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ST. RITA’S AND LOST CAUSES: IMPROVING NURSING HOME EMERGENCY PREPAREDNESS

Robert A. Mead*

INTRODUCTION

Early in the morning on August 29, 2005, Hurricane Katrina made landfall, passing slightly east of New Orleans, Louisiana as a Category Four storm with torrential rain and winds over 130 miles per hour. The storm caused fifteen to twenty-three foot storm surges off of Lake Ponchartrain. The initial celebration that New Orleans did not receive a direct hit from the storm was quickly replaced by panic and mayhem when the levees that protect low-lying New Orleans from the higher waters of Lake Ponchartrain and the Mississippi River began to fail, flooding roughly eighty percent of the city under as much as twenty feet of water. Although the images of trapped residents and dead bodies are fresh in the nation’s memory, city officials estimate that approximately eighty percent of the population had complied with evacuation orders and escaped. Nevertheless, as of December 9, 2005, state officials had recovered nearly 1,100 bodies of people killed by the storm and

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3. Id.
4. Id.
subsequent flooding. Over sixty percent of the deceased were at least sixty-one years old, and at least 215 of the bodies were found in or around nursing homes and hospitals. Louisiana Department of Health and Hospitals' spokesman, Bob Johannessen, explained that the "elderly were much more likely to be in hospitals and nursing homes as well as possibly homebound and not able to access transportation in order to evacuate from the storm."

One group of elderly Katrina victims was found in St. Rita's Nursing Home, in Violet, an incorporated community located in St. Bernard Parish, a suburban area southeast of New Orleans. State and local officials have concluded that thirty-four residents of the nursing home were killed by rapidly rising flood waters. On September 13, 2005, the Louisiana Attorney General, Charles C. Foti, Jr. and parish officials brought thirty-four counts of negligent homicide against each of the owners of St. Rita’s, Mabel Mangano and Salvador Mangano Sr., because of their failure to comply with mandatory evacuation orders and their facility’s own emergency response plan. State and local officials are continuing their investigation of the tragedy while the Manganos prepare their legal defense.

Fittingly, St. Rita is revered as the patron saint of lost or impossible causes. The massive impact of Hurricane Katrina on the elderly residents of New Orleans and surrounding areas

7. Id.
8. Body is Thought to be Nursing Home Patient's, TIMES-PICAYUNE, Oct. 6, 2005, at 7. At the time of arrest, only thirty-four bodies had been found. The suspected thirty-fifth victim of the St. Rita's tragedy was found on October 1, 2005, behind the facility in a wooded area. Although it is not definite that the body came from St. Rita's, the storm victim still had a feeding tube inserted in her body. To date, there has not been an additional negligent homicide charge brought against the Manganos.
forces the critical question of whether existing evacuation and facility safety policies are reasonably sufficient to protect the lives of residents of nursing homes. This article contends that the current regulatory scheme for both nursing home safety design and evacuation planning makes safety during natural disasters an impossible cause that demands rectification. The first section of this article examines recent nursing home tragedies caused by hurricanes Katrina and Rita. Examples of resident deaths caused by both non-evacuation and problematic evacuation are documented as case studies that highlight the dilemma currently faced by nursing home administrators when natural disasters are predicted. The second section details the perfunctory nature of the federal regulations requiring nursing homes to develop emergency preparedness and evacuation plans. Louisiana's revised nursing home licensure regulations regarding emergency preparedness are highlighted in comparison to the federal regulations. The third section analyzes the failure of state legislatures to hold the nursing home industry accountable to higher emergency preparedness standards. The weaknesses of current regulatory requirements are exacerbated by the power of the nursing home lobby to limit state statutory efforts to tighten safety requirements, as shown by the legislative process in Florida and Louisiana. The fourth section focuses on judicial alternatives to strengthened regulation through the pursuit of tort and criminal lawsuits. The upcoming prosecution of Salvador and Mabel Mangano for negligent homicide is considered as a potential bell-weather case. The final section consists of recommendations for strengthened federal regulations governing nursing home emergency preparedness. This article concludes with the assertion that regulation, rather than legislative or judicial alternatives, provides the superior vehicle for keeping the nation's nursing home residents as safe as possible during natural disasters.
Recent Nursing Home Evacuation Tragedies

Residents of nursing homes are frail, disabled, and usually elderly.\textsuperscript{11} The fact that they are residents of a nursing home typically indicates that they are unable to care for themselves and need the assistance of nursing staff for many basic self-care tasks.\textsuperscript{12} This inability to care for themselves is compounded in natural disasters, where the elderly are most likely to suffer the impacts.\textsuperscript{13} In addition to hurricanes, other natural disasters that can affect nursing home residents are floods,\textsuperscript{14} wildfires,\textsuperscript{15} tornadoes,\textsuperscript{16} earthquakes,\textsuperscript{17} blizzards and ice storms,\textsuperscript{18} and periods of extreme heat.\textsuperscript{19} All natural disasters are potentially

\begin{itemize}
  \item \textsuperscript{11} Marshall B. Kapp, \textit{Resident Safety and Medical Errors in Nursing Homes: Reporting and Disclosure in a Culture of Mutual Distrust}, 24 J. LEGAL MED. 51, 53 (2003).
  \item \textsuperscript{12} Id.
  \item \textsuperscript{13} U.S. Admin. on Aging and the Kansas Dep’t on Aging, \textit{Emergency Preparedness Manual for the Aging Network} 1 (1995), at 5.
  \item \textsuperscript{14} Forty-seven residents of a nursing home in Ada, Minnesota were evacuated when the town flooded in 1997. Within seven months, fifteen of the evacuees had died of natural causes, complicated by the stress, loneliness, and despair caused by the evacuation. \textit{William Oriol, Psychosocial Issues for Older Adults in Disasters} 27 (1999).
  \item \textsuperscript{15} In the 1998 Florida wildfires, three nursing home residents died during evacuation. \textit{Courage Under Florida's Fires}, PALM BEACH POST, July 12, 1998, at 1E.
  \item \textsuperscript{16} On May 30, 2004, a tornado destroyed the Friendship Healthcare Nursing Home near Indianapolis, Indiana, with little warning. Although no one was directly killed by the tornado itself, the damage forced the fifty-one residents to move to another nursing home for over a year, causing transfer trauma, potentially exacerbating the illnesses that caused the death of nineteen of the residents during the following year. \textit{Will Higgins, Nursing Home Recovers from '04 Tornado}, INDIANAPOLIS STAR, Sept. 17, 2005.
  \item \textsuperscript{17} The January 17, 1994 Northridge, California earthquake forced a pre-dawn evacuation of residents of the Simi Valley Rehabilitation and Nursing Center to a local hospital because the earthquake opened a crack through the building. \textit{Betty Kwong, Hospital Makes Room for Seniors}, DAILY NEWS, July 3, 1994, at 1.
  \item \textsuperscript{18} A West Virginia nursing home was evacuated after a winter storm knocked out electricity and dropped the temperatures to an eleven-degree low. \textit{W. Va. Wind Chill 20 Below Zero}, DAILY MAIL, Jan. 4, 1999, at 1A.
  \item \textsuperscript{19} Two patients died in the SunBridge Care & Rehabilitation Nursing Home in Burlingame, California, in a June 2000 heat wave when temperatures reached 108 degrees on the second floor of the building which did not have air conditioning. \textit{Nancy Weaver Teichert, Nursing Home Chain Told to Make Upgrades}, SACRAMENTO BEE, Oct. 5, 2001; \textit{See also} Eric Klinenberg, \textit{Heat Wave: A Social Autopsy of Disaster in Chicago} (2002) (detailing the deaths of over 700, mostly elderly, victims of the 1995 Chicago heat wave).
\end{itemize}
lethal and grounds for a presidential, state, or local disaster declaration. Fire safety equipment and procedures are also a critical element of nursing home emergency preparedness plans. Non-natural disasters, including industrial chemical accidents and acts of terrorism, are also threats to the lives and safety of nursing home residents and need to be included in facility emergency preparedness plans, but they are beyond the scope of this article.

Emergency preparedness strategies for nursing home residents are complicated by the fact that elders often die or are

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20. A FEMA map showing a national distribution of the 1,198 Presidential Disaster Declarations between December 24, 1964 and January 12, 1998. It shows heavy concentration of disasters along in California, Washington, Louisiana, Florida, Oklahoma, North Dakota, Minnesota, Kentucky, Hawaii, Virginia, Maine, Massachusetts, and scattered pockets throughout tornado country. Over fifty percent of these declarations have been due to flooding with another approximately twenty percent attributable to tornados. FEMA, Historical Presidential Disaster Declarations (May 23, 2005), available at http://www.fema.gov/graphics/library/dd-1964.gif.

21. Over one-half of the nation’s 16,000 nursing homes are in violation of fire safety standards each year. Peter Eisler, Fire Risks Threaten Assisted Living, USA TODAY, Dec. 16-18, 2005, at 1A. Sprinklers are not now required under the federal regulations. Reta A. Underwood, Survey Survival: Don’t Fool with Mother Nature, 54 NURSING HOMES 66 (Nov. 2005). This contributes to tragedies such as the two deaths on December 12, 2005, at the Mather Nursing Center in Ishpeming, Michigan. The State Police Fire Investigator, Jeff Hubbard, explained that “[i]f there would have been a sprinkler system in the room, I’m sure it could have helped, but it’s not required.” Pete Mackin & Steve Brownlee, Police Mum on Fire Probe: Report Due Thursday on Cause, MINING J., Dec. 14, 2005, available at http://www.miningjournal.net/news/story/1214202005_new02-n1214.asp. Alison Hirschel, of the Michigan Campaign for Quality Care, notes, “ninety-two percent of Michigan nursing homes were cited for fire safety violations during the latest inspection” and she finds it “shocking and unconscionable that almost two-thirds of our frail, vulnerable nursing home population live in facilities that cannot adequately protect them in case of fire and that virtually all nursing homes violate some fire safety requirements.” Alison Hirschel, State Nursing Homes Need Safety Upgrade, LANSING STATE J., Dec. 15, 2005, at 11A.

22. See Ute J. Dymon & Robert Schwartz, Nursing Home Evacuation Plans: Myth or Reality; The Greater Cleveland Area as a Case Study, 2002 J. OF THE AM. SOC. OF PROF. EMERGENCY PLANNERS 97, 103 (2002) (finding that although sixty percent of twenty-five randomly selected nursing homes in Cuyahoga County, Ohio were within one mile of a hazardous chemical storage facility only eight percent of the administrators who responded to the study’s survey were aware of such facilities).

