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The Quarterly

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PERSONAL CARE AND ASSISTED LIVING UPDATE

By Louis J. Capozzi, Jr., Esquire

As general counsel for Pennsylvania Assisted Living Association (PALA), Capozzi & Associates, P.C., has recently been involved with the numerous bills pending before the Pennsylvania General Assembly, as well as the proposed Personal Care Home (PCH) regulations. Presently, both "Personal Care Homes" and "Assisted Living Facilities" are licensed and regulated through a Personal Care Home regulation, which makes no mention of the concept of "Assisted Living." These outstanding proposals involve changes to that concept, and are at times opposing and have the potential to cause great confusion if more than one of these bills are passed and become law (or regulation). A brief synopsis of each is as follows:

SB 136, sponsored by Senator Mowery, has been revised numerous times by the Senate Public Health and Welfare Committee. The bill proposes to create a new level of licensure for Assisted Living Facilities (ALF) and to add a new level of care between the existing Personal Care Home and the Skilled Nursing Care. The bill is still a work in progress, but if it is not passed by November 30, 2004 (the end of the current Legislative Session), it will have to be introduced again in the next session that begins in January 2005. The bill allows a facility to choose to receive licensure under this new ALF title, and requires that any facility currently dubbed an "Assisted Living Facility" and licensed under the PCH regulations must change its name if it elects to not follow the new ALF standards.

HB 420, sponsored by Representative Watson, passed unanimously in the House in June 2003, and was referred to the Senate Public Health and Welfare Committee. The bill proposes to provide licensure for two levels of care — personal care and assisted living. The bill differs from SB 136 in that it incorporates both types of care, acknowledging that more structure, better definitions, and more regulations are required to differentiate between the concepts of assisted living and personal care, but is similar to SB 136 in that it is intended to make a distinction between personal care and assisted living.

SB 567, sponsored by Senator Schwartz, is currently pending before the Senate Public Health and Welfare Committee, and proposes to create a new statute to be the underlying basis for future PCH regulations. The bill recognizes that the current statutes and regulations that govern PCHs are outdated and in need of repair. This bill differs from the other two bills in that there is no discussion of the concept of the ALF, but simply retains the general concept of PCH to continue to regulate facilities electing to use either the "Assisted Living" or "Personal Care" title.

Proposed DPW regulations, published in the Pennsylvania Bulletin on October 5, 2002, restructure and modify the existing 55 Pa. Code Chapter 2620 PCH regulations, by proposing to completely replace such regulations with a new Chapter 2600. Following the mandatory 30-day comment period, a "final" version of the proposed rules must be published within 2 years of the expiration of that comment period. That deadline comes on November 4, 2004. If final rules are not published by that date, the process must begin again with draft rules, and a 30-day comment period.

On behalf of PALA, and in an attempt to bring resolution to the proposals, clarify the terms "assisted living" and "personal care," and create a position favorable to all interested parties (Senators, Representatives, facilities, consumers, PA Law Project), all of these proposals have been reviewed by Capozzi & Associates, P.C. At a meeting with the PALA Board, a position of PALA was created, and a letter was sent to Senator Mowery, offering a suggestion as to how the future of these proposals may best be shaped. The proposal of PALA included, among other things: general support of SB 136, but "cherry picking" from other proposals, clarification of definitions of all terms, and licensure (for both personal care and assisted living), support of the multiple levels of licensure (as addressed in HB 420), creation of a uniform admissions agreement, regulations, licensure, and survey procedures, and support of an increase in the SSI.

