SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 849 (Reyes)
Version: February 17, 2021
Hearing Date: June 22, 2021
Fiscal: No
Urgency: No
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SUBJECT

Skilled nursing facilities: intermediate care facilities: liability

DIGEST

This bill amends the damages that can be sought by a current or former resident or patient of a skilled nursing facility or intermediate care facility, as defined, for violation of the resident or patient's rights.

EXECUTIVE SUMMARY

A "skilled nursing facility" is a health facility that provides skilled nursing care and supportive care to patients whose primary need is for availability of skilled nursing care on an extended basis. An "intermediate care facility" is defined as a health facility that provides inpatient care to ambulatory or nonambulatory patients who have recurring need for skilled nursing supervision and need supportive care, but do not require availability of continuous skilled nursing care.

The Department of Public Health (DPH) is charged with licensing and regulating these facilities and is empowered to bring enforcement actions against them for civil penalties and other relief. The law also allows for private enforcement in certain situations. A current or former resident or patient of a skilled nursing facility or intermediate care facility (together "facilities") may bring an action against the licensee of a facility that violates any rights of the resident or patient, as provided in the Patients Bill of Rights or in other state and federal laws and regulations. The law provides that the licensee shall be liable for up to $500, and for costs and attorneys' fees. A recent state Supreme Court case ruled that this language sets a "$500 per lawsuit cap." This bill provides that the aggrieved resident or patient is entitled to $500 for each violation of their rights.

The bill is author-sponsored. It is supported by AARP and California Advocates for Nursing Home Reform, among others. It is opposed by the California Association of Health Facilities, the California Hospital Association, and other health associations.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Provides for the licensure and regulation of health facilities by DPH and makes a violation of these licensure requirements and regulations a crime. (Health & Saf. Code § 1250 et seq.)

2) Establishes a civil penalty structure for violations committed at these facilities, and categorizes violations into AA, A, or B violations:
    a) "A" violations are violations that DPH determines presents either imminent danger of death or serious harm, or a substantial probability that death or serious harm to residents would result;
    b) "AA" violations, which are the most severe, are violations that meet the criteria for a class "A" violation that DPH determines was a direct proximate cause of the death of a resident of an LTC facility; and
    c) "B" violations are those that DPH determines have a direct or immediate relationship to the health, safety, or security of LTC facility residents. (Health & Saf. Code § 1424.)

3) Defines "skilled nursing facility" to mean a health facility that provides skilled nursing care and supportive care to patients whose primary need is for availability of skilled nursing care on an extended basis. (Health & Saf. Code § 1250(c).)

4) Defines "intermediate care facility" to mean a health facility that provides inpatient care to ambulatory or nonambulatory patients who have recurring need for skilled nursing supervision and need supportive care, but who do not require availability of continuous skilled nursing care. (Health & Saf. Code § 1250(d).)

5) Authorizes, except where DPH has taken action and the violations have been corrected, a licensee who commits a class "A" or "B" violation to be enjoined from permitting the violation to continue or may be sued for civil damages within a court of competent jurisdiction. Such an action may be prosecuted by the Attorney General in the name of the people of the State of California upon their own complaint or upon the complaint of a board, officer, person, corporation, or association, or by a person acting for the interests of itself, its members, or the general public. The amount of civil damages that may be recovered in an action brought pursuant to this section may not exceed the maximum amount of civil penalties that could be assessed on account of the violation or violations. (Health & Saf. Code § 1430(a).)

6) Authorizes a current or former resident or patient of a skilled nursing facility or intermediate care facility to bring a civil action against the licensee of a facility who violates any rights of the resident or patient as set forth in the Patients Bill of Rights, or any other right provided for by federal or state law or regulation. The licensee shall be liable for the acts of the licensee's employees. An agreement to waive this right to sue is void as contrary to public policy. (Health & Saf. Code § 1430(b).)

7) Provides that the licensee in the above action shall be liable for up to $500, and for costs and attorney fees, and may be enjoined from permitting the violation to continue. (Health & Saf. Code § 1430(b).)

8) Provides that the remedies specified in Section 1430 are in addition to any other remedy provided by law. (Health & Saf. Code § 1430(c).)

