARGE PORTION OF OUR SOCIETY THAT IS NEGLECTED AND OVERLOOKED

The number of elderly people in the United States has significantly increased over the past several years. As such, the number of people requiring nursing home care during their lifetime has also increased. However, the care that our elderly population receives during the last years of their lives in our nation's nursing facilities is often appalling. In fact, the problem of substandard care and abuse in our nation's nursing facilities has been well documented for over thirty years and does not seem to be improving.¹¹ This is so despite significant government and state level regulations.¹²

A. *Elderly Citizens Age 85 and Older, the Fastest Growing Segment of our Population, are the Heaviest Users of Long-Term Care*

The number of elderly citizens age eighty-five and older, the segment of the population at the most risk for needing long-term care services, has increased dramatically over the last few decades and is only expected to grow larger. From 1960 to 1994, the number of people ages eighty-five and older increased by 247 percent.¹³ Elderly people in our country represent a significant portion of our population. As of 1994, there were 33.2 million Americans age sixty-five and older—approximately one-eighth of the total population. From that number, approximately 3.5 million were age eighty-five or older.¹⁴ This segment of our population is only expected to increase in number due to advances in health care and the longer life expectancy rate as the “baby boom” generation gets older.¹⁵ In fact, between 1994 and 2020, the eighty-five and older population is projected to double to seven million. By 2050, this number is expected to increase even more dramatically to between 19 and 27 million.¹⁶ As such, those Americans age eighty-

¹¹See Eric Bates, *The Shame of our Nursing Homes*, THE NATION, Mar. 29, 1999, available at 1999 WL 9306974.

¹²Since the 1970s, the federal government has set mandatory standards for nursing homes that choose to participate in the Medicare and Medicaid programs. These regulations are enforced through regular inspections and surveys administered by the Department of Health and Human Services. Congress enacted the Nursing Home Quality Reform Act as part of the Omnibus Budget Reconciliation Act of 1987 (OBRA); this imposed even more significant requirements regarding patient rights in areas such as medical treatment, personal care, and maintaining privacy. See Kapp, *infra* note 17, at 1255-59. For a more detailed overview, see Jennifer Gimler Brady, *Long Term Care Under Fire: A Case for Rational Enforcement*, 18 J. CONTEMP. HEALTH L. & POL'Y 1, 6-17 (2001).

¹³Frank B. Hobbs & Bonnie L. Damon, 65+ in the U.S., U.S. Bureau of Census, Current Population Reports, Special Studies, P23-190 (Apr. 1996), at <http://www.census.gov/prod/1/pop/p23-190/p23-190.html> (last visited Aug. 8, 2003).

¹⁴*Id.*

¹⁵See Admin. on Aging, U.S. Dept. of Health and Human Serv., A Profile of Older Americans: 2002 (2002), at http://www.aoa.gov/prof/statistics/profile/profiles2002_pf.asp (last visited Aug. 8, 2003); see also F. Robert Radcliff, II, *Nursing Home Litigation: An Overview of a Rapidly Evolving Area of Practice*, MEALEY'S LITIG. REP., Vol. 1 No. 1 (Jan. 2001).

¹⁶Hobbs, *supra* note 13.

five and older are the fastest growing segment of both the general and elderly populations.¹⁷

People ages eighty-five and older are the largest users of long-term care services.¹⁸ In 1996, nearly one in every four Americans in this age group was living in a nursing facility.¹⁹ In all, there are approximately 1.5 million people living in the nation's 17,176 nursing facilities.²⁰ Thus, a large number of the elderly population in our country requires nursing home care. Further, if the elderly population continues to grow as projected, the need for quality nursing home care will also increase.

B. The State of our Nursing Homes Today Reveals a Bleak Picture of Big Business Concerns, Abuse, and Neglect

Despite the growing elderly population with increased needs for nursing home care, our nation's nursing homes are generally not providing quality services to its residents. In fact, studies show that the majority of nursing homes are often understaffed and unable to provide even basic care such as dressing, grooming, and feeding their residents.²¹ Additionally, staff are often under-trained, and facilities typically have high turnover rates, many at 100%.²² Staff often report feeling overworked and under-paid, and believe they could make more money elsewhere doing less demanding work.²³ Yet, despite these staff concerns, many argue that nursing homes fail to correct problems due to weak federal and state oversight. Enforcing

¹⁷*Id.* See also Marshall B. Kapp, *Malpractice Liability in Long-term Care: A Changing Environment*, 24 CREIGHTON L. REV. 1235, 1236 (1991).

¹⁸Hobbs, *supra* note 13. Long-term care includes subacute, rehabilitative, medical, skilled nursing, and supportive services for people who have functional limitations or chronic health problems and who require ongoing health care or assistance with activities of daily living. Long-term care services are provided in nursing facilities, as well as other settings such as respite care, adult day care, and home and community-based settings. *Today's Nursing Facilities and the People They Serve*, at <http://www.zianet.com/stenzel/news2.htm> (last visited Aug. 8, 2003).

¹⁹Hobbs, *supra* note 13.

²⁰*Today's Nursing Facilities and the People They Serve*, *supra* note 18.

²¹See Christopher Newton, *90% of Nursing Homes Providing Substandard Care – Federal Report*, SEATTLE TIMES, Feb. 20, 2002, at A1; see also Phillip O'Connor, *Small, Overworked Staff Are Trigger for Patient Neglect*, ST. LOUIS POST-DISPATCH, Oct. 14, 2002, at A1.

²²Quinn, *supra* note 4, at 662 (citing Daniel M. Gitner, *Nursing the Problem: Responding to Patient Abuse in New York State*, 28 COLUM. J.L. & SOC. PROB. 559, 567 (1995); Robert Tomsho, *Old Problem: A Trail of Complaints Slows but Can't Stop Nursing Home Mogel*, WALL ST. J., Sept. 3, 1997, at A1; Daniel C. Dilworth, *Negligent Nursing Home Care Triggers Juror Outrage*, TRIAL, Aug. 16, 1989; Mark Thompson, *Fatal Neglect in Possibly Thousands of Cases, Nursing Home Residents Are Dying From a Lack of Food and Water and the Most Basic Level of Hygiene*, TIME, Oct. 27, 1997; and *Nursing Homes: When a Loved One Needs Care*, CONSUMER REP., Aug. 1995, at 518).

²³Quinn, *supra* note 4, at 663 (citing Karl Pillemer & Beth Hudson, *A Model Abuse Prevention Program for Nursing Assistants*, 33 THE GERONTOLOGIST 128, 128-31 (Feb. 1993)). For example, nursing assistants provide nearly 90% of the care to nursing home residents while earning near poverty level wages. In Missouri, for instance, the average hourly wage for a nursing assistant is \$7.90. O'Connor, *supra* note 21.

regulations and imposing sanctions on nursing home owners has been lax in the past. As such, nursing home operators have had little motivation to provide residents with care that is both necessary and required.²⁴

However, neglect is not the only concern in our nation's nursing facilities. Abuse is a serious and widespread problem, with thousands of homes cited for abuse violations. According to a recent federal study, 5,283 nursing homes (almost one out of every three in the country) were cited for an abuse violation during a two-year period from January 1, 1999, to January 1, 2001.²⁵ These nursing homes were cited for nearly 9,000 abuse violations during this two-year period. Additionally, 1,327 of the homes were cited for multiple abuse violations during this time period. These citations included numerous instances of physical and verbal abuse, failure to adequately protect residents, many instances of sexual abuse, and cases where nursing homes simply ignored signs of serious abuse.²⁶

For example, in an Illinois nursing home, a staff member cursed at a resident and then hit her in the face, breaking her nose.²⁷ In a California nursing home, a staff member pushed a resident to the ground; this staff member was observed kicking the resident on the sides of her body and face.²⁸ In another California nursing home, a male nursing assistant molested two elderly female residents by putting his fingers in their vaginas while bathing them.²⁹ In an Ohio nursing facility, a staff member "yanked" a resident out of bed, "slammed" him into a chair, closed off the resident's nose with his hand to cut off his airway, and then let him fall to the floor. This staff member was not disciplined and continued to work at the nursing home.³⁰ In a Missouri nursing home, an 80-year-old stroke victim suffering from dementia was violently abused on several occasions. This resident was locked in a bathroom, hit with a belt, dragged on his knees, and hit in the head with a book by nursing home employees. Because of the resident's impaired memory, family members did not learn of the abuse until another staff member at the facility reported the incident.³¹

These are only a few examples of the horrific findings that this federal study of nursing homes uncovered. Yet, even more startling is that since many of the abuse violations were only discovered after the filing of a formal complaint, it is likely that the incidence of abuse is even higher than was indicated in this study.³² As other government studies have indicated, this thirty percent figure is "only the tip of the

²⁴Quinn, *supra* note 4, at 669 (noting that the survey, inspection, and enforcement process outlined in OBRA 87 "appears to be failing what it intended to do"—to provide care that would promote the quality of life of each resident). *Id.* (citing 43 U.S.C. § 13951-3(1)(A) (1994)).

²⁵Abuse of Residents Is a Major Problem in U.S. Nursing Homes, *supra* note 1.

²⁶*Id.*

²⁷*Id.* (citing HCFA Form 2567 for Nursing Home in Oak Lawn, Ill. (Mar. 17, 2000)).

