FLORIDA ASSISTED LIVING ASSOCIATION

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November 10, 2000

The Honorable Frank T. Brogan
Lieutenant Governor & Chairman
Task Force on the Affordability and Availability
of Long-Term Care
Florida Policy Exchange Center on Aging
USF#30437
Tampa, Florida 33620

Dear Governor Brogan:

On behalf of the Florida Assisted Living Association, I am pleased to submit the following recommendations to you and members of the Task Force for review and consideration. These recommendations were developed with the goal of improving the availability and affordability of long-term care for Florida's elder and disabled citizens. We make the following recommendations:

1. Amend Section 400.429, F.S., to be enforceable by an action for injunctive relief;

2. Require that the plaintiff show ordinary negligence;

3. Make agency or department surveys and investigative reports produced pursuant to Chapter 400, F.S., inadmissable in any civil action against ALFs;

4. In actions against ALFs, require each party to pay their own attorney's fees;

5. Cap non-economic damages to $350,000 and punitive damages to $500,000 in all civil actions against long term care facilities; and

6. Limit lawsuits to survivors as defined in Section 768.18(1), F.S.

The Florida Assisted Living Association (FALA) is the largest statewide association representing the assisted living industry in Florida. Our member providers join you in the development and promotion of high standards for assisted living while maintaining an affordable and homelike setting that allows a high degree of independence and integrity for the people cared for in our communities.

If we can be of any assistance to you, members of the Task Force, or staff, please do not hesitate to contact me.

Sincerely,

Paul J. Williams
Executive Director

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1. Amend Section 400.429 Resident's Bill of Rights to be Enforceable by an Action for Injunctive Relief Only.
2. Require that the Plaintiff Show Ordinary Negligence;
3. Make Agency or Department Survey of Investigative Reports Produced Pursuant to Chapter 400 Inadmissable in any Civil Action against an ALF;
4. In Actions ALFs Each Party Pays Their Own Attorney;
5. Cap Non-Economic Damages at $350,000 and Punitive Damages at $500,000;
6. Limit Lawsuits to Survivors as Defined in Section 768.18(1).

Overview of Florida's Assisted Living Industry

What is an assisted living facility? As Florida's large elder and disabled population continues to grow, appropriate care options are an important issue. Many individuals do not need the expensive and intensive level of care provided by a nursing home, however, they cannot continue to live independently. Assisted living facilities are not nursing homes. ALFs offers an alternative to nursing homes by allowing the elderly and disabled to live in a less restrictive, more socially-oriented setting. An ALF is not permitted to admit persons requiring 24-hour nursing care. Some of the services provided by ALFs may include;

- Basic housing (from private or double occupancy rooms/units to apartments);
- Meals and snacks;
- 24-hour emergency monitoring, security, and staff availability;
- Transportation to activities, appointments, shopping, etc;
- Toileting and incontinence care;
- Assistance with medications;
- Housekeeping, maintenance and help with laundry;
- Social and recreational activities; and
- Assistance with activities of daily living (ADLs) such as bathing, dressing, hygiene and grooming, eating and walking.

Who lives in assisted living facilities? Approximately 67,000 Floridians reside in over 2,370 ALFs.[1] These residents have a wide variety of needs. There are different levels of assistance, from minimal to comprehensive, that an ALF may offer. The number and types of services needed by a resident can determine the total monthly cost of care. Also, some ALFs offer specially designed environments for Alzheimer's and other memory impaired persons.

What do assisted living facilities look like? ALFs range in size from small, homelike environments with under six residents to large full-service communities with over 500 residents. Most ALFs are privately owned and operated. Fees, generally starting at $1,000 per month, vary according to location, amenities, and services provided.

[1] Source: The Florida Department of Elder Affairs

How are assisted living facilities regulated in Florida? In order to provide assisted living services, a facility must obtain and maintain a license issued by the State of Florida. ALF's are licensed and inspected by the Agency for Health Care Administration. The rules governing the specific standards of operations for ALFs are promulgated by the Department of Elder Affairs. The standard license allows the facility to provide housing, meals, and personal care services. There are three specialty licenses; Limited Nursing Services (LNS), Extended Congregate Care (ECC), and the Limited Mental Health Services (LMH). When applying for a specialty license, an ALF must meet the criteria for a standard license and the specialty license.

- Limited nursing services (LNS) authorizes a facility to provide such nursing services as application and care of routine dressings, care of casts, braces, and splints however, such services cannot be complex enough to require 24-hour skilled nursing supervision.