23. Non-natural disasters, whether intentional or unintentional, are much more complicated to plan for and require even greater coordination with local and national authorities. JAMES T. TWEEDY, HEALTHCARE HAZARD CONTROL AND SAFETY MANAGEMENT 133 (1997). One study found that about one-half of the nursing home evacuations in the 1980s were related to weather, with hurricanes being the most common cause to evacuate. BARBARA M. VOGT, EVACUATION OF INSTITUTIONALIZED AND SPECIAL POPULATIONS (1990).
injured during evacuations. Increased frailty can cause “transfer trauma,” which exacerbates illnesses and can even cause death.\textsuperscript{24} For example, in the 1997 Ada, Minnesota flood, of forty-seven residents evacuated from a nursing home, fifteen were dead within seven months of being transferred.\textsuperscript{25} Charlie Hicks, the nursing home’s director, explained, “[t]he stress of being uprooted in the middle of the night and deposited in places far from their families has simply been too much for many of the old people weakened by age and disease.”\textsuperscript{26} Transfer trauma may exacerbate the psychiatric and behavioral conditions affecting over an estimated ninety percent of nursing home residents.\textsuperscript{27} The most potentially lethal transfers are those where a facility is shut down or its residents are otherwise dispersed, causing a “serious deterioration in the support system.”\textsuperscript{28} Although it would be unethical to construct a valid scientific study to prove the point, emergency evacuations on unsafe buses in sweltering conditions where friends from the nursing home are dying in transit is likely to exponentially increase transfer trauma. Cohort studies of the effects of evacuation on residents who survived Hurricanes Katrina and Rita would provide a badly needed understanding of both the vulnerabilities and resiliencies of nursing home residents who were transferred. Transfer trauma can be mitigated by care providers who help to reestablish routines and reconnect ties with caregivers, friends, and family.\textsuperscript{29}

\textsuperscript{24} U.S. Admin. on Aging and the Kansas Dep’t on Aging, supra note 13, at 5. See also H.R. REP. NO. 106-44, at 3 (1999) (“According to a Feb. 8, 1999 letter to Health and Environment Subcommittee Chairman Michael Bilirakis in support of H.R. 540 from Geme G. Hernandez, Florida Secretary of Elder Affairs, ‘The evidence is overwhelming that, without extraordinary preparatory efforts that are hardly ever made, any move is harmful for the preponderance of the frail elderly; the technical term is ‘transfer trauma.’”).

\textsuperscript{25} ORIOL, supra note 14, at 27.

\textsuperscript{26} Id. at 38.

\textsuperscript{27} Id.

\textsuperscript{28} Terri D. Kellive, Studies of Transfer Trauma in Nursing Home Patients: How the Legal System Has Failed to See the Whole Picture, 3 HEALTH MATRIX: J. OF LAW-MEDICINE 421, 439 (1993) (citing Thomas L. Coffman, Relocation and Survival of Institutionalized Aged: A Re-examination of the Evidence, 21 GERONTOLOGIST 483, 492 (1981)).

\textsuperscript{29} Elizabeth Fried Ellen, The Elderly May Have Advantage in Natural Disaster, 18
ST. RITA'S NURSING HOME AND THE FAILURE TO EVACUATE

The disputed facts regarding what happened on August 28 and 29, 2005, at St. Rita's Nursing Home are beginning to emerge sufficiently enough to highlight critical issues regarding the evacuation of nursing homes. Nevertheless, the advocates in the criminal and tort cases are busily coloring the facts in the press in preparation for trial. In order to provide the broadest and fairest view, this article includes information from defense counsel, reporters' descriptions, as well as quotations from local and state authorities and prosecutors.

St. Rita's Nursing Home, a one-story brick facility, sits in an area of comparative high ground in the low-lying region southeast of New Orleans in St. Bernard's Parish that had not flooded prior to Hurricane Katrina, even during Hurricane Betsy in 1965. It is owned and operated by Salvador and Mabel Mangano. The facility was home to approximately seventy residents, including at least five "special needs" residents who needed to be transferred in ambulances to an evacuation facility with appropriate medical capabilities. St. Rita's Nursing Home had an average safety record, with no deaths related to

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31. Paul Rioux, Attorney: Arrested Nursing Home Operators are Heroes, Times-Picayune, Sep. 14, 2005, at 99 [hereinafter Operators are Heros]. Newsnight: President Bush Accepts Responsibility For Katrina Failures; Controversy Over Gathering of the Dead in New Orleans; Did Racism Effect the Governments Response to Hurricane Katrina? (CNN television broadcast Sept. 13, 2005) available at http://transcripts.cnn.com/TRANSCRIPTS/0509/13/asb.01.html [hereinafter Newsnight] (quoting Dr. Bryan Bertucci saying "one of the owners, Mable [sic] Mangano, was betting on her experience that this nursing home was on high ground, had never flooded, and that New Orleans had been spared before."); Laura Parker, What really happened at St. Rita's? Dozens of residents died when Katrina's storm surge flooded a nursing home. Now, emerging details are shedding light on the tragedy — and even debunking a few myths, USA TODAY, Nov. 29, 2005, at IA.
32. Foti, supra note 9.
33. Paul Rioux, Doomed Nursing Home Had Offer of Bus Transport; Coroner says Owner Snubbed Help Until it was Too Late, TIMES-PICAYUNE, Sept. 9, 2005, at A2 [hereinafter Offer of Bus].
34. Newsnight, supra note 31 (quoting Dr. Bryan Bertucci).
substandard care, as well as a reputation for being a fairly good facility.\textsuperscript{35}

As Hurricane Katrina approached southeastern Louisiana, having been down-graded from a Category Five to a Category Four hurricane, a number of parishes ordered the mandatory evacuation of residents.\textsuperscript{36} An August 28, 2005, a news release from the Louisiana State Patrol regarding mandatory evacuation categorized St. Bernard Parish’s evacuation as mandatory, but also noted that the parish had made a “strong recommendation of evacuation.”\textsuperscript{37} Somewhat earlier, on Saturday, August 27, 2005, the \textit{New Orleans Times-Picayune} website quoted St. Bernard Parish Emergency Management Director, Larry Ingargiola, as saying that the parish had “recommended that all residents evacuate, though it likely will not declare a mandatory evacuation because the parish won’t offer shelters.”\textsuperscript{38} Whether and when St. Bernard’s Parish ordered a mandatory evacuation of the parish is likely to be a key issue in the Manganos’ negligent homicide prosecution.

St. Rita’s Nursing Home had an evacuation plan on file with St. Bernard Parish.\textsuperscript{39} Dr. Bryan Bertucci, the parish coroner, explained, “[a]ll of our nursing homes have evacuation plans to begin getting their residents to safety 72 hours before a hurricane is expected to make landfall. There may have been some extenuating circumstances that kept St. Rita’s from executing their plan.”\textsuperscript{40} The other nursing homes in St. Bernard

\textsuperscript{35} Id. (quoting Dr. Bryan Bertucci: “This was a very good home, provided very good care. The owners are very conscientious toward the patients.”).


\textsuperscript{37} Id. Bruce Nolan, \textit{Katrina Takes Aim}, \textit{TIMES-PICAYUNE}, Aug. 28, 2005, at 1 (The Times-Picayune lists St. Bernard Parish as having ordered an evacuation by the mid-afternoon of Sunday, August 28, 2005.).


\textsuperscript{39} Rioux, \textit{Offer of Bus}, supra note 33.

\textsuperscript{40} Id.
Parish successfully evacuated their patients. Larry Ingargiola explained that St. Rita’s plan was to “be out 72 to 48 hours” prior to when a hurricane was forecast to hit.

A second critical question of fact in the St. Rita’s prosecution will be whether St. Bernard Parish officials appropriately alerted St. Rita’s staff of the mandatory evacuation. Dr. Bryan Bertucci, the parish coroner, has publicly stated that he called Mabel Mangano about 2:00 p.m. on August 28, 2005, to urge her to accept evacuation assistance, asserting that “I told her I had two buses and two drivers who could evacuate all seventy of her residents and take them anywhere she wanted to go.” According to Dr. Bertucci, she declined the assistance, allegedly stating, “I have five nurses and a generator, and we’re going to stay here.” Dr. Bertucci has expressed the opinion that Mabel Mangano had decided to stay prior to his call, perhaps because ambulances were unavailable to evacuate her special care patients to the Superdome. She reportedly changed her mind two hours later and called to see if the buses were still available. Unfortunately, by that point, it was too late to evacuate, according to Dr. Bertucci, “[t]hey all could have been stuck on a highway in buses in the middle of a hurricane. It might have been an even worse tragedy than this.” The Manganos’ attorney, James Cobb, disputes Dr. Bertucci’s alleged offer of patient evacuation buses prior to the storm. He also disputes that parish officials alerted the

41. Id.
43. Rioux, Offer of Bus, supra note 33.
44. Id. See also Newsnight, supra note 31 (quoting Dr. Bertucci as stating Mabel Mangano said, “I have five nurses. I have a generator, and I have spoken to the families, and they said it was OK to stay.”).
46. Rioux Offer of Bus, supra note 33.
47. The outer bands of Hurricane Katrina hit St. Rita’s starting about 7:30 p.m. on August 28, 2005. Id.
48. Rioux, Offer of Bus, supra note 33.
49. Rioux, Operators are Heros, supra note 31.
Manganos of the mandatory evacuation.\textsuperscript{50}

After the storm passed on the morning of Monday, August 29, 2005, Salvador Mangano and several others stepped outside to inspect the grounds.\textsuperscript{51} They reported hearing a rumbling sound and saw a wall of water coming towards them.\textsuperscript{52} They rushed back inside the facility and attempted to barricade the doors and windows.\textsuperscript{53} Over the next twenty to thirty minutes, thirty-four residents drowned in the incoming water as the water filled the rooms from floor to ceiling.\textsuperscript{54} Contrary to some early media reports, the Manganos did not abandon their residents during the flooding, but instead stayed to work with their staff, fire-fighters, and neighbors to save as many residents as they could.\textsuperscript{55} Also contrary to early reports, none of the victims were found strapped to their beds or wheelchairs.\textsuperscript{56}

The Manganos assert that broken levees, rather than their failure to evacuate, caused the deaths at St. Rita's.\textsuperscript{57} The Manganos' attorney, James Cobb, characterizes their behavior after the storm as heroic, noting that they stayed at the facility in

\textsuperscript{50} Live From: Ophelia Strikes Outer Banks; Pumps Continue to Dry Out New Orleans; Bombings Kill Nearly 150 in Baghdad; Bush Asks U.N. for Unity on Poverty, Terrorism (CNN Sept. 14, 2005) available at http://transcripts.cnn.com/TRANSCRIPTS/0509/14/lol.02.html (James Cobb is quoted as saying, “Our view is that we absolutely had an evacuation plan. That plan was of record with the Department of Health and Hospitals. It was of record with St. Bernard Parish. That plan - they had it.”). When asked by host, Paula Zahn, why they didn’t execute the plan, Mr. Cobb answered

Ma’am? They did execute it. They sat and waited for a mandatory evacuation order from the officials at St. Bernard Parish. It never came. I just heard Dr. Patusi ... indicate that he called them and told them to evacuate. That is not the recollection of everybody at the nursing home. And they were in the facility, not someplace else. \textit{Id.}

\textsuperscript{51} Parker, supra note 31.