²⁸*Id.* (quoting State Citation Issued to Nursing Home in Pomona, Cal. (Feb. 17, 2000)).

²⁹*Id.* (citing State Citation Issued to Nursing Home in Walnut Creek, Cal. (May 3, 1999)).

³⁰*Id.* (quoting HCFA Form 2567 for Nursing Home in Utica, Ohio (July 17, 1999)).

³¹*Id.* (citing Mo. Dept. of Social Services, Police, and Court Records (1999)).

³²Abuse of Residents Is a Major Problem in U.S. Nursing Homes, *supra* note 1.

iceberg.”³³ Additionally, the problems of abuse have increased over the past few years. In fact, since 1996, the percentage of nursing homes cited for abuse violations during annual state inspections has almost doubled.³⁴ Thus, it is very likely that the prevalence of abuse and neglect in our nation’s nursing homes will worsen in the future.

Furthermore, nursing homes today are big business enterprises. Nursing homes bring in \$87 billion of business each year, and Medicare and Medicaid funds provide seventy-five cents of every dollar of that amount.³⁵ Sole-proprietor nursing homes have given way to almost all large for-profit corporate chains.³⁶ For example, one for-profit chain, Beverly Enterprises, owns more than 700 nursing homes with annual revenues of nearly three billion dollars.³⁷ No doubt, the less money a nursing home spends on care, the more the facility owners and shareholders keep for themselves.³⁸ When these for-profit chains inadequately pay their workers and understaff their nursing facilities, quality of care greatly suffers and the potential for abuse and neglect occurs.³⁹ As one staff member noted, “They don’t care about the patients; [a]ll they’re worried about is that the money keeps coming in.”⁴⁰

C. Nursing Home Residents Cannot Protect Themselves from Abuse and Neglect and Already Have Inadequate Means or Inclinations to Seek Legal Redress for this Abuse and Neglect

Not surprisingly, the majority of elderly residents of nursing homes cannot protect themselves from things like physical attack or assault. Most of the residents in these facilities are ill, disabled, or poor.⁴¹ Furthermore, they are often alone with few relatives or supporters to assist them and are almost entirely dependent upon nursing homes to ensure their safety.⁴² Even if family is present, many of the residents in nursing facilities suffer from dementia or impaired memory and have no

³³Press Statement, Nat’l Citizens’ Coalition for Nursing Home Reform, Tort Reform Would Deny Nursing Home Residents Basic Legal Protections and Access to Courts (July 17, 2002), at http://nccnhr.newc.com/uploads/TortReformPressRelease_071702.pdf (last visited Aug. 8, 2003).

³⁴Abuse of Residents Is a Major Problem in U.S. Nursing Homes, *supra* note 1.

³⁵Bates, *supra* note 11.

³⁶Susan J. Hemp, *The Right to a Remedy: When Should an Abused Nursing Home Resident Sue?*, 2 ELDER L.J. 195, 200 (1994) (citation omitted).

³⁷*Nursing Homes: When a Loved One Needs Care*, CONSUMER REP., Aug. 1995, at 518.

³⁸See Bates, *supra* note 11.

³⁹O’Connor, *supra* note 21, at A1 (quoting Dr. Steffie Woolhandler, associate professor of medicine at Harvard Medical Center); see also Hemp, *supra* note 36, at 200.

⁴⁰O’Connor, *supra* note 21, at A1 (quoting a nursing assistant named Grace Huber).

⁴¹Quinn, *supra* note 4, at 678; see also Kimberly L. Intagliata, Comment, *Improving the Quality of Care in Nursing Homes: Class Action Impact Litigation*, 73 U. COLO. L. REV. 1013, 1025 (2002).

⁴²See Quinn, *supra* note 4, at 680.

way of communicating to family members that they have suffered abuse.⁴³ Thus, our elderly population already has inadequate support and financial means to seek legal redress when abuse or neglect does occur, and additional laws that restrict their ability to bring suit are unfair and unnecessary.⁴⁴ Further, even if means are somehow available, many residents are immobile and scared that the nursing home or its staff will retaliate against them if a suit is brought.⁴⁵

Unfortunately, abuse and neglect do occur at alarming rates in our nation's nursing homes and will undoubtedly continue to occur. Despite all the obstacles against an elderly person attempting to bring suit, this segment of our population and rates of abuse and neglect are increasing, and as such, so have lawsuits.⁴⁶ Many are thankful that the elderly are finally getting "their day in court" after years of almost no litigation coming from Americans age eighty-five and older.⁴⁷ However, others are not as concerned about protecting resident rights and have initiated tort reform laws that severely restrict a resident's ability to bring suit.⁴⁸

III. NURSING HOME LAWSUIT REFORM

Limiting the elderly population's rights to bring suit through tort reform first surfaced in 2001 in the state of Florida.⁴⁹ With a growing elderly population, Florida had been experiencing an increased number of claims against nursing home owners.⁵⁰ Florida's new reform law, which was welcomed by nursing home operators because it limits incentive to sue, has become an example for other states and their reform bills—like Ohio's recent House Bill 412.⁵¹ Thus, the factors that led to the passage of Florida's 2001 reform law will be examined here in an effort to shed light on the issues and concerns facing Ohio's legislature and nursing home operators.

⁴³*Today's Nursing Facilities and the People They Serve*, *supra* note 18 (citing the 1985 Nat'l Nursing Home Survey conducted by the Nat'l Ctr. For Health Statistics). Sixty-three percent of the residents in the nation's nursing homes are disoriented or memory impaired. *Id.*

⁴⁴*See* Quinn, *supra* note 4, at 680.

⁴⁵*Id.*

⁴⁶*See* Radel, *supra* note 15; *see also* Michael Higgins, *Getting Sued by Seniors*, 84 A.B.A. J. 28 (1998).

⁴⁷*See* Kapp, *supra* note 17, at 1237-38.

⁴⁸*See States Enact Laws to Protect Nursing Home Residents Limit Med-Mal*, *infra* note 70, and accompanying text. This will be discussed further in parts III and IV of this Note.

⁴⁹*Florida Enacts Sweeping Nursing Home Reform Bill*, S.B. 1202, 3 No. 16 ANDREWS NURSING HOME LITIG. REP. 3 (May 18, 2001).

⁵⁰*See* Jennifer L. Williamson, Note and Comment, *The Siren Song of the Elderly: Florida's Nursing Homes and the Dark Side of Chapter 400*, 25 AM. J.L. & MED. 423, 430 (1999); *Florida Passes Reforms on Nursing Home Liability*, 3 No. 23 ANDREWS NURSING HOME LITIG. REP. 11 (Aug. 24, 2001).

⁵¹*See New Florida Law Levels the Playing Field for Nursing Home Litigants*, 9 No. 6 ANDREWS HEALTH L. LITIG. REP. 15 (2001).

A. *Florida's Perspective: The Growing Elderly Population, Prevalence of Suits, and the Impact on Insurance Led to the Passage of Senate Bill 1202*

Florida's Senate Bill 1202, the Long Term Care Reform Bill, took effect in May of 2001 and was designed to improve standards of care and to limit the number of suits that were being brought against the state's nursing facilities.⁵² With approximately 80,000 residents living in Florida's nursing homes, and a growing elderly population, the nursing facilities in the state were four times more likely to be sued than anywhere else in the country.⁵³ With increases in both the number of claims against nursing facilities and the sizes of damage awards, insurance carriers began doubling or tripling their rates or stopped writing policies for nursing facilities altogether.⁵⁴

With difficulty finding low cost insurance carriers, the nursing home industry strongly lobbied for tort reform.⁵⁵ In response, on May 15, 2001, Governor Jeb Bush signed Senate Bill 1202 after the State Senate passed it 38-0, and it had been approved by the House 109-8.⁵⁶ The bill does several things to reduce a potential plaintiff's incentive to sue. For example, the bill reduced the statute of limitations from four years to two years.⁵⁷ Additionally, caps on punitive damages were provided with a three-tier system, with allowable damages ranging from one million dollars to a maximum of four million dollars in most cases.⁵⁸ The negligence per se/strict liability standard for violating a resident's rights was replaced with a negligence standard.⁵⁹ Also, attorneys' fee awards were repealed for injury and wrongful death cases and are now only allowable for claims of injunctive relief.⁶⁰

⁵²See *Florida Passes Reforms on Nursing Home Liability*, *supra* note 50.

⁵³*Id.* See also Williamson, *supra* note 50, at 430; *Nursing Home Session Not a Cure for Stalemate*, THE PALM BEACH POST, Mar. 28, 2001, at 18A. In 2000, Florida's nursing homes reported twenty-eight lawsuits for every 1,000 beds, compared to less than seven lawsuits for every 1,000 beds elsewhere across the nation. *Florida Passes Reforms on Nursing Home Liability*, *supra* note 50.

⁵⁴See Jason M. Healy, et al., *Confidentiality of Health Care Provider Quality of Care Information*, 40 BRANDEIS L.J. 595, 619 (2002); Tom J. Manos, *Florida's Nursing Home Reform and Its Anticipated Effect on Litigation*, 75 FLA. B.J. 18, 18 (Dec. 2001). In Florida, the average cost per one million of insurance had risen from \$300 per year in 2000 to \$1,400 in 2001—more than a 350 percent increase. Healy, at 619.