- Extended Congregate Care (ECC) allows a facility to provide some skilled nursing services to residents that would otherwise not qualify for continued care. This license allows residents to age in place who would otherwise be placed in a skilled facility (such as a nursing home or hospital) as long as the ALF has adequate resources to meet the resident's ongoing health care needs. This license allows residents the choice to age in place.

- Limited Mental Health Services (LMH) allows an ALF to provide services to individuals who have a mental disorder.

Additionally, two entities, the Long Term Care Ombudsman Council (LTCOC) and the Statewide Human Rights Advocacy Committee (SHRAC), work closely with AHCA, DOEA and Florida's ALFs to ensure Florida's elderly and disabled citizens are provided protections set forth by the resident's bill of rights. The LTCOC is authorized by the state in Part 1 of chapter 400, F.S. and by the federal government in Title VII of the Older Americans Act and specifies their responsibilities:

- Identify, investigate and resolve complaints made by or on behalf of residents;

- Provide information to residents about long-term care services;

- Represent the interests of residents before governmental agencies and seek administrative, legal and other remedies to protect residents;

- Analyze, comment on and recommend changes in laws and regulations pertaining to the health, safety, welfare and rights of residents;

- Educate and inform consumers and the general public regarding issues and concerns related to long-term care and facilitate public comment on laws, regulations, policies and actions;

- Promote the development of citizen organizations to participate in the program; and

- Provide technical support for the development of resident and family councils to protect the well-being and rights of residents.

The Statewide Human Rights Advocacy Committee (SHRAC) was created by Florida law in 1975, within the Department of Health and Rehabilitative Services (now Department of Children and Family Services). The SHRAC serves as an independent third-party mechanism for protecting the constitutional and human rights of any client within a program or facility operated, funded, licensed, or regulated by the DCFS and their responsibilities include:

- Monitoring the delivery and use of services, programs, or facilities operated, funded, regulated, or licensed by the department;

- Receiving, investigating, and resolving reports of abuse or deprivation of constitutional and human rights referred by a district HRAC;

- Reviewing existing programs and services and new or revised programs of the department and making recommendations as to how the rights of clients are affected;

Are there publicly funded assisted living programs? Yes. Florida has saved millions of dollars in long term care costs by allowing those people who would otherwise be placed in a nursing home to enter into less restrictive, community-based assisted living. ALF care can be provided in many cases for one-half to two-thirds the cost of institutional care such as skilled nursing. The two most popular statewide public assisted living programs are the Optional State Supplementation (OSS) Program and the Assisted Living for the Elderly Medicaid Waiver (ALE).

- **Optional State Supplementation (OSS) Program**. The OSS program is a General Revenue funded, means-tested cash assistance program which supplements a recipient's federal Supplemental Security Income (SSI)'s income to assist in paying for supportive living arrangements. Care can be provided in the assisted living or adult family care home (AFCH) environments.

- **Assisted Living Medicaid Waiver**. This program pays for services provided to ALF residents who are at risk of nursing home placement due to lack of financial means and meet Medicaid financial eligibility criteria. An ALF must enroll as a Medicaid provider and hold an Extended Congregate Care (ECC) or Limited Nursing Services (LNS) license to provide services to a waiver recipient. Presently, approximately 1800 beds are funded for the Assisted Living Medicaid Waiver; however, the demand for this cost-effective program far exceeds the number of funded beds.

The Assisted Living Facility (ALF) Insurance/Litigation Crisis

Florida's ALFs are experiencing extreme difficulty regarding the availability and affordability of liability insurance which, by law, they must have in order to operate. During the last two years 11 major insurance companies have withdrawn from the Florida market. Currently Florida has only one

admitted company and five surplus lines companies which are actively writing long-term care facilities insurance. Surplus lines companies are not part of Florida's insurance guaranty fund, which would cover their claims in the event of an insolvency, nor are their rates regulated by the Department of Insurance. Rates have increased a minimum of 600% the past year.

Insurance companies cite an explosion of litigation as the reason for rate increases and their exodus from Florida. According to the Department of Insurance the number of claims against ALFs increased by 187.5% from 1997 to 1999. Florida has 21% of the total claims in the nation even though it has 10% of the number of beds. Florida's frequency of claims per 1,000 beds for 1999 was 22.6% compared to 7.2% for the rest of the nation.

Recently ALFs licensed to provide Extended Congregate Care (ECC) or Limited Nursing Services (LNS) for residents have been notified by insurers they will be charged the same rate as nursing homes because insurers now consider them equally at risk for lawsuits. Many ALFs will be forced to drop their ECC or LNS license if they are unable to replace their coverage. As a result, many residents will lose their choice and be forced to relocate to a more expensive and restrictive nursing home.

