

UPCOMING EVENTS:

- June 9, 2007** *Capozzi & Associates, P.C. Adopt-A-Highway Clean Up Day,*
I-81 and Route 322 Interchange, Harrisburg, PA.
- June 11, 2007** *Capozzi & Associates, P.C. 10th Anniversary Celebration.*
- September 15, 2007** *"Government's Role in Health Care Policy, Regulation and Reimbursement,"*
Slippery Rock University Core of Knowledge
For Nursing Home Administrators Program, Slippery Rock, PA
- October 6, 2007** *"Government's Role in Health Care Policy, Regulation and Reimbursement,"*
Slippery Rock University Core of Knowledge
For Nursing Home Administrators Program, Harrisburg, PA

Capozzi & Associates, P.C. is pleased to welcome the Slippery Rock University Core of Knowledge for Nursing Home Administrators Program to Harrisburg's Dixon University Center, 2986 North Front Street, just up the block from our Firm. Louis J. Capozzi, Jr., Esq., Bruce G. Baron, Esq., and others at our Firm have participated in these Programs for NHA's since their inception by Professor Charles A. Bisch, Sr. For more information on these NHA programs, you may contact Slippery Rock University, Center for Lifelong and Community Learning, 165 Elm Street, Slippery Rock, PA 16057-1326, Telephone: 724-738-1601, or on their Website at: <http://www.sru.edu/pages/13731.asp>.



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DEFEATING A NURSING FACILITY UNIONIZATION EFFORT EVEN WHEN THEY HAVE THE CARDS—

A RECENT EXPERIENCE AND IMPLICATIONS FOR EFFORTS TO CHANGE THE LAW

By Louis J. Capozzi, Jr., Esquire

There is currently a proposal before the U.S. Congress that would make it easier for unions to get established in nursing facilities—The Employee Free Choice Act of 2007, H.B. 800, S. 1041, which includes a provision to “streamline union certification” by deeming union certification automatic, eliminating any secret ballot election by the facility’s staff, whenever a majority of the employees of the proposed bargaining unit have signed authorization cards designating a particular union. H.B. 800 recently was passed in the U.S. House of Representatives and is awaiting consideration in the U.S. Senate.

In a recent union organization effort in Northeastern Pennsylvania this year, nursing facility employees rejected union certification for their facility after they had received the other side of the story from facility management and more information about the experience of other unionized facilities, even though more than 75% of the bargaining unit had signed authorization cards in support of SEIU-District 1199P. If the new law had been in effect, the

facility would have been deemed unionized before the employer had a meaningful opportunity to rebut the union’s organizing attempt.

Current law provides both employers and union organizers a meaningful opportunity to get their side of the unionization issue out to employees. The success of District 1199P in organizing healthcare workers throughout the country demonstrates that they have been able to get their position out to employees under the current law. The recent National Labor Relations Board—supervised process in Northeastern Pennsylvania demonstrates that, when employees are provided with information on both sides of the question and are given the opportunity to evaluate it as part of a secret ballot election, that information can result in employees’ reevaluating the promised benefits of unionization and vote against unionization. If your facility would like more information on the lessons learned from this unsuccessful union organizing effort, you may contact Louis J. Capozzi, Jr., Esq. at our Firm.

PENNSYLVANIA'S NEW AMENDMENTS TO THE LIVING WILL STATUTE SOLVE SOME PROBLEMS AND CREATE SOME NEW ONES—

By Doreena Craig Sloan, Esquire

Act 169 of 2006, which became effective in January 2007, includes a new version of Pennsylvania’s Decedents, Estates, and Fiduciaries Code, 20 Pa. C.S. Chapter 54, dealing with Living Wills and Health Care Powers of Attorney. The Act increases the effective period of Living Wills by replacing references to “terminal condition” with “end-stage medical condition” (“an incurable and irreversible medical condition in an advanced state caused by injury, disease or physical illness that will, in the opinion of the attending physician to

a reasonable degree of medical certainty, result in death despite the introduction or continuation of medical treatment.”). The Act also provides new forms for Living Wills and Durable Health Care Powers of Attorney, while preserving the validity of those already in place.