⁵⁵See *Florida Enacts Sweeping Nursing Home Reform Bill*, *supra* note 49.

⁵⁶*Id.*

⁵⁷*New Florida Law Levels the Playing Field for Nursing Home Litigants*, *supra* note 51; see also Mary Ellen Klas, *Nursing Home Bill Starts Debate*, THE PALM BEACH POST, Mar. 7, 2001, at 12A.

⁵⁸See *Florida Enacts Sweeping Nursing Home Reform Bill*, *supra* note 49. Award amounts for plaintiffs in nursing home cases in the years of 1990 to 2000 in Florida ranged from \$22,000 to \$20 million. Christopher E. Johnson & J. Stuart Bunderson, *Enacting Litigious Environments: Litigation and Florida's Nursing Homes*, 27 HEALTH CARE MGMT. REV. 720, July 1, 2002.

⁵⁹*New Florida Law Levels the Playing Field for Nursing Home Litigants*, *supra* note 51.

⁶⁰*Id.*

However, the new reform bill was not only concerned with limiting incentives to sue. It also contained several provisions aimed at improving quality of care by increasing staffing, regulatory oversight, training, and funding.⁶¹ For instance, the bill required nursing facilities to hire enough certified nursing assistants to increase their time with each resident from 1.7 hours to 2.3 hours per day by January 1, 2002.⁶² Nursing homes are also required to establish a resident grievance procedure, and they must report the number of grievances and the manner in which they were handled every year. This report is to be made available to all of the nursing home's residents and families.⁶³ Also, "quality monitors" are required to visit each home at least once on a quarterly basis.⁶⁴ Licenses may be revoked or denied if the facility consistently fails inspections or is cited for two or more deficiencies during one inspection.⁶⁵ Additionally, facilities must report their staff turnovers and staff-to-resident ratios on a semi-annual basis.⁶⁶ Nursing aides are required to complete eighteen hours of annual training and additional training about Alzheimer's disease.⁶⁷ Furthermore, Florida also increased state funding. It provided \$15.2 million for implementing the quality initiatives in Senate Bill 1202 and \$200 million for workload and price level increases.⁶⁸ Therefore, not only was this bill favorable to and strongly pushed by nursing home owners, it was also approved by senior citizens' groups like the American Association of Retired Persons because of its tougher standards and focus on improving care.⁶⁹

Thus, Florida's state legislature in 2001 had quality of care concerns in mind with the passage of its reform bill. However, not all states are as concerned about the care the residents in their nursing facilities are receiving.⁷⁰ As for Florida, it is not surprising that suits against nursing homes have been reduced since the passage of Senate Bill 1202.⁷¹ As such, it has become a model for other states with large

⁶¹*Florida Passes Reforms on Nursing Home Liability*, *supra* note 50.

⁶²*Id.* See also *New Florida Law Levels the Playing Field for Nursing Home Litigants*, *supra* note 51.

⁶³*Florida Passes Reforms on Nursing Home Liability*, *supra* note 50.

⁶⁴*Id.*

⁶⁵*Id.*

⁶⁶*Id.*

⁶⁷*Id.*

⁶⁸*Florida Passes Reforms on Nursing Home Liability*, *supra* note 50; see also *New Florida Law Levels the Playing Field for Nursing Home Litigants*, *supra* note 51.

⁶⁹See Lindsay Peterson & Joe Follick, *Nursing Home Package Prevails*, THE TAMPA TRIB., May 7, 2001, at 1.

⁷⁰See *States Enact Laws to Protect Nursing Home Residents, Limit Med-Mal*, 5 No. 10 ANDREWS NURSING HOME LITIG. REP. 1 (Dec. 6, 2002). As described in part IV of this Note, nursing home care was not a primary concern to Ohio's legislature with its passage of House Bill 412.

⁷¹See Stephen Nohlgren, *Law Causes Nursing Home Claims to Tumble*, ST. PETERSBURG TIMES, Nov. 23, 2002, at 1B. In October of 2002, only twenty claims or notices of intent to sue were filed against nursing home operators, compared with at least three times that prior to the reform bill. *Id.*

elderly and nursing home populations, like Ohio.⁷² Despite the reduction in lawsuits, the new law's impact on lowering insurance premiums has yet to be seen. For now, it seems that insurance in Florida is still available at only very high prices.⁷³

B. Other States Following Florida's Lead: Three States, Including Ohio, Sought Nursing Home Reform in 2002

The three states that followed Florida's lead with reform bills in 2002, Ohio, Oklahoma, and Delaware, had quite different concerns regarding their elderly residents.⁷⁴ The nursing home reform bills in Oklahoma and Delaware focus on quality of care issues and staff-to-patient ratios.⁷⁵ Ohio, on the other hand, had a different agenda with its reform bill. Unlike the other two states, Ohio's bill focuses entirely on protecting nursing home owners and operators and provides nothing to improve the quality of care in the state's nursing facilities.⁷⁶

The reform bill in Oklahoma, House Bill 2604, was signed into law on May 9, 2002. This law, which took effect in November of 2002, gives the State Department of Health power to intervene when a nursing facility files for bankruptcy, writes bad checks, or shows other signs of financial trouble that could possibly threaten patient safety or welfare.⁷⁷ Under this law, the state department has authority to appoint a monitor or manager to supervise a home having financial difficulties.⁷⁸ The Department of Health additionally has the ability to suspend or revoke the license of a nursing home operator that does not have financial resources available to provide adequate care.⁷⁹

In Delaware, state legislators approved Senate Bill 368.⁸⁰ This bill increases staff-to-patient ratios and requires all nursing homes to provide a minimum of 3.28 hours of direct care to residents each day.⁸¹ It also permits some smaller facilities or

⁷²See *New Florida Law Levels the Playing Field for Nursing Home Litigants*, *supra* note 51. In Ohio, there are about 80,000 elderly residents living in the state's over 1,000 nursing facilities. State of Ohio Long-Term Care Guide, at <http://www4.state.oh.us/longtermcareguide/consumer/index.asp?html=homecare#HomeCareHead> (last visited Aug. 8, 2003).

⁷³Nohlgren, *supra* note 71 (quoting Jim King, Republican Florida Senate President). As for nursing home insurance still only being available at very high prices, Jim King and industry proponents were reported as saying "perhaps this year's Legislature needs to restrict lawsuits even more." *Id.*

⁷⁴*Three States Seek Nursing Home Reform*, 3 No. 11 ANDREWS NURSING HOME LEGAL INSIDER 8 (June 2002).

⁷⁵*See id.*

⁷⁶*See States Enact Laws to Protect Nursing Home Residents, Limit Med-Mal*, *supra* note 70.

⁷⁷*Id.* See also *Three States Seek Nursing Home Reform*, *supra* note 74.

⁷⁸*Three States Seek Nursing Home Reform*, *supra* note 74.

⁷⁹*Id.*

⁸⁰*Id.*

⁸¹*Id.*

those with designs that allow patient-care standards to be maintained by fewer nurses to seek waivers from a state oversight commission.⁸²

In Ohio, House Bill 412 was passed in August, 2002. However, this bill, unlike the others in Florida, Oklahoma, and Delaware, does not address the poor and substandard care that is prevalent in the nursing facilities across the country.⁸³ Ohio's new law only seeks to limit damage awards and a resident's right to bring suit. Further, it offers no relief whatsoever to the state's abused and neglected elderly nursing home residents. Sadly, in its attempt at tort reform, the Ohio Legislature somehow thought it was proper to almost completely disregard its elderly population.

IV. NURSING HOME REFORM IN OHIO AND THE PASSAGE OF HOUSE BILL 412

Ohio's House Bill 412 is very heavy on reform but completely indifferent about elderly rights and quality of care. House Bill 412 took effect in November of 2002 and does many things to decrease incentives to sue such as shortening the statute of limitations, reducing punitive damage awards, eliminating attorney fee awards, narrowing who can bring suit, and limiting evidence that can be used in court.⁸⁴ However, Ohio's nursing homes are facing the same problems as other homes across the country.⁸⁵ Many of the homes are providing substandard care, and as a result, many elderly Ohioans are suffering from abuse and neglect.⁸⁶ The Ohio Legislature and Governor Taft, in their concerns about the possibility of becoming the next state like Florida to suffer from rises in liability suits and insurance premiums, forgot to focus on the real problem facing nursing homes in Ohio and across the country—poor and substandard care.⁸⁷

A. *Legislative History of House Bill 412: The Passage of a Major Nursing Home Reform Bill with Only Minor Disputes Despite Massive Opposition*

Ohio House Bill 412 was first introduced to the House in October of 2001 and was signed into law in August of 2002.⁸⁸ The bill passed rather easily and expediently with only minor disputes over a one or two-year statute of limitations

⁸²*Id.*

⁸³See *States Enact Laws to Protect Nursing Home Residents, Limit Med-Mal*, *supra* note 70.

⁸⁴See Budish, *supra* note 6, at 02F.

⁸⁵See *Abuse of Residents Is a Major Problem in U.S. Nursing Homes*, *supra* note 1; see also *A Missed Opportunity*, THE CINCINNATI POST, Aug. 13, 2002, at 8A.

