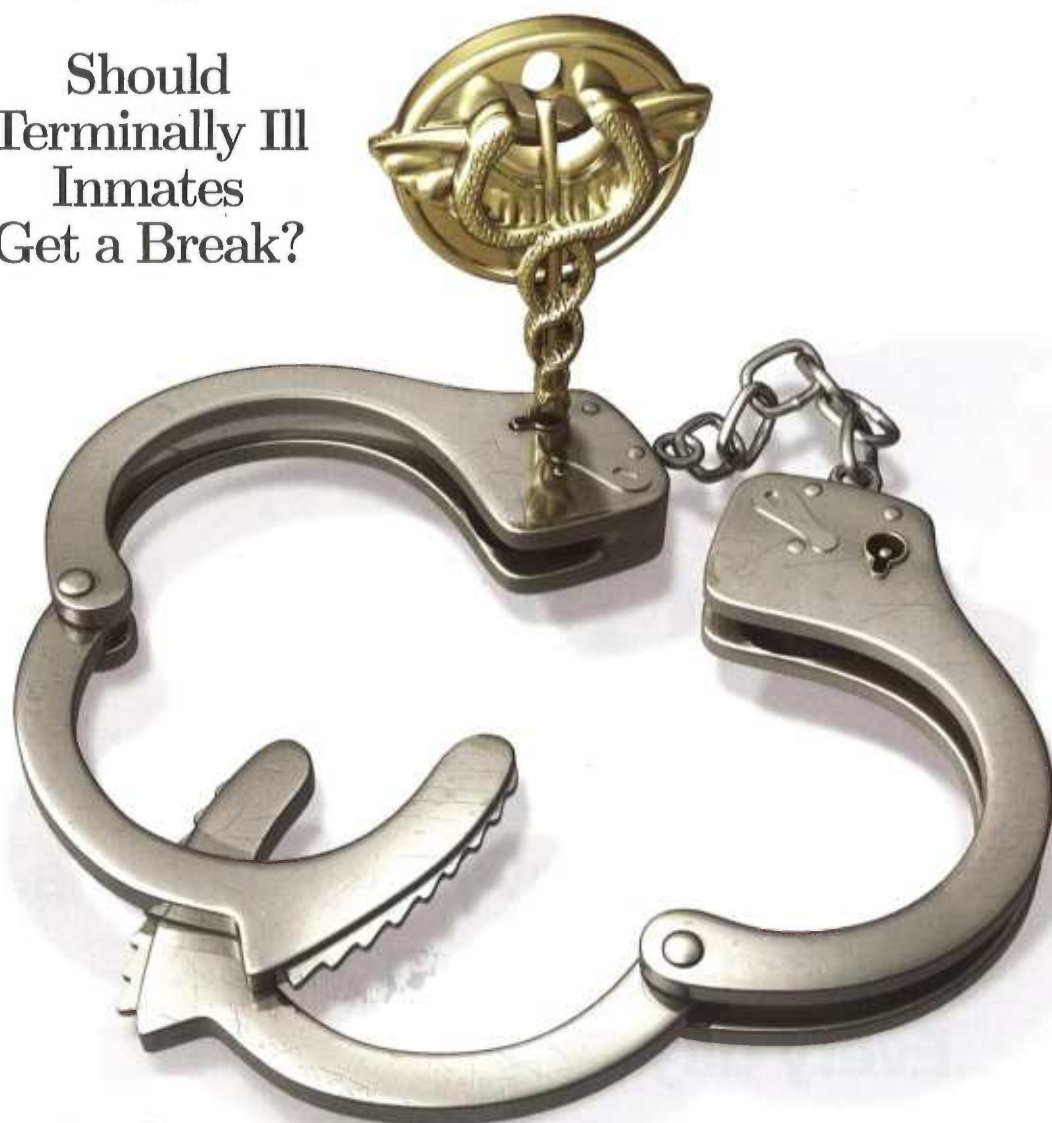


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Compassionate Release

Should
Terminally Ill
Inmates
Get a Break?



5 Strategies that
Push the Envelope

The 9th Circuit on Pensions

Benefit Corporations



BENEFIT CORPORATION IS A RECENT LEGAL PHENOMENON—a for-profit entity with three attributes that go beyond creating shareholder value: purpose, accountability, and transparency. A series of California statutes lead the way for entrepreneurs who wish to take advantage of

this option. (See Cal. Corp. Code §§ 14600–14631.)

- **Purpose.** Benefit corporations fundamentally change the way a company is permitted to act. In addition to creating shareholder value like other for-profit companies, a benefit corporation must provide general public benefit—namely a material positive impact on society and the environment taken as a whole (§ 14601(c)). Examples include providing low-income individuals or communities with beneficial products or services; preserving the environment; promoting economic opportunity; improving health; and promoting arts, science, and knowledge (§ 14601(e)). The state's general corporation law applies to benefit corporations except when it is in conflict with the special provisions enacted to create this new type of enterprise (§ 14600).

- **Accountability.** A benefit corporation must assess its overall social and environmental performance annually using an independent third-party standard. However, the assessment need not be audited or certified by a third party (§ 14630). The standard must be developed by an entity that has no material financial relationship with the corporation, and the criteria must be publicly available. In addition, the amount and sources of financial support for the third-party entity developing the standard must be publicly disclosed, along with any relationships that could reasonably be considered to present a potential con-

flict of interest (§ 14601(g)). The purpose of these requirements is to prevent the corporation from using an assessment tool that is self-serving.

- **Transparency.** A benefit corporation must report on its overall social and environmental performance to its shareholders and the public in an annual benefit report. This report must include information on the third-party standard selection process, a description of how the benefit corporation pursued any general or specific public benefit during the year, and any circumstances that hindered the creation of the public benefit (§ 14630(a)–(c)).

DIRECTORS' DUTIES

Each director of the benefit corporation must act in good faith, in a manner that he or she believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinary prudent person in a similar position would use under similar circumstances (§ 14620(a)).

Directors must consider the impact of any action upon the shareholders, employees, customers, the community, the environment, short- or long-term interests of the corporation, and the ability of the corporation to accomplish its public benefit purpose (§ 14620(b)). That said, the code clearly dictates that directors owe their duty to the corporation; they do not owe a fiduciary duty to the general public (§ 14620(i)).

In discharging their duties, directors are not required to give priority to any particular factor or person unless the corporation so stated in its articles (§ 14620(d)).

ENFORCEMENT, CHANGE, TAXES

If the directors fail to discharge their duties as described above, or if the corporation fails to pursue its public benefit purposes, assess its performance, or issue the benefit report, the shareholders may bring an action in court to force the corporation to do so. No monetary damages are available in such a derivative action, though the court may order reimbursement of attorneys fees (§ 14623).

The articles of the corporation must state that it is a benefit corporation and describe any specific public purposes (§ 14602). Stock certificates must identify the corporation as a benefit corporation (§ 14631). Conversion or merger into or out of a benefit corporation requires at least a vote of two-thirds of the outstanding shares (§§ 14603, 14604). Shareholders who oppose the conversion or merger are entitled to dissenters rights under the code (§ 14604(d)).

For tax purposes, a benefit corporation may elect to be a C or an S corporation. They also may be subject to various local preferences. For example, in San Francisco a benefit corporation enjoys a 4 percent bidding preference on city contracts.

Benefit corporations represent a new breed of American capitalism, paving the way for a sustainable economy with no trade-off between purpose and long-term profit. ☪

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