9) Establishes the Patients Bill of Rights that facilities are required to abide by. Facilities must establish and implement written policies and procedures which include these rights and make a copy of these policies available to the patient, to any representative of the patient, and to the public upon request. These rights include the right:
    a) to consent to or to refuse any treatment or procedure or participation in experimental research;
    b) to be free from mental and physical abuse;
    c) to be assured confidential treatment of financial and health records and to approve or refuse their release, except as authorized by law;
    d) to be treated with consideration, respect and full recognition of dignity and individuality, including privacy in treatment and in care of personal needs; and
    e) to be free from discrimination based on sex, race, color, religion, ancestry, national origin, sexual orientation, disability, medical condition, marital status, or registered domestic partner status. (22 C.C.R. § 72527.)

This bill provides that the $500 cap on statutory damages for violations of a patient or resident's rights is per violation.

COMMENTS

1. A narrow interpretation of statutory damages available to residents and patients

Section 1430(b) provides patients and residents of certain health facilities with a private right of action against the licensees of those facilities for violation of their rights. The clause at issue provides a cap of $500 on statutory damages in those private actions. Despite that specific clause being in statute for nearly 40 years, the California Supreme Court was recently tasked with interpreting its meaning.

The court in *Jarman v. HCR ManorCare, Inc.* (2020) 10 Cal. 5th 375, 381, framed the issue:

> The parties' disagreement centers on the phrase, "[t]he licensee shall be liable for up to five hundred dollars ($500)." (§ 1430(b).) The statute does not explain how the $500 cap is calculated. Is the cap applied to each violation committed, or is $500 the maximum award of statutory damages in each lawsuit brought?

The court analyzed the history of the statute and the policy arguments put forth by the parties and plentiful amici curiae. The court identified a number of practical issues with applying the statute as a per violation cap, which together with "the lack of textual guidance and specificity, suggest that the Legislature did not focus on calibrating any monetary relief to the nature of each patient right and violation articulated in section 1430(b)."[1] The court concluded that it was "the Legislature's intent that the dollar amount refers to the recovery of the entire case, not per violation."[2] This holding severely curtailed the remedies available to aggrieved facility patients.

However, the court did provide a closing thought that envisioned legislative response to the issue:

> Undoubtedly, nursing care patients comprise a particularly vulnerable segment of our population and deserve the highest protections against any abuse and substandard care. That said, we cannot and must not legislate by grafting onto section 1430(b) a remedy that the Legislature has chosen not to include. (*See Cornette v. Department of Transportation* [(2001)] 26 Cal.4th [63,] 73–74 [courts "may not rewrite a statute, either by inserting or omitting language, to make it conform to a presumed intent that is not expressed"].) Instead, we look to the Legislature, which has left the phrase (i.e., a facility "shall be liable for up to five hundred dollars ($500)" (§ 1430(b))) unchanged for nearly 40 years, to make any necessary adjustments or clarifications as it sees fit.[3]

This bill provides that the $500 cap is per violation, not per lawsuit, abrogating the holding in *Jarman*. According to the author: "This bill restores fairness to the nursing home residents' private right of action to ensure that those who harm our seniors are held accountable and that such action will serve as a deterrent to others."

2. <u>Ensuring robust private enforcement</u>

In his dissent in *Jarman*, Justice Cuellar makes the case for the changes made by this bill:

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[1] *Jarman v. HCR ManorCare, Inc.* (2020) 10 Cal. 5th 375, 387.
[2] *Ibid.*
[3] *Id.* at 392.

> The Long-Term Care Act was enacted to protect the rights of nursing home patients, and section 1430(b) serves as one of its key remedial provisions. Even if one treats the language in this provision as somewhat ambiguous, the relevant legislative history and statutory structure are most consistent with the conclusion that this provision created a new private enforcement mechanism allowing penalties for violations to be imposed in the amount of up to $500 per violation in damages. Per violation damages support the statute's deterrent function, and other private and public enforcement mechanisms are not suited to fill the void created by the majority's decision today.[4]

Other courts have emphasized the importance of maintaining the adequacy of the private enforcement mechanism in Section 1430(b):

> However, by enacting section 1430, subdivision (b), the Legislature specifically authorized skilled nursing facility residents themselves to bring actions to remedy violations of their rights rather than forcing them to depend upon the CDPH to take action. The importance of this private right of action is demonstrated by the Legislature's expression that "under no circumstances may a patient or resident waive his or her right to sue . . ." under section 1430, subdivision (b), "for violations of rights under the Patients Bill of Rights, or other federal and state laws and regulations . . ." . . .
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> We also find it significant that when the Legislature amended section 1430, subdivision (b) in 2004, it expanded rather than narrowed the scope of the legislation to allow a private right to sue for damages, not just for a violation of the Patient's Bill of Rights, but for a violation of "any other right provided for by federal or state law or regulation." This amendment was due to the "concern that enforcement by CDPH would be constrained by financial and demographic pressures in the coming years."[5]

These concerns about lagging enforcement were arguably well founded. A 2018 California State Auditor's report investigated "the quality of care, financial practices, and statewide oversight of California's skilled nursing facilities (nursing facilities)." The report laid out the gravity of the situation and the failures it found:

> Tens of thousands of elderly and disabled Californians rely on skilled nursing facilities (nursing facilities) to provide them 24-hour inpatient care. Generally operated by private companies, nursing facilities collect

[4] *Id.* at 407-408.