⁸⁶See *A Missed Opportunity*, *supra* note 85, at 8A. In 1998, Ohio recorded 2,395 complaints of abuse, neglect, and misappropriation by nursing home workers. Also, that same year, more than 100 nursing aides were barred for life from working in nursing homes after the State Department of Health found evidence that they had abused residents. Stephen Koff, *Surveillance in Nursing Homes Urged*, THE PLAIN DEALER, Sept. 15, 1999, at 16A.

⁸⁷See *A Missed Opportunity*, *supra* note 85, at 8A.

⁸⁸H.R. 412, 124th Gen. Assemb., Reg. Sess. (Ohio 2002); see also Bill History, HB 412, 124th Gen. Assemb. (Ohio 2001-02), at http://80-han2.hannah.com.proxy.ohiolink.edu:9099/htbin/f.com/oh_ban_124:HB412notes (last visited Aug. 8, 2003).

period and the use of evidence.⁸⁹ This was so despite tremendous opposition from the AARP,⁹⁰ Service Employees International Union,⁹¹ and state ombudsmen⁹² because it does nothing to promote quality of care.⁹³ Supporting the bill were the Ohio Health Care Association, which was known to have contributed thousands of dollars to the majority House Republicans prior to the passage of the bill,⁹⁴ and the American Health Care Association.⁹⁵

⁸⁹*Governor Taft Signs Liability Reform Bill*, THE OHIO CAPITAL NEWS (Aug. 2002), at <http://www.ohiocapitalnews.org/ohio-cap-news-Aug.htm> (last visited Oct. 2, 2003); Lee Leonard, *Bill Would Limit Suits Against Nursing Homes*, THE COLUMBUS DISPATCH, June 4, 2002, at 05B. The House version of the bill, passed 67-26, established a one-year statute of limitations for claims against a nursing facility. See H.R. 412, 124th Gen. Assemb., Reg. Sess. (Ohio Mar. 13, 2002) (passed first house version); Bill History, *supra* note 88. The Senate version, passed 20-11, amended this to two years. See H.R. 412, 124th Gen. Assemb., Reg. Sess. (Ohio Apr. 25, 2002) (passed second house version); Bill History, *supra* note 88. The House refused to concur in the Senate amendments 35-59, and the final version, following Conference Committee recommendations, included the House's version providing for the one-year statute of limitations. See Bill History, *supra* note 88; H.R. 412, 124th Gen. Assemb., Reg. Sess. (Ohio Aug. 8, 2002) (enacted).

⁹⁰The AARP, formerly known as the American Association of Retired Persons, is a nonprofit membership organization dedicated to addressing the needs and interests of persons fifty and older. AARP Facts, What is AARP?, at <http://www.aarp.org/leadership/Articles/a2002-12-18-aarpfactsheet.html> (last visited Aug. 8, 2003).

⁹¹The Service Employees International Union, SEIU, is comprised of 1.6 million working people and 120,000 retirees united to improving jobs and communities. Its membership includes doctors, nurses, and other health care providers. SEIU, Who We Are, at <http://www.seiu.org/who> (last visited Aug. 8, 2003).

⁹²State ombudsmen provide information regarding locating a nursing facility and obtaining quality care. Under the Federal Older Americans Act, every state is required to have an Ombudsman Program that addresses complaints and advocates for improvements in long-term care. Nat'l Citizens' Coalition for Nursing Home Reform, Ombudsmen, at http://nccnhr.newc.com/static_pages/ombudsmen.cfm (last visited Aug. 8, 2003).

⁹³*Governor Taft Signs Liability Reform Bill*, *supra* note 89; Ohio Leg. Alert, Vote No on H.B. 412 (Apr. 24, 2002), at <http://www.dimenet.com/silcoh/cgi/getlink.cgi?163> (last visited Aug. 8, 2003).

⁹⁴The Ohio Health Care Association, OHCA, represents more than 800 nursing facilities, assisted living communities, and intermediate care facilities for the mentally retarded. OHCA Online, About OHCA, at <http://www.ohca.org/howe-aboutohca.htm> (last visited Aug. 8, 2003). The OHCA contributed at least \$59,560 to House Republicans through its political action committee between January 1, 1999, and December 31, 2001. John McCarthy, *Bill Limits Nursing Home Lawsuits*, AKRON BEACON J., Mar. 6, 2002, at 6.

⁹⁵See *Governor Taft Signs Liability Reform Bill*, *supra* note 89; AHCA, NCAL Applaud New Successes on Tort Reform Front, at <http://www.heaton.org/tortreform.htm> (last visited Aug. 8, 2003). The American Health Care Association, AHCA, is a nonprofit federation of affiliated state health organizations that represents nearly 12,000 assisted living, nursing, developmentally disabled, and subacute care facilities. Profile of the AHCA, at <http://www.ahca.org/about/profile.htm> (last visited Aug. 8, 2003).

House Bill 412, The Nursing Home Tort Liability Reform Act, was sponsored by Republican William Seitz of Cincinnati.⁹⁶ The purpose of the bill was to amend the Ohio Revised Code relative to the “results of a home inspection or nursing home survey, liability of a residential care facility or a home due to employee actions, liability of a residential care facility for punitive damages, and expansion of the definition of ‘medical claim’ in the statute of limitations.”⁹⁷ Representative Seitz introduced the bill in the House on October 25, 2001, saying it was needed because of a “liability insurance crisis facing nursing homes in Ohio.”⁹⁸ One major insurance carrier was reportedly no longer renewing policies in Ohio, and two other carriers stopped accepting new business in Ohio.⁹⁹ Representative Seitz reportedly feared that Ohio would soon be in the same situation as Florida, with some facilities going without insurance or facing bankruptcy.¹⁰⁰

During the Senate and House hearings, opponent testimony centered around poor care and problems with patient-to-caregiver ratios and worker retention. Dan Stewart, legislative director of the Service Employees International Union, testified that this “is an attempt by nursing homes to avoid accountability at the expense of the residents in those homes.”¹⁰¹ Further, he noted that “lawsuits are being caused by poor quality care . . . [and that] better staffing would result in better care.”¹⁰² Donald Greenburg, a consumer advocate, stated that “[b]y limiting liability, HB 412 gives the green light to nursing homes to continue to provide substandard care to their residents because they will not be held accountable.”¹⁰³ Susan Marshall, director of the Regional Long-Term Care Ombudsman Program, commented that “HB 412 does nothing to advance quality of care or quality of life for citizens receiving long-term care services.”¹⁰⁴ It actually “reduces protection for the consumer, while increasing protection for the provider.”¹⁰⁵

Despite this opposition, the final, amended version contains no provisions that address the poor and substandard care that is being provided in many of the state’s

⁹⁶Bill History, *supra* note 88.

⁹⁷H.R. 412, 124th Gen. Assemb., Reg. Sess. (Ohio Oct. 25, 2001) (introduced version). The purpose was to amend §§ 2305.11, 2315.21, 2711.23, 2711.24, 3721.02, and 3721.17, and to enact §§ 3721.171 and 5111.411 of the Ohio Rev. Code. Only the original House version contained § 3721.171, which was an extreme attempt at protecting Ohio nursing home owners from liability for the acts of their employees. The House version also excluded nursing homes from two arbitration statutes in the Ohio Rev. Code. These two sections, 2711.23 and 2711.24, were not included in the later versions. *Compare* H.R. 412 (introduced version) *with* H.R. 412 (passed second house version).

⁹⁸Bill History, *supra* note 88 (House Civ. & Com. Law Hr’g, Jan. 16, 2002).

⁹⁹*Id.*

¹⁰⁰*See id.*

¹⁰¹Bill History, *supra* note 88 (House Civ. & Com. Law Hr’g, Mar. 6, 2002).

¹⁰²*Id.*

¹⁰³Bill History, *supra* note 88 (S. Jud. on Civ. Justice Hr’g, Apr. 17, 2002).

¹⁰⁴*Id.*

¹⁰⁵*Id.*

nursing homes.¹⁰⁶ Nothing regarding staff-to-patient ratios, staff turnover, or training and education was included in the bill by the Ohio Legislature. In fact, the provisions included by the Legislature only focus on one thing—the protection of the state’s nursing facilities.

The final version of the bill, signed by Governor Taft on August 8, 2002, without comment, became effective on November 7, 2002.¹⁰⁷ Governor Taft’s office noted that the Governor was “concerned about the affordability of nursing homes that face mounting insurance costs.”¹⁰⁸ Thus, the new provisions in House Bill 412 do nothing to address poor and substandard care. Consequently, it will have quite a detrimental effect on Ohio’s elderly nursing home residents and their families.

B. The Aftermath of House Bill 412: Its Beneficial Impact on Nursing Home Operators and Detrimental Effect on Nursing Home Residents and Families Attempting to Bring Suit

Despite the prevalence of abuse and neglect in Ohio’s nursing homes, House Bill 412 makes it very difficult for nursing home residents who have been abused and neglected to hold facilities accountable for their actions.¹⁰⁹ The law’s new provisions, each discussed in detail below, clearly benefit Ohio’s nursing home owners and operators as the provisions limit incentives to sue and access to Ohio’s court systems.

1. The Statute of Limitations Shortened

The Ohio Revised Code was amended to include “home or residential facility” in the definition of “medical claim” in order to shorten the statute of limitations for claims against nursing homes.¹¹⁰ This pertains to any claims against a nursing facility, including claims due to the “hiring, training, supervision, retention, or termination of caregivers providing medical diagnosis, care, or treatment,” and to any claims brought under the Resident’s Bill of Rights Law.¹¹¹ Placing “home or residential facility” in the definition of “medical claim” establishes a one-year statute of limitations for claims against nursing facilities.¹¹² Thus, the new law extends

¹⁰⁶See H.R. 412, 124th Gen. Assem., Reg. Sess. (Ohio 2002).

