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CONFLICT IN THE COURTS: THE FEDERAL NURSING HOME REFORM AMENDMENT AND § 1983 CAUSES OF ACTION

By Susan J. Kennedy*

Introduction

When I was younger, I could remember anything, whether it had happened or not; but my faculties are decaying now and soon I shall be so I cannot remember any but the things that never happened. It is sad to go to pieces like this but we all have to do it. — Mark Twain

The inevitability of old age that Mark Twain referred to, and the possibility that most of us will spend our final years in a nursing home, was a major factor in explaining why Congress chose to examine nursing-home conditions in 1987. As a result of its investigation, Congress discovered the presence of a shocking amount of substandard conditions. Congress attempted to address these conditions by incorporating the Federal Nursing Home Reform Amendment (FNHRA) into the Omnibus Budget Reconciliation Act of 1987 (OBRA). In FNHRA, Congress endeavored to provide legislation that would force nursing homes to provide quality care to nursing-home residents by coupling participation in federal Medicare and Medicaid programs with adherence to certain required standards. Unfortunately, even though FNHRA has been instrumental in increasing the quality of care provided to nursing home residents, the persistence of substandard-care issues in the face of this legislation is surprising. Substandard care can result in deadly consequences because of the fragile state of most elderly nursing-home residents. Many families of deceased residents turn to the legal system,

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* M.A., Legal Studies, Texas State University, 2012; B.S., Education, University of Texas, 1982. I wish to express my heartfelt gratitude to my family for their constant support. I would also like to recognize the excellent teaching staff at Texas State’s Legal Studies department. In particular, I would like to recognize Dr. Walter Wright without whose guidance and patient support this article would never have been completed.

3  Id.
5  Nicolas Castle, Nursing Home Reform Act, 40 MED. CARE 868, 868 (2002).
6  See INST. OF MED. OF THE NAT’L ACADS., RETOOLING FOR AN AGING AMERICA: REBUILDING THE HEALTH CARE WORKFORCE xi (2008), available at
not only for a private remedy, but also to bring change to the system that victimized their loved ones. Many U.S. courts are asking whether a privately run nursing home can be held liable in a lawsuit under 42 U.S.C. § 1983 for violations of FNHRA requirements in an attempt to force nursing homes to raise the standard of care through legal action. This paper will explore this question in the light of a recent Third Circuit decision, Grammer v. John J. Kane Regional Centers - Glen Hazel.7

I. Background

Title XIX of the Social Security Act, codified at 42 U.S.C. §§ 1396-1396v, established a “cooperative federal-state program under which the federal government furnishes funding to [the] states for the purpose of providing medical assistance to eligible low-income persons.”8 This cooperative program allows participating states to receive federal funding in exchange for complying with the Medicaid Act and with regulations transmitted by the Secretary of Health and Human Services.9

Only two sanctions against noncomplying nursing homes existed before Congress amended the “Medicaid Act” in 1987. First, either the Health and Human Services Secretary or the states themselves could terminate a nursing home’s certification for participation in the Medicaid reimbursement program.10 Second, the Secretary or the states could deny payment for new admissions for up to eleven months if the infractions did not pose a serious threat.11 Because these penalties were rarely invoked, many nonconforming nursing homes remained open and provided substandard care. By 1987, Congress had become “deeply troubled that the Federal Government, through the Medicaid program, continued to pay nursing facilities for providing poor-quality care to vulnerable elderly and disabled beneficiaries.”12

In response to this concern, Congress passed FNHRA in 1987. As part of the Omnibus Budget Reconciliation Act of 1987, FNHRA was incorporated into one multi-purpose bill to ensure final passage of all of FNHRA’s elements. FNHRA provided for the inspection and oversight of nursing facilities that participate in Medicare and Medicaid programs. In

