# 7 TO 2 - THE US SUPREME COURT CONFIRMS THAT FEDERAL NURSING HOME REFORM ACT CREATES PATIENT ENFORCEABLE RIGHTS

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**US Policy and Regulatory Alert**

On 8 June 2023, in *Health and Hospital Corporation of Marion County v. Talevski*, the United States Supreme Court ruled that the rights set out in the Federal Nursing Home Reform Act (FNHRA) can be enforced under 42 U.S.C. § 1983 by a resident of a publicly owned nursing home. Claims recognized under § 1983 can result in an award of damages and attorney's fees to the plaintiff that may not be otherwise available.

FNHRA is a federal statute enacted under Art. I, §8 of the Constitution (i.e., a Spending Clause). The Constitutional Spending Clause authorizes the federal "Legislature to lay and collect Taxes . . . to pay the Debts and provide for the common Defense and general Welfare of the United States." FNHRA creates the right of a resident to be free from unnecessary chemical restraints and to be discharged or transferred only when certain preconditions are satisfied, but it does not specifically authorize litigation by resident to enforce these rights. The Supreme Court's ruling appears to put an end to the argument that federal rights enacted by Congress under the Spending Clause are outside the scope of "laws" enforceable under § 1983. In so doing, the Court generally reaffirmed the ability of residents to bring federal lawsuits when someone "under color of state law violates 'any rights … secured by the Constitution and laws.'"[1]

## WHY THIS CASE MATTERS

This case is important to publicly owned nursing homes, patients and the federal government as evidenced by the large number of friend of the court briefs filed, including briefs by past and present members of the House and the Senate and senior officials of the United States Department of Health and Human Services.[2] The decision is significant to the federal government because it allows the federal government to leverage regulatory compliance by harnessing the power of patients as litigants who can enforce their congressionally conferred rights. It is important to publicly owned nursing homes because it confirms a resident's power to institute litigation to address federally granted resident rights.

Although the *Talevski* decision concerned a county-owned nursing home and is limited to two discrete FNHRA provisions, this decision will almost certainly lead to additional § 1983 litigation against other government-owned nursing home facilities, particularly in states with statutory caps on damages and attorneys' fee awards. As such, *Talevski* may not be the last time the courts deal with the scope of individual rights in the delivery of health care under § 1983. Notably, on 20 June 2023, the Supreme Court remanded two cases for further consideration in light of the *Talevski* decision. Moreover, according to some commentators, the costs associated with defending additional § 1983 suits, as well as any associated increases in facilities' liability insurance premiums, could lead to

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additional financial strain on an industry already struggling to recover from the COVID-19 pandemic and a workforce crisis, making it more difficult to provide quality care.

## FACTS IN THE CASE

In 2016, Gorgi Talevski became a resident of Valparaiso Care and Rehabilitation (VCR), a county-owned nursing facility in Indiana, due to his dementia.[3] After his condition deteriorated later the year, his daughter suspected and confirmed with an outside physician that VCR was chemically restraining Talevski with six psychotropic medications.[4] In that same year, VCR also began sending Talevski to a psychiatric hospital 90 minutes away for several days at a time based on his alleged harassment of female residents and staff.[5] After the third transfer, VCR refused to readmit Talevski and attempted to transfer him to a dementia facility in Indianapolis, without notification to him or his family.[6]

Taleveski, through his wife, brought an action against VCR, American Senior Communities, LLC, and Health and Hospital Corporation of Marion County (collectively, HHC). The suit claimed that HHC's use of chemical restraints and its attempts to transfer Talevski violated rights guaranteed to Talevski under FNHRA that the facility "protect and promote the rights of each resident" as a condition to receiving federal Medicare and Medicaid funding.[7] These rights included "[t]he right to be free from . . . any physical or chemical restraints imposed for purposes of discipline or convenience and not required to treat the resident's medical symptoms,"[8] and the right to be transferred or discharged only when certain conditions are met.[9]

Because FNHRA does not contain a private right of action, Talevski filed his suit under 42 U.S.C. § 1983, which authorizes private suits against state and local governments who deprive the plaintiff of rights "secured by the Constitution or laws."[10] The District Court granted HHC's motion to dismiss, finding that a plaintiff cannot enforce FNHRA via § 1983. On appeal, the Seventh Circuit reversed.

The United States Supreme Court affirmed the Seventh Circuit, holding that FNHRA "unambiguously" creates rights that are enforceable by § 1983. As a threshold matter, HHC argued that the Court should narrow or overrule precedent permitting plaintiffs to use § 1983 to remediate the violation of a wide array of federal statutes involving the Spending Clause of the US Constitution. The crux of HHC's argument was that FNHRA may not be enforced by third-party beneficiaries via § 1983 because FNHRA and other Spending Clause statutes are essentially contracts between the federal government and states, and common law principles in effect in 1871, when § 1983 was enacted, did not recognize third-party beneficiary enforcement rights. The Court, however, found HHC's arguments unpersuasive for two reasons. First, the Court found HHC's common law argument—that contracts were not enforceable by third-party beneficiaries at common law—to be "at a minimum, contestable."[11] Second, the Court explained that "the cause of action created by § 1983 is, and was always regarded as, a tort claim."[12] The Court went on to state that HHC had "utterly failed" to identify any reason to displace the plain scope of § 1983's tort liability.[13]