¹⁰⁷See Bill History, *supra* note 88.

¹⁰⁸*Ohio Gov. Bob Taft (R) has Signed Am. Sub. H.B. 412, a Nursing Home Liability Law that Restricts the Time Frame for Malpractice Lawsuits and the Individuals who Can File Them on the Resident’s Behalf*, STATE HEALTH MONITOR, Sept. 1, 2002.

¹⁰⁹See Budish, *supra* note 6, at 02F; see also Lee Leonard, *Panel OKs Bill that Puts Limit on Lawsuits*, THE COLUMBUS DISPATCH, Mar. 7, 2002, at O1C.

¹¹⁰OHIO REV. CODE ANN. § 2305.113(E)(3) (West 2003).

¹¹¹OHIO REV. CODE ANN. § 2305.113(E)(3)(3b)(ii)(c) (West 2003). The Nursing Home Resident’s Bill of Rights, O.R.C. §§ 3210.10 through 3721.17, provides specific rights to nursing home residents, like the right to certain living conditions, the right to adequate medical treatment, and the right to be free from abuse and neglect. OHIO REV. CODE ANN. §§ 3210.10-3721.17 (West 2002).

¹¹²See § 2305.113(E)(3). The exception to this is, if prior to the expiration of the one-year period, a claimant gives to the person who is the subject of the claim, written notice that he or she is considering bringing an action, that action may be brought against the notified person at

current law governing malpractice claims against hospitals to nursing homes.¹¹³ Prior to this, there was generally a two-year statute of limitations period.¹¹⁴

Nursing homes are not the same as hospitals. Nursing “homes” are just that – residents’ “homes.” They do not provide the same type of acute care services that are provided in hospitals. Thus, they do not require the same protection that is afforded to hospitals. Past Ohio case law has consistently agreed, holding that a nursing home does not perform the functions of a hospital and should not be afforded the benefit of the one-year statute of limitations for medical malpractice.¹¹⁵

The one-year statutory limitation period is much too restrictive and unnecessary, especially at this point in time. It is even more restrictive than other states’ laws, including Florida’s Senate Bill 1202, previously discussed.¹¹⁶ This is so despite the fact that Florida has seen many more lawsuits against its nursing homes and suffered much sharper rises in insurance premiums than what has been experienced in Ohio.¹¹⁷ According to the Ohio Health Care Association, which strongly pushed for Ohio’s new bill, although “there has been some rise in lawsuits in Ohio, we are not yet in the dire straits of Florida and some other high risk states.”¹¹⁸ Yet, the Ohio Health Care Association believed this bill was needed because “it is only a matter of time before out-of-state law firms that specialize in high-profile, expensive suits against long-term care facilities make inroads in Ohio.”¹¹⁹ However, this is only a possibility, and some argue a far-reaching one at that.¹²⁰ Thus, it seems quite premature for Ohio to limit the statute of limitations period to protect nursing home owners just based on the potentiality of suits in the future.

The practical effect of the new statutory period is that many elderly residents may be deprived of their right to file suit if they do not act, or are unable to act, within the one-year time frame.¹²¹ Unfortunately, many instances of abuse and neglect do not surface until years after the incident(s).¹²² As already noted, the majority of the

any time within 180 days after the notice is given (this notice is known as a “180-day letter”). § 2305.113(B)(1) (West 2003).

¹¹³See Bill History, *supra* note 88 (House Civ. & Comm. Law Hr’g Feb. 13, 2002).

¹¹⁴Laura A. Bischoff, *House Passes Bill Protecting Nursing Home Operators*, DAYTON DAILY NEWS, Mar. 14, 2002, at 4B.

¹¹⁵See, e.g., *Morris v. Monterey Yorkshire Inn*, 278 N.E.2d 686 (Ohio Ct. App. 10th Dist. 1971); *Henderson v. Franklin Nursing Inns*, 1981 WL 2530 (Ohio Ct. App. 2^d Dist. 1981); *Evans v. S. Ohio Med. Ctr.*, 659 N.E.2d 326 (Ohio Ct. App. 4th Dist. 1995).

¹¹⁶See *New Florida Law Levels the Playing Field for Nursing Home Litigants*, *supra* note 51.

¹¹⁷See OHCA Position of H.B. 412, *supra* note 7. For example, in Florida, the average cost of liability insurance is \$12,000 per bed, while in Ohio, it is between \$300 to \$500 per bed. *Id.*

¹¹⁸*Id.*

¹¹⁹*Id.*

¹²⁰See *A Missed Opportunity*, *supra* note 85.

¹²¹See Budish, *supra* note 6, at 02F.

¹²²See Radel, *supra* note 15.

elderly residents in nursing facilities are ill, disabled, and memory-impaired.¹²³ Furthermore, they often have few or no family members to watch over the type of care that is being provided by these homes.¹²⁴ Therefore, an incident of abuse or neglect can easily fall through the cracks and be left undiscovered for years. However, when incidents like these are finally discovered, it will be too late to pursue a claim against the facility or home that inflicted the abuse or neglect.

2. Standard of Proof for Compensatory Damages Raised

The bill also raises the standard of proof for recovery of compensatory damages. With the modification of Section 3721.17, a plaintiff may now only recover compensatory damages for a claim if he or she is able to show “by a preponderance of the evidence, that the violation of the resident’s rights resulted from a negligent act or omission . . . of the home, and that the violation was the *proximate cause* of the resident’s injuries”¹²⁵ Thus, a negligence per se/strict liability theory can no longer be used by plaintiff attorneys.¹²⁶ As such, a nursing home resident must prove not only that one of his or her rights were violated, such as his or her right to be free from abuse or neglect, but also that this violation was the direct cause of his or her injury.¹²⁷

Proximate cause, however, can be very difficult to prove in nursing home cases. In fact, it can be almost impossible to show that a nursing home’s negligence was the proximate or direct cause of an injury for an elderly resident who is already very frail and debilitated both mentally and physically.¹²⁸ Many nursing home residents suffer from dementia and Alzheimer’s disease and are unable to offer evidence of the alleged incidents.¹²⁹ Further, if they can offer some evidence, a resident with Alzheimer’s disease suffering from confusion will not be viewed as a credible or

¹²³See Quinn, *supra* note 4, at 678; *Today’s Nursing Facilities and the People They Serve*, *supra* note 18.

¹²⁴See Quinn, *supra* note 4, at 680.

¹²⁵OHIO REV. CODE ANN. § 3721.17(I)(2)(a) (West 2002) (emphasis added). A plaintiff may still recover injunctive relief for a violation of a resident’s rights. *Id.*

¹²⁶Negligence per se is a legal doctrine that presumes negligence where a statute that provides a standard of care to protect a class of persons from a particular risk, such as the Nursing Home Resident’s Bills of Rights in the Ohio Revised Code, is violated. See *Crawford v. Ohio Div. of Parole & Comm. Serv.*, 566 N.E.2d 1233 (Ohio 1991).

¹²⁷§ 3721.17(I)(2)(a).

¹²⁸Kapp, *supra* note 17, at 1238.

¹²⁹*Id.* See also *Today’s Nursing Facilities and the People They Serve*, *supra* note 18. For example, in an Illinois case, the resident was the only witness to the incident of abuse; however, she was incapable of testifying because she suffered from organic brain syndrome. “The court acknowledged that absent a presumption of fault on the part of the nursing home, the plaintiff and all the plaintiffs similarly situated would be unable to enforce their rights under the Act (Illinois Nursing Home Care Act).” STEPHEN C. BUSER & JOHN J. HOPKINS, NURSING HOME LITIGATION – PLAINTIFF PERSPECTIVE, ILL. INST. FOR CONTINUING LEGAL EDUC. Ch. 6 (2001) (citing *Flinn by Brogan v. Four Fountains, Inc.*, 536 N.E.2d 89 (Ill. 5th Dist. 1989)).

persuasive witness.¹³⁰ Elderly residents are also prone to certain physical conditions like bruising and skin tears.¹³¹ Nursing homes can easily argue that such bruises and skin tears are due to an elderly resident's compromised and deteriorating health status, not abuse or neglect.¹³²

Thus, the effect of this new provision could result in diminishing compensatory damage awards.¹³³ Yet, elderly residents already have difficulty obtaining compensatory damages. The usual components of compensatory damages, like lost wages and out-of-pocket medical expenses, are problematic for nursing home residents, as they are no longer working and have medical expenses that are likely covered by Medicaid or Medicare.¹³⁴

3. Punitive Damage Awards Greatly Decreased and Attorney Fees Limited

Even more drastically affected than compensatory damage awards are awards of punitive damages and attorneys' fees. To begin, Section 3721.17 was revised allowing plaintiffs to recover attorneys' fees in cases in which *only* injunctive relief is granted.¹³⁵ Bringing a lawsuit against a nursing facility can be very expensive, however, especially for an elderly resident with limited or no funds.¹³⁶ Thus, eliminating awards of attorneys' fees may affect many abused and neglected nursing home residents' ability to afford attorney representation.¹³⁷ As such, horrific cases of abuse and neglect may never surface, and the homes that inflicted such abuse and neglect may never be held accountable for their actions.