7 Grammer v. John J. Kane Reg’l Ctrs.-Glen Hazel, 570 F.3d 520 (3d Cir. 2009).
9 Id.
10 Grammer, 570 F.3d at 523.
11 Id.
order to receive certification in the programs, FNHRA required facilities to satisfy certain quality-care standards.\footnote{13}{42 U.S.C. §§ 1395i-3(g), 1396(g) (2006).}

Unfortunately, many questions have arisen as to the interpretation and application of FNHRA. In particular, courts have struggled with the interpretation of FNHRA as it applies to both county-run and privately run facilities and lawsuits claiming FNHRA rights violations. Federal statutes can authorize private causes of action, explicitly or implicitly.\footnote{14}{Grammer, 570 F.3d at 525.} In such lawsuits, however, the court must first determine whether Congress intended to confer individual rights upon a class of individuals.\footnote{15}{Gonzaga Univ. v. Doe, 536 U.S. 273, 281 (2002).} If the court determines the statute does confer a federally protected right, it must then decide whether Congress intended to create a remedy to enforce that right.\footnote{16}{Alexander v. Sandoval, 532 U.S. 275, 286 (2001).} In cases where the defendant is a state actor (someone acting on behalf of a governmental body) and is accused of violating an individual’s federal right, that right is presumptively enforceable under 42 U.S.C. § 1983.\footnote{17}{Gonzaga Univ., 536 U.S. at 284.} Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.\footnote{18}{42 U.S.C.A § 1983 (West 2006).}

If the defendant is not a state actor, the court must determine whether Congress intended to provide a private remedy under the statute, because § 1983 is not available as a remedy where no state actor is involved.\footnote{19}{Sabree v. Richman, 367 F.3d 180, 188 (3d Cir. 2004).} While addressing these lawsuits, courts have wrestled with determining
whether the provisions and language contained in FNHRA create rights protected by federal law or the Constitution. Similarly, they have arrived at conflicting decisions and have not been able to come to any agreement on whether FNHRA contains an implied, private § 1983 cause of action. Courts also have struggled as to whether a privately owned nursing home is a state actor operating under the color of law as required for a § 1983 lawsuit.

II. For purposes of pursuing a § 1983 lawsuit for violations of FNHRA requirements, can a privately held nursing home be considered a state actor operating under the color of law?

A. Rights Conferred by Statutes and FNHRA

One question courts have struggled to answer is whether the language in FNHRA successfully confers enforceable federal rights. Answering that question is the first step in exploring whether a privately held nursing home can be held liable for FNHRA rights violations under § 1983. The Supreme Court requires that a plaintiff seeking a remedy through § 1983 prove the violation of a federal right, not merely violation of a federal law.20

In the 1997 U.S. Supreme Court case, Blessing v. Freestone, the Supreme Court addressed necessary conditions in order for a statute to confer federal individual rights.21 In Blessing, a group of mothers whose children were eligible under Title IV-D of the Social Security Act to receive state child-support services filed a § 1983 action against the state of Arizona,22 suing the director of Arizona’s child support agency. In their lawsuit, the custodial parents claimed they had an enforceable right to have the State’s program achieve “substantial compliance” with the requirements of Title IV-D.23

In determining whether Title IV-D gave individuals enforceable federal rights, the Court outlined three mandatory factors a plaintiff must demonstrate. First, the plaintiff must be an intended beneficiary of the statute.24 Second, the right asserted in the language of the statute cannot be so “vague and amorphous” that its enforcement would burden judicial competence.24 Finally, the provision giving rise to the asserted right must

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21 Id. at 340.
22 Id. at 329.
23 Id. at 329.
24 Id. at 340-41.
be stated in mandatory terms.\textsuperscript{25} After applying these three factors to the facts in the Blessing case, the Court ruled against the petitioning parents and reversed the Arizona federal district court’s decision.\textsuperscript{26}

The Supreme Court found it necessary to clarify the first factor in a 2002 case, Gonzaga University v. Doe.\textsuperscript{27} In Gonzaga, a former university student sued Gonzaga University under § 1983, alleging violations of the Family Educational Rights and Privacy Act (FERPA). The Court, denying the student’s claim, noted that it is a right, not a vague “benefit,” that may be enforced under § 1983.\textsuperscript{28} In applying the Blessing factors, and the Gonzaga clarification to FNHRA, courts have arrived at vastly different conclusions.