On October 6, 2004, at the PALA conference, a panel discussion, involving Scott Johnson, Executive Director of the Senate Public Health & Welfare Committee, and Sharon Schwartz, Executive Director of House Aging and Older Adult Services Committee, as well as Ray Landis, AARP representative, Louis J. Capozzi, Jr., Esquire, & Daniel J. Pedersen, Esquire, of Capozzi & Associates, P.C., and Joe Wydra of Wydra & Wydra, lobbyists, was held in an effort to allow participants to ask questions about the future of the proposals, and receive an update on where these proposals currently stand. Ultimately, the participants seemed to agree that the future is still uncertain with respect to any of these proposals. While representatives of the Pennsylvania Department of Public Welfare did not participate, the panel recognized that DPW is likely awaiting final publication of the regulations pending any movement of SB 136, SB 567, or HB 420. If the regulations are passed, however, SB 567, or one similar, could easily be passed for purposes of making such regulations (which were based upon the old PCH related statutes) obsolete. It was also recognized that HB 420, having spent much time in the House, has seen little action in the Senate, but has been discussed at the committee level. Likewise, it was stated that SB 136 has not yet been put to vote in either the Senate or House, and it is uncertain as to whether this would even happen. With only a handful of session days left, whether or not SB 136 gets to open debate in the senate cannot be predicted at this time.

Mr. Johnson and Ms. Schwartz both acknowledged that if consensus could be achieved, and if each bill has support in either the House or Senate, efforts could be made to create a revised bill, incorporating language from each, similar to the proposal presented by PALA. It was also stated that PALA's proposed plan was well received by Senators and Representatives, and our collective efforts were greatly appreciated. Overall, there is the desire of all interested persons for finality of the proposals presently looming in the various arenas. The concept of revisions to the PCH regulations and the development of an ALF statute are not new. The bills have been presented in both the House and Senate for the previous three sessions (since 1999). While the bills may die out, DPW will not let November 4 pass without implementing the new regulations. Some have speculated that if the regulations are passed before any action is taken with respect to the bills, that the bills may fizzle out. Likewise, it has been speculated that if action is taken with the bills prior to November 4th, DPW may forego implementation of the regulations, knowing that they will only need to be replaced in the near future.

There are common concerns about all of the bills and proposed regulations, that have been raised by advocates, consumers, and facilities alike. Some general themes, along with a commentary related to each consist of the following:

1) Cost of implementation to the Commonwealth and the facilities. SB 136 in particular calls for the Commonwealth to create such things as qualified assessors, admissions agreements, assessment sheets, training programs. PALA has proposed to eliminate much of these costs, in the interest of saving the Commonwealth money.
2) Medication administration. This is a popular topic among Assisted Living Facilities across the country. Many people feel that a Medication Technician, with adequate training needs to be employed to ensure appropriate medication administration at Assisted Living and Personal Care Facilities.
3) Training of the employees. The bills call for large amounts of training hours for administrators.
4) Resident rights. Many of the bills include resident rights provisions, similar to those that presently exist for skilled nursing facilities.
5) Treatment of residents with cognitive impairments. Both SB 136 and HB 420 have sections that discuss these elements, however, a large concern is what criteria must be relied upon before the impairment is considered to be too severe for a person to be treated by a personal care or assisted living facility.
6) The possible future role of the MA program to finance care. Presently, MA waiver dollars are not available for facilities licensed under the Personal Care regulations because these waiver programs are only available to persons who require SNF care. By statute the personal care regulations state that persons in a personal care setting may not require skilled nursing services. SB 136 is designed to permit persons requiring skilled nursing care to reside at an assisted living facility, to be eligible for MA waiver programs, and be able to receive care, but also attain their highest level of mental and physical ability, and better age in place than what generally occurs when a resident is placed into a skilled nursing facility.
7) Home Health Licensure. While these proposals do not discuss this issue, there are other bills that address the facts that home health agencies are unlicensed, unregulated, and the employees are not subject to TB screening, criminal background checks, or other safety measures prior to the provision of elder care.

It is encouraged that you contact your local Senators and Representatives, this Firm, and DPW to express your concerns, and seek additional information and clarity. Your facility (personal care, assisted living, even skilled nursing) could be affected by any of these changes.