With that threshold issue resolved, the Court applied its § 1983 precedent to the two FNHRA provisions at issue. In doing so, the Court looked at whether the statutory provisions unambiguously conferred individual rights.[14] The Court found that both provisions directly concern the resident's rights. Under the first provision, the statute requires the nursing home to "protect and promote the rights of each *resident*."[15] Additionally, the second provision requires that the nursing home "permit each *resident* to remain in the facility" unless the enumerated conditions are met.[16] As such, the Court found that the two provisions used "rights-creating language," speak "in

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terms of the persons benefited," and have an "unmistakable focus on the benefited class," making them presumptively enforceable under § 1983.[17]

Finally, the Court explained that the presumption that a statute unambiguously secures rights for purposes of § 1983 may be rebutted by demonstrating that Congress did not intend those rights to be enforceable under § 1983.[18] The defendant can do this by showing that the statute expressly forbids a § 1983 action, or by showing that "Congress issued the same command implicitly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983."[19] Because FNHRA does not expressly prohibit § 1983 actions, the Court focused on FNHRA's administrative processes concerning inspection of covered nursing facilities and accountability for noncompliant facilities, finding that those processes do not preclude a § 1983 action, and a § 1983 action would not frustrate the purpose of the administrative process outlined in FNHRA.[20] Because the FNHRA rights at issue were "unambiguous," and there was no "incompatibility" between FNHRA's administrative enforcement mechanisms and a private § 1983 action, Talevski's § 1983 suit could proceed.

## CALL TO ACTION

As is often the case, adopting, and more importantly implementing, appropriate policies and procedures may help avoid or reduce the adverse consequences of hard decisions confronted by facilities.

The individual tasked with monitoring regulatory compliance at your nursing home should take this moment to consider the benefit of reviewing the following:

- The relevant statutes, regulations and CMS Manual provisions related to resident rights.

For example, you may want to review the CMS State Operations Manual Chapter 7 - Survey and Enforcement Process for Skilled Nursing Facilities and Nursing Facilities, including Appendix PP, which provides examples of specific situations deemed to violate a resident's rights.

- Your policies and procedures, including those impacting or referencing resident rights, such as your form for the Resident Bill of Rights.
- The documentation your facility creates and maintains regarding staff education about your policies and procedures, including but not limited to, staff's obligation to internally report their concerns.

This documentation might include (a) periodic notices to employees of their obligations; (b) employee training materials, dates of training, and associated training logs; (c) the form of an Employee Bill of Rights; (d) employee-signed attestations of training; and (e) copies of posters in the facility about reporting and photographs of those posters prominently displayed in the employee break room or elsewhere.

- Your facility's processes for investigating incidents, determining corrective action needed, reporting events to state regulatory agencies (when required), and creating key documents (which might include incident report forms and statements from witnesses).

To the extent that attorney client privilege might be needed in specific instances with respect to any of this work, you may want a process and procedure to define when an investigation will be overseen by counsel.

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- The relevant statutes, regulations, and CMS Manual provisions related to admissions, discharges and transfers.
- Your resident intake policies and procedures including, but not limited to, the timely and legible completion of all documentation related to informing patients of their rights.
- Your policies, procedures, and internal process for transfers, discharges, and readmissions, including the internal process for evaluating decisions with respect to patients whose needs may be progressing beyond the facility's capabilities.

This list is meant to be a starting point, not an exhaustive list, and you need to tailor you work to your facility. K&L Gates' Health Care practice regularly advises health care providers on compliance issues.

## FOOTNOTES

[1] *Health and Hospital Corporation of Marion County v. Talevski*, 599 U. S. ____ (2023), at 1. (Barrett, J., concurring).

[2] Amici briefs were filed by members of the House and the Senate, senior officials of the United States Department of Health and Human Services, National Association of Community Health Centers and Thirty One Primary Care Associations, Contract Law and Legal History Professors, AARP, the California Medical Association, the American Cancer Society Cancer Action Network, the American Diabetes Association, The AIDS Institute, the Cystic Fibrosis Foundation, the Epilepsy Foundation, the Hemophilia Federation of America, the Leukemia & Lymphoma Society, the National Multiple Sclerosis Society, the National Patient Advocate Foundation, the National Organization for Rare Disorders, WomenHeart, the ACLU, etc.

[3] *Talevski*, note 1, at 3.

[4] *Id*.

[5] *Id*.

[6] *Id*.

[7] *Id*. at 1.

[8] 42 U.S.C. § 1396r(c)(1)(A)(ii).

[9] *Id*. § 1396r(c)(2)(A).

[10] *Id*. § 1983.

[11] *Talevski*, note 1, at 9.

[12] *Id*. at 10 (quoting *Monterey v. Del Monte Dunes at Monterey, Ltd*., 526 U.S. 687, 727 (1999)).

[13] *Id*.

[14] *Id*. at 11 (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002)).

[15] 42 U.S.C. § 1396r(c)(1)(A)(ii) (emphasis added).

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[16] 42 U.S.C. § 1396r(c)(2)(A) (emphasis added).

[17] *Talevski*, note 1, at 16-17.

[18] *Id*. at 17 (quoting *Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005)).

[19] *Id*. (internal quotation marks omitted).

[20] *Id*. at 18-19.

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