The Factors Driving the Crisis and Recommendations for Reform

While drafted with good intentions, Florida's current law concerning ALF resident's rights is vague and counterproductive to its stated purpose: to promote the availability and affordability of quality care for our elderly and disabled persons.

Section 400.428, F.S. establishes a resident bill of rights for persons residing in an ALF. This bill of rights specifically enumerates 12 residents' rights which cover everything from the right to "be treated with consideration and respect and with due recognition of personal dignity, individuality, and the need for privacy", to the right to have "access to a telephone."

Furthermore, Section 400.429, F.S provides a resident, or anyone acting on behalf of the resident, with a civil cause of action to enforce such rights and to recover actual and punitive damages for any violation of the enumerated rights. It allows large, uncapped awards and fees for attorneys who can manipulate the system. Although some suits are justified and should be pursued to the fullest extent, the increased Chapter 400 litigation has had a tremendously negative impact on Florida's vital long term care industry.

Generally, Part III of Chapter 400, F.S. offers needed regulatory features and resident protections to our elderly and disabled citizens. However, reform is needed to protect our long term care providers from excessive litigation. Reform should preserve residents' ability to enforce their rights, but also shelter providers from attorneys who are abusing this well-intentioned legislation. The proposed reforms are similar to the legal protection afforded to Florida's hospitals and physicians. The following recommendations will help us accomplish this goal.

Recommendations for Reform

Recommendation 1: Amend Section 400.429, Civil actions to enforce rights, to be enforceable by an action for injunctive relief only.

The goal of the residents' bill of rights is to ensure the rights of the residents be protected in a timely manner. Therefore, action for monetary damages is an inadequate remedy. To expeditiously protected resident's rights, the current system allows for many formal and informal methods of resolution of disputes (as discussed before). Traditional litigation is well known for its inordinate expense to the parties and unreasonably long delays in reaching any sort of resolution. Time is one commodity that the typical ALF resident does not have. Furthermore, if a resident is truly being deprived of his or her statutory rights, money does not restore those rights, it merely acts to punish the provider.

On the other hand, an action for injunctive relief is a far superior method for handling violations of the residents' bill of rights. An injunction is a court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury. Such an action will provide residents with an extremely quick and effective remedy in situations where it can be proved by a greater weight of the evidence that their statutory rights are being violated. To remedy situations, such as accessibility to a telephone or unsanitary conditions, a resident may retain an attorney to seek an order from the court, usually on that same day. The court can require the facility to comply with its order immediately and failure to do so will result in monetary fines and/or being held in contempt of court. Such an action does not provide the big monetary awards that have attracted so many plaintiffs' attorneys to Part III of Chapter 400 litigation. The statutory attorney's fees provision is maintained for cases seeking injunctive relief to guarantee the availability of competent legal representation and access to courts that was envisioned by the initial drafters of the current law. This provides a powerful weapon to protect all the provisions of the resident's bill of rights.

Those cases where physical injuries and/or death exists, the resident or their survivors would pursue the appropriate cause of action for monetary damages under the common law or non-Chapter 400 statutory provisions (ie. ordinary negligence, medical malpractice, wrongful death, etc.). This course will not create a hardship upon the resident or their survivors; it will not act to close any courtroom doors. Rather, it will place them in the same, if not better, position as their counterparts who do not live in such ALFs. The long term care industry has been so demonized by the excessive litigation and media coverage over the last few years, that the potential verdicts available for meritorious cases will be more than enough to induce attorneys to undertake such cases. Simply put, such cases deal with our most elderly and frail citizens and have great sympathy value to which juries respond with large awards.

Recommendation 2: Require that the plaintiff show ordinary negligence.

Ordinary negligence is the failure to exercise the care an ordinarily prudent person would use in the same or similar situation. Actions for ordinary negligence can arise from a wide variety of

circumstances. Typically, such cases are brought when a person claims to have received injuries as a result of an automobile accident, slip and fall, or defective product. In order to prove a cause of action for negligence the plaintiff must prove all of the following elements by the greater weight of the evidence:

- That the defendant owed some duty to the plaintiff;
- That the defendant breached that duty;
- That the breach of the duty was the proximate or legal cause of the damages alleged; and
- That the plaintiff did suffer some sort of compensable damages as a result. Take for instance a case in which a plaintiff claims to have received neck and back injuries as a result of an automobile accident.