NOTEWORTHY ITEMS

1. Louis J. Capozzi, Jr., Esquire and Daniel J. Pederson were panel members at the PALA Annual meeting.
2. Capozzi and Associates, P.C. were awarded the 4 Star Award for our participation in PANPHA.
3. Louis J. Capozzi, Jr., Esquire, was honored with the G. M. Revis Humanitarian Award from Faith, Hope and Love Partnership Services, Inc., for his contribution of property that will be used to house a Community Training and Technology Center.
4. Capozzi and Associates, P.C., has been selected as the General Counsel for the Pennsylvania Health Care Cost Containment Council.

REPORTING ELDER ABUSE AND EMPLOYMENT BACKGROUND CHECKS

By Jeffrey J. Wood, Esquire

Our senior citizens may be one of our most valuable resources, but they can also become our most vulnerable citizens. Sickness, loneliness, or mere "old age" can leave an older adult vulnerable to abuse. The General Assembly has declared, pursuant to The Older Adults Protective Services Act (Act), it a policy of our Commonwealth of Pennsylvania to provide services safeguarding the rights of older adults while protecting them from abuse (35 P.S. § 10225.102). The purpose of this brief article is to provide general information, not legal advice, involving the issues of 'reporting abuse to recipients of long-term care services' and 'criminal background checks for facility employment applicants caring for recipients', thereby protecting older Pennsylvanians from abuse.

The Act (35 P.S. § 10225.101 et seq.) establishes a program of protective services for the detection and reduction, correction or elimination, of abuse to older Pennsylvanians. An older adult is defined by the Act as a person in the Commonwealth who is age 60 or over (35 P.S. § 10225.103; see 71 P.S. § 581-2). Through the Act, the Pennsylvania Department of Aging (PDA) and Area Agencies on Aging (AAA) assist thousands of older Pennsylvanians to overcome abusive situations by intervention in incidents of abuse, including sexual abuse, serious physical injury, serious bodily injury or suspicious death.

The Act enables anybody to voluntarily report suspected abandonment, abuse, exploitation or neglect. Abuse is defined as: the infliction of injury, unreasonable confinement, intimidation or punishment with resulting physical harm, pain or mental anguish; or as the willful deprivation of necessary goods or services to maintain physical or mental health; or, as any sexual act, harassment or placing one in reasonable fear of serious bodily injury (35 P.S. § 10225.103; see 23 Pa. C.S.A. § 6102 and 18 Pa. C.S.A. § 2301). Consequently, any person who knows that abuse has been, or is being, perpetrated upon an older adult, may voluntarily report such to the AAA (35 P.S. § 10225.302(a)).

Notwithstanding the voluntary reporting directive, the Act requires any employee or administrator of a facility, who has reasonable cause to suspect that a recipient of care, services or treatment from a facility is a victim of abuse, shall immediately make a report of such abuse to the AAA (35 P.S. § 10225.701(a)(1)). Further, any employee or an administrator who has reasonable cause to suspect that such individual is the victim of sexual abuse, serious physical injury or serious bodily injury or that a death is suspicious shall, in addition to contacting the AAA, immediately contact law enforcement and PDA officials to make a report (35 P.S. § 10225.701(b)(1)). Consequently, any facility employee or an administrator who has knowledge that abuse has been, or is being, perpetrated upon an older adult, is required to report, depending upon the severity of the abuse, to the AAA, law enforcement, and PDA.

In addition to The Older Adults Protective Services Act voluntary and mandatory elder abuse reporting declarations, the Pennsylvania Crimes Code mandates reporting acts of abuse for certain Commonwealth Agencies and for certain medical personnel, when such Agencies or personnel are engaged in the performance of their duties. That is, elder abuse must be reported by any member or agent of the Commonwealth Agencies of PDA, Department of Health or Department of Public Welfare, when in the course of conducting the performance of regulatory or investigative duties and having reasonable cause to believe that an individual receiving care, services or treatment has suffered abuse. Such criminal care omission shall immediately be reported to the local law enforcement agency or to the Office of Attorney General (18 Pa. C.S.A. § 2713(c)). Further, a physician, intern or resident, or any person conducting, managing or in charge of any hospital or pharmacy, or in charge of any ward or part of a hospital, to whom shall come or be brought any person suffering from any wound or other injury inflicted, by his own act or by the act of another, by means of a weapon or has injuries inflicted in violation of any Commonwealth law, shall report such criminal commission of injuries to the local law enforcement agency or to the State Police (18 Pa. C.S.A. § 5106(a)).