While most courts agree that FNHRA meets the second and third Blessing factors, determining congressional “intent” for the first Blessing factor has created a split among the courts. This split is illustrated by two recent federal district court cases, Grammer v. John J. Kane Reg’l Centers-Glen Hazel\textsuperscript{29} and Duncan v. Johnson-Mathers Health Care, Inc.\textsuperscript{30}

In Grammer v. Kane, the daughter of a deceased nursing-home resident brought a § 1983 action against a county-run nursing home for wrongful death, alleging the nursing home violated her mother’s rights by breaching a duty to provide quality care.\textsuperscript{31} The Grammer court found that, in order to rule on allegations of a federal right violation as the basis for a § 1983 action, it first had to determine if the statute in question conferred an individual right.\textsuperscript{32} Citing Gonzaga, the court reasoned that whether a federal statute creates a federal right enforceable under a § 1983 depends upon “whether or not Congress intended to confer individual rights upon a class of beneficiaries.”\textsuperscript{33} The court noted that, because of suggestions by other Supreme Court cases, fine distinctions in the application of the

\textsuperscript{25} Id. at 341.
\textsuperscript{26} Id. at 346. Noting that the lower court did not separate and clearly define what rights it believed arose from Title IV-D, the Court left open the possibility that Title IV-D may give rise to enforceable rights. Id. at 346. Therefore, because the Court was unable to rule on whether Title IV-D conferred an enforceable right, the Court did not address the other factors. Id.
\textsuperscript{27} Gonzaga Univ. v. Doe, 536 U.S. 273, 281 (2002).
\textsuperscript{28} Id. at 283.
\textsuperscript{29} Grammer v. John J. Kane Reg’l Ctrs.-Glen Hazel, 570 F.3d 520 (3d Cir. 2008).
\textsuperscript{31} Grammer, 570 F.3d at 522.
\textsuperscript{32} Id. at 525 (citing Blessing v. Freestone, 520 U.S. 329, 349 (1997)).
\textsuperscript{33} Id. at 525 (emphasis added) (citing Gonzaga Univ. v. Doe, 536 U.S. 273, 285 (2002)).
Blessing factors required examining not only the statutory language but also congressional intent.\footnote{Id. at 526.}

In analyzing FNHRA’s statutory language, the \textit{Grammer} court determined the statutory requirement that a plan for care “must provide” services was the same as the “no person shall” language in the \textit{Gonzaga University} case that the Supreme Court cited as an example of rights-creating language.\footnote{Id. at 527.} In addition, the court found the statutory language mandatory rather than precatory.\footnote{Id.} Finally, because the relevant provisions of FNHRA mandated that such privileges be made available to “all eligible individuals,” the statute did not focus on the “entity regulated rather than the individuals protected.”\footnote{Id. (citing Sabree v. Richman, 367 F.3d 180, 190 (3d Cir. 2004)).} In light of these determinations, and noting the congressional purpose for FNHRA was to improve conditions in nursing homes, the \textit{Grammer} court concluded the language of the statute clearly conferred unambiguous and personal rights.\footnote{Id.}