\textsuperscript{52} \textit{Id.}

\textsuperscript{53} \textit{Id.}

\textsuperscript{54} \textit{When Care Means Evacuating}, \textit{TIMES-PICAYUNE}, Sept. 20, 2005, at B6.


\textsuperscript{56} \textit{Id.}

\textsuperscript{57} Rioux, Operators are Heros, supra note 31 (the argument that the federal government’s failure to erect and maintain adequate levees is more to blame for the deaths caused by Hurricane Katrina than failure to evacuate is not isolated to nursing home cases). \textit{See} Jarvis DeBerry, \textit{We Needed Levees, Not More Buses}, \textit{TIMES-PICAYUNE}, Dec. 16, 2005, at 7.
order to help save fifty-two people, including residents, staffers, and their families.\textsuperscript{58} He also explained that their decision not to evacuate was affected by their concern that the evacuation could harm or kill more residents than the storm.\textsuperscript{59}

The whereabouts of Salvador and Mabel Mangano during the two week period after August 29, 2005, are unclear, although in the chaos of the evacuation, this also was true of many Gulf Coast residents. On September 8, 2005, Louisiana Attorney General, Charels C. Foti, Jr., announced that his Medicaid Fraud Control Unit was investigating an estimated thirty-two deaths at St. Rita’s Nursing Home and was looking for the Manganos and any other witnesses.\textsuperscript{60} On September 13, Salvador and Mabel Mangano voluntarily surrendered to the Medicaid Fraud Control Unit investigators\textsuperscript{61} and were each charged with thirty-four counts of negligent homicide.\textsuperscript{62} In response to their arrest, the Manganos’ attorney argued “[i]t’s ridiculous to arrest these two people considering the problems with the evacuation at all levels of the government.”\textsuperscript{63}

Other Louisiana nursing homes also decided not to evacuate their residents. As of October, 2005, Louisiana Attorney General Charles C. Foti, Jr. had instigated criminal investigations against thirteen nursing homes and six hospitals for failure to evacuate patients.\textsuperscript{64} According to a list compiled by the Louisiana Nursing Homes Association, of the approximately sixty nursing homes affected by Katrina, only twenty-one evacuated before the storm.\textsuperscript{65} In Orleans and Jefferson Parishes,
only eight of forty-one nursing homes evacuated. Some of these decisions not to evacuate were nearly as lethal as the tragedy at St. Rita’s. For example, at least nineteen residents died in the Lafon Nursing Home of the Holy Family in eastern New Orleans. The administrator, Sister Augustine McDaniel, reportedly decided to stay in the brick, two-story building rather than risk moving her fragile patients on the jammed evacuation routes, despite the fact that the facility had two evacuation addresses outside of New Orleans in its emergency preparedness plan. Most of the nursing home victims of Katrina did not die in flood waters, like the victims at St. Rita’s, or during evacuation transit. Rather, they died in the days following the hurricane, like the patients at the Lafon Nursing Home of the Holy Family, in sweltering hundred-degree conditions while overwhelmed nursing staff frantically sought emergency evacuation.

**Resident Deaths During Hurricane Evacuations**

Nursing home patients from other facilities died during evacuation from Hurricanes Katrina and Rita. For example, Thelma Wall, a ninety year-old resident of Huntington Place Senior Community in Chalmette, Louisiana died during an evacuation of the facility after an alleged twelve-hour bus ride in a school bus without air conditioning. The investigating police officer noted that the evacuees had not received medicine, food, or water during the trip, explaining, “[m]ost of them had to urinate on themselves and defecate . . . [t]he bus stopped one time in a 12-hour period. I verified that.”

67. Id.
71. Id. (quoting Carencro Police Department Lieutenant Tony Herbert).
Director of Emergency Preparedness, Larry Ingargiola, praised the nursing home's decision to evacuate, arguing, "At least they take the gumption to follow their plan and leave . . . [t]hey didn't abandon them." He explained that all the nursing homes in the parish including both St. Rita's and Huntington Place, had filed evacuation plans with his office calling for evacuation of residents forty-eight hours before a Category Three or stronger hurricane.

On September 23, 2005, just twenty-five days after Hurricane Katrina made landfall, Hurricane Rita, a Category Three storm, came ashore east of Houston. In response to recent events in New Orleans, many in Houston evacuated inland, causing massive traffic jams. In juxtaposition to the typical Louisiana decision not to evacuate, over 11,000 residents of nursing homes were evacuated in Texas.

Unfortunately, the Hurricane Rita evacuation highlights some of the additional risks inherent in the evacuation of nursing homes. On the morning of September 23, thirty-eight patients and six nurses from Brighton Gardens Nursing Home in Houston, Texas were being evacuated by bus to a nursing home in Dallas that was also owned by the parent company, Sunrise Senior Living. Twenty-three of the patients burned to death when the bus caught fire, likely because a faulty rear brake or wheel fire ignited the patient oxygen tanks in the luggage bays.

72. Id.
73. Id.
75. Id.
76. Terri Langford, Melanie Markley & Leigh Hopper, Hurricane Rita: The Aftermath, HOUSTON CHRONICLE, Sept. 27, 2005, at 1. See also Roma Khanna & James Pinkerton, Special Needs: Weighing the Risks of Moving the Elderly, HOUSTON CHRONICLE, Sept. 25, 2005, available at http://www.chron.com/disp/story.mpl/metropolitan/3369373.htm, (quoting Beth Ferris of the Austin chapter of Texas Advocates for Nursing Home Residents, "They were afraid not to evacuate people. Those images of people who died in their beds as floodwaters rose and the owners who have been indicted were fresh in people's minds when they decided to evacuate for Rita.").
under the seats. The nursing home had contracted with BusBank, a charter bus reservation and booking agent to provide the buses necessary to evacuate their nursing homes. The bus, operated by Global Limo of Pharr, Texas, reportedly had an illegal license plate, taken from one of the company’s other buses. The bus driver, Juan Robles Gutierrez, is an undocumented Mexican National who was initially detained and referred to a grand jury for twenty-three counts of negligent homicide despite accounts of his heroic efforts to get patients off of the bus. The grand jury refused to indict him, although he is currently required to stay in Houston pending the federal investigation of the cause of the crash. In addition to transfer trauma, evacuations can expose residents to dangers beyond the control of nursing home administrators, such as badly maintained and equipped buses and traffic accidents.

78. Lyman & Griffin, supra note 77.
79. Kevin Johnson, Texas: Ill-fated Charter Bus Had Expired Registration: Fire That Killed 23 Elderly Evacuees Under Investigation, USA TODAY, at A5. (Sunrise had used BusBank to secure buses to evacuate Louisiana nursing homes prior to Katrina. Sunrise spokesperson Sarah Evers explained, "It's our understanding that BusBank has a rigorous evaluation process.").
80. Terri Langford, Burned Bus Had Illegal Tags, Gaps in Its History, HOUSTON CHRONICLE, Sept. 30, 2005, available at http://www.chron.com/disp/story.mpl/special/05/rita/3376111.html ("On Thursday, Dallas County Sheriff's Department officials, who traced the burned vehicle's identification number, said the bus was actually a 1998 model and was registered to an Oklahoma couple — Robert John and Joanne Jaqueline McMynn — and should have been bearing an Oklahoma plate. It was not immediately clear why a bus registered to Oklahoma owners was bearing a tag for an older Texas bus owned by Global. However, a vehicle with an illegal license plate can make it more difficult for officials to track.").
Both emergency planning and adequate adherence to building codes are necessary for nursing homes to be able to contend with natural disasters. Federal Medicare and Medicaid regulations require that nursing homes have emergency preparedness plans that are constructed and maintained in compliance with the Life Safety Code. States typically require emergency preparedness plans as part of nursing home licensure. Despite the existence of these regulatory requirements, very few nursing homes are cited for inadequate evacuation plans. In 2004, only one percent of the nation's 17,000 nursing homes were cited by inspectors for inadequate emergency preparedness, as compared with 31.5% for poor food sanitation and 14.5% for residents who had pressure sores, a measurement used as an indicator of both poor care and inadequate staffing. This author contends that the surprisingly low citation rate for emergency preparedness is directly attributable to the scanty regulatory requirements for long-term care facilities rather than any realistic degree of disaster preparedness in the nation's nursing homes. Investigative reporting following Hurricanes Katrina and Rita confirms this suspicion. Reporters from the Houston Chronicle found that only forty-four of 130 nursing homes in Brazoria, Galveston, and Harris counties along the Texas Gulf Coast supplied evacuation plans to nursing home inspectors in 2004 and that fourteen of Louisiana's parishes "failed to meet the most basic of the state's requirements: keeping a copy of the homes' evacuation plans on file at the emergency operation centers."

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84. 42 C.F.R. § 483.75(m) (2005); 42 C.F.R. § 483.70 (2005).
85. See, e.g., LA. ADMIN. CODE tit. 48, § 9729(A) (1998).
regulatory laxity is pervasive regarding nursing home emergency preparedness and should be rectified in order to protect the nation's nursing home residents.

**FEDERAL EMERGENCY PREPAREDNESS REGULATIONS FOR NURSING HOMES**

In order to meet the needs of their residents, almost all nursing homes accept federal funding, typically Medicare and Medicaid payments. The Medicare statute requires nursing homes to provide care that attains or maintains "the highest practicable physical, mental and psychosocial well-being of each resident." The federal Department of Health and Human Services houses the Centers for Medicare and Medicaid Services (CMS) which works with various state healthcare agencies who conduct annual Skilled Nursing Facilities/Intermediate Care Facilities (SNF/ICF) surveys to determine "whether the quality of care, as intended by the law and regulations, and as needed by the resident, is actually being provided in nursing homes." The federal regulations require participating nursing homes to be licensed by state and local authorities. The regulatory standards used by the surveyors apply to both Medicare and Medicaid eligibility for long-term care facilities. Failure to implement the regulations may result in CMS finding that the provider is out of compliance with the regulatory conditions for participation in the program, and it may either terminate the provider agreement or use "any other applicable intermediate sanctions and remedies." Because state employees license

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91. 42 C.F.R. § 483.75 (a) (2005).
92. 42 C.F.R. § 483.1 (b) (2005).
93. 42 C.F.R. § 488.7(d) (2005); see, e.g., Livingston Care Ctr. v. U.S. Dept. of Health and Human Serv., 388 F.3d 168 (6th Cir. 2004) (holding that the facility failed to comply
nursing homes and typically conduct the SNF/ICF surveys, an examination of both state and federal emergency preparedness regulations is necessary for identifying the specific planning and implementation requirements for a specific nursing home.