The Act further requires a facility employment applicant to submit with their employment application a criminal history report from the Pennsylvania State Police (35 P.S. § 10225.502(a)(1); see 18 Pa. C.S.A. § 9109). If the applicant is not a resident of Pennsylvania, and has not been a resident of Pennsylvania for the two years immediately proceeding employment application, then in addition to the report from the Pennsylvania State Police a report of Federal criminal history record information must be obtained from the Federal Bureau of Investigation (35 P.S. § 10225.502(a)(2); see 28 U.S.C.A. § 534(a)(1)). However, as a result of the decision of the Supreme Court of Pennsylvania in Nixon et al., v. Commonwealth 576 Pa. 385, 839A 2d 277, (2003 LEXIS 2604), affirming 789 A.2d 376 (Pa. Cmwlth. 2001) (En Banc), found that the Legislature could not reasonably bar some convicted persons from employment in covered facilities. The Supreme Court held that: "the criminal records chapter, particularly with regard to its application to the Employees, does not bear a real and substantial relationship to the Commonwealth's interest in protecting the elderly, disabled, and infirm from victimization, and therefore unconstitutionally infringes on the Employees' right to pursue an occupation [as established by Article I, § 1 of the Pennsylvania Constitution]." Therefore, facilities cannot rely on the criminal records chapter of the Act to preclude employment.

Criminal history reports are still required for all applicants, and the Pennsylvania State Police will continue to process applications for state criminal history reports and provide such information to the entity requesting the criminal history report. PDA will continue to process FBI criminal history reports and issue letters to indicate "clear" or "prohibited", based on FBI criminal history background check information; however, facilities will not be sanctioned for hiring or employing individuals who demonstrate rehabilitation by evidence of a minimum five-year aggregate work history in care-dependent services, without incident, from either the date of conviction or release from incarceration, whichever is later. Facilities must reasonably investigate the character of an individual with a previously disqualifying criminal offense by means of interviews, references and evidence of work history. The Court's ruling in no way prohibits a facility from refusing to employ an individual, even one who has a clean

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CAPOZZI & ASSOCIATES, P.C. IS OF
TUESDAY, MARCH 1, 2005, AT T
(Harrisburg-Hershe

"2005 CURRENT ISSUES FOR NURSING FACILITIES IN PENNSYLVANIA"

9:00 a.m. – 4:30 p.m. *(Pending NAB confirmation of approval)*

Seminar Outline

9:00 – 10:00 a.m. – *Louis J. Capozzi, Jr., Esquire*
MEDICARE AND MEDICAID IN PENNSYLVANIA:
STATUS OF PROVIDER TAX ASSESSMENTS & IGT
PROPOSED CHANGES FOR ELIGIBILITY, BENEFITS, PAYMENTS, AND PROVIDERS
REVIEW OF RECENT COURT AND ADMINISTRATIVE DECISIONS AND LEGISLATIVE/ADMINISTRATIVE CHANGES

10:00 – 10:30 a.m. – *Louis J. Capozzi, Jr., Esquire*
LABOR AND EMPLOYMENT ISSUES FOR PENNSYLVANIA NURSING HOMES
BACKGROUND CHECK UPDATE
UNIONIZATION UPDATE
RECENT PENNSYLVANIA CASES

10:30 – 10:45 a.m. **MIDMORNING BREAK**

10:45 a.m. – 11:45 – *Joseph F. Murphy, Esquire*
DEFENDING NURSING FACILITY LIABIITY CLAIMS AND SELF-INSURANCE:
THE CURRENT CLIMATE OF NURSING FACILITY LIABILITY CLAIMS IN PENNSYLVANIA.
WHAT IS INVOLVED IN DEFENDING A LIABILITY CLAIM?
WHAT IS SELF INSURANCE AND HOW DOES IT WORK?
WHAT INSURANCE PAYMENTS ARE ALLOWABLE MA COSTS?
DOES SELF INSURANCE MEET STATE MCARE REQUIREMENTS?