In \textit{Duncan v. Johnson-Mathers Health Care, Inc.}, the court rejected the logic of the \textit{Grammer} case and found that FNHRA does not create enforceable rights.\footnote{Duncan v. Johnson-Mathers Health Care, Inc., No. 5:09-CV-00417, 2010 WL 3000718, at *9-10 (E.D. Ky. July 28, 2010).} In \textit{Duncan}, the brother of a deceased nursing-home resident sought relief on four counts of FNHRA violations.\footnote{Id. at *2.} The court reasoned that, in cases that turn on whether a plaintiff has a statutory right of action, the language of the statute should be examined first.\footnote{Id. at *5.} In evaluating the language of the statute, the \textit{Duncan} court reasoned that because the statute is entitled “Requirements for nursing facilities” and sets forth requirements for nursing homes related to providing services, it does not have an “unmistakable” focus on the rights of individuals.\footnote{Id. at *8.} Instead, the court found the statute sets forth requirements for nursing homes to meet in order to receive funding.\footnote{Id.} Therefore, the court declined to adopt the \textit{Grammer} court’s ruling that the language in FNHRA has “an unmistakable focus on the benefitted class” as required by the Supreme Court in \textit{Gonzaga}.\footnote{Id. at *8 (citing Gonzaga Univ. v. Doe, 536 U.S. 273, 283 (2002)).} In addition, the court noted that it was mindful of the Supreme Court’s reluctance to associate Spending
Clause legislation with individual rights.\(^45\) Noting that Congress did not speak in a clear, unambiguous voice and confer individual rights on nursing-home residents, the Duncan court refused to adopt the Grammer court’s ruling, and it ruled there was “no basis for private enforcement directly under the statute or under [§] 1983.”\(^46\)

Unfortunately, the U.S. Supreme Court denied the petition for certiorari in the Grammer case, so the courts remain divided on whether FNHRA created federally enforceable rights.

**B. Implied Cause of Action and FNHRA**

If a court determines the FNHRA created federally enforceable rights, the second step in exploring whether a privately held nursing home can be held liable for FNHRA rights violations is to determine if the FNHRA implies a private cause of action. Since the FNHRA does not contain an explicit cause of action, courts have turned to case precedent to determine whether the statute implies such a cause of action.

*Cort v. Ash*, a 1975 Supreme Court case,\(^47\) addressed this issue under a different statute. In *Cort*, stockholders sought an injunction and asserted a derivative claim for damages based on violations of a statute prohibiting the funding of campaigns for federal offices with corporate funds.\(^48\) The Court concluded four factors must be present to determine whether a private remedy is implicit in a statute that does not expressly provide one. First, the plaintiff must be a member of the class that the statute was expressly created to benefit.\(^49\) Second, there must be an indication of legislative intent to create a remedy.\(^50\) Third, implying such a remedy must be consistent with the underlying purposes of the legislative order.\(^51\) And finally, the cause of action should not be one that is traditionally relegated to state law, in an area that is the concern of the States, so that inferring a cause of action based solely on federal law would be inappropriate.\(^52\)

\(^45\) *Id.* at *10.

\(^46\) *Id.* at *10.


\(^48\) *Id.* at 66.

\(^49\) *Id.* at 78 (citing Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39 (1916)).


\(^51\) *Id.* (citing Sec. Investor Prot. Corp. v. Barbour, 421 U.S. 412, 423 (1975); Calhoon v. Harvey, 379 U.S. 134 (1964)).

In Grammer, the Third Circuit considered only the presence of rights in the FNHRA and not the presence of a remedy. Thus, examining how other courts have treated this issue is necessary. Sparr v. Berks County\textsuperscript{53} and Brogdon v. National Healthcare\textsuperscript{54} discuss this issue.

In Brogdon, residents of a long-term health-care facility brought an action against the owners of the facility, alleging the facility failed to provide the minimally required levels of care as mandated in the FNHRA.\textsuperscript{55} In applying the first Cort factor, the court found the Medicare and Medicaid Acts were enacted to benefit nursing-home residents.\textsuperscript{56} The court even went so far as to concede that the FNHRA clearly conferred federal rights.\textsuperscript{57} However, the court stated that just because individuals enjoy certain federal rights, it does not mean they are necessarily entitled to a private cause of action to enforce those rights.\textsuperscript{58} In considering the third Cort factor, the court determined that Congress did not intend to create a remedy.\textsuperscript{59} The court found nothing in the written statute or its history to persuade it that Congress intended to create a private cause of action.\textsuperscript{60} In considering congressional intent, the court viewed the FNHRA through the context of contract, explaining that legislation addressing the spending power is really a contract: in return for federal funds, the recipients agree to comply with federally imposed conditions.\textsuperscript{61} In conclusion, the Brogdon court ruled there was insufficient evidence to support the position that Congress intended to create a private cause of action in the FNHRA.\textsuperscript{62}