While much of Act 169 is still familiar territory, two areas present new territory and challenges for implementation: (1) the establishment of the “health care representative” as a new kind of authorized agent to make decisions and (2) specific

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mandated procedures for making health care decisions. While the establishment of “health care representatives” increases the number of people who are authorized under Pennsylvania law to make health care decisions on behalf of a patient, including decisions required by Federal and State requirements for nursing facilities (e.g. 42 U.S.C. § 1396r(c)(1)(C)), it does not eliminate the need for a guardian or other means to deal with issues related to payment and protection of a patient’s property interests. The protocols for health care decision-making, including a provider’s right to refuse to comply with directions and decisions not made in conformity with the Act, present providers with a challenging quality assurance and compliance problem requiring cooperation between the Administrator, Medical Director, Director of Nursing, attending physicians, and patient decision-maker(s).

While Act 169 does not change the rights of family members to make end-of-life decisions without a Living Will or Court intervention as authorized by the Supreme Court of Pennsylvania’s 1996 decision in *In Re Fiori*, it authorizes additional individuals to make health care decisions in such cases. “Health care decisions” include decisions to select or discharge a health care provider, approve or disapprove tests, surgery, or a program of medication, and directions to initiate, continue, withhold or withdraw life-sustaining treatment, including DNR instructions. A “health care representative” also can be given additional authority by the patient in writing to incur expenses for health care or health insurance to be paid for out of the patient’s funds.

The new Section 5461 dealing with “health care representatives” permits an individual to be appointed, preferred or excluded by the patient in writing or by otherwise informing the attending physician or the health care provider (which includes a nursing facility), but requires them to be an adult who has knowledge of the patient’s preferences and values, including but not limited to, moral and religious beliefs, to assess how the patient would make health care decisions; however, the attending physician and the owner, operator, or employee of the health care provider in which the patient is receiving care cannot serve unless they are related by blood, marriage or adoption to the patient. They can claim authority to act even without written authorization from a patient, but may be required by the provider to sign a certification, under penalty of perjury, that they meet the Act’s qualification requirements. All health care agents are required to make decisions following the specified protocol in Section 5456. The Department of Health is required to issue regulations to assure that health care providers have policies and procedures in place to implement these decision making requirements.

Decisions by an agent must be communicated to the patient and can be countermanded by the patient. Even when the patient is not of sound mind, the patient can countermand a decision to withhold or withdraw life-sustaining treatment by informing the attending physician in “any manner.” Decisions of “health care representatives” can also be countermanded by others: (1) when another authorized health care agent under a living will or health care power of attorney is authorized to do so; (2) if there is a health care power of attorney or living will that precludes the decision; and (3) if the health care provider or anyone else believe in

good faith that the “health care representative” is not acting in conformity with either the limitations of their authority under the Act (Section 5461(c)) or the decision-making protocol required by the Act (Section 5456(c)). Section 5431(a)(3) of Act 169 protects the health care provider from liability for such good faith refusals to recognize the agent’s decision.

While a court-appointed guardian also can monitor the actions of a “health care representative” and countermand their decisions, the existence of a “health care representatives” may deter courts from finding a need for a guardian. Unless the patient has given a written authorization or Act 169 is construed to authorize “health care representatives” to make payment decisions and to appeal denials of public benefits on behalf of residents without written authorization, guardians with such authority will still be required to protect both patient and provider rights to payment for necessary care and services.

Section 5456(c) specifies information that must be provided to and considered by all health care agents when they make decisions, whether the patient is in an end-stage medical condition or not. They are required to gather information on the patient’s prognosis and acceptable medical alternatives regarding diagnosis, treatments and supporting care, including information required for “informed consent.” Where an end-stage medical condition exists, the information must distinguish between curative alternatives, palliative alternatives, and alternatives that merely prolong the process of dying, while also distinguished between the end-stage medical condition and any other conditions.

After gathering the required information, agents must consult with the health care providers about the information and make decisions in accordance with the patient’s instructions or, if there are none, in accordance with the agent’s assessment of the patient’s wishes or, where there is insufficient information for an assessment, taking into consideration the goals of: (1) preservation of life; (2) relief from suffering; and, (3) the preservation or restoration of functioning, taking into account the patient’s current conditions. Where insufficient information is available to the contrary, the agents must also presume that the patient would not want nutrition or hydration withheld.

Providers are currently required to have policies and procedures in place to monitor that: (1) the required information is gathered by and provided to health care agents; (2) that health care agents and providers consult to consider how to apply the information to health care decisions; (3) that the decisions made take into consideration available information about the patient’s preferences and values; and, (4) that the decisions made do not exceed the limitations in the Act. Providers also are required by the Medicare/Medicaid Conditions of Participation and licensure regulations to give their residents information about their new rights under Act 169, including their rights to have or modify/update their Advance Directives.