CMS requires long-term care facilities to be "designed, constructed, equipped, and maintained to protect the health and safety of residents, personnel and the public." Structural inspections by SNF/ICF survey teams currently focus on whether National Fire Protection Association Life Safety Code requirements are met. In lieu of compliance with the Life Safety Code, facilities may comply with a similar state law, if CMS finds that the law "adequately protects patients, residents, and personnel in long term care facilities." Facilities also must have an emergency electrical power system adequate at least for lighting entrances, exits, fire alarm and suppression equipment, and life support systems. CMS has the authority to "waive specific provisions of the Life Safety Code which, if rigidly applied, would result in unreasonable hardship upon the facility, but only if the waiver does not adversely affect the health and safety of the patients." The regulations do not contain criteria for determining what constitutes an adverse affect.

In addition to the structural requirements, CMS requires long-term care facilities to comply with "all applicable Federal, State, and local laws, regulations, and codes, and with accepted professional standards and principles that apply to professionals providing services in such a facility." More specific to emergency preparedness, facilities also must have "detailed written plans and procedures to meet all potential emergencies

with Medicare requirement for patients' skin care); Crestview Parke Care Ctr. v. Thompson, 373 F.3d 743 (6th Cir. 2004) (failure of generator for emergency lighting one of numerous violations).

95. Id. § 483.70 (a)(i).
96. Id. § 483.70 (a)(2).
97. Id. § 483.70 (b).
98. Id. § 483.70 (a)(2).
99. 42 C.F.R. § 483.75(b) (2005).
and disasters, such as fire, severe weather, and missing residents," 100 and "must train all employees in emergency procedures when they begin to work in the facility, periodically review the procedures with existing staff, and carry out unannounced staff drills using those procedures." 101

These federal emergency preparedness regulations for long-term care facilities are vague and unlikely to result in effective responses to emergencies. The regulations do not contain a description of the constituent parts of an appropriately detailed plan, nor do the regulations contain any explicit requirement that facilities actually follow their plans in the case of an actual emergency. The inadequacy of these regulations is illustrated by the Interpretative Guidelines in the State Operation Manual, the guidance that CMS gives to state investigators who conduct the SNF/ICF Surveys. 102 The guidelines recommend that facilities tailor disaster plans to both geographic location and to the types of residents the facility serves, but does not explain what such a tailored plan should contain. The guidelines explain, "the purpose of staff drills is to test the efficiency, knowledge, and response of institutional personnel in the event of an emergency" and warn that unannounced staff drills to test the responsiveness of the staff should not "disturb or excite residents," but they are completely silent as to any sort of criteria for determining whether a particular drill was effective or how often they should be conducted. 103 Most telling are the instructions for surveyors, who are simply required to separately ask two staff persons, such as nurse aides or housekeepers, the following questions:

If the fire alarm goes off, what do you do?

If you discover that a resident [is] missing, what do you

100. Id. § 483.75(b) (m)(1).
101. Id. § 483.75(b) (m)(2).
103. Id. at 362.
What would you do if you discovered a fire in a resident’s room?
Where are fire alarms and fire extinguisher(s) located on this unit?
How do you use the fire extinguisher?  

Surveyors are then supposed to use the answers to predict the staff person’s “competency in assuring resident safety.” Unfortunately, the location of fire extinguishers has little bearing on whether a facility is adequately prepared to decide to weather or evacuate in the case of a natural disaster. The guidelines do direct surveyors to construct similar probes relevant to geographically specific natural emergencies such as hurricanes, tornadoes, earthquakes, or floods, but give no examples, guidance, or criteria for determining whether a particular locale is likely enough to face a particular type of disaster in order to warrant the need for a specialized emergency plan. In short, the interpretative guidelines confirm that the federal emergency preparedness regulations for long-term care facilities are perfunctory at best, both in their text, as well as in how they are supposed to be applied by investigators.

Other types of care facilities for elders and people with disabilities have similar emergency preparedness regulations. PACE centers and hospices that provide inpatient care also must comply with the Life Safety Code, or similar state law. PACE Centers are required to “establish, implement, and maintain documented procedures to manage medical and nonmedical emergencies and disasters that are likely to threaten

104. Id.
105. Id.
106. Id.
107. Programs of All-Inclusive Care for the Elderly (PACE) Centers are adult outpatient and day-care facilities designed to support seniors such that they are able to continue living at home rather than in an institution. See Center for Medicare & Medicaid Serv., U.S. Dep’t of Health & Human Serv., Overview, (Dec. 14, 2005) available at http://www.cms.hhs.gov/pace.
108. 42 C.F.R. § 418.100(d) (2005).
the health or safety of the participants, staff, or the public." 109 Specifically, they are required to plan for "natural disasters likely to occur in the organization's geographic area," but they are not required to plan for disasters that do not typically occur. 110 Hospices are merely required to have "an acceptable written plan periodically rehearsed with staff," including procedures for the care of casualties arising from a disaster. 111

In contrast, End-Stage Renal Disease facilities have surprisingly thorough federal regulations governing disaster preparedness, requiring written procedures for different kinds of emergencies with annual testing, review, and revision requirements under the direction of the facility's chief executive officer. 112 The plans require that each employee be trained and drilled for specific roles during an emergency. 113 Even more impressively, the regulations require that patients be "trained to handle medical and nonmedical emergencies" and that they are "fully informed regarding what to do, where to go, and whom to contact if a medical or nonmedical emergency occurs." 114 In comparison to the regulatory requirements for long-term care facilities, the emergency preparedness regulations for End-Stage Renal Disease facilities are much more specific and likely to produce effective responses to disasters.

**LOUISIANA EMERGENCY PREPAREDNESS REGULATIONS FOR NURSING HOMES**

Some states have licensure standards for emergency preparedness that are stricter and more detailed than the federal requirements. For example, the Louisiana Administrative Code contains licensure standards for nursing homes, promulgated in

110. Id. § 460.72 (c)(2)(iv).
111. 42 C.F.R. § 418.100(b) (2005).
114. Id. § 405.2140 (d)(5).
that are significantly higher than the federal standards; yet, they still failed to prevent nursing home tragedies during Hurricane Katrina. The regulation requires nursing homes to have an emergency preparedness plan in conformity to a model plan from the Office of Emergency Preparedness. The written plan, at minimum, must describe the "evacuation of residents to a safe place;" the continued "delivery of essential care and services to [ ] residents" wherever they are housed during an emergency; provisions for management responsibilities and functions; a plan for "coordinating transportation services required for evacuating residents to another location;" and the

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115. The Louisiana regulations were strengthened in 1998, in response to several deaths during the Hurricane George evacuation. Moller, supra note 64, at 2.

116. Nevertheless, the New Orleans Times-Picayune editorial staff characterizes Louisiana’s enforcement of nursing home safety regulations as “unacceptably lax,” noting that despite at least thirty-three nursing home deaths attributable to poor care since 1996, the state only applies minimal penalties. Editorial, When Care Means Evacuating, TIMES-PICAYUNE, Sep. 20, 2005, at B6.

117. LA. ADMIN. CODE tit. 48 § 9729(A). On July 27, 1999, Colonel Michael L. Brown, Assistant Director of the Office of Emergency Preparedness, Louisiana Military Department, released the Louisiana Model Nursing Home Emergency Plan (“Plan”). Essentially, the Plan walks a nursing home operator through the necessary steps for creating a workable plan, including contingency planning; lowest elevation and Flood Hazard Area information; auxiliary emergency power generators above the projected flood level; air conditioning and other utilities above the projected flood level; transportation capabilities; staff members who will evacuate with the nursing home rather than with their own families; lightning rods; plans for fires, lightening, tornadoes, hurricanes, flooding, hazardous substances, winter storms, bomb threats, terrorist incidents, nuclear power plant incidents, earthquakes, and civil disturbances; quarterly drills; sufficient emergency equipment and supplies for at least forty-eight hours of survival without outside assistance; arrangements to evacuate residents to specific facilities in specific locations outside of the risk area; Shelter-In-Plan plans for fast moving emergencies such as tornadoes; and specific responsibilities for each administrator or staff member. Unfortunately, the Plan highlights a serious weaknesses in regulatory oversight, noting that the Department of Health and Hospitals, Bureau of Health Standards:

has no authority or expertise to review emergency plans. Survey protocol requires only on-site verification that the plan exists, review of employee training in emergency procedures, and interviews with staff members to determine readiness for implementation of the plan. The State Fire Marshal’s Office will review specifics of the plan as it relates to the Life Safety Code and other fire laws.


118. LA. ADMIN. CODE tit. 48 § 9729 (B)(1).
119. Id. § 9729 (B)(2).
120. Id. § 9729 (B)(3).
121. Id. § 9729 (B)(4).
notification of the resident’s family or sponsor if the resident is evacuated. Perhaps more importantly, the regulation requires the activation of the plan at least annually, “either in response to an emergency or in a planned drill” with the plan’s performance evaluated, documented, and revised, if necessary. Finally, the plans must be reviewed, approved by the parish’s Office of Emergency Preparedness, and made available to the Office of the State Fire Marshal.

The missing necessary elements of Louisiana’s regulation were quite clear in light of the deaths and injuries caused by Hurricane Katrina. Consequently, the Louisiana Department of Health and Hospitals declared an emergency and amended the regulations. Perhaps most telling is the inclusion of the following sentence: “The facility shall follow and execute its approved emergency preparedness plan in the event of the occurrence of a natural disaster or other emergency.” Prior to this revision, the regulations required the development of a detailed plan with appropriate drilling and oversight but did not explicitly require nursing homes to follow their plan in the event of an emergency.

The Department of Health and Hospitals also added a number of clauses to the regulation to ensure that nursing homes were safe to reopen. If a facility was evacuated and sustained wind, flooding, or power outages, it cannot reopen until “a joint survey has been conducted by the Office of the State Fire Marshal, the Office of Public Health and the Bureau of Health Services Financing, Health Standards Section.” The Department explained that the purpose of such a survey is

122. LA. ADMIN. CODE tit. 48 § 9729(B)(5).
123. Id. § 9729 (C).
124. Id. § 9729 (D).
125. Id. § 9729 (E).
127. Revised LA. ADMIN. CODE tit. 48, § 9729 (A).
128. Id.
to assure that the facility is in compliance with the licensing standards in the areas of the structural soundness of the building, the sanitation code, staffing requirements, and access to the community service infrastructure (i.e., hospitals, emergency transportation [including adequate resources for evacuation], physicians and other professional services, and necessary supplies).  