In order to prevail, that plaintiff would have to prove:

- That the defendant owed her a duty to drive in a reasonably careful manner;
- That the defendant did not drive in such a manner;
- That the defendant's driving did indeed cause or contribute to the accident; and
- That as a result of the accident, plaintiff's neck and back were injured.

Current law allows a plaintiff to get a negligence per se instruction to a jury before they begin their deliberations. Negligence per se is conduct which is automatically presumed to be negligent without any argument or proof as to the surrounding circumstances. The practical effect of such an instruction is that if an attorney is able to prove, by a greater weight of the evidence, that an ALF violated <u>any one</u> of the vague rights enumerated in section 400.428, F.S., the court instructs the jury that the facility <u>is necessarily negligent</u> and damages are automatically presumed. In other words, the determination of whether a facility is negligent is taken away from the jury and their only task is to assign damages.

Missing from this equation are the elements found in ordinary negligence actions where the plaintiff must not only prove that a person or entity was indeed negligent, but that the negligence was also a legal cause of the damages alleged. Negligence is a legal cause of loss, injury or damage if it directly or contributes substantially to producing such loss, injury or damage so that it can reasonably be said that, but for the negligence, the loss, injury or damage would not have occurred.

A negligence per se instruction in cases alleging physical injuries and/or death are inherently unfair and prejudicial to ALFs. Imagine a situation where a resident alleges that he or she developed bed sores due to a facility's negligence and during the trial of the case, the resident is able to prove that the facility violated his or her right to privacy. Although the violation has nothing to do with the development of the bed sores, the court will instruct the jury that the ALF was negligent and the jury

is left to assign damages. Under our system of justice, there must be a correlation between the rights violation and the alleged injury in such cases. If not, residents are allowed to recover large awards from facilities without ever having to prove, by the greater weight of the evidence, that a facility's actions or inactions directly caused or contributed to the alleged damages.

Due to this great inequity, cases involving physical injuries and/or death, a violation(s) of a resident's statutory rights should be admissible only as evidence of negligence, not conclusive evidence of negligence.

Recommendation 3. Make agency or department surveys and investigative reports produced pursuant to Chapter 400, F.S., inadmissible in any civil action against ALFs.

As part of its regulatory oversight activities the Agency for Health Care Administration (AHCA) conducts surveys on a biennial or more frequent basis of ALFs. Information gathered for this survey, in addition to agency employee observations, may also come from private informal conversations with family members or guardians. Under current law, plaintiffs are allowed to admit these surveys into evidence at trial to help prove their case against an ALF. While these surveys are useful to the agency and public in assessing the quality of the services provided by the facility, the survey findings bear no direct evidence to a judge or jury as to why the facility was in fact negligent to any one particular plaintiff.

These surveys must continue to seek valuable feedback from facility staff, residents, and family members to assist the state in its goal to ensure quality care. However, if the facility staff responses can be used in actions for monetary damages in a civil action, there is an adverse affect on the free-flow of information. Due to the current state of the law, we are essentially asking facility staff to jeopardize their jobs and the viability of facility remaining open if they candidly respond to questions. Surveys serve a legitimate service to preserve the integrity of the regulatory process. Surveys should not be used to inflame the passions of a jury on unrelated matters in every plaintiff's case. For all the foregoing reasons, such surveys and investigative reports should specifically be made inadmissible in any civil action against an ALF.

Recommendation 4. In actions against ALFs, each party must pay their own attorney's fees.

Present long term care law allows prevailing plaintiffs in actions involving physical injury and/or death to recover their attorney's fees from the defendant in addition to any award of damages. This provision greatly encourages litigation, raises the cost of litigation and artificially increases the cost and difficulty of settlements.

In the vast majority of civil actions, each party bears the expense of their own attorney's fees and many plaintiff's attorneys arrange for their compensation by contracting with the plaintiff to receive a portion - typically 25% - 40% - of any award the plaintiff receives. The defendant bears the cost of their legal representation, win or lose. Allowing the recovery of attorneys fees from defendants

in long term care cases in addition to any award or settlement encourages attorneys to accept marginal litigation because they are entitled to the full amount of their attorneys fee even if they are awarded only token damages. Litigation is encouraged even if the alleged injury is relatively trivial.

When the plaintiff's attorney is on the defendant's time clock, there is a strong incentive to ask every question, subpoena every document, and talk to every potential witness. The incentive to conserve resources is lost because, to the plaintiff's attorney, it is free.