Similarly, in Sparr v. Berks County, the court held no private cause of action existed under the Act to enforce the Bill of Resident Rights.\textsuperscript{63} Determining that the FNHRA did contain rights-creating language, the court reasoned that the lynchpin issue in the case was whether Congress intended to create a judicially enforceable cause of action.\textsuperscript{64} In examining the legislative history, the court found the statute’s purpose was to distribute funds and to place conditions on the recipients of the funds. The

\textsuperscript{55} Id. at 1325.
\textsuperscript{56} Id. at 1330.
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id. at 1331.
\textsuperscript{62} Id.
\textsuperscript{64} Id.
Sparr court disagreed with the plaintiff’s interpretation of the FNHRA’s legislative history used to support the plaintiff’s assertion that Congress intended for the FNHRA to contain an implied cause of action.\textsuperscript{65} The Sparr court determined the section of legislative history quoted by the plaintiff, when read in context, not only emphasized no authorization of a private cause of action, it also specified that the statute did not limit private remedies available under common law. Therefore, the court concluded that the FNHRA did not satisfy the second \textit{Cort} factor.\textsuperscript{66}

Although the \textit{Cort} factors were not discussed in \textit{Grammer}, it is interesting to note that on the one pivotal issue, congressional intent of FNHRA, the \textit{Grammer} court arrived at a very different conclusion. In \textit{Grammer}, the court emphasized that it was “not concerned” that the provisions of the FNHRA were phrased in terms of responsibilities imposed upon the nursing home.\textsuperscript{67} To the \textit{Grammer} court, it was clear that the purpose of the statute was to protect the rights afforded to individuals.\textsuperscript{68} In distinguishing between intent and purpose, the court looked to the House of Representatives Report regarding the circumstances that the statute was intended to remedy. All of the mitigating conditions in the Report revolved around the prevalence of substandard care in nursing homes.\textsuperscript{69} The focus was on the resident, not the nursing home.

In summary, while most courts have ruled that the FNHRA does not contain an implied private cause of action, the ruling in \textit{Grammer} creates some uncertainty. Citing the Supreme Court’s reluctance to rule that Spending Clause legislation creates enforceable federal rights, most courts have chosen not to look beyond the FNHRA’s enforcement scheme to determine intent. However, \textit{Grammer} examined the legislative history of the FNHRA in an effort to determine the congressional purpose in drafting the statute.\textsuperscript{70} While examining the purpose of the statute instead of its intent, the \textit{Grammer} court scrutinized the specific social problems Congress was addressing and how the statute was written to cure those problems. In taking this approach, the \textit{Grammer} court may have arrived at a more accurate interpretation of the FNHRA legislation. The words of a statute are meaningful only when they fit some intelligible purpose.\textsuperscript{71}

\textsuperscript{65} Id. at *1.
\textsuperscript{66} Id. at *2.
\textsuperscript{67} \textit{Grammer} v. John J. Kane Reg’l Ctrs.-Glen Hazel, 570 F.3d 520, 530 (3d Cir. 2008).
\textsuperscript{68} Id.
\textsuperscript{69} Id.
\textsuperscript{70} Id.
\textsuperscript{71} \textsc{Lee H. Carter \& Thomas F. Burke}, Reason In Law 84 (Eric Stano ed., 6th ed. 2002).
determining the purpose of a statute, a judge should always look to the problem it addresses for direction on discovering intent. In adopting this approach, contrary to other court rulings, Grammer established that the FNHRA does imply a private cause of action. Because Grammer involved a county-run facility, the court concluded that the plaintiff could pursue a remedy through a §1983 action because all violations of federal rights by state entities are presumptively enforceable under §1983.