[5] *Shuts v. Covenant Holdco LLC* (2012) 208 Cal. App. 4th 609, 623-624 (internal citations omitted).

> payments for the services they provide from Medicare, Medi-Cal, private insurance, and patients. The importance of nursing facilities will only increase as the State's population ages and demand rises. Of particular concern, from 2006 through 2015, the number of instances in which the California Department of Public Health (Public Health) cited California nursing facilities for deficiencies related to substandard care increased by 31 percent from a total of 445 in 2006 to 585 in 2015, while deficiencies associated with nursing facility noncompliance that caused or were likely to cause, serious injury, harm, impairment, or death to residents increased by 35 percent from 46 in 2006 to 62 in 2015.
>
> The State has not adequately addressed ongoing deficiencies related to the quality of care that nursing facilities provide. . . . Public Health in particular has not fulfilled many of its oversight responsibilities, which are meant to ensure that nursing facilities meet quality-of-care standards. . . . Despite the importance of this process, Public Health's licensing decisions appear inconsistent because of its poorly defined review processes and failure to document adequately its rationale for approving or denying license applications. Furthermore, Public Health has not performed all of the state inspections of nursing facilities that it is required to perform and has not issued citations for facilities' noncompliance with federal and state requirements in a timely manner. It has also failed to seek legislative actions to increase the penalties associated with those citations by the cost of inflation, after we recommended in 2010 that it take this action. Together, these oversight failures increase the risk that nursing facilities may not provide adequate care to some of the State's most vulnerable residents.[6]

Writing in support, a number of groups highlight this issue. AARP points out that despite the increase in deficiencies revealed by the audit, "the net income for three of the largest nursing home companies in California increased significantly during the same period. In 2006, none of those companies' net income exceeded $10 million; in 2015, their net incomes ranged between $35 million and $54 million." It writes:

> The COVID-19 pandemic has painfully exposed the general inadequacy of the care provided to residents of nursing homes in the United States, and therefore the urgent need for reform. According to the Kaiser Family Foundation, as of April 6, 2021, there have been 12,983 COVID-19-related deaths of residents and staff in California long-term care facilities – representing an unimaginable 23 percent of COVID-19-related deaths in the state. . . .

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[6] *Skilled Nursing Facilities: Absent Effective State Oversight, Substandard Quality of Care Has Continued*, Report 2017-109 (May 2018) California State Auditor, https://www.bsa.ca.gov/pdfs/reports/2017-109.pdf.

> When families make the very important decision to admit a loved one into a nursing home, they should have confidence that their parent, grandparent, partner, or sibling is safe and will receive the quality of care they deserve. Nursing homes (SNFs) are often a crucial last resort for older adults who have disabilities or chronic illnesses. However, gaps in laws that regulate nursing homes have led to deficiencies and abuses that have jeopardized this vulnerable population.

California Advocates for Nursing Home Reform (CANHR) also highlight the issues at play and the importance of a robust private enforcement mechanism for residents:

> Nursing homes have historically been institutions with a great imbalance of power between owners and residents. This imbalance has led to extensive, well-documented abuse and neglect of residents. In response to these problems, the federal and state governments have created a comprehensive system of regulatory standards of care and resident protections. However, these rules must be accompanied by meaningful enforcement or else they will be disregarded. Section 1430(b) was meant to give residents a tool for supplementing the grossly inadequate enforcement provided by the California Department of Public Health ("DPH").

CANHR argues the law post-*Jarman* is not up to the task: "Limiting the victims of rights violations to $500 total undermines 1430(b)'s purpose to deter wrongful conduct and prevents residents from being made whole." Capping Section 1430(b) damage awards to $500 is arguably inadequate to cover the array of circumstances that residents and patients may face and strips judges and juries from using their discretion to arrive at a just result. For instance, even a plaintiff proving their case against the most egregious licensee, violating every right in the Patients Bill of Rights, will not be entitled to more than $500 in damages in a Section 1430(b) action – basically the same penalty for running a red light.