Further minimized by the bill are punitive damages. Under the new law, punitive damages are awarded based upon a facility's ability to afford them.¹³⁸ With the revision of Section 2315.21, all of the following must be considered when determining the amount of an award of punitive damages:

- (1) The ability of the home or residential facility to pay the award of punitive or exemplary damages based on the home's or residential facility's assets, income, and net worth;
- (2) Whether the amount of

¹³⁰Kapp, *supra* note 17, at 1238.

¹³¹Jennifer Gimler Brady, *Long-Term Care Under Fire: A Case for Rational Enforcement*, 18 J. CONTEMP. HEALTH L. & POL'Y 1, 42 (2001).

¹³²*Id.* See also Intagliata, *supra* note 41, at 1034.

¹³³See Fiscal Note & Local Impact Statement, 124th Gen. Assemb. (Ohio May 24, 2002), at <http://www.lbo.state.oh.us/fiscal/fiscalnotes/124ga/HB0412EN.HTM> (last visited Aug. 8, 2003).

¹³⁴Brady, *supra* note 131, at 42 (citing BARRY F. FURROW ET AL., *HEALTH LAW CASES, MATERIAL AND PROBLEMS* 113 (3d ed. 1997)).

¹³⁵OHIO REV. CODE ANN. § 3721.17(I)(2)(c) (West 2002) (emphasis added).

¹³⁶See Budish, *supra* note 6, at 02F. Trial lawyers report spending anywhere from \$20,000 to \$150,000 for private investigators, expert witnesses, and depositions for nursing home lawsuits. Groeller, *infra* note 179, at A1.

¹³⁷See Ellen J. Scott, J.D., Commentary, *Punitive Damages in Lawsuits Against Nursing Homes*, 23 J. LEGAL MED. 115, 117 (2002).

¹³⁸OHIO REV. CODE ANN. § 2315.21(E)(1)-(3) (West 2002).

punitive or exemplary damages is sufficient to deter future tortious conduct; [and] (3) The financial ability of the home or residential facility, both currently and in the future, to provide accommodations, personal care services, and skilled nursing care.¹³⁹

This is a major change in the law and grants to the nursing home industry an advantage that is not afforded to any other type of business.¹⁴⁰ Furthermore, this standard is extremely vague and will be difficult for juries to consistently apply to nursing home cases. Thus, potential damage awards will be quite unpredictable, and elderly residents with limited financial resources are unlikely to pursue costly and time-consuming litigation if recovery is uncertain.¹⁴¹

Additionally, this provision seems to protect the ill-funded nursing homes that have already cut costs and increased the potential for abuse and neglect.¹⁴² Even though Governor Taft apparently signed this bill out of concern for keeping nursing facilities from bankruptcy and going out of business,¹⁴³ there are already more than enough nursing home beds in Ohio to care for the state's elderly. In fact, on any given day, more than one out of every ten beds in Ohio's nursing homes are unused.¹⁴⁴ Thus, the concern for keeping even poorly financed homes open so that there will be a place to "care" for our elderly population is ill-conceived. Simply put, bad nursing homes should be allowed to go out of business.

Moreover, this new provision may also encourage larger nursing home operators that are not so ill-funded to shield their assets so it appears that they are unable to "afford" to pay punitive damages.¹⁴⁵ This may effectively reduce punitive damages awards, and in some cases, completely eliminate them altogether.¹⁴⁶ As a result, punitive damage awards may no longer play any factor at all in deterring or penalizing the conduct of substandard nursing homes.

Punitive damage awards were already very difficult for elderly nursing home residents to recover.¹⁴⁷ In order to recover punitive damages, a plaintiff must prove with "clear and convincing evidence" that the defendant nursing home or employee

¹³⁹§ 2315.21(E)(1)-(3).

¹⁴⁰Bill History, *supra* note 88 (S. Jud. on Civ. Justice Hr'g, Apr. 17, 2002).

¹⁴¹See Steven M. Levin, et al., *Protecting the Rights of Nursing Home Residents Through Litigation*, 84 ILL. B.J. 36 (Jan. 1996).

¹⁴²See Steve Bennish, *Advocacy Groups Oppose MRDD Bill*, DAYTON DAILY NEWS, Feb. 10, 2002, at 1B. Kathy Keller of the AARP was noted as saying she is concerned the new legislation "would keep bad homes in business. It benefits the facilities that commit the worst misconduct to residents." *Id.*

¹⁴³See *Ohio Gov. Bob Taft (R) has Signed Am. Sub. H.B. 412*, *supra* note 108.

¹⁴⁴Spencer Hunt, *Elderly Shun Nursing Homes*, THE CINCINNATI ENQUIRER, Dec. 26, 2000, available at http://enquirer.com/editions/2000/12/26/loc_elderly_shun_nursing.html (last visited Aug. 8, 2003). As of December 2002, Ohio had approximately 12,700 empty nursing home beds. *Nursing Homes: Spiraling Costs*, THE CINCINNATI ENQUIRER, Dec. 18, 2002, at 6.

¹⁴⁵*Putting Limits on Lawsuits*, THE CINCINNATI POST, Mar. 8, 2002, at 18A.

¹⁴⁶Budish, *supra* note 6, at 02F.

¹⁴⁷Scott, *supra* note 137, at 120.

acted or failed to act with “malice, aggravated or egregious fraud, oppression, or insult”¹⁴⁸ This is already a very high standard of proof.¹⁴⁹ The additional factors for determining punitive damage awards in House Bill 412, then, seem quite unjust. The new law leaves nursing home residents that have suffered abuse and neglect at the hands of nursing homes and nursing home employees greatly disadvantaged as compared to the homes that inflicted this abuse and neglect. Again, the Ohio Legislature seems to have completely disregarded the rights of its elderly residents and focused only on protecting nursing homes. Unfortunately, it will mostly likely be the homes that are providing the worst care that will be protected as a result of this new law.

4. Individuals Who Can Bring Suit Narrowed

House Bill 412 also limits who can assist an elderly nursing home resident in commencing a legal action. Many elderly residents, as already discussed, are unable to adequately pursue a lawsuit against a facility that has inflicted abuse or neglect, whether it be due to mental or physical disabilities, funding, or lack of family support.¹⁵⁰ Due to this, almost anyone could file suit on a resident’s behalf prior to the passage of House Bill 412.¹⁵¹ Now, however, the law specifies that a resident or a resident’s sponsor can initiate a suit against a nursing facility.¹⁵² Further, if the resident or the sponsor are unable to file suit, “the following persons in the following order of priority” have the right to commence an action on the resident’s behalf: “(i) The resident’s spouse; (ii) The resident’s parent or adult child; (iii) The resident’s guardian if the resident is a minor child; (iv) The resident’s brother or sister; (v) The resident’s niece, nephew, aunt, or uncle.”¹⁵³

Thus, the bill imposes limits on who may pursue a suit on a resident’s behalf. Further, if there are, for example, multiple siblings or multiple children, a court can select which family member will represent the resident.¹⁵⁴ This takes away an elderly resident’s right to choose who can represent his or her best interest. Although many residents are memory-impaired or suffer from other mental disabilities, some residents are quite capable of making choices in their own care. As Susan Marshall, director of the Regional Long-Term Care Ombudsman Program noted, “[c]apable individuals should be able to choose who represents them.”¹⁵⁵ We

¹⁴⁸*Id.* at 123 (quoting OHIO REV. CODE ANN. § 2315.21(B)(1)&(2), (c)(2) (West 2000)).

¹⁴⁹*Id.*

¹⁵⁰*See* Quinn, *supra* note 4, at 678-80; *see also* Intagliata, *supra* note 41, at 1025.

¹⁵¹Budish, *supra* note 6, at 02F.

¹⁵²OHIO REV. CODE ANN. § 3721.17(I)(1)(b) (West 2002). A “sponsor” is an appointed legal representative who has an interest or responsibility in the resident’s welfare. OHIO REV. CODE ANN. § 3721.10(D) (West 2002). However, according to Susan Marshall, director of the Regional Long-Term Care Ombudsman Program, “experience demonstrates that consumers’ interests are not always fully served by their appointed legal representatives.” Bill History, *supra* note 88 (S. Jud. on Civ. Justice Hr’g, Apr. 17, 2002).

¹⁵³§ 3721.17(I)(1)(b)(i)-(v).

¹⁵⁴Budish, *supra* note 6, at 02F.

¹⁵⁵Bill History, *supra* note 88 (S. Jud. on Civ. Justice Hr’g, Apr. 17, 2002).

should not presume that a court will necessarily have a nursing home resident's best interests in mind when it chooses who should represent him or her.