When defendants consider settling litigation, they are faced with assessing whether the plaintiff can obtain more money by trying the case to a jury. The amount of the attorney's fee to the plaintiff is of no real concern to the defendant, since that is the plaintiff's responsibility. When the defendant must calculate what the plaintiff's attorneys fee would be, if they prevail at trial, then the plaintiff can force the defendant to insert this into the calculation of what the case is worth. The defendant is, in effect, forced to add some portion of the fee the plaintiff may receive to the settlement offer. In addition, the plaintiff has significantly less incentive to settle knowing that even with a nominal damage award their full fee will be paid by the defendant.

We believe changes must be made to ensure the rules for this type of lawsuit are the same as for almost every other lawsuit. This system of each party paying their own attorney's fees has worked well in other types of litigation and will work well in these cases. This can be achieved by amending Section 400.429, F.S., and its attorneys fees provision, to be applicable only to actions for injunctive relief.

Recommendation 5. Cap non-economic damages to $350,000 and punitive damages to $500,000 in all civil actions against long term care facilities.

As the above discussion demonstrated, Florida's long term care facility industry is the leader in litigation rates, losses per bed and insurance costs per bed. These costs have led facilities to raise rates for private pay residents and cut expenses so they can stay in business. While we must improve quality of care at every opportunity this will not resolve the present crisis. The long term care industry, in partnership with federal and state governments, like any other industry has limited resources. Monetary resources are even more scarce given the government cutbacks in recent years.

In light of this scarcity, policymakers have two choices: allow plaintiffs to continue to obtain unlimited damages thereby threatening the future of long term care and consumer choice or establish limits to recovery. With the establishment of limits and other measures, insurers will have much greater certainty about projected future losses. Presently, many of the insurers who have left the Florida market have done so not only because of their absolute amount of losses, but because of their <u>inability to predict future losses</u>. No prudent businessperson will continue to stay in the market when they are unable to predict future losses.

Consequently, policymakers must take the same step as the Legislature with tort reform and establish limits with respect to non-economic (pain and suffering) and punitive damages. Without these steps there is no ceiling to the liability crisis.

The resources available to the long term care industry are limited. For ALFs relying upon government funding for a significant portion of their revenues, an increase in liability insurance costs means budget cuts or pressure for increased government reimbursements for those facilities participating in government funded programs. Where their increases are substantial, the budget cuts must also be substantial. This is particularly true for small facilities which represents 64% of the licensed ALFs in Florida[2]. Given the needs of our growing elderly and frail population, we simply cannot afford to continue to allow multi-million dollar verdicts for pain and suffering and punitive damages. If we do, the future of the industry itself is threatened. Huge verdicts do nothing to improve the quality of care! Given that the numbers of elderly and frail Floridians is expected to continue to increase for the foreseeable future and the state's goal to effect savings through community-based care, this is an unacceptable outcome.

As a consequence, the law must be changed to cap non-economic damages in negligence actions at $350,000 and punitive damages at $500,000.

Recommendation 6. Limit lawsuits to survivors as defined in Section 768.18(1), F.S.

Actions for wrongful death brought under Florida's Wrongful Death Act limits those who can sue for wrongful death to:

> "The decedent's spouse, children, parents, and when partly or wholly dependent on the decedent for support or services, any blood relative and adoptive brothers and sisters. It includes the child born out of wedlock of the mother, but not the child born out of wedlock of the father, unless the father has recognized a responsibility for the child's support."

The nursing home and assisted living statutory cause of action statutes, Sections 400.023 and 400.429, F.S., provide:

> "Any person or resident whose rights as specified in this part are violated shall have a course of action against any facility owner . . . responsible for the violation. The action may be brought by the resident or his or her guardian, or by a person or organization acting on behalf of a resident with the consent of the resident or his or her guardian, or by the personal representative of the estate of a deceased resident when the cause of death resulted from a violation of the decedent's rights . . . "

The class of persons allowed to sue for wrongful deaths are limited to close family members or persons who were dependent upon the decedent. Nursing homes and ALFs, on the other hand, can be sued for wrongful death by a personal representative of the decedent even though there is no surviving relative of the decedent, and the personal representative is not related by blood or marriage

[2] Source: Florida Department of Elder Affairs

to the decedent. If the goal of awarding damages is to compensate surviving relatives of residents, it is not productive to award damages when there are no surviving relations or dependants. A better use of resources is to provide care for the frail and elderly. It is important to note we are not recommending that adult children be prohibited from bringing suit. This reform can best be achieved by amending Section 400.429, F.S., to be enforceable only by actions for injunctive relief. Cases against long term care facilities involving physical injury and/or death would be pursued through actions under common law or non-nursing home statutory provisions.