11:45 a.m. – 12:45 p.m. **LUNCH (PROVIDED ON SITE)**

12:45 – 1:45 p.m. – *Daniel K. Natirboff, Esquire*
THE FASTER NEW SYSTEM FOR MA PROVIDER APPEALS
WHAT THINGS ARE CHANGED BY THE NEW SYSTEM?
OVERVIEW OF THE ACT 142-2002 AND NEW DPW APPEAL RULES.
THINGS TO DO BEFORE YOU FILE AN APPEAL.
THINGS YOU MUST DO AFTER YOU FILE AN APPEAL.

1:45 – 2:30 p.m. – *Doreena Craig Sloan, Esquire and Jeffrey J. Wood, Esquire*

'ERING A 6-HOUR CLE SEMINAR ON
IE HOLIDAY INN-GRANTVILLE

Area – Exit 80 of I-81)

CURRENT ISSUES RELATING TO GUARDIANSHIPS, PROTECTIVE SERVICES AND RESIDENT RIGHTS

2:30 – 2:45 p.m. **AFTERNOON BREAK**

2:45 – 3:30 p.m. – *Michael J. Volk, Esquire*
CURRENT ISSUES RELATING TO ADMISSION AGREEMENTS AND NURSING FACILITY COLLECTIONS IN PENNSYLVANIA.

3:30 – 4:15 p.m. – *Donald R. Reavey, Esquire*
TAX ASSESSMENT AND EXEMPTION APPEALS:
WHY IS THIS STILL AN ISSUE?
WHAT KINDS OF RESULTS ARE BEING OBTAINED?

4:15 – 4:30 p.m. **SUMMARY, FURTHER QUESTIONS, AND EVALUATION**
ALL SPEAKERS PRESENT.

THERE WILL BE A RECEPTION after the session from 4:45 – 6:00 p.m.

CERTIFICATES OF ATTENDANCE WILL BE PROVIDED FOR SEMINAR PARTICIPANTS. PARTICIPANTS MUST SIGN IN AND SIGN OUT IN ORDER TO OBTAIN CREDIT FOR CLE HOURS.

IF YOU ARE INTERESTED IN ATTENDING THE SEMINAR, PLEASE SEND THE FOLLOWING REGISTRATION INFORMATION TO: Joan Hoke, Cappozzi & Associates, P.C., 2933 North Front Street, Harrisburg, PA 17110-1250 or by Email to: JoanH@CapozziAssociates.com:

NAME:
POSITION:
EMPLOYER:
ADDRESS:
NHA LICENSE NO. (IF APPLICABLE)
TELEPHONE NUMBER:
EMAIL ADDRESS (FOR CONFIRMATION OF YOUR REGISTRATION)

SUBMITTED FOR NAB CLE APPROVAL FOR 6.0 CLE HOURS FOR NHA'S ON OCTOBER 7, 2004. APPROVAL EXPECTED PRIOR TO 1/1/2005.

THE SEMINAR WILL BE AT THE HOLIDAY INN-GRANTVILLE, 604 STATION ROAD, GRANTVILLE, PA 17028 (JUST OFF OF I-81 AT THE HERSHEY-GRANTVILLE EXIT, NEW EXIT 80, AT THE INTERSECTION WITH ROUTE 743).

ACT 171 REMINDER AND UPDATES

By Daniel K. Natirboff, Esquire and Daniel J. Pederson, Esquire

Act 171 of 2002, the "Elder Care Payment Restitution Act", became effective as of February 7, 2003. The state law establishes requirements for facilities that are regulated by the Departments of Aging (domiciliary care), Health (long-term care), and Public Welfare (personal care homes and older adult daily living centers), but does not authorize any of those Departments to promulgate regulations to implement the requirements of the Act. The Act involves provisions related to both storage of property and reimbursement for elder care costs paid in advance but never received by a resident in instances where a resident has deceased. The Act also establishes criminal penalties for willful violations of the Act. Because of these possible penalties, facilities need to assure that they are implementing the provisions of Act 171 in accordance with the intentions of the Act. However, as facilities have read the Act carefully, it has become more and more difficult to implement the provisions of the Act, as the Act has proven to be vague and ambiguous, especially with respect to the storage and storage fee provisions.