If your facility has questions or would like more information on the development and implementation of policies and procedures for compliance with these and other requirements of Act 169 as well as resident notices and related changes to your admissions agreements, you may contact Doreena Craig Sloan, Esquire at our Firm.

COMMONWEALTH COURT UPHOLDS PROVIDER OBJECTIONS TO DPW AFTER-THE-FACT CHANGE TO COMPUTING NURSING HOURS CAP

By Daniel K. Natirboff, Esquire

Finding that DPW’s after-the-fact change was inconsistent with the language of the regulation, DPW’s own cost-reporting instructions, and DPW’s own implementation of the regulation, the Commonwealth Court of Pennsylvania reversed DPW’s decision that costs and hours of the nursing facility’s Unit Managers (formerly with job titles of Assistant Director of Nursing) and Staff Development/Infection Control Manager must be included in the computation of nursing hours subject to DPW’s cap on nursing hours in 55 Pa. Code § 1181.242 and effectively disallowed. *St. Ignatius Nursing Home v. Department of Public Welfare*, ___ A.2d ___ (No. 542 C.D. 2006, decision issued on March 14, 2007). DPW has not filed for further review of the decision and therefore the decision is final and binding in other related cases.

While the Court noted that DPW’s interpretation of its own regulations is usually controlling, the Court determined that no deference was due to DPW’s interpretation, given the language of the regulations and DPW’s own cost-reporting instructions, DPW’s prior practice, and the fact that DPW could not explain how its new interpretation could be squared with its admitted continuing exclusion of RNAC costs and hours from the cap. DPW had excluded the costs at issue from the Schedule H computation for all prior years until a DPW audit supervisor changed the rules during audits of the facility’s 1995 cost reports, the last ones subject to the nursing hours cap regulation, effectively changing

the meaning of the regulation after the fact without rulemaking. The Court agreed that DPW’s new approach was also inconsistent with all of DPW’s prior rulemakings and DPW’s current cost-reporting instructions, which linked the cap to the kinds of direct care floor hours of nursing used by the Department of Health to check that nursing facilities met minimum staffing requirements for licensure.

The approach used by the Commonwealth Court in this case to test whether DPW’s new interpretation of its regulations crossed the line of reasonableness reflects parallel developments by the U.S. Court of Appeals for the Third Circuit and the Supreme Court of the United States limiting “disingenuous” after-the-fact changes in the meaning and intent of regulations. While the Commonwealth Court did not cite these federal cases, its approach should be applicable to limit agency overreaching in other cases. In addition, while DPW eliminated the cap when it replaced Chapter 1181 with Chapter 1187 in 1996, there are still hundreds of open audit appeals subject to the Chapter 1181 rules for periods back to the 1980’s. If your facility has open audit appeals pending before DPW’s Bureau of Hearings and Appeal that involve nursing cap adjustments or you have other questions about the application of this court decision to more recent after-the-fact changes in agency rules, you may contact Dan Natirboff, Esquire, at our Firm for additional information.

CAPOZZI & ASSOCIATES, P.C. WELCOMES—

ANDREW R. EISEMANN, ESQ., who recently joined our Firm upon his return from deployment in Iraq. Mr. Eisemann is a graduate of the Dickinson School of Law of the Pennsylvania State University, where he was Senior Editor of the Dickinson Law Review and a member of the Appellate Moot Court Board. He continues to serve as a Lt. Colonel in the U.S. Army Reserve after 16 years active duty service in special operations and field artillery. He earned his B.S. in Political Science and English, as well as his Regular Army Commission, at the University of Connecticut. He also earned his M.S. in International Relations from Troy State University while on active duty. He currently serves as chairman of the Military and Veterans’ Affairs Committee and a member of the Health Law Committee of the Pennsylvania Bar Association. Mr. Eisemann’s

practice focuses on the special legal interests of long-term care facilities and creditor rights, bankruptcy, and veterans’ affairs. Prior to his deployment, he represented creditors, debtors and the U.S. Trustee as an attorney for The Law Office of Markian R. Slobodian in Harrisburg and was a law clerk for Cumberland County Common Pleas Court Judge Edward E. Guido. He is admitted to practice in Pennsylvania, the U.S. District and Bankruptcy Courts of the Middle District of Pennsylvania, and the U.S. Court of Veterans Appeals. Mr. Eisemann, his wife, and two children live in Hershey, Pennsylvania.

Mr. Eisemann will be providing a regular feature on “Managing Your Accounts Receivable” starting with the next edition of *The Quarterly*.