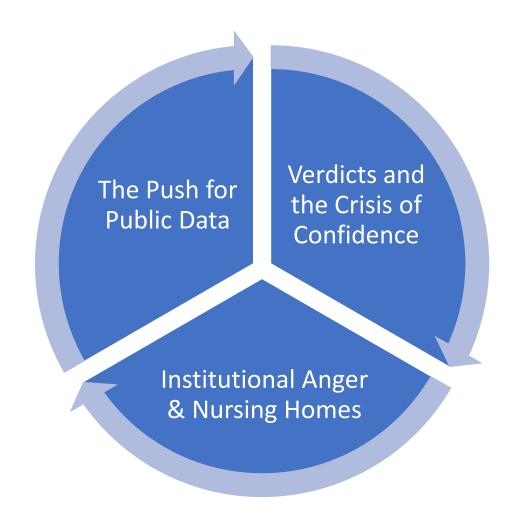
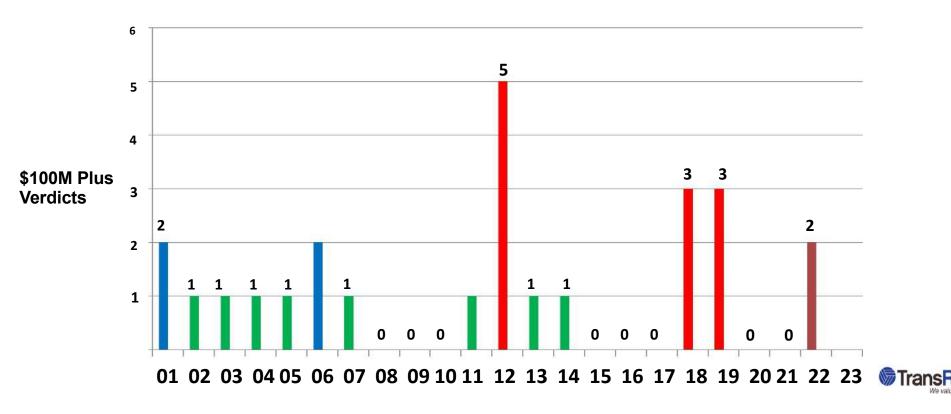
Senior Care: Current Liability, Licensure, and Regulatory Risk

Maria Wood Drew Graham Hall Booth Smith, P.C.