Different interpretations exist with respect to the storage of property under Act 171. The first interpretation is that the storage of property is optional, because the language used in Act 171 is that the facility <u>may choose</u> to store the property. Similarly, because storage charges are not permitted to accrue at any time <u>after</u> the property has been "placed into storage," it is implied that the property must first be <u>moved</u> from the room. The argument can be made that where property is not moved into storage, but "held" in the room, charging at the per diem rate is not a storage fee. Only where the facility takes an affirmative obligation to <u>agree</u> to store property (presumably at a location other than the room) for additional time would the additional storage requirements of Act 171 make sense. In instances where the facility elects not to store property, the language apparently permits the facility to dispose of the property immediately.

The opposing interpretation, which is held by the Office of Social Programs (OSP), is that the property can either be retained in the resident's room, or be "stored" somewhere else in the facility. This interpretation is valid from a common sense perspective (in that the facility should not be able to discard property quickly by simply refusing to store the property), but does not seem to agree with a literal reading of the Act. This interpretation also implies that storage does <u>not</u> occur if the property is maintained in the resident's room, but OSP maintains that the charging of a fee is still inappropriate.

Some additional questions and conflicting terms within Act 171 consist of the following:

1) How should the "may" language contained in the act be interpreted? (e.g. does this language give the facility the right to refuse to store the property of a deceased resident or retain the property in the room subject to additional "holding" charges, or does Act 171 require that the facility retain <u>any and all</u> resident property at some place at the facility for a maximum of 30 days, plus 14 days after notice?)
2) If property is maintained in the resident's room, may the facility charge a per diem rate, since the room is still being used, and retention of property in the room does not appear to be storage?
3) If the facility elects to <u>not</u> store the property, how long can, or should, property be retained before the facility can dispose of the property?
4) Section 4 of the Act states that an inventory must occur, after contacting the family within 24 hours of the death, for purposes of advising that an inventory will occur. Must the family be involved in the actual inventory, or must the family only be notified that an inventory will occur?
5) Section 5 of the Act indicates that the facility may elect to store the items only after the inventory has occurred. Can storage by the facility be determined on a case-by-case basis, or must the facility have a single policy as to whether it will store the property for all residents? (e.g. if a facility generally stores property, but a particular resident had a lot of personal property and there is insufficient space within the facility, can the storage be denied?)
6) Section 5 uses the terms "hold" and "storage" seemingly interchangeably. Are these terms intended to be synonymous? If not, what is the difference?
7) Section 5 discusses a prohibition on charging "the consumer's estate or the consumer's family." At what point does the prohibition with regard to charging for storage begin? How long does it last? If there is a difference between "storing" the property and "holding" the property, can a charge accrue where the property may be "held" but not "stored"?
8) In instances where only elder care costs are reimbursed in accordance with Section 3 of the Act (the facility does not refund any room and board charges that had been paid in advance), will retention of any room and board money by the facility be deemed a storage fee? (ie., Can a facility keep room and board costs, or other payments received in advance for services that were never rendered due to the death of the resident? Can authorities deem <u>any</u> money retained or received by the facility as being a storage fee?)
9) It seems clear that Section 3 of Act 171 requires repayment of elder care costs only on those contracts or admissions agreements entered into <u>after</u> February 7, 2003. Are the storage and charging provisions applicable to all residents, regardless of the admission date, or only those residents admitted after February 7, 2003?