5. Evidence for Use by Plaintiffs Excluded

Finally, House Bill 412 excludes from evidence results of inspections, surveys, and investigations conducted for regulatory compliance purposes.¹⁵⁶ This is true even if these reports reveal that a nursing facility provides extremely substandard care to its residents or if a facility has been repeatedly cited for abuse. This is so because House Bill 412 specifies that the results of an inspection, investigation, or survey of a nursing home, "including any statement of deficiencies and all findings and deficiencies cited in the statement," shall be "used *solely* to determine the nursing facility's compliance with certification requirements" or with the laws of the Ohio Revised Code.¹⁵⁷ As a result, any findings of deficiencies in these documents are not admissible as evidence and cannot be used in court.¹⁵⁸

Inspection reports, however, "are the only available objective measure of life in a nursing home."¹⁵⁹ As already discussed, causation is a very difficult element for an abused and elderly nursing home resident to demonstrate.¹⁶⁰ Inspection and survey reports need to be available so that plaintiffs can show a pattern of bad practices and substandard care in nursing homes.¹⁶¹ Additionally, these reports are matters of public record.¹⁶² All residents and their families are capable of viewing these inspection reports in order to aid them in selecting a facility,¹⁶³ so why should they not be available for use in court? Clearly, this is simply another attempt by the Ohio Legislature to bend over backwards to protect the state's nursing homes.

According to Clark Law, the president of the Association of Ohio Philanthropic Homes, Housing and Services for the Aging, the rationale behind excluding these findings for use in court is that otherwise, nursing homes are subject to a form of

¹⁵⁶The Director of Health is required to inspect nursing homes at least once every fifteen months as a condition of meeting certification requirements. A standard survey of every nursing facility is conducted in Ohio on a statewide average of not more than once every twelve months. The Department of Health may conduct additional surveys or investigations when necessary. OHIO REV. CODE ANN. § 5111.39(A)&(B) (West 2002). For a more detailed overview of the survey and inspection process, see Nursing Homes, About Nursing Homes Inspections, at <http://www.medicare.gov/Nursing/AboutInspections.asp> (last visited Aug. 8, 2003).

¹⁵⁷OHIO REV. CODE ANN. §§ 3721.02(E)(1) & 5111.411 (West 2002) (emphasis added).

¹⁵⁸*Id.* The results of these inspections and surveys can be used in a criminal proceeding. *Id.*

¹⁵⁹*When a Loved One Needs Care: In Search of the Right Home*, HEALTH CARE FINANCING ADMIN., Vol. 60 No. 8, Aug. 22, 1995, at 518.

¹⁶⁰See Kapp, *supra* note 128, at 1238, and accompanying text.

¹⁶¹Laura A. Bischoff, *House Passes Bill Protecting Nursing Home Operators*, DAYTON DAILY NEWS, Mar. 14, 2002, at 4B (quoting State Rep. Joyce Beatty, D-Columbus).

¹⁶²Bill History, *supra* note 88 (S. Jud. on Civ. Justice Hr'g, Apr. 17, 2002).

¹⁶³See Budish, *supra* note 6, at 02F.

“double jeopardy” by being sanctioned by both the state and the resident.¹⁶⁴ However, it is not right to permit a nursing home with documented reports of repeated abuse and neglect to get away with these practices by simply paying a fine to the state, while the resident who endured the abuse receives no relief or compensation for his or her suffering.

Despite the unfairness and complete disregard for elderly rights, this, unfortunately, is the law in Ohio. The new law will have a devastating impact on Ohio’s elderly nursing home residents, especially those who have suffered the greatest abuse and neglect, as the law protects the most substandard nursing homes in the state.¹⁶⁵ Ohio’s Legislature, which quickly and prematurely acted to protect the state’s nursing facilities from “mounting insurance costs,”¹⁶⁶ completely disregarded the poor care and abuse that is inflicted upon many of the state’s nursing home residents.

The new law almost completely strips nursing home residents of their ability to sue for negligence and abuse. To begin, the statute of limitations should not have been shortened. Two years was the statutory period prior to House Bill 412, and this was already a short amount of time in which a resident could bring suit when many of these cases of abuse and neglect go undiscovered for years.¹⁶⁷ Additionally, damage awards should not be reduced by a facility’s ability to pay. This new standard simply allows second-rate nursing homes to completely avoid accountability for their actions. Also, all available evidence should be admissible in court, especially evidence that is of public record like inspections and surveys, and attorneys’ fee awards should not be prohibited. Nursing home residents and their families should have the right to sue for the abuse and neglect that they have suffered. Yet, the Ohio Legislature did everything and anything that it could to make sure this is not the case.

C. There is No Evidence that the New Law Will Even Lower Insurance Premiums

Despite the Ohio Legislature and Governor Taft’s concerns of an insurance crisis with “mounting insurance costs,” there is no evidence whatsoever that Ohio’s new law will even have an impact on lowering insurance premiums for the state’s nursing facilities. There is simply no data showing a connection between lawsuits and insurance premiums.¹⁶⁸ There is a connection, however, between poor care and insurance availability and premiums.¹⁶⁹

First, there is no evidence that reducing nursing home residents’ rights and ability to bring suit will decrease liability insurance costs or make liability insurance more available.¹⁷⁰ This type of legislation has not reduced the cost of insurance or made it

¹⁶⁴Bill History, *supra* note 88 (House Civ. & Commercial Law Hr’g, Feb. 13, 2002).

¹⁶⁵See Bennish, *supra* note 142.

¹⁶⁶Quoting the office of Ohio Gov. Bob Taft, *supra* note 108.

¹⁶⁷See Bischoff, *supra* note 114; *see also* Radel, *supra* note 15.

¹⁶⁸See Bischoff, *supra* note 114 (quoting Ron Bridges, AARP Ohio Gov’t Affairs Rep.).

¹⁶⁹*Id.*

¹⁷⁰Ohio Leg. Alert, *supra* note 93.

more available in other states that have enacted laws like that of Ohio's.¹⁷¹ In fact, even in Florida, where lawsuits have decreased significantly since the passage of its reform bill in 2001, nursing home insurance is still only available at very high prices.¹⁷² Second, insurance companies' practices and financial problems have led to rising insurance premiums, not the tort system.¹⁷³ In the current economy, especially since the attacks of September 11th, all businesses, including nursing homes, have had difficulty affording liability insurance.¹⁷⁴ Thus, resident advocates assert that nursing home operators should take up their grievances about insurance affordability and availability with the insurance industry itself "and not try to limit the rights of residents to recover damages for mistreatment."¹⁷⁵ Insurance problems need insurance solutions and Ohio's House Bill 412 offers no such solutions.¹⁷⁶ Instead, it only severely restricts a nursing home resident's ability to hold poor and substandard nursing homes accountable. Therefore, it is very likely that Ohio's new law will not do what it was supposedly set out to do—maintain affordability of liability insurance for the state's nursing facilities.

Finally, what has been shown to have a connection with insurance availability and premiums is quality of care.¹⁷⁷ Nursing homes with a history of providing good care to their residents have been able to obtain affordable liability insurance more easily than facilities with a record of poor and substandard care.¹⁷⁸ As such, what really should be addressed is improving the quality of care in the state's nursing facilities, as this is what will have the greatest impact on improving the affordability and accessibility of nursing home liability insurance.

D. High Insurance Premiums and Lawsuits, However, Are not the Real Cause of the Nursing Home Industry's Financial Problems

Despite nursing home industry complaints that it's being run out of business by a flood of frivolous lawsuits and skyrocketing insurance premiums, many blame the nursing home industry's financial woes on its own business practices, quality of care problems, and lack of reimbursement from the Medicaid and Medicare programs.¹⁷⁹

¹⁷¹*Id.*

¹⁷²Nohlgren, *supra* note 71.

¹⁷³*See Provider News Malpractice: Wall Street Journal Examines Role of Insurers*, AM. POL. NETWORK, AM. HEALTH LINE, Vol. 6 No. 9, June 24, 2002. The insurance industry has even agreed with this position. Donald Zuk, CEO of California malpractice insurer Scpie Holdings Inc., stated, "I don't like to hear insurance company executives say it's the tort . . . system" that is causing the malpractice problems, and added that insurers' current financial situation is "self-inflicted." *Id.*

¹⁷⁴Ohio Leg. Alert, *supra* note 93.

¹⁷⁵Lee Leonard, *Panel OKs Bill that Puts Limits on Lawsuits*, THE COLUMBUS DISPATCH, Mar. 7, 2002, at 01C.

¹⁷⁶Ohio Leg. Alert, *supra* note 93.

¹⁷⁷*Id.*

¹⁷⁸*Id.*

¹⁷⁹*See* John Elliot Leighton, *The Nursing Home Industry Versus Government and Advocates: Legislation, Litigation, and Bankruptcy*, Ass'n of Trial Law. of Am. Winter

The reasons for the nursing home industry's financial difficulties are definitely more than simply lawsuits and insurance premiums.¹⁸⁰ Further, even if lawsuits have played a role in affecting the financial strength of the nation's nursing homes, lawsuits have ensued because too many homes provide substandard care.¹⁸¹

Nursing home groups frequently point to cuts in Medicare and Medicaid disbursements as the primary reason for nursing home bankruptcies.¹⁸² The nursing home industry also blames this lack of federal money for care and staffing problems.¹⁸³ Many claim that Medicaid and Medicare reimbursements "often are too low to cover the cost of caring for the sickest patients, causing some facilities to cut corners and withhold crucial care."¹⁸⁴

However, the Government, including the General Accounting Office and the Department of Health and Human Services, does not think unintended Medicare cuts are to blame for the nursing home industry's financial problems.¹⁸⁵ Instead, it contends that any difficulties are the direct result of the nursing home industry's own business decisions.¹⁸⁶ After the development of the Medicare and Medicaid programs in the 1960s, the number of nursing facilities increased dramatically as nursing home operators "went on nursing home buying and building sprees, banking on easy money from Medicare."¹⁸⁷ For example, in Florida, so many nursing facilities were added that many of the beds in the facilities are actually empty. Now, homes are in debt because they are not bringing in the revenue that they anticipated.¹⁸⁸ Thus, many blame the nursing home industry's financial difficulties on their aggressive business decisions that "failed to pan out."¹⁸⁹

Many forget, however, that beneath these financial complaints and concerns regarding increased litigation, there are many elderly residents suffering from abuse and neglect, often in silence. Lawsuits against nursing homes are anything but

Convention Reference Materials (2001); *see also* Greg Groeller, *Elderly Care Put to Test*, THE ORLANDO SENTINEL, Mar. 4, 2001, at A1.