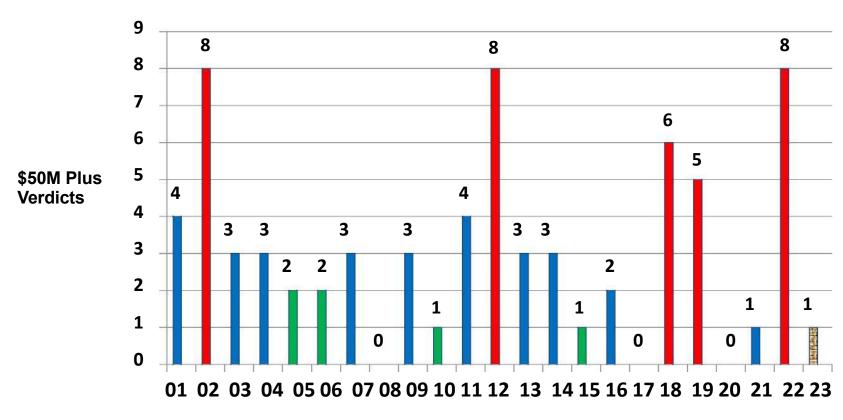




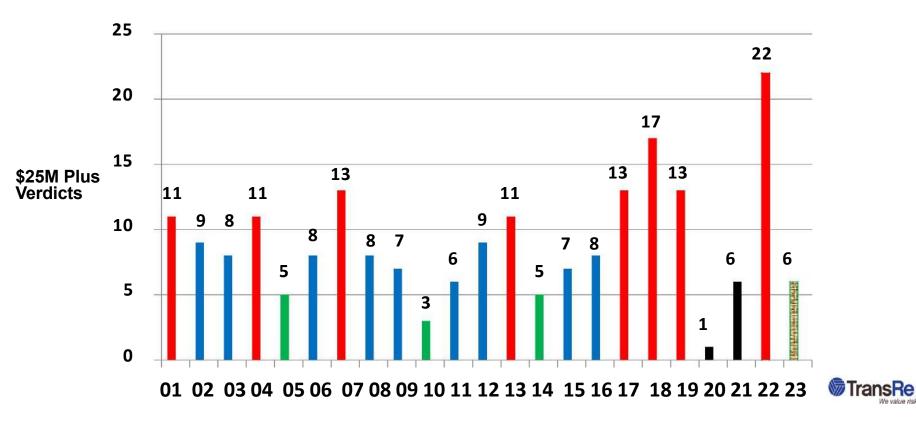
\$100M + Verdicts from 2001 – 2023



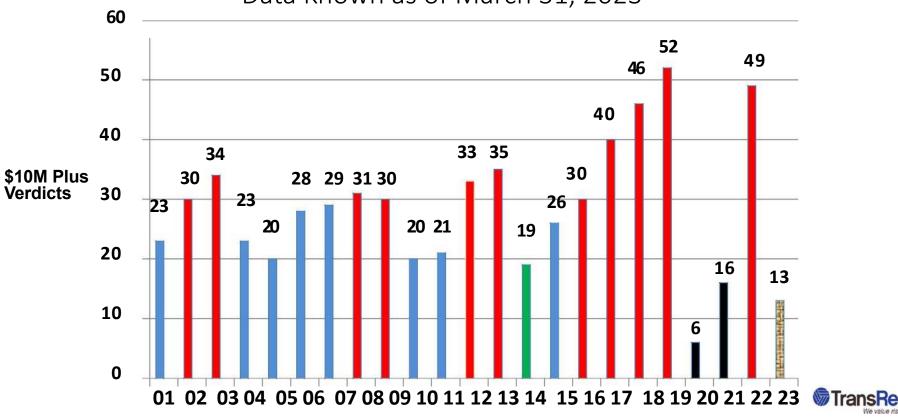
\$50M + Verdicts from 2001 – 2023



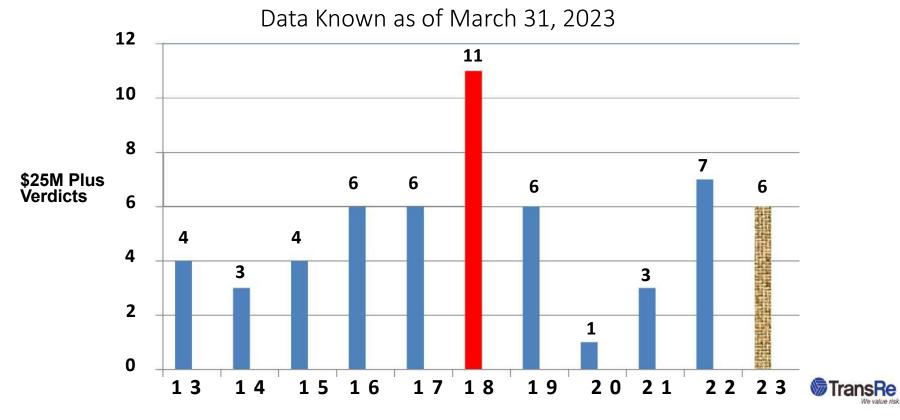
\$25M + Verdicts from 2001 – 2023



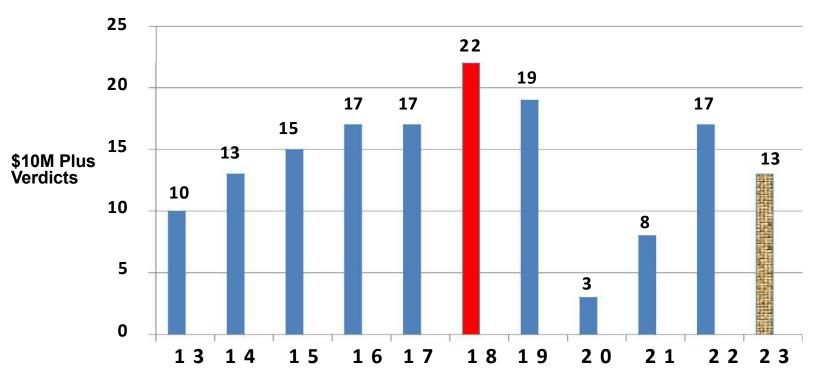
\$10M + Verdicts from 2001 – 2023



\$25M + Verdicts in the First 6 Months of 2013-2023



\$10M + Verdicts in the First 6 Months of 2013-2023

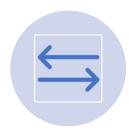




"But these are just verdicts..."