C. § 1983 Cause of Action and a Privately Owned Nursing Home

The Supreme Court in Flagg Bros. Inc. v. Brooks and Blum v. Yaretsky addressed the issue and the “under color of any statute” requirement.

In Flagg Bros., a class-action civil-rights suit was brought against the State of New York for the selling of private goods by a warehouse storage facility. The original plaintiff in Flagg Bros. had been evicted and her belongings had been placed in a storage unit. The storage warehouse threatened to sell Brooks’ belongings pursuant to Section 7-210 of the New York Uniform Commercial Code unless she made a payment on her unpaid balance. Brooks then brought a class action under 42 U.S.C. § 1983 seeking damages, an injunction, and a declaration that the sale under Section 7-210, which provided a way for a warehouseman to convert his lien into good title, was a violation of Due Process and Equal Protection Clauses of the Fourteenth Amendment. The District Court dismissed the claim, noting that the complaint failed to evoke relief under § 1983 because it did not meet the necessary “acting under the color of law” requirement for a § 1983 cause of action. The Court of Appeals reversed the lower court’s decision, reasoning that Section 7-210 delegated some sovereign state power over binding conflict resolution. However, the Supreme Court reversed the Court of Appeals decision, affirming the decision of the District Court. In making its decision, the Supreme Court explored and clarified the necessary components for the creation of a state actor working under the color of law.

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72 Id.
75 Flagg Bros., 436 U.S. at 151.
76 Id. at 152.
77 Id.
78 Id.
79 Id.
80 Id.
Specifically, the Supreme Court noted that any claim for relief under § 1983 must contain two elements. First, the plaintiff must show he has been deprived of a right “secured by the Constitution and the laws” of the United States. Second, he must show whoever deprived him of the right was acting “under [the] color of any statute”. The Court noted that some rights created by government are protected from both governmental and private violation. However, even though a private person may cause a deprivation of a federal right, he cannot be held liable under § 1983 if he was not acting under the color of law. The Supreme Court further found that most rights secured by statute are protected only against governmental infringement. The Court pointed out that, although any person with sufficient physical power may deprive a person of his property, only a State or a private person whose actions “may be fairly treated as that of the State itself” may deprive a person of “an interest encompassed within the Fourteenth Amendment’s protection.”

Although the discussion in Flagg Bros. solidified the “state actor” requirement for a § 1983 cause of action, it did not define exactly what makes a private party a state actor. Another Supreme Court case, Blum v. Yaretsky, addresses this question.

In Blum, a group of nursing-home residents brought a class action lawsuit against a privately run nursing home in New York. The lawsuit alleged violation of the residents’ federal rights when they were not afforded adequate notice of decisions to transfer the residents to a lower level of care. In addition, the residents asserted they were not given notice of an administrative hearing where they could challenge those decisions. Federal regulations required that the services provided by the facility be medically necessary in order for the resident to receive Medicaid assistance. The regulations required that a proprietary review committee (“URC”) composed of doctors associated with the facility review the residents’ care plan periodically to determine whether each resident was receiving appropriate care, or whether a transfer to a different level care facility was appropriate. This review satisfied the “medically necessary” requirement for the resident to receive Medicaid assistance. The URC

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81 Id. at 155.
82 Id.
83 Id.
84 Id.
85 Id. at 157.
87 Id. at 995.
88 Id. at 994-95.
89 Id.
notified the state agency responsible for reimbursement of services when it determined the level of care for a resident needed to be reduced.\textsuperscript{90}

When the state agency refused to reimburse the nursing home for future treatment of the residents at the same level of care, the residents filed the lawsuit. On appeal, the residents argued that the State “affirmatively command[ed] the summary discharge or transfer of Medicaid patients” by nursing-home doctors through the operation of several federal and state regulations.\textsuperscript{91}