¹⁸⁰ *See* Leighton, *supra* note 179.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *See* O'Connor, *supra* note 21; Groeller, *supra* note 179, at A1. According to the American Health Care Association, "Medicaid is underfunded by \$3.5 billion annually, or approximately \$10 per patient per day . . . [and] [t]hat's why we are operating so close to the margins." O'Connor, *supra* note 21 (quoting Dr. Charles H. Roadman II, President of the Am. Health Care Ass'n).

¹⁸⁴ Groeller, *supra* note 179, at A1.

¹⁸⁵ *See* Leighton, *supra* note 179.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* The nation's largest for-profit nursing home chains accumulated \$5 billion in debt in the early 1990s alone to finance aggressive expansion plans. Groeller, *supra* note 179, at A1.

¹⁸⁸ Leighton, *supra* note 179. Approximately 13 percent of Florida's nursing home beds are empty. *Id.*

¹⁸⁹ *Id.*

frivolous.¹⁹⁰ These claims accuse nursing facilities of things like sexual assault, physical abuse, improper medical treatment, ignoring long-standing open sores that lead to infections and amputations, doing nothing to prevent falls that lead to broken bones, and failing to treat malnutrition and dehydration resulting in death.¹⁹¹

Therefore, even if increased litigation is related to the industry's financial worries, the claims are a result of the utter abuse and neglect that is rampant in some of these facilities. As one attorney simply stated, "if nursing home residents were not abused and neglected, there would be nothing to sue for."¹⁹² Further, "it should be easy to sue for resident abuse and neglect and to suggest that it should be harder and more restrictive for seniors to protect their rights is immoral."¹⁹³ Yet, this is just what Ohio's new law is doing. It simply attempts to make it harder and more restrictive for an elderly resident to bring suit but does nothing to address the real problems of abuse and neglect in long-term care. As such, the state's elderly are at an even higher risk for injuries and death.¹⁹⁴

E. No Bright Light at the End of the Tunnel: More Reform Is Expected

However, the Ohio Legislature is not stopping with House Bill 412 in its attempts at tort reform. In fact, both in Ohio and nationally, more reform is expected. In Ohio, a proposal is apparently being considered that would reduce some of the staffing and health care standards that nursing homes are required to follow.¹⁹⁵ According to Beverly Laubert, a long-term care ombudsman in Ohio, "the changes [in this proposal] would help nursing homes save money while putting residents' health and safety at risk."¹⁹⁶ Thus, the Ohio Legislature must believe that it did not do enough to put our elderly at risk with its passage of House Bill 412. Obviously, any reform that is proposed should increase staffing and health care standards, not reduce them.

Further, President George W. Bush is pushing a comprehensive national reform package.¹⁹⁷ This legislation, entitled the HEALTH Act, attempts to place national limits on things like punitive damages and the statute of limitations period.¹⁹⁸ Our government must do something more than simply protect big business concerns. However, protecting wealthy, big business owners seems to be the government's

¹⁹⁰See Groeller, *supra* note 179, at A1.

¹⁹¹*Id.*

¹⁹²Leighton, *supra* note 179.

¹⁹³*Id.*

¹⁹⁴See Groeller, *supra* note 179, at A1 (discussing Florida's elderly nursing home residents).

¹⁹⁵Spencer Hunt, *Proposal May Hurt Nursing Home Care*, TIMES RECORDER, Nov. 25, 2002, at A3.

¹⁹⁶*Id.*

¹⁹⁷See AHCA, NCAL Applaud New Successes on Tort Reform Front, *supra* note 95.

¹⁹⁸*Id.* With Congress now being controlled by Republicans, this proposal, as well as any proposals supported by the Republican party, will likely be passed. See Judy Keen, *New Congress is a New Start for Bush Agenda*, USA TODAY, Dec. 26, 2002, at 9A.

primary objective. As such, this reform, both nationally and in Ohio, is only going to place our elderly residents in this country at even greater risk for abuse and neglect.

V. CONCLUSION

House Bill 412 was, quite simply, an attack on the rights of our abused and neglected elderly population. As Ohio's new law, House Bill 412 has effectively stripped elderly nursing home residents from their ability to sue negligent nursing homes and to hold these homes accountable for substandard care. The new law was passed, supposedly, in order to prevent increasing insurance rates from forcing nursing facilities into bankruptcy and closing their doors.¹⁹⁹ Even though the Ohio Legislature was apparently concerned about keeping nursing facilities open for business, they were not overly concerned about the quality of care that is being provided in these facilities. The Ohio Legislature was well aware of the prevalence of abuse and neglect in these facilities; yet, the provisions in House Bill 412 did nothing to address poor and substandard care.²⁰⁰ However, quality of care is really what should have been on the minds of the Ohio Legislature with its passage of a nursing home reform bill. Insufficient care and short staffing are what leads to poor care, and in turn, what leads to lawsuits.²⁰¹ Thus, a reform bill like House Bill 412 would not even be necessary if quality of care was improved and staffing was increased in the state's nursing homes. Ohio must focus on measures that will raise minimum staffing levels, and it must force nursing facilities to spend money directly on patient care. The nursing home industry also needs to focus its efforts on providing quality care by increasing staffing, providing adequate and on-going training to its staff, and increasing employee incentives through things like pay raises and bonuses. If the quality of care provided by nursing homes was increased, elderly residents in Ohio and across the country would simply have nothing to sue for.

Nevertheless, instead of taking the most logical and humane approach to the elderly residents in its state, Ohio decided that it would be much simpler to just make it more difficult for an abused or neglected elderly resident to bring suit against a nursing facility. As one concerned Ohio citizen noted, House Bill 412 "is a dagger to the heart of Ohio's seniors."²⁰² One can imagine what a detrimental effect House Bill 412 will have against a neglected or abused nursing home resident.

For instance, suppose a debilitated and demented 90-year-old woman develops severe bedsores because her nursing home is so understaffed that it cannot adequately feed her or turn her frequently enough while she is in bed. Hopefully, she has family or a court-appointed sponsor that is involved enough with her care to notice that the nursing facility is being negligent. If not, this case of neglect of this poor 90-year-old woman could easily never be discovered, let alone within the one-year statute of limitations period. Assuming, however, that this 90-year-old woman does have someone outside of the nursing facility actively involved with her care,

¹⁹⁹See *Ohio Gov. Bob Taft (R) has Signed Am. Sub. H.B. 412*, *supra* note 108; see also Bill History, *supra* note 88.

²⁰⁰See Bill History, *supra* note 101, and accompanying text.

²⁰¹See Leighton, *supra* note 179.

²⁰²Letters to the Editor of the Post, *Bad Bill*, THE CINCINNATI POST, Apr. 1, 2002, at 9A (quoting Bill Adams of Austintown, Ohio).

and that person is qualified to bring suit under the new restrictions, and can afford to hire an attorney, as the new law eliminates attorneys' fee awards, the elderly resident at trial cannot show evidence regarding her twenty fellow residents who have also suffered from bedsores because of the nursing home's neglect. With the new law, she cannot even show evidence of past health citations from the Department of Health against the nursing home for failing to feed residents and prevent bedsores. Further, even if the jury finds that the nursing home was negligent, this elderly woman is awarded almost no compensatory damages due to her age, and the nursing facility claims it is going bankrupt and cannot afford to pay punitive damage awards. Thus, the court awards almost nothing for this woman's pain and suffering even though the nursing home has clearly provided negligent care.²⁰³

Although this may seem like an extreme example, it is not that far-fetched. Ohio House Bill 412 will have quite a devastating impact on the state's elderly residents who attempt to bring suit, and it may deter many elderly residents and their families from bringing suit altogether. Consequently, many nursing homes will never be held accountable for the poor and substandard care they provide, and have no reason with this new law to even attempt to provide better care. As such, Ohio, and all other states, need to force the country's nursing homes to provide better care. This is the only thing will have any substantial impact on decreasing lawsuits against nursing facilities. This is also what our elderly population in this country deserves—to be treated and cared for with dignity, respect, and kindness by nursing homes and their employees.

ROBIN P. BRAVCHOK²⁰⁴

²⁰³The basis for this example came from a letter to the editor of the Cincinnati Post. *See Bad Bill, supra* note 202.

²⁰⁴Managing Editor, *Cleveland State Law Review*, 2003-2004, J.D. expected May 2005. Ms. Bravchok is a registered nurse and received her Bachelor of Science in Nursing from the Franciscan University of Steubenville in Steubenville, Ohio. She would like to thank her legal writing instructor Carolyn Broering-Jacobs for her assistance with the editing process of this Note.