Only a fraction of claims (5-7%?) are tried, so verdicts are overrated.



The verdict is almost never the final resolution amount.



Verdicts end up appealed, settled, not fully collectible.



So, verdicts aren't really that important...or are they?



Highly publicized aberration verdicts are creating a confidence crisis.



Verdicts are driving unprecedented demands.

Well funded plaintiff attorneys

Enhanced plaintiff attorney communication

Publicity of large settlements and verdicts

Third party liability funding

Plaintiff strategies: *The Reptile, Ball on Damages* Settlements of co-defendants financing plaintiff's case

Complacent claims handlers, complacent defense attorneys

Growing institutional anger

Nursing homes became the target of institutional anger after COVID.



[COMMITTEE PRINT]

94th Congress }

SENATE

No. —

NURSING HOME CARE IN THE UNITED STATES: FAILURE IN PUBLIC POLICY

Supporting Paper No. 2

DRUGS IN NURSING HOMES: MISUSE, HIGH COSTS, AND KICKBACKS

PREPARED BY THE

SUBCOMMITTEE ON LONG-TERM CARE OF THE

SPECIAL COMMITTEE ON AGING UNITED STATES SENATE



Printed for the use of the Special Committee on Aging



NURSING HOME CARE IN THE UNITED STATES: FAILURE IN PUBLIC POLICY



January 1975

[COMMITTEE PRINT]

94th Congress 1st Session

SENATE

REPORT

NURSING HOME CARE IN THE UNITED STATES: FAILURE IN PUBLIC POLICY

Supporting Paper No. 2

DRUGS IN NURSING HOMES: MISUSE, HIGH COSTS, AND KICKBACKS

PREPARED BY THE

SUBCOMMITTEE ON LONG-TERM CARE

SPECIAL COMMITTEE ON AGING UNITED STATES SENATE



Printed for the use of the Special Committee on Agin

"Profits by nursing homes have occasioned serious and persistent controversy."

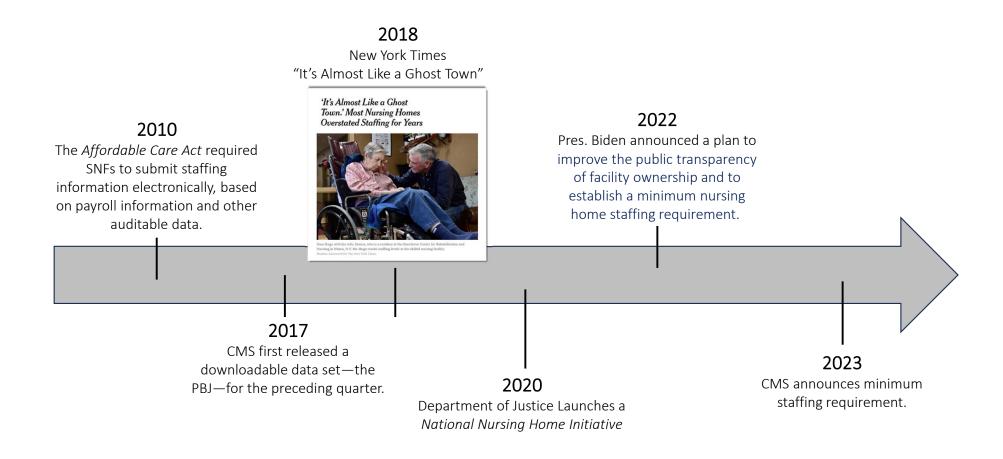
"A subcommittee survey made in 1973-74, indicates that the 106 publicly held corporations controlled 18 percent of the industry's beds and accounted for one-third of the industry's \$3.2 billion in revenue (as of 1972)"

https://www.aging.sénate.gov/imo/media/doc/reports/rpt175.pdf









The explosion of public data

Types of data available

Staffing (PBJ)