Recently, the law Firm of Capozzi & Associates, P.C., has corresponded with these agencies to determine whether questions regarding the implementation of the Act are best resolved by a Declaratory Judgment action before the Commonwealth Court of Pennsylvania or whether there is a joint rulemaking or interpretative guideline process that can be established. Because the statute has no corresponding regulations, the ambiguity within the Act must be resolved by one of these alternate methods. We strongly encourage you to contact your local agency representatives, or the Secretary of these agencies, as well as your local Senator or Representative to stress the importance of obtaining clarity and prompt resolution of the ambiguities within this Statute. It is also important that your Admissions Agreements and Policies and Procedures contain provisions related to the Act 171 requirements. If you have not had a Compliance Check and Update within the last year, you may be out of compliance in areas that you may not be aware of. We are prepared to provide Compliance training to ensure that your compliance program is complete and up to date. Please feel free to contact us with any questions.

ESSENTIAL INFORMATION ABOUT SELF INSURANCE

By Joseph F. Murphy, Esquire

The cost of professional liability insurance per nursing bed tripled between 1996 and 2002. In response, many health care providers are searching for ways to reduce these ever-increasing costs. Self-insurance trusts and captive insurance programs may be the solution to this crisis. Although neither of these alternatives is new to the health care industry, providers are increasingly utilizing these programs in order to avoid the growing costs of premiums paid to the traditional insurance market.

Self-insurance trusts require formal structure but are not especially difficult to establish. A self-insurance trust is an arrangement whereby a provider contributes money to a reserve of funds that is specifically dedicated to the payment of liability claims. The fund is held and administered by an independent entity, such as a bank or private benefits administrator, pursuant to a trust agreement that identifies the respective obligations of the parties. Actuarial loss projections determine the amount of reserves and contribution levels to the fund. In Pennsylvania, the Insurance Department regulations specifically permit providers to create self-insurance programs for professional liability coverage in lieu of coverage obtained through the traditional insurance market. These regulations require approval of self-insurance plans by the Department, impose basic standards for the creation of plans, and require rather minimal reporting requirements. The regulations also require that the fund contain a minimum amount of capital upon the effective date of the plan. The amount required depends upon the type of institution seeking approval. For example, health care providers other than hospitals are required to maintain a minimum of $300,000 in the trust ($600,00 if the provider does less than 50% of its business in the Commonwealth of Pennsylvania) plus an amount equal to the potential liability of existing claims against the provider that are not covered by insurance. Of course, a provider may capitalize the fund with any amount it deems sufficient to cover its potential losses, so long as the required minimum is maintained.

Many of the advantages of creating self-insurance trusts are obvious: (1) reducing the cost of professional liability coverage by avoiding significant profits earned by insurance companies on premiums collected, and retention by the trust of investment income that would otherwise have been used to pay premiums; (2) avoiding the cost of absorbing losses of other insureds with poor claims histories; and (3) allowing autonomy in managing the funds with regard to such matters as the handling and payment of claims, choice of defense counsel, and the determination of coverages and exclusions. There are, of course, disadvantages to self-insurance, such as the absence of risk shifting to third parties and tax deductibility of premiums paid; however, a properly created and maintained self-insurance program can abate these concerns and save providers money in the long run. There are many businesses that can assist providers in determining the feasibility of implementing such programs, the determination of appropriate reserve amounts, and the management of risk and handling of claims. In addition, the most common use of a self-insurance program is to cover a high deductible under a commercial insurance policy, which shifts the risk of loss to a third party over and above a specific dollar amount. Under this arrangement, the exposure to the provider is essentially capped at the deductible amount.

A captive insurance program requires the creation of a separate legal entity to act as a limited-purpose insurance company for the provider. As with self-insurance programs, there are many businesses that specialize in creating and administering captive insurance programs. These firms can prepare feasibility studies, select vendors to manage the captive, and provide all of the necessary support services, including actuarial analysis and claims handling. Once a decision has been made to proceed with the program, a license must be obtained in the selected domicile of the captive, and the provider must make the requisite capital contribution to the captive. Often, captives enter into reinsurance agreements to cover losses that exceed a particular threshold of aggregate claims, thereby capping the provideris exposure to a specific dollar amount.