Nursing homes that evacuate as a result of a parish's Office of Emergency Preparedness evacuation order but that did not sustain damage are allowed to re-open. Prior to re-opening after an evacuation, nursing homes must submit a "detailed summary to the licensing agency attesting to how the facility's emergency preparedness plan was followed and executed." The summary must include a copy of the facility's approved emergency preparedness plan, as well as a summary of how the plan was executed during the emergency; identification of plan provisions that were not followed; the reasons and mitigating circumstances for failure to follow any provisions in the plan; any contingency arrangements made for plan provisions that were not followed; and a list of injuries and deaths of residents that occurred during the evacuation and temporary relocation. Prior to re-opening, the licensing agency must certify that the facility was in substantial compliance with its emergency preparedness plan. If the licensing agency cannot determine whether the nursing home was in substantial compliance with its plan, then it may conduct an on-site survey or investigation. If the licensing agency finds that the "facility failed to comply with the provisions of its plan, the facility shall not be allowed to re-open." There is only one published opinion regarding Louisiana

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129. *Id.* § 9729 (F)(1).
130. *Id.*
131. *Id.* § 9729 (G)(1).
132. *Id.* § 9729 (G)(1)(a)-(e).
133. Revised L.A. ADMIN. CODE tit. 48, § 9729 (G)(2)(a).
134. *Id.* § 9729 (G)(2)(b).
135. *Id.* § 9729 (G)(2)(c).
Department of Health and Hospitals enforcement of the emergency preparedness regulations. In *In re Maison Deville Nursing Home*, the Louisiana Court of Appeals for the First Circuit heard an appeal regarding a $1,500 fine for a violation of the emergency preparedness plan regulation that resulted in the death of a resident.\(^{136}\) During the 1998 evacuation of New Orleans for Hurricane George, a resident of the Maison Deville Nursing home died during an eight-hour bus ride from New Orleans to Baton Rouge.\(^{137}\) Although the bus had an air conditioner, it only worked well only when the bus was moving, not when the bus was stopped in a traffic jam.\(^{138}\) Water and snacks for the residents where inaccessible, placed in the bottom bay of the bus.\(^{139}\) The Department found that the nursing home had violated the emergency preparedness regulation and fined the home $1,500.\(^{140}\) On appeal, an administrative law judge reduced the fine to $1,000 in an undated letter to the Director of the Department.\(^{141}\) The Department of Health and Hospitals' Director reversed the decision of the administrative law judge, a decision which was upheld by the district court.\(^{142}\) The Louisiana Court of Appeals affirmed, holding that the statutory ten-day time period given to the Director to reverse the administrative law judge had not been violated when there was no way to determine the date of entry of the administrative law judge's decision.\(^{143}\)

The nursing home emergency preparedness regulations of the Louisiana Department of Health and Human Services are superior to the underdeveloped federal regulations. Nevertheless, an administrative fine for $1,500 for the death of a resident is unlikely to alter noncompliant behavior by nursing home administrators. Minimal regulatory fines may be one

\(^{137}\) *Id.*
\(^{138}\) *Id.*
\(^{139}\) *Id.*
\(^{140}\) *Id.*
\(^{141}\) *Id.* at 729.
\(^{142}\) *In re Maison Deville Nursing Home*, 797 So. 2d at 730.
\(^{143}\) *Id.*
reason that only about one-third of the nursing homes in Katrina’s path complied with mandatory evacuation orders.\textsuperscript{144} Technical compliance with the regulations is meaningless unless nursing homes train, drill, implement, follow, and then adapt their plans based on experience, as is intended by the post-Katrina revisions to the regulations. The federal government and other states should learn from the Louisiana example and strengthen and then require compliance with their emergency preparedness plans. The threat of rescinding their Medicaid and Medicare provider agreements would provide the apparently necessary impetus to force states and the nursing home industry to better prepare for emergencies.

**FAILURE OF STATE LEGISLATIVE ATTEMPTS TO STRENGTHEN NURSING HOME EMERGENCY PREPAREDNESS**

In lieu of strengthened regulatory oversight, advocates for nursing home residents could seek legislative action in the various state capitols. Statutory remedies have the added advantage of giving state regulators stronger authority upon which to draft good regulations. Unfortunately, state statutory schemes designed to strengthen construction standards for nursing home buildings and emergency preparedness requirements, in light of threats from natural disasters, have been strongly resisted by the nursing home lobby as shown by the outcomes of attempted reforms in Florida and Louisiana.

**FLORIDA**

Hurricane Andrew devastated parts of southern Florida on August 24, 1992, killing twenty-three people and causing $26.5 billion in damage.\textsuperscript{145} In response to Hurricane Andrew, the Governor’s Disaster Planning and Response Review Committee

\textsuperscript{144} Khanna, supra note 66. Undoubtedly, the new regulations will result in a much higher percentage of evacuation when the next hurricane comes ashore.

authored the Lewis Report in 1993, which found that health care providers, rather than local county emergency management authorities, were better able to care for the needs of residents with special medical needs during disasters. Consequently, in 1993, the Florida Legislature passed a statute requiring the Agency of Health Care Administration to draft regulations requiring "all nursing homes and hospitals to become structurally capable of serving as shelters and be equipped to be self-supporting during disasters."  


147. Id. at 2. After passage of the FLORIDA SESSION LAWS, Chapters 93-211 in 1993, the relevant sections of the Florida Statutes follow:

§ 395.1055. Rules and enforcement

(1) The agency shall adopt, amend, promulgate, and enforce rules to implement the provisions of this part, which shall include reasonable and fair minimum standards for ensuring that:

(a) Sufficient numbers and qualified types of personnel and occupational disciplines are on duty and available at all times to provide necessary and adequate patient care and safety.

(b) Infection control, housekeeping, sanitary conditions, and medical record procedures that will adequately protect patient care and safety are established and implemented.

(c) A comprehensive emergency management plan is prepared and updated annually. Such standards must be included in the rules adopted by the agency after consulting with the Department of Community Affairs. At a minimum, the rules must provide for plan components that address emergency evacuation transportation; adequate sheltering arrangements; postdisaster activities, including emergency power, food, and water; postdisaster transportation; supplies; staffing; emergency equipment; individual identification of residents and transfer of records, and responding to family inquiries. The comprehensive emergency management plan is subject to review and approval by the local emergency management agency. During its review, the local emergency management agency shall ensure that the following agencies, at a minimum, are given the opportunity to review the plan: the Department of Elderly Affairs, the Department of Health, the Agency for Health Care Administration, and the Department of Community Affairs. Also, appropriate volunteer organizations must be given the opportunity to review the plan. The local emergency management agency shall complete its review within 60 days and either approve the plan or advise the facility of necessary revisions.

(d) Facilities are structurally capable of serving as shelters and equipped to be self-supporting during and immediately following disasters.

(e) Construction, maintenance, repair, life safety, and renovation of licensed facilities are governed by the most recently adopted, nationally recognized life-safety code, except as may be specifically modified by rule.

§ 400.23. Rules; minimum standards; evaluation and rating system; fee for review
Over the next four years, the Agency for Health Care Administration attempted to develop regulations in accordance with the statute. Unfortunately, an agency publication explains, "[b]ecause the economic impact to implement these changes to all of the new and existing health care facilities throughout the state was very costly, the health care providers were resistant to the promulgation of this rule and began to encourage the Legislature to revise these statutes." In 1998, the Florida Legislature gutted the requirement that all nursing homes be self-supporting and capable of serving as a shelter, instead limiting the requirement to just new facilities, wings, or floors, and limiting the shelter capability requirement to residents, staff, and their families. As if that was not sufficient to undermine

(2) Pursuant to the intention of the Legislature, the agency shall publish and enforce rules to implement the provisions of this part, which shall include reasonable and fair minimum standards in relation to:

(a) The location and construction of the facility; including fire and life safety, plumbing, heating, lighting, ventilation, and other housing conditions which will ensure the health, safety, and comfort of residents, including an adequate call system. The agency shall establish standards for facilities and equipment to increase the extent to which facilities are structurally capable of serving as shelters and equipped to be self-supporting during and immediately following disasters. In making such rules, the agency shall be guided by standards recommended by nationally recognized reputable professional groups and associations with knowledge of such subject matters. The agency shall update or revise such standards as the need arises. All nursing homes must comply with those life safety code requirements and building code standards applicable at the time of approval of their construction plans. The agency may require alterations to a building if it determines that an existing condition constitutes a distinct hazard to life, health, or safety. The agency shall adopt fair and reasonable rules setting forth conditions under which existing facilities undergoing additions, alterations, conversions, renovations, or repairs shall be required to comply with the most recent updated or revised standards. (Emphasis added).

§ 395.1055(1) The agency shall adopt, amend, promulgate, and enforce rules to implement the provisions of this part, which shall include reasonable and fair minimum standards for ensuring that:

(d) New facilities and a new wing or floor added to an existing facility after July 1, 1999, are structurally capable of serving as shelters only for patients, staff, and families of staff and patients, and equipped to be self-supporting during and immediately following disasters.

§ 400.23(2)(a)

The location and construction of the facility; including fire and life safety,
the statutory requirement that nursing homes be prepared to withstand natural disasters, the Legislature also required the agency to “work with facilities licensed under this part and report to the Governor and Legislature by April 1, 1999, its recommendations for cost-effective renovation standards to be applied to existing facilities.” 150 Requiring a regulatory agency to consult with representatives from a regulated industry to ensure that any requirements are cost effective is tantamount to giving the industry veto power over any proposed change. This alteration of the statutory text to delay and then weaken structural safety requirements shows the power of the nursing home lobby in Florida.

The agency complied with the new version of the statute and published recommendations for minimum standards meant to improve resident safety. 151 In view of the Florida Legislature’s mandate to consider the economic impact on the nursing home industry, the agency recommended, “[t]o reduce the amount of reconstruction required to meet these recommendations, an area within the structure of the building should be designated where residents and support services can be located. If this is done,
then the entire facility will not have to undergo renovation."\textsuperscript{152} The resulting recommendations include: a shelter area that has at least thirty net square feet per resident, location above the 100-year flood plan and Category Three hurricane surge inundation elevation, hurricane shutters to cover windows; sufficient air conditioning or mechanical ventilation to "ensure the health, safety and well-being of all residents and staff during and immediately following a disaster;" an on-site Level One emergency electrical generator system sufficient to support ice making, food refrigeration, lighting, life support systems, and air conditioning with fuel for seventy-two hours; and three gallons of clean water for each resident and one gallon for anyone else in the facility per day for three days.\textsuperscript{153}

Even the weakened version of the statute was apparently too restrictive for the nursing home lobby. In 2000, the Legislature stripped the Agency for Health Care Administration's authority to adopt construction standards and the Agency was directed to "provide assistance to the Florida Building Commission in updating the construction standards of the code relative to nursing homes."\textsuperscript{154} Fortunately, the structural provisions advocated by the Agency were included within the Florida Building Code.\textsuperscript{155} Nevertheless, these standards still only apply to new facilities or wings, and the agency responsible for surveying facilities no longer has direct regulatory control over the standards.