3. Opposition

A coalition of groups in opposition, including the California Association of Health Facilities, the California Hospital Association, and the California Chamber of Commerce, assert a number of issues with the bill.

First they argue that this is "a strict liability law which means there is no requirement of intent, negligence, causation or harm by the defendant." They assert that the "large majority of violations that make up the basis of lawsuits against skilled nursing facilities under 1430(b) are administrative."

The opposition also argues that this will raise insurance costs and could "destroy what is left of the liability insurance market for these facilities." The opposition then asserts that the bill will produce "extortionate demands," which will lead to devastating outcomes: "Skilled nursing facilities and other health care settings and providers provide critical access to health care in the state. It is unwise to promote legislation that could lead to facilities filing for bankruptcy or closing facilities."

The coalition offers amendments that raise the cap to $2000 for residents and patients, but maintain the per-action application and impose heightened standards on plaintiffs for establishing liability.

It should be noted that the bill maintains that the damages for each violation are "up to" the $500 cap and the factfinder will make the ultimate determination of what is a reasonable award for each respective violation. The practical operation of the statute with a $500 per violation award was explained by Justice Cuellar in his *Jarman* dissent:

> Legislators who supported the Long-Term Care Act, of course, may have sought to place some limitation on private lawsuits to protect against fears of open-ended liability. A cap of $500 per violation is well suited to this purpose, and may reflect a judgment that this limit is high enough to protect patient rights and provide recourse when rights are violated, but low enough to create some limitation on liability. By creating a cap with no floor, the Legislature might reasonably have been relying on juries to rightsize damages to account for how serious or minor a specific violation was.[7]

Given the discussion by the courts, more guidance from the Legislature on how these awards should be "rightsized" may be beneficial. This would ensure that more minor infractions are treated as such when determining the level of damages, but provides the clarity that more serious violations should be met with more serious penalties. In response, the author has agreed to the following amendments that provide guidance for assessing the appropriate amount of damages "to account for how serious or minor a specific violation was":

> <u>Amendment</u>
>
> Add the following provision:
>
> "In assessing the amount of the statutory damages, the following factors may be considered:
>
> (1) The nature and seriousness of each and every violation;

[7] *Jarman*, 10 Cal. 5th at 399.

(2) The likelihood and severity of the risk that each and every violation would cause a resident to suffer indignity, discomfort, or pain; and
(3) The efforts made by the facility to prevent each and every violation from occurring or to prevent future violations."

SUPPORT

AARP
California Advocates for Nursing Home Reform
California Commission on Aging
California Continuing Care Residents Association
California Elder Justice Coalition
California Long-Term Care Ombudsman Association
California Retired Teachers Association
California Women's Law Center
Consumer Attorneys of California
Consumer Federation of California
Essential Caregivers Coalition
Grace Care Management
Gray Panthers of San Francisco
Humboldt Del Norte Long Term Care Ombudsman Program
Justice in Aging
Law Offices of Daniel Murphy
Office of the State Long-Term Care Ombudsman
Ombudsman Services of San Mateo County
Schneberg Law
SEIU California
The Geriatric Circle

OPPOSITION

Association of California Healthcare Districts
California Association of Health Facilities
California Chamber of Commerce
California Hospital Association
California Medical Association
LeadingAge California
The Doctors Company

RELATED LEGISLATION

Pending Legislation: AB 323 (Kalra, 2021) redefines a class "AA" violation as a class "A" violation that the department determines to have been a substantial factor, as described, in the death of a resident of a long-term health care facility. The bill would

increase the civil penalties for a class "A," "AA," or "B" violation by a skilled nursing facility or intermediate care facility, as specified. The bill would delete numerous references to the "patients" of a long-term health care facility. This bill is currently in the Senate Health Committee.

Prior Legislation:

AB 2791 (Simitian, Ch. 270, Stats. 2004) expanded the predicate offenses for an action pursuant to Section 1430(b) to include a violation of any right provided for by federal or state law or regulation.

AB 1160 (Shelley, 1999) would have amended the damages award in Section 1430(b) to create a floor of $1,000 and a cap of $2,500 depending upon the severity of the violation. The bill was vetoed by Governor Gray Davis.

PRIOR VOTES:

Assembly Floor (Ayes 51, Noes 14)
Assembly Judiciary Committee (Ayes 8, Noes 3)

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