As with self-insurance trusts, there are obvious advantages to the creation of a captive insurance program: namely, reduction of premiums and greater autonomy in managing the provideris funds. However, additional benefits to these programs include direct access to the reinsurance market and the possible deductibility of premiums paid in certain jurisdictions. The disadvantages of captive insurance programs include greater start-up costs than self-insurance trusts, but the retention of money saved in avoiding premiums paid to traditional insurers will make up this difference over time and save providers money in the long run.

In light of the current professional liability insurance crisis, providers should seriously consider utilizing alternatives to the traditional insurance market. The potential savings over time more than justifies the cost of having a feasibility study performed to determine whether such a program would work for the provider. If you have any questions about the legal requirements for self-insurance in Pennsylvania, the use of self-insurance to fulfill MCARE obligations, how self insurance is used to resolve liability claims, or whether expenses for self-insurance programs are allowable costs under the Medical Assistance program, please feel free to call or write to Capozzi & Associates, P.C. (Attention: Joseph Murphy, Esquire).

HOLIDAY OPEN HOUSE

On Thursday, December 9, 2004, we will host our "Holiday Open House" at our offices from 3-7 p.m. All of our clients are welcome to stop in, greet our staff and share holiday cheer! Please RSVP by December 2, 2004.

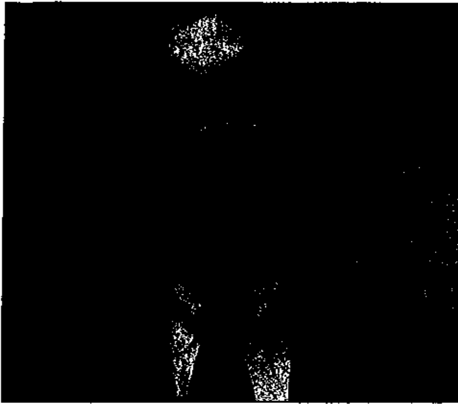
REPORTING ELDER ABUSE . . . *continued from page 3*

aggregate five-year work history, based on information obtained in a criminal history report. Pennsylvania law, 18 Pa.C.S. § 9125, provides that an employer may consider criminal history felonies and misdemeanors, to the extent they relate to the applicant's suitability for employment in the position sought. The employer is required to notify the applicant, in writing, if the decision not to hire the applicant is based, in whole or in part, on the applicant's criminal history.

However, nothing in the decision affects the application to facilities participating in the Medicare or Medical Assistance Programs of federal laws and regulations precluding employment of individuals convicted of certain Program related offenses (c.g. 42 CFR §483.13(c)(ii)(A), precluding employment of individuals found guilty of abusing, neglecting, or mistreating residents).

If you have questions about these or related issues, please call our Harrisburg office to speak with Jeffrey J. Wood, Esquire.

CAPOZZI & ASSOCIATES, P.C.
2933 NORTH FRONT STREET
HARRISBURG, PA IS
PLEASED TO ANNOUNCE THAT
JEFFREY J. WOOD, Esquire,
former Chief Counsel at the
Pennsylvania Department of Aging,
and
JOSEPH F. MURPHY, Esquire,
have joined the Firm.



Jeffrey J. Wood, Esquire

Joseph F. Murphy, Esquire

Mr. Murphy will lead the Firm's liability insurance defense unit. The Firm was recently selected as Pennsylvania defense counsel for Health Care RRG, the Washington, DC risk retention group affiliate of HealthCap. Mr. Wood, who has also served as counsel for several Central Pennsylvania county and local government authorities and as a lecturer at area colleges, will join the Firm's corporate compliance and business unit, focusing on health care facility regulatory compliance, enforcement and payment, as well as acquisitions and business organization. CAPOZZI & ASSOCIATES, P.C. represents and provides consulting services for nursing homes, assisted living and continuing care facilities, as well as individual and business clients, and serves as counsel for the Pennsylvania Assisted Living Association (PALA) and the Pennsylvania Health Care Cost Containment Council (PHC4).

Capozzi & Associates, P.C.
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Harrisburg, PA 17110

Address Correction

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