\textit{Louisiana}

Florida is not the only state with a powerful nursing home industry. Even in the period immediate following Hurricane Katrina, the Louisiana Senate weakened an attempt to

\begin{itemize}
\item \textsuperscript{152} Id. at 3.
\item \textsuperscript{153} Id. at 4-10.
\item \textsuperscript{154} 2000 Fla. Sess. Law Serv. Ch. 00-141 (West).
\item \textsuperscript{155} FLA. BUILDING CODE, Section 420 Nursing Homes, \textit{available at} http://infosolutions.com/icce/gateway.dll?f=templates$fn=default.htm$vid=icc:florida_building.
\end{itemize}
strengthen nursing home regulations. During the Extraordinary Session in October 2005, Representative Monica Walker introduced House Bill Five which would require the Department of Health and Human Services to promulgate regulations governing the "establishment, reestablishment, or continued operation" of nursing homes, hospitals, and intermediate care facilities for people with developmental disabilities located in "areas subject to hurricanes, tidal surges, or flooding." The original bill required the Department to include stricter building codes and restrictions of facility location in the new regulations. The bill passed the Louisiana House unanimously, with only an amendment requiring health-care facilities to have a satellite communication system for emergency communication.

Unfortunately, House Bill Five faced powerful opposition in the Louisiana Senate. The Department of Health and Hospitals supported the original version of House Bill Five, and wanted to ensure that nursing homes destroyed by Katrina were not rebuilt in the same low-lying locations. Joseph Donchess, the Executive Director of the Louisiana Nursing Home Association, expressed the industry's opposition, explaining, "[w]e don't think stricter building codes necessarily are the answer for existing facilities... I guess what I'm asking is that you not use a mallet to hammer in a nail." The Louisiana Nursing Home Association has a powerful ally in Senator Joe McPherson, the Chair of the Health and Welfare Committee and co-owner of Maison de Lafayette Nursing Home who significantly amended House Bill Five in committee in order to protect existing nursing

160. Id.
homes.161

The Senate amendments to House Bill Five focused on four key changes to protect existing nursing homes and hospitals. The Senate amendments attempted to strip the phrase "continued operation" out of the bill, thus exempting any nursing home that did not evacuate during Katrina but continued to operate from the new regulations.162 Secondly, the amendments sought to limit any new location restrictions of health care facilities to "newly approved facilities."163 In order to finance any new required changes, the amendments included provisions for the fair allocation of the Medicaid share of facility specific costs directly incurred by a facility as a result of compliance with any new regulations pursuant to the statute.164 Finally, and perhaps most cynically, the Senate amendments stripped the word "stricter" from the bill in regards to building and construction codes and guidelines.165 The House rejected the Senate's amendments in a vote of ninety-nine to zero on November 21, 2005, and appointed conference committee members, including Representative Walker, the bill's author.166 The Senate's conferees included Senator McPherson.167

On whole, the nursing home industry won a significant
battle within the conference committee for House Bill Five.\textsuperscript{168} Although the conferees rejected the Senate's amendment, which would prevent application of the new regulations to nursing homes that "continued operation" during Hurricane Katrina, all of the other Senate amendments were accepted, including the stripping of the requirement that the regulations include stricter building codes and guidelines.\textsuperscript{169} The conferees even included a new limitation on the power of the Department of Health and Hospitals, requiring the regulations to have "provisions for reasonable time periods for compliance, not to exceed three years, except when extensions are granted by the department for good cause."\textsuperscript{170} The net result of the Conference Committee Report is that the Department of Health and Hospitals is directed to draft regulations regarding nursing homes and hospitals in areas subject to hurricanes, tidal surges, or floods, but the regulations do not have to include stricter building codes or guidelines; only newly approved nursing homes will be subject to any location restrictions.\textsuperscript{171} Nursing homes have a three year window in which to comply, and they may use Medicaid funds for any costs incurred in order for the facility to comply with the regulations.\textsuperscript{172} Governor Blanco signed the bill as Act Forty-One of the First Extraordinary Session on December 6, 2005.\textsuperscript{173}

Florida and Louisiana exemplify the difficulty of strengthening nursing home building codes related to emergency preparedness within state legislatures. Presumably, nursing home industry lobbyists may not wield the same power in all state legislatures, but reliance upon state statutes to strengthen nursing home emergency preparedness is unlikely to

\begin{itemize}
  \item \textsuperscript{168} Official Journal of the House of Representatives of the State of Louisiana, Nov. 22, 2005, at 38-39.
  \item \textsuperscript{169} Id.
  \item \textsuperscript{170} Id.
  \item \textsuperscript{171} Id.
  \item \textsuperscript{172} Id.
\end{itemize}
be either consistent or enduring. A patchwork quilt of widely differing state standards, dependent upon the strength of the nursing home industry in each state, leaves residents of nursing homes more vulnerable than they would be under a uniform national standard. Perhaps even more dangerous is the ability of the nursing home industry to ease expensive regulatory standards over time, such as they did in Florida, once memories of the most recent disaster are no longer fresh. A uniform national standard likely would require more political capital to amend and would allow advocates for residents to mount a national defense against any attempts to undermine facility safety, rather than fighting fifty smaller battles.

**USING TORT AND CRIMINAL LAW TO ENCOURAGE EMERGENCY PREPAREDNESS**

Death and injury caused by either the failure to evacuate or poor quality evacuation can expose nursing homes owners and administrators to both tort and criminal liability. These remedies obviously only occur after a tragedy, when residents have already been hurt or killed. Consequently, although they can serve as punishment and may help to make victims, or their heirs whole, these remedies are reactionary rather than prescriptive and will only improve resident safety in the future to the extent that they deter future tortuous or criminal negligence.

**TORT SUITS AGAINST NURSING HOME OPERATORS**

Tort litigation is increasingly burdensome to nursing homes. Until the past decade, civil lawsuits brought against nursing homes or their staff were relatively rare.\(^{174}\) One commentator has noted that in medical error cases, “this previously tranquil part of the legal picture has changed dramatically lately” due, in part, to growing jury verdicts, a

\(^{174}\) Kapp, *supra* note 11, at 67.
larger cadre of expert witnesses, and the enactment of legislation favorably to plaintiffs. Of course, an alternate explanation is simply that there are ample opportunities to bring meritorious suits against nursing homes and their staff due to negligence, elder abuse, and professional malpractice committed against residents. Regardless of the root cause of nursing home’s increasing legal exposure, both damages and liability insurance premiums are rising exponentially. The rising liability and insurance premiums have resulted in a number of facilities being sold, and twenty-three of seventy-nine insurers of long-term care facilities in Florida stopped providing coverage in the period from 1997 to 2000.

The failure of a nursing home operator to adequately prepare for or respond to a natural disaster in a fashion that led to the injury or death of patrons is likely to result in personal injury or wrongful death suits and may significantly add to the burden felt by Gulf Coast nursing homes and their insurers. In addition to wrongful death, surviving family members in Louisiana may file an action to recover for the pain and suffering experienced by a dying nursing home patient between the time of injury and death. This survival action for pain and suffering may result in significant damages in cases where

175. Id.
177. See Richard H. Tilghman IV, Rethinking Constitutional Limitations on Punitive Damages: Providing Economically Efficient Incentives to Prevent Nursing Home Abuse, 54 DEPAUL L. REV. 1007, 1011 (2005) ("Recent studies show that nursing homes are sued at a rate of 14.5 lawsuits for every 1,000 beds, which is double the rate from just five years ago. Since 1997, the average claim paid has risen by twenty-eight percent, from $156,000 to $200,000. The increase in lawsuits, liability, and damages has caused nursing home liability insurance premiums to increase by about 400% since 1998, to $80,000 per facility.").
178. Id. at 1012.
179. Suits have already been filed against St. Rita’s Nursing Home. See Parker, supra note 31. Additionally, Texas personal injury firms have filed suits against all the entities involved in the bus fire that killed the Brighton Gardens Nursing Home residents. Brenda Sapino Jeffreys, First Suits Filed in Bus Fire Case, TEXAS LAWYER ONLINE, Oct. 14, 2005, available at http://www.law.com/jsp/tx/PubArticleFriendlyTX.jsp?id=1129280706891.
residents suffered in sweltering conditions as they slowly died of dehydration and heat exhaustion.

Another key concern for nursing homes in emergency situations should be the evacuation of patients whose known health problems contraindicate their survival if moved. Nursing homes typically have the same duty of care as hospitals and, although they are not required to insure the health of their residents, they must provide a reasonable standard of care that takes into account the patient’s known mental and physical condition. The risk assessment regarding the evacuation of extremely frail patients puts nursing home administrators in a “Catch-22;” either they risk the patient dying during evacuation or from transfer trauma, or they risk the patient dying during the disaster or its aftermath.

Nursing homes have a number of potentially strong legal defenses to liability caused by their responses to disasters. Three causation defenses may prove to be the most reliable, depending upon the facts in each particular case. First, in cases like the Brighton Gardens Nursing Home bus fire, the nursing home itself has a fairly strong argument that the proximate cause of the deaths of their residents was a faulty bus, which was completely outside of its control. Plaintiff's counsel may find a way to link nursing homes to deaths and injuries caused by contractors during evacuations, such as a nursing home’s failure to communicate necessary information regarding the health status of its residents. However, the burden to make those connections will rest with the plaintiff. Secondly, plaintiffs must prove that the negligence of the nursing home, rather than the resident's underlying health problems, was responsible for the death or injury. Finally, the nursing home may be able to successfully raise an act of God defense in situations where

182. According to reports, both Mabel Mangano at St. Rita's Nursing home and Sister Augustine McDaniel at Lafon Nursing Home of the Holy Family struggled with this dilemma in the hours prior to Hurricane Katrina. See Newsnight, supra note 31; Hull & Struck supra note 65.
183. Kapp, supra note 11, at 67.
natural disasters rather than the negligence kill residents. The commentary to the proposed final draft of the Restatement (Third) of the Law of Torts defines an "act of God" as "a serious and unusual adverse natural event."\textsuperscript{184} In situations where an adverse natural event is unforeseeable, such as a tornado touching down without a tornado warning having been announced, the defendant might successfully avoid liability in a negligence suit.\textsuperscript{185} An act of God, however, does not preclude recovery under negligence theory so long as the defendant's negligence is also the proximate cause of the plaintiff's injury.\textsuperscript{186} Foreseeability and whether the defendant's precautions for foreseeable adverse natural events were reasonable are the touchstones for understanding the act of God defense.\textsuperscript{187} The foreseeability of floods, such as the one at St. Rita's Nursing Home, depends on whether the flood's "occurrence and magnitude should or might have been anticipated, in view of the flood history of the locality and the existing conditions affecting the likelihood of floods, by a person of reasonable prudence."\textsuperscript{188} The burden for arguing that a flood was an act of God, rather than a foreseeable event, rests with the defendant and is a question for the jury.\textsuperscript{189}

