Articles + Publications | June 15, 2023

Nursing Homes, Beware! Supreme Court Greenlights Civil Lawsuits to Enforce FNHRA

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This article was republished in MedCity News on September 25, 2023.

The Supreme Court's recent decision in *Health and Hospital Corporation of Marion County, Indiana, et al. v. Talevski* has raised the stakes for nursing homes by ruling that private litigants may bring civil claims against facilities to recover damages for violations of certain provisions of the Federal Nursing Home Reform Act (FNHRA). Under the FNHRA, nursing homes that receive Medicaid funding must meet certain standards to ensure their residents' health, safety, and dignity. While these standards previously could only be enforced by the government, the Supreme Court has now ruled private litigants may bring lawsuits against nursing homes for certain FNHRA violations. In addition to potentially opening the floodgates for a torrent of litigation against nursing homes, this decision also provides powerful incentives for nursing homes and other facilities subject to the FNHRA to enhance their monitoring and compliance processes.

Nursing Home Residents' Enforceable Rights

The Supreme Court's decision in *Talevski* focused on two specific rights provided to nursing home residents by the FNHRA: (1) the right to be free from unnecessary chemical restraints; and (2) the right to be discharged or transferred only when certain preconditions are met.

The plaintiff brought the lawsuit under a federal statute (42 U.S.C. §1983) that provides private litigants the right to sue certain entities for civil rights violations.[1] The *Talevski* plaintiff sued a nursing home, claiming that both its use of psychiatric medication on a resident without familial consent and its subsequent refusal to readmit the resident violated his rights under FNHRA. The nursing home defendant argued that the plaintiff lacked standing to bring claims under FNHRA. The district court agreed with the nursing home, but the Seventh Circuit Court of Appeals reversed the decision on appeal. The Supreme Court then affirmed that reversal, ruling the plaintiff did have standing to bring the claims to enforce the FNHRA.

In its opinion, the Supreme Court reasoned that both the unnecessary chemical restraint provision and the predischarge notice provisions constituted enforceable rights because Congress used "rights-creating" language with an "unmistakable focus on the benefited class" in the FNHRA.[2] Specifically, the Court found that the unnecessary restraint provision required nursing facilities to "protect and promote" residents' "right to be free from … any physical or chemical restraints … not required to treat the resident's medical symptoms."[3] And the predischarge notice provision also imposed preconditions that a nursing facility must meet to discharge or transfer a resident.[4]

Implications of *Talevski*

The text of the Supreme Court's decision in *Talevski* is limited to the two specific FNHRA provisions discussed above: the unnecessary restraint and the predischarge notice provisions. However, this decision will likely have vastly greater implications for nursing homes going forward. The Supreme Court's analysis, as well as its rationale in determining that the FNHRA used "rights-creating" language, opens a wide pathway that litigants will likely use to sue to enforce other FNHRA provisions on the theory that other FNHRA provisions likewise use "rights-creating" language.

For example, another provision of the FNHRA states: "A nursing facility must protect and promote the rights of each resident, including … the right to reside and receive services with reasonable accommodation of individual needs and *preferences*, except where the health or safety of the individual or other residents would be endangered."[5] The Supreme Court decision did *not* address this provision. However, it seems possible, if not likely, that private litigants and the plaintiff's bar will try to point to provisions like this one as now being enforceable by private litigants. These issues are sure to work their way through the various court systems, and thus create additional litigation risk for nursing homes.

However, since the Supreme Court's ruling in *Talevski* focused on standing, it is still uncertain what damages nursing homes are at risk for under private FNHRA claims. In this case, the plaintiff demanded actual damages, compensatory damages for pain and suffering, and punitive damages. Aside from these types of damages, nursing homes are reminded that they are still subject to the government enforcement mechanisms outlined in the FNHRA, including surveys, sanctions, corrections, and complete exclusion from Medicaid funding. Should a private suit be filed against a nursing home, it also increases the likelihood of government investigation and enforcement.

Key Takeaways

1. ***Nursing homes should be incentivized to more strictly comply with FNHRA.*** Compliance with FNHRA has always been important for nursing homes. However, it is well understood that government agencies have limited resources to inspect and enforce its provisions. Private litigants (and the growing number of plaintiffs' attorneys who will now be willing to take cases like *Talevski*) do not have the same limiting resources. Thus, the Supreme Court's decision will have the effect of vastly expanding the number of parties scrutinizing nursing homes' compliance with FNHRA. As the litigation risks for nursing homes rise, so too should their incentives to strictly comply with FNHRA.

2. ***Nursing homes should be more proactive with their compliance activities.*** Even more than before, nursing homes should be investing more time and more resources to stay compliant with FNHRA standards. This includes, especially, proactive measures designed to prevent compliance issues (particularly those arising under the FNHRA) from ever arising. Nursing homes should update their compliance activities to ensure they match the provisions in the FNHRA. Nursing homes should also take other proactive steps to ensure their staff are complying fully with those provisions (*e.g.*, enhanced employee training and monitoring).

3. ***Nursing homes should encourage internal reporting to avoid civil suits.*** Given the expansion of civil litigation risk, nursing homes should now, more than ever before, look to create incentives for personnel to

report issues internally. These internal reporting incentives will enable a nursing home to investigate and remediate issues before they ripen into a regulatory violation or now, a civil lawsuit. Further, encouraging internal reporting can also help mitigate the risk of whistleblowers. Generally, if individuals report a concern internally and see the nursing home addressing it, they are less likely to pursue external remedies.

4. ***Nursing homes should involve legal as soon as possible.*** As civil lawsuits like *Talevski* become more common, plaintiffs' attorneys will focus more and more on suing nursing homes and testing the outer boundaries of what claims they can bring. A nursing home can mitigate litigation risk by working closely with internal and/or external legal counsel on topics, such as communication with residents, compliance policies and procedures, staffing decisions, and other operational decisions that have the potential to be perceived — by residents, family members, or plaintiffs' attorneys — as violating the FNHRA.

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[1] Section 1983 claims provide an individual the right to sue any person who acts "under color of law" and deprives the individual of a right.

[2] *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002).

[3] Section 1396r(c)(1)(A)(ii).

[4] Sections 1396r(c)(2)(A)–(B).

[5] Section 1396r(c)(1)(A)(v)(I).

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