Acuity

Survey

COVID-19 Reporting

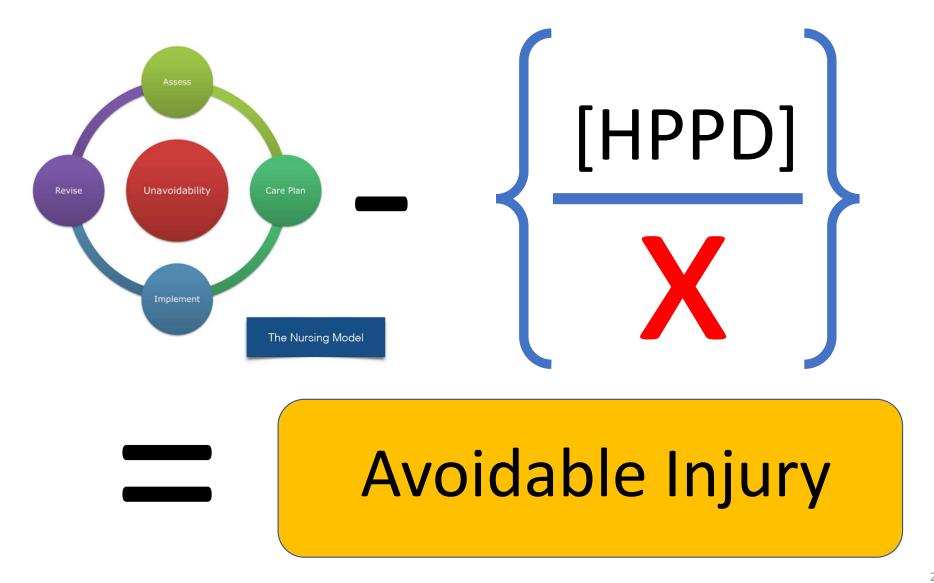
Turnover

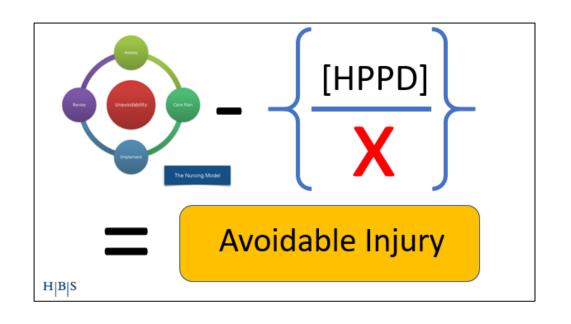
Ownership

Change of Ownership (CHOW)