In addition to the causation defenses, defendants in a nursing home natural disaster case have the benefit, at least in Louisiana, of arguing that the federal Medicare and Medicaid regulations do not substitute for expert testimony of the relevant standard of care in a medical malpractice action. In \textit{Satterwhite v. Reily},\textsuperscript{190} the plaintiff in a wrongful death and survival action against the medical director of a nursing home argued that the doctor's alleged failure to comply with CMS regulations

\begin{footnotes}
\footnote{184. \textit{RESTATEMENT (THIRD) OF TORTS} § 3 cmt. l (2005).}
\footnote{185. \textit{Id.}}
\footnote{188. \textit{Keystone Elec. Mfg. Co.}, 586 N.W.2d at 351 (citing 78 Am. Jur. 2d § 224 at 669).}
\footnote{189. \textit{Id.}}
\end{footnotes}
constituted a breach of the standard of care. The Court of Appeals disagreed:

no court has ever imposed a tort duty upon a nursing home's medical director based solely on this regulatory provision... nothing in the regulation sets forth a standard of care for medical directors; the purpose is plainly to qualify providers for the Medicare and Medicaid programs. On this record and on the authority cited, we decline to hold that 42 C.F.R. § 483.75(i) grants a private cause of action against a medical director of a nursing home or establishes the standard of care or duty that a nursing home medical director owes to the patients of the nursing home he serves, or that a violation of the regulation is negligence per se.191

This holding is important in natural disaster cases if plaintiffs attempt to use CMS regulations alone to prove that nursing home medical staff or nurses violated the standard of care owed to the resident. Additional proof, typically expert testimony regarding the failure of the defendant to meet a reasonable standard of care, is necessary to prove that a flawed professional decision is responsible for causing the resident's injury or death.192

Despite the existence of potential tort defenses, the horrific nature of resident deaths and injuries that happened during Hurricanes Katrina and Rita may result in a situation where Gulf Coast juries are so angered that nursing homes will be exposed to climate of de facto strict liability. Nursing homes may be punished for every patient death or injury regardless of whether there is ascertainable negligence. If this forecast is correct, there will be significant financial strain on the nursing home industry and their insurers, perhaps to the point that Gulf Coast states will experience a marked reduction in the number of nursing home beds. Even if the impact is less dramatic, costs drained from nursing homes by tort litigation will reduce funds available

191. Id. at 412.
for improved patient care, facility repair, and heightened emergency preparedness.\footnote{193}

While nursing home tort lawsuits may further the interests of justice for injured patients and their heirs, there is some concern that tort liability, by itself, is unlikely to deter poor healthcare decisions.\footnote{194} Exposure to liability in cases where the provider is not negligent may lead to over-deterrence, where providers practice defensive and unnecessary healthcare to avoid liability, rather than focusing on providing the best, necessary care for the patient.\footnote{195} In the context of nursing home emergency preparedness, such defensive measures may result in the unnecessary evacuation of residents, simply to avoid low probability tragedies. Although responsibility for negligent emergency decision is important, this author contends that regulators, with adequately stringent regulations at their disposal, are better equipped than juries to remedy poor nursing home emergency preparedness. In truly egregious cases, gross violations of strong regulations may actually strengthen personal injury and wrongful death lawsuits, but for more mundane violations, an annual visit by surveyors may actually bring about better results and keep more nursing homes in operation than occasional massive jury verdicts.

**Criminal Suits Against Nursing Home Operators**

In addition to tort litigation, nursing home operators who fail to appropriately respond to emergencies may find themselves facing criminal sanctions. The pending prosecution of Salvador and Mabel Mangano provides a clear example for


\footnote{194}{Edward A. Dauer, *A Therapeutic Jurisprudence Perspective on Legal Responses to Medical Error*, 24 J. Legal. Med. 37, 38-9 (2003) ("Where patient safety is concerned – "deterrence" is the term more familiar to attorneys-malpractice liability seems, at least on the margin, to have little if any positive correlation to future error reduction. At the same time the malpractice system fosters distortions in medical practice ("defensive medicine") whose value to patient health may run from the arguably useful to the decidedly harmful.").}

\footnote{195}{Bedell, *supra* note 193, at 382.}
analyzing the potential difficulties in prosecuting nursing home operators for deaths resulting from the failure to appropriately prepare and respond to a natural disaster. Salvador and Mabel Mangano are charged with thirty-four counts of negligent homicide of the residents who died at St. Rita’s Nursing Home. Louisiana Attorney General Charles C. Foti, Jr. based his decision to charge on the Mangano’s alleged failure to follow St. Bernard Parish’s mandatory evacuation order and St. Rita’s own evacuation plan coupled with the alleged refusal of evacuation assistance from the parish. In Louisiana, negligent homicide is “the killing of a human being by criminal negligence.”

Criminal negligence exists “when, although neither specific nor general criminal intent is present, there is such disregard of the interest of others that the offender’s conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances.” Consequently, the state must prove that the Mangano’s failure to evacuate the residents of St. Rita’s amounted to a gross deviation below the standard of care expected from a reasonably careful nursing home operator in similar circumstances. Section B of Louisiana’s negligent homicide statute only allows the violation of a statute or ordinance to be considered as presumptive evidence of a gross deviation below the standard of care.

Although the prosecution has plenty of ground for moral indignation, it may have a difficult time convicting the Manganos of negligent homicide under the criminal standard of guilt beyond a reasonable doubt. As discussed earlier, the Louisiana licensure and Federal Medicare/Medicaid regulations required the existence of an emergency preparedness plan and related drills, but they did not explicitly require nursing homes to follow their emergency plan. The state will be hard-pressed to show that the Manganos violated a statute or ordinance requiring evacuation. The revision of the regulations on October

196. Foti, supra note 9.
18, 2005, to explicitly require evacuation may, in fact, serve as a tacit admission that the regulations in place during Hurricane Katrina did not require the Manganos to evacuate their residents. The case is complicated further by factual questions as to when St. Bernard Parish declared a mandatory evacuation and whether the Manganos were given notice of this declaration.200

Without a statutory or ordinance violation, the state will need to convince the jury that the Manganos were grossly negligent based on a reasonable person standard. If the evidence at trial matches the published reports regarding the St. Rita's tragedy, the state will need to overcome a number of factual issues that go to whether their alleged negligence was a gross deviation from reasonable carefullness. Because St. Rita's had relatively few complaints or citations, it will be difficult to portray the Manganos as chronic offenders that were indifferent to the safety of their residents. The fact that the Manganos were on the premises when the flooding occurred and stayed to rescue as many residents as possible will also raise similar obstacles to proving a "disregard of the interest of others." As only about one-third of the nursing homes affected by Hurricane Katrina in Louisiana reportedly evacuated, the state will find it difficult to argue that the Manganos acted unreasonably when compared to others in like circumstances.201 Finally, the legitimate fear of deaths caused by transfer trauma when coupled with a belief that St. Rita's was safe because it was brick, had a generator and available nursing staff, and was on higher ground that had not flooded in previous hurricanes, provides a somewhat plausible explanation for why the Manganos decided to ride out Hurricane Katrina. Even a key prosecution witness, Dr. Bryan Bertucci, is on record as saying that "the fact people don't understand that we have evacuated several times where the hurricane didn't even come near us. And two to three of our

200. See supra, notes 37-39 and accompanying text.
201. Hull & Struck, supra note 65.
nursing home patients, each time we transport them out, die."²⁰²
If the facts as presented in the press are similar to those presented at trial, the Mangano's choice not to evacuate may be found negligent, but not grossly negligent, and mere negligence is an insufficient basis for negligent homicide in Louisiana.²⁰³

The state does have a fairly strong counter-argument regarding a heightened standard of care and the failure to perform a special duty. In State v. Irvine, the Louisiana Supreme Court heard a case regarding a fatal train accident caused by negligent switching.²⁰⁴ In response to an argument that the defendant was merely inattentive rather than grossly negligent, the court held that "where one is charged with a special duty the nonperformance of which involves danger to the safety of others, the failure to perform the duty even through inattention is gross and culpable, or, in other words, criminal negligence."²⁰⁵ Arguably, the Manganos should be held to a "special duty" standard based on their care responsibility for relatively helplessness clients, the existence of an evacuation plan, and Mrs. Mangano's alleged refusal of buses with which to evacuate. In other words, a reasonable nursing home operator who had an evacuation plan and the means to evacuate should have made a more informed decision than an average reasonably careful person because of the safety and regulatory information of which the operator should be familiar.

Like the tort litigation, perhaps the most contentious issue will be causation. The state must prove beyond a reasonable

²⁰³. Louisiana v. D.L., 697 So. 2d 706, 711 (La. Ct. App. 1997) ("Unlike general or specific criminal intent, criminal negligence is essentially negative. Rather than requiring that the accused intend some consequence of his actions, criminal negligence is found from the accused's gross disregard for the consequences of his actions. Ordinary negligence does not equate to criminal negligence. Thus, the state is required to show more than a mere deviation from the standard of ordinary care."); Louisiana v. Moak, 387 So. 2d 1108, 1110 (La. 1980) ("the wrong choice of action in an emergency does not meet the test of criminal negligence").
²⁰⁴. Louisiana v. Irvine, 52 So. 567 (La. 1910).
²⁰⁵. Id. at 569.
doubt that the Manganos’ alleged criminal negligence was the cause of the deaths of the thirty-four victims.\textsuperscript{206} In \textit{Louisiana v. Martin}, a negligent homicide case factually rooted in a high speed car race that killed the occupants of a third vehicle, the Louisiana Supreme Court held, “Our later decisions have made it clear that the defendant’s conduct need not be the sole proximate cause of the victim’s death. Rather, the proper test is whether: ‘Was the defendant’s conduct a substantial factor in bringing about the forbidden result?’\textsuperscript{207} Clearly, if the flooding was caused by levees which could reasonably be expected to hold, then the causation of the deaths is at least partially attributable to the governmental agencies responsible for designing and maintaining the levee system. If, however, flooding was reasonably foreseeable, the existence of another potential tortfeasor does not excuse the decision not to evacuate. The likely answer to the causation question is to require significant expert testimony in the trial and may allow the defense the strategic opportunity to turn the case into a trial of the state and federal government’s failure to properly build and maintain Louisiana’s flood control system.