In a seven-to-two decision, the Court ruled against the residents. In reaching its decision, the Court focused mainly on the private decision-making of the nursing-home doctors.\textsuperscript{92} The Court noted the federal regulations mandated and controlled much of how nursing homes managed resident care. For example, homes providing excessive care faced potential expulsion from the Medicaid reimbursement program. In addition, regulations required state officials to review forms outlining each decision and to fine facilities that violated applicable regulations. In spite of these seemingly intertwining conditions, the Court determined that the full power to decide on discharge or transfer to a lower level of care facility ultimately rested with the doctors in charge of the residents’ care plan.\textsuperscript{93} Because discharge and transfer decisions were medical decisions determined by facility doctors and uninfluenced by the action of the State, to which the State merely responded by affecting Medicaid reimbursements according to assessment of the doctors, the \textit{Blum} Court ruled there was not a close-enough nexus between the State and the decision to transfer or discharge.\textsuperscript{94} A majority of the Court agreed that the State did not apply enough “coercive power” or “significant encouragement” toward the privately run nursing home to warrant labeling the home as a State actor.\textsuperscript{95}

In conclusion, the \textit{Blum} Court specified three principles that a court should examine when attempting to determine state-actor classification. First, the fact that a “business is subject to state regulation does not . . . convert its action[s] into that of the State for purposes of the Fourteenth Amendment.”\textsuperscript{96} Second, a State normally can be held liable for a private decision only when it has exercised enough coercive power or significant persuasion so that the private actor’s decisions are deemed decisions of the

\textsuperscript{90} Id. at 995.
\textsuperscript{91} Id. at 995-96, 1005.
\textsuperscript{92} Id. at 1010.
\textsuperscript{93} Id. at 1009-10.
\textsuperscript{94} Id. at 1010.
\textsuperscript{95} Id. at 1004.
\textsuperscript{96} Id. at 992.
State. Third, the required nexus may be present only if the private entity has exerted powers that are “traditionally the exclusive prerogative of the State.”

In 2011, the three Blum principles were applied in two § 1983 lawsuits brought against private nursing homes: Taormina v. Suburban Woods and Baum v. Northern Dutchess Hospital.

In Taormina, the estate of a deceased nursing-home resident sought remedy for FNHRA rights violations through a § 1983 cause of action. The plaintiff (“Taormina”) was the daughter of a resident of Suburban Woods Health and Rehabilitation Center (“Suburban Woods”). Taormina’s mother had been admitted to the facility for a variety of rehabilitation and medical treatments. Suburban Woods was a privately run facility that operated without active direction from any government entity. However, Suburban Woods also was a participant in the federal Medicaid reimbursement program and, as such, was subject to both state and federal regulations regarding patient care. While under the supervision of a speech and language pathologist contracted by Suburban Woods, the deceased choked on food and died. Taormina drew exclusively on the decision in Grammer to prove the existence of federal rights via FNHRA. The court did not address this issue, but instead focused on the fact that one of the requirements of a § 1983 lawsuit was that “the defendant acted under the color of state law, in other words, that there was a state action.” Taormina argued that Suburban Woods satisfied this requirement because it received funding from the state government, it was subject to regular inspections and a state-mandated licensing regime, and it was required to comply with various state laws governing patient care. In addition, Taormina contended a close nexus between the state’s licensing, regulations, and funding of the nursing-home facility established state action. Taormina further argued that the state exercised coercive power, or overtly encouraged Suburban Woods to