The Role of Staffing in SNF Litigation



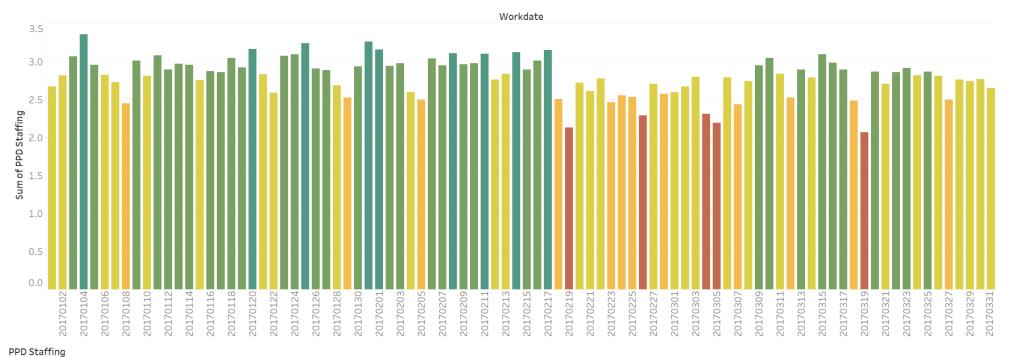




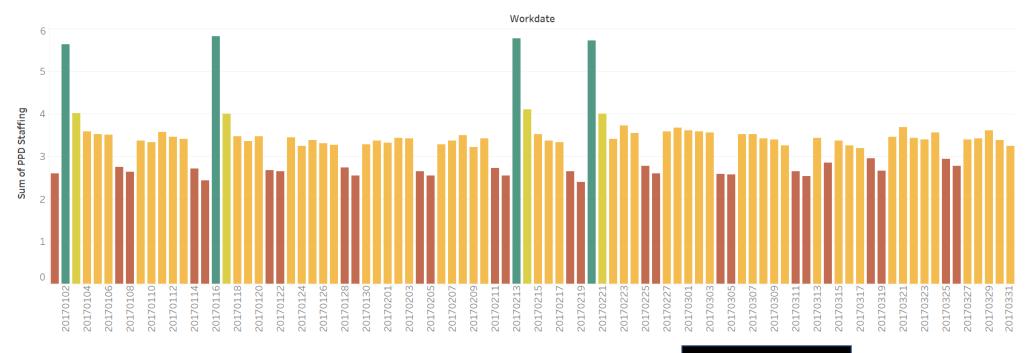


Staffing reductions implemented to maximize profitability

Example 1: HPPD Staffing (by Work date)



Example 2: HPPD Staffing (by Work date)



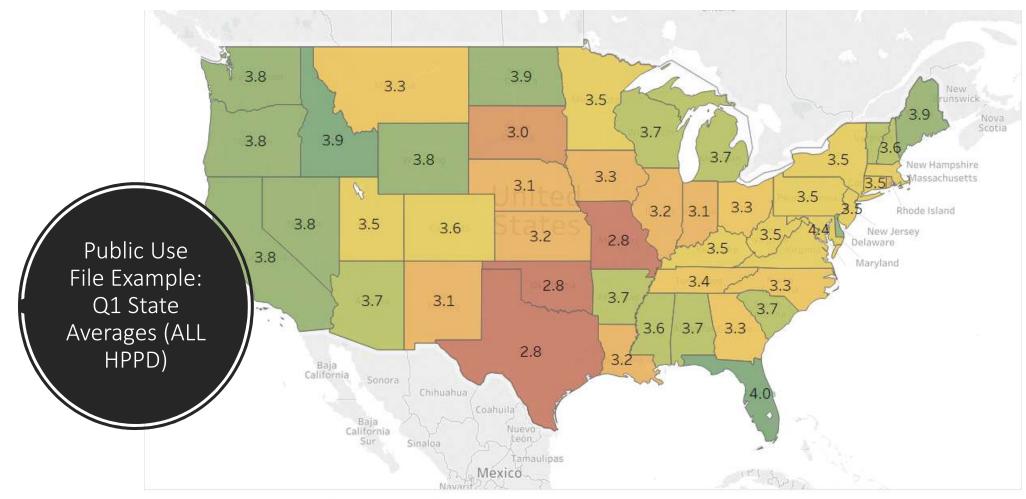
Sum of PPD Staffing for each Workdate. Color shows average of PPD Staffing. The data is filtered on Provname and State. The Provname filter keeps members. The view is filtered on Workdate, which keeps 90 of 90 members.

The State filter keeps 51 of 51

PPD Staffing

2.392 5.817

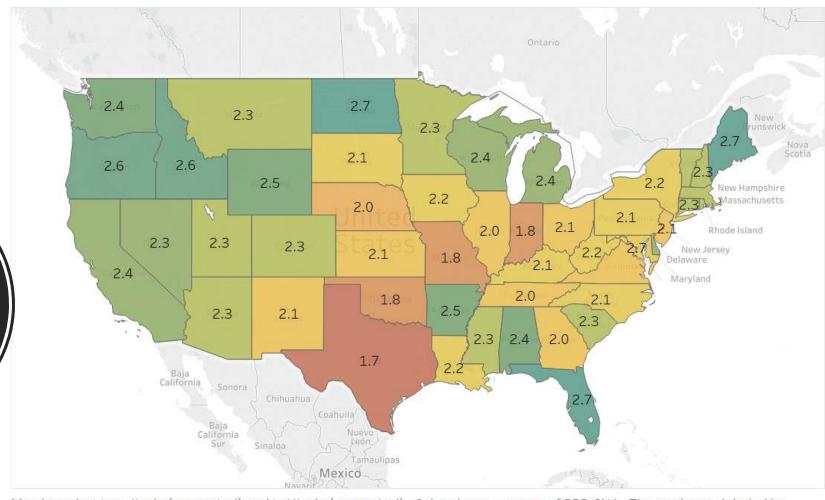
27



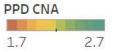
Map based on Longitude (generated) and Latitude (generated). Color shows average of PPD Staffing. The marks are labeled by average of PPD Staffing. Details are shown for State. The view is filtered on State, which excludes AK.