The Manganos’ trial will be a prime opportunity to determine whether a high profile criminal action against a negligent nursing home owner has a behavioral impact on other owners and administrators. At a broader level, while punishment may be an appropriate societal goal when patients die because of a nursing home’s failure to appropriately respond to a natural disaster, the more pressing issue for residents is whether criminal sanctions will have a deterrent effect that encourages the nursing home industry to strengthen emergency preparedness measures. The weakness of relying on criminal sanctions to improve conditions in nursing homes is that elder abuse and neglect, and related crimes, such as negligent homicide or manslaughter are difficult to prosecute.\textsuperscript{208}

\textsuperscript{206} \textit{Louisiana v. Hammontree}, 363 So. 2d 1364, 1372 (La. 1978).
\textsuperscript{207} 539 So. 2d 1235, 1239 (La. 1989) (citing \textit{State v. Matthews}, 450 So. 2d 644, 646 (La. 1984)).
\textsuperscript{208} Michael J. Davidson, \textit{Governmental Responses to Elder Abuse and Neglect in
commentator attributes this difficulty to a combination of factors including abuse that goes unreported; untimely reporting well after the incident occurred; witnesses with impaired memory or communication difficulties, and juries who can be reluctant to punish a negligent caregiver for causing the premature death of a person in the last stages of life. Nevertheless, according to another commentator, "[p]rovider anxieties also derive from the growing perceived threat of criminal prosecutions being initiated by politically ambitious local prosecutors and states' Attorneys General."210

Nursing home provider anxiety might deter negligent behavior if a few high publicity cases involving negligent emergency preparedness resulted in prison sentences. Unfortunately, acquittal may cause an the opposite result. If nursing home operators successfully defend themselves in cases where dozens of residents died due to their alleged negligence, then criminal sanctions will have been shown to be a paper tiger. Given the difficulty in successfully prosecuting criminal actions against nursing home owners, criminal sanctions alone should not be relied upon as the primary methodology for improving emergency preparedness. Furthermore, in Louisiana, improved regulation might actually increase the opportunity for successful prosecution for criminal negligence in the most egregious cases by creating a statutory violation that can serve as a presumptive evidence of a gross deviation below the reasonably expected standard of care.211 The regulatory approach has the added, and more important, advantage of potentially preventing tragedy in the first place rather than simply relying on indirect, uncertain deterrence.

RECOMMENDATIONS

209. Id. at 340.
210. Kapp, supra note 11, at 64.
Improving nursing home emergency preparedness regulations is not an easy task, at least concerning large-area disasters such as hurricanes. Operators face the dilemma of choosing between two options, evacuate or stay in place, either of which has potentially lethal consequences. Evacuations are likely to kill a small percentage of residents during the evacuation and perhaps, another group from transfer trauma over the weeks and months following evacuation. The decision to stay-in-place can be catastrophically lethal, as in the case of St. Rita's Nursing Home, or cumulatively lethal during the aftermath, as patients die while conditions degrade, such as in the case of the Lafon Nursing Home of the Holy Family.

Disaster plans should incorporate a rational criterion for determining when the risks of staying outweigh the risks inherent in evacuating frail residents. Despite the difficulties caused by this dilemma, maintaining the regulatory status quo is not an appropriate option after the tragedies caused by Hurricanes Katrina and Rita. The federal government and other states should follow the example of Louisiana and begin to address the issue, and unlike Louisiana, enact heightened regulations even if they are opposed by the nursing home industry.

A seminal study by Barbara Vogt, sponsored by the Federal Emergency Management Agency (FEMA), that examined evacuations of nursing homes and other institutions during the 1980s, found that "organizations are not significantly influenced by policies (either legal or in-house) that require evacuation plans" and suggested that these organizations had been "overlooked in the past when planning for low-probability events." The findings suggest that what nursing homes know

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212. See, e.g., Newsnight, supra note 31; Hull & Struck, supra note 65.
213. Supra, notes 24 through 29 and accompanying text.
214. See supra note 54 (where thirty-four residents of St. Rita's Nursing Home drowned after the nursing home administrator's decided not to evacuate).
215. Supra, notes 66 through 69 and accompanying text.
216. Gross, supra note 86.
about emergency preparedness comes from experience learned from conducting fire drills and information in their disaster plans rather than contact with emergency management officials or the FEMA. Consequently, the burden of resident evacuation had fallen squarely on operators of nursing homes. She concludes that "institutional populations are protected in emergencies by the adaptiveness of their organizations and not by formal planning nor by efforts of local communities . . . . [t]he fact that organizations adapt to crises is not a new discovery, but again we find that the planning that can reduce problems in emergencies has yet to be applied."

This seat-of-the-pants approach has been unmasked as disastrous to nursing home residents in region-wide emergencies such as hurricanes. One reason is that multiple national, state, and local authorities all have some part of the responsibility to ensure that nursing homes are prepared for emergencies, leading to unclear lines of authority and accountability. One commentator asserts that the "regulatory octopus entangling nursing homes has multiple tentacles" made up of multiple, antagonistic inspectors that each enforce their own particular set of standards without apparent coordination or logical consistency, leading nursing home providers to complain about "inconsistent, unclear, and contradictory expectations foisted on them." It is time to cut through the confusion and make it clear that nursing homes will not receive Medicaid or Medicare funding unless they are in compliance with basic emergency preparedness requirements. Furthermore, it is time for the CMS to hold its partners in state agencies who conduct the annual inspections of nursing homes accountable for ensuring that nursing homes are prepared for emergencies.

Congress has a number of bills in committee addressing the

218. Id. at 37.
219. Id.
220. Id. at vii-viii.
221. Khanna, Olsen, & Hassan, supra note 87.
222. Kapp, supra note 11, at 63.
issue of emergency preparedness. Perhaps the most helpful is Senate Bill 1685, which directs the Secretary of Homeland Security through the Office of State and Local Government Coordination and Preparedness to ensure that each State, in its Homeland Security Strategy or other homeland security plan, provides detailed and comprehensive information regarding its pre-disaster and post-disaster plans for the evacuation of individuals with special needs... in emergencies that would warrant their evacuation, including plans for the provision of food, water, and shelter for evacuees.

None of the congressional bills, however, call for CMS to improve its emergency preparedness regulations, nor is one needed as CMS already has such authority.

The CMS regulation governing emergency preparedness should be amended to include the following requirements. First, the state agency that inspects nursing homes should be required to annually submit the emergency preparedness plan for each nursing home to a national, publicly-accessible database. This would bring instant transparency to the issue and allow residents and their families to know the plan and ask probing questions. Secondly, emergency management should be

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223. See, e.g., The Planning for Evacuations of People in Life-Threatening Emergencies Act, seeks to amend the Robert T. Stafford Disaster Relief and Emergency Assistance Act to require the Director of the Federal Emergency Management Agency to ensure that state and local emergency preparedness plans “include procedures for evacuating individuals from an area in preparation for anticipated hazards.” H.R. 4258, 109th Cong. (2005); The Under Secretary for Emergency Preparedness and Response Qualifications act of 2005, seeks to require that the Department of Homeland Security’s Under Secretary for Emergency Preparedness and Response has a background in emergency preparedness and at least four years of experience. S. 1612, 109th Cong. (2005); The Emergency Preparedness & Response for Individuals with Disabilities Act of 2005, directs the Secretary of the Department of Homeland Security to create the position Disability Coordinator to help ensure that the needs of people with disabilities are met during emergencies. S. 2124, 109th Cong. (2005); S. 2043 amends the Robert T. Stafford Disaster Relief and Emergency Assistance Act to provide grants for mass evacuation exercises for urban and suburban areas. S. 2043, 109th Cong. (2005); The American Evacuation Planning Act, directs the Department of Homeland Security to coordinate with State and local governments to prepare and improve evacuation plans for communities and individuals with special needs. H.R. 3815, 109th Cong. (2005).


225. 42 C.F.R. § 483.75(m) (2005).
conducted at the state rather than the local level. Three critical resources, ambulances, air-condition buses, and empty beds at other long-term care facilities, are in danger of being double or triple booked if emergency plans are only examined at the local level.\textsuperscript{226} If a state governmental agency was responsible for coordinating the allocation of these precious commodities in a centralized fashion, there may be less scrambling for services in the time immediately before and after a disaster. Thirdly, there should be a model emergency evacuation plan for each state that is tailored for specific geographic threats, such as hurricanes for the Gulf and East Coasts, tornadoes and ice storms for the southern Plains, and earthquakes, wildfires, and tsunamis for the West Coast. State agencies should be required by CMS regulations to assist nursing homes in tailoring these plans for their specific needs. Fourthly, the regulations need to recognize that in some situations, it is safer for residents to stay-in-place rather than evacuate. Florida recognized this and tried to require nursing homes to be physically capable of acting as an emergency shelter by requiring adequate food, water, power, and structural safety measures.\textsuperscript{227} It is especially important in locations where the primary dangers to residents are unpredictable emergencies, such as tornadoes and ice storms when evacuation may simply not be an option. The specific circumstances governing the decision to evacuate or stay-in-place ought to be in the contingency plans in each emergency plan. Further, the decision ought to ultimately be the call of the state’s centralized nursing home emergency preparedness center, if they are in command and control of the necessary resources. Perhaps more controversially, CMS needs to seriously consider banning reimbursement to nursing homes that are in inherently unsafe locations unless they are adequately

\textsuperscript{226} Id.

\textsuperscript{227} See supra notes 144-154. The biggest problem with nursing home evacuations for Hurricane Elena was the transportation of residents to shelter in a timely fashion. Wiley P. Mangum, Jordan I. Kosberg, & Peg McDonald, Hurricane Elena and Pinellas County, Florida: Some Lessons Learned from the Largest Evacuation of Nursing Home Patients in History, 29 GERONTOLOGIST 388 (1989).
prepared to protect residents from the danger. Fifthly, the regulations need to hold nursing homes accountable for compliance with their emergency plans, yet also allow for some flexibility when the plan simply falls apart. The focus should be on regulatory punishment for the failure to plan and train, not punishment for situations beyond the control of the nursing home. Sixthly, in the case of evacuation, nursing homes should be required to send residents with staff, when possible, food, water, medical records, and necessary medications. Continuity of care between staff and residents is important and may result in less transfer trauma. Finally, nursing homes should continue to be held accountable for adequate fire safety. The regulations need to hold nursing homes accountable to the most recent Life Safety Code, which include mandatory fire sprinklers in all nursing homes. They also need to continue to emphasize fire drills. The goal should be to improve preparedness for natural disaster response by nursing homes, not to switch the focus from fire safety to disaster planning.

These recommendations are likely to be expensive, both financially and in terms of the political capital necessary for realigning agency turf and responsibility. Yet, the expense of not adequately regulating nursing homes to require adequate emergency planning is shifted to residents and the people who love them when low-probability, high-damage disasters occur. Simply gambling and hoping that disasters will not happen guarantees that resident safety is a lost cause.

CONCLUSION

Improved emergency preparedness regulation may significantly decrease injury and death among residents of nursing homes when the next disaster occurs. Nevertheless, University of

228. See Underwood, supra note 21.
231. Underwood, supra note 21.
Minnesota Public Health Professor Rosalie Kane wisely reminds the public that it is important not to make high quality evacuation plans "the be-all and end-all of how we judge nursing homes" but rather "the choice of a nursing home should still be on verities like quality, quantity and caring nature of the staff and what it would be like to live there." Improved emergency preparedness will help good nursing homes, like St. Rita's Nursing Home, remain good and safe places to live.

232. Gross, supra note 86.