97 Id.
98 Id. at 1005 (citing Jackson v. Metro. Edison Co., 419 U.S. 345, 353 (1974)).
101 Taormina, 765 F. Supp. 2d at 668.
102 Id.
103 Id.
104 Id.
105 Id.
106 Id.
107 Id. at 669.
108 Id.
109 Id.
provide substandard care, because the state’s incentive program encouraged facilities to manage and reduce costs.\textsuperscript{110} The \textit{Taormina} court referenced the ruling in \textit{Blum}, however, and held the allegations were insufficient to plead a close nexus between the state and the nursing home. Noting that a mere incentive is not sufficient to justify holding the state responsible for a private party’s actions, the court refused to rule that Suburban Woods was operating as a state actor.\textsuperscript{111} \textit{Taormina} attempted to use the ruling in \textit{Grammer} to support changing the state-actor inquiry and thereby convert the actions of a private nursing home into action by the state.\textsuperscript{112} However, the court countered with the fact that \textit{Grammer} did not consider whether the plaintiff was a state actor because the nursing home involved in \textit{Grammer} was a county-run facility.\textsuperscript{113} The court concluded that FNHRA does not transform a traditionally private act into a public one, unless government itself becomes directly involved.\textsuperscript{114}

In \textit{Baum v. Northern Dutchess Hospital},\textsuperscript{115} the administrator of a nursing-home resident’s estate filed a § 1983 action against a privately run nursing home and hospital. The \textit{Baum} court held that FNHRA did not authorize a private cause of action, and the nursing home was not a state actor.\textsuperscript{116} The decedent in this lawsuit (“Baum”) was admitted to Northern Dutchess Hospital (“Northern Duchess”) for hip surgery and then went to Wingate Nursing Home for rehabilitation. While at Wingate, Baum developed bedsores and died. Baum’s lawyers asserted that FNHRA was rights-creating and because Wingate and New York State were “inextricably intertwined” in providing medical services, Wingate acted under the color of law in treating the decedent.\textsuperscript{117} Baum relied predominately on the ruling in \textit{Grammer} to support his position.\textsuperscript{118} The \textit{Baum} court countered by detailing various cases that had not adopted \textit{Grammer}’s line of reasoning in holding a nursing home subject to a § 1983 lawsuit. Citing these cases, the court disagreed with the ruling in \textit{Grammer} and ruled that FNHRA did not confer a federal right. The court also addressed the state-actor requirement for a § 1983 lawsuit and relied heavily on the \textit{Blum} ruling. As in \textit{Blum}, the court determined the state did not exclusively coerce or influence patient care through its regulatory authority. Therefore, it could not be considered a co-actor in the delivery

\begin{thebibliography}{9}
\bibitem{110} Id.
\bibitem{111} Id.
\bibitem{112} Id. at 672.
\bibitem{113} Id.
\bibitem{114} Id.
\bibitem{116} Id. at 428.
\bibitem{117} Id. at 417.
\bibitem{118} Id. at 421.
\end{thebibliography}
of medical services. Finally, the court reasoned, “government does not treat bed sores,” medical doctors do. Law cannot transform that private action into a public one.\textsuperscript{119}

\textbf{Conclusion}

Even though conditions in nursing homes have improved since the passing of the Federal Nursing Home Reform Amendment in 1987, the existence of substandard care in nursing homes, which Congress attempted to correct with the statute, still exists today. As various state agencies, advocacy groups, and victims’ families attempt to educate the public on the failure of nursing homes to ensure that the elderly receive the best quality medical care in the waning years of their lives, the courts are struggling with how to make substandard nursing homes responsible for unacceptable care and conditions. As evidenced by the ruling in \textit{Grammer}, some players in the legal world are still trying to achieve what Congress desired in drafting FNHRA: protecting nursing-home residents.

Although privately run nursing homes probably cannot be considered state actors and thereby making a private cause of action under § 1396r difficult to demonstrate, \textit{Grammer} does open the door for state-run nursing homes to be held accountable for abuse and substandard care. In light of several courts’ conflicting interpretations of FNHRA’s provisions, Congress should amend the law and clearly establish a cause of action. Such an amendment would accomplish the original purpose of FNHRA: improving nursing-home conditions. Considering that most of us at some point in our future will live the nursing-home experience first-hand, we should keep this topic on our radar.

\textsuperscript{119} \textit{Id.} at 433.