

## California Court of Appeal Confirms Limited Recovery Under Health & Safety Code Section 1430(b)

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In the recent case of *Lemaire v. Covenant Care California (2015) LLC.*, 234 Cal.App.4th 860, the California Court of Appeal confirmed its prior holding that a plaintiff's recovery under Health and Safety Code section 1430(b) was limited to \$500, regardless of the number of violations involved (See *Nevarrez v. San Marino Skilled Nursing and Wellness Centre (2013)* 221 Cal.App.4th 102.) Further, for the first time, the Court of Appeal expressly stated that a plaintiff can

pursue an action under 1430(b) for deficient medical recordkeeping standing alone.

### Background of Lemaire Case

In *Lemaire*, the plaintiff's mother was admitted to Covenant's skilled nursing facility in 2010. After her mother passed, Lemaire sued the facility for wrongful death, elder abuse, and violations of patients' rights under section 1430(b). Lemaire alleged that the facility was

understaffed and that the medical records were illegible, undated, unsigned, and failed to contain sufficient narratives. The plaintiff sought \$500 per violation per day. The jury found against Lemaire on her wrongful death and elder abuse causes of action, but agreed that Covenant did not provide "complete and accurate health records" and "meaningful and informative nurses' progress notes." The jury found a total of 540 patient violations and awarded plaintiff \$500 for each, resulting in a judgment against Covenant for \$270,000 in statutory damages, \$841,842 in attorney fees, and \$26,327.45 in costs.

### California Court of Appeal Decision

The Court of Appeal held that long term care patients may sue for poor charting under section 1430(b). That statute provides that "[a] current or former resident or patient of a skilled nursing facility . . . may 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 Court of Appeal reasoned that regulations requiring proper charting were enacted for patient benefit and so, a private right of action existed under section 1430(b). The Court of Appeal rejected Covenant’s argument that no private right of action to enforce recordkeeping regulations exists, holding that “[t]he absence of express language in the regulations about a private right of action does not bar litigation to enforce regulatory compliance . . .”

The Court of Appeal agreed with Covenant that section 1430(b) permitted a *single* award of \$500 for *all* violations, regardless of the number of violations. In doing so, the Court of Appeal confirmed its prior holding in *Nevarrez* where it first decided that section 1430(b) had a \$500 recovery limit. As in *Nevarrez*, the Court of Appeal reversed the damage award and the attorney fees and costs. Because the damage award was substantially reduced, the amount of attorney fees and costs recoverable is impacted, and must be reconsidered.

### **Significance of Lemaire**

The *Lemaire* case is significant

because it reaffirms its holding of the \$500 recovery limit in *Nevarrez*, and expressly makes nursing facilities accountable for poor charting, even where there was insufficient evidence of abuse or negligence. For instance, in *Lemaire*, despite providing Lemaire’s mother with overall good care, Covenant was penalized solely for its charting. By allowing a private right of action for deficient charting under section 1430(b), the Court of Appeal has made it easier for plaintiffs to maintain an action against nursing facilities, given the strong likelihood that any healthcare chart will have at least some defects.

A nursing facility’s responsibility to maintain proper charting is further compounded where certain services, such as therapy, have been contracted out. In such cases, a nursing home may also be subjected to liability for the improper charting of outside providers not under its control. For instance, in 2012, Bethany Lutheran Homes, Inc. was hit with false claims allegations and forced to enter into a corporate integrity agreement after it was discovered that the therapy charting was improper. Although Bethany had contracted with a therapy company to provide therapy

services (and therapy charting), it was still held accountable for the vendor’s improper charting. Moreover, in light of the ruling in *Lemaire*, it remains to be seen how courts will grapple with subjective disagreements over the sufficiency of entries in the chart. For instance, would it be sufficient for a nurse to note that, upon discovering a change of condition, a physician was notified, or would the entry need to state exactly what was told to the physician? The *Lemaire* case highlights yet another problem for nursing facilities to worry about, many of which are already financially-strapped and understaffed.

Given the *Lemaire* holding, it is crucial that nursing facilities have in place a strong quality assurance program that includes frequent internal audits of records even if the entries are recorded by outside vendors.

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