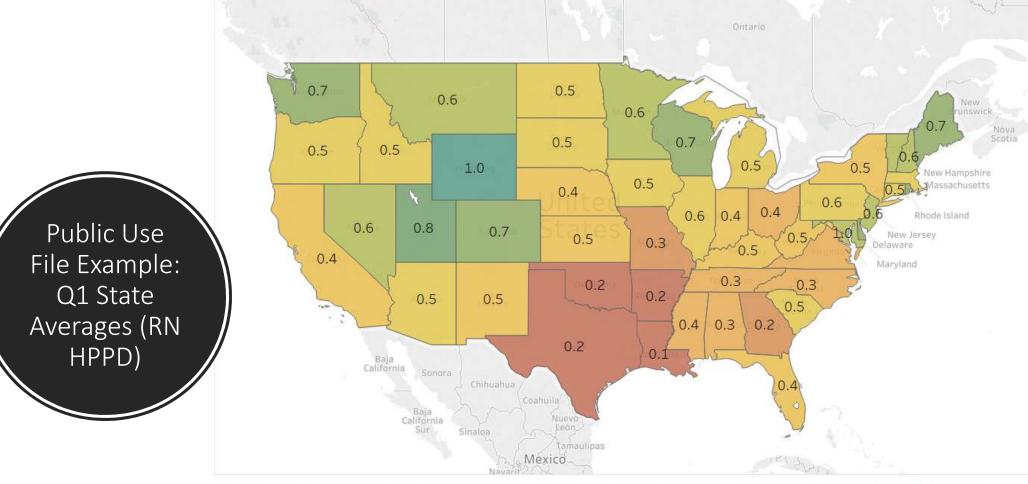


Public Use File Example: Q1 State Averages (CNA HPPD)

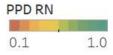


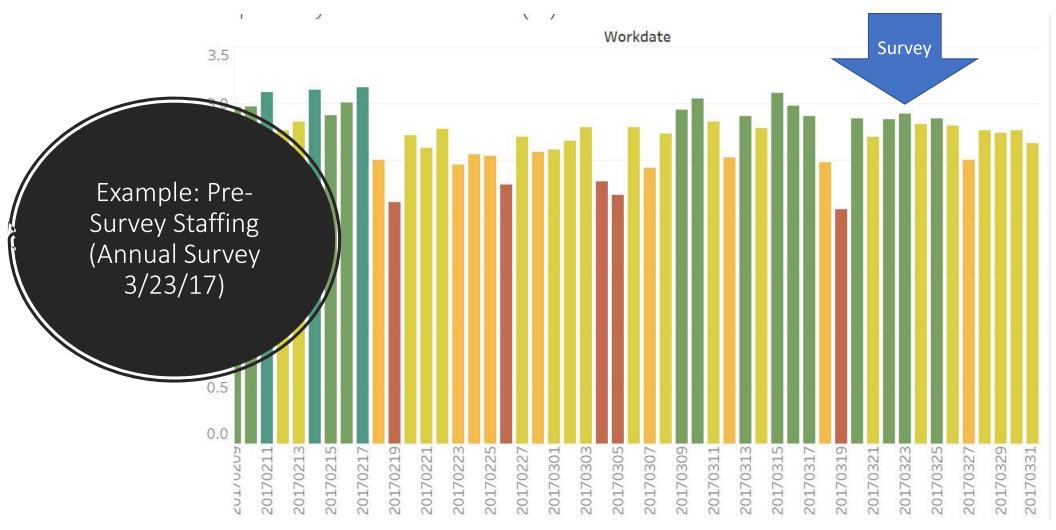
Map based on Longitude (generated) and Latitude (generated). Color shows average of PPD CNA. The marks are labeled by average of PPD CNA. Details are shown for State. The view is filtered on State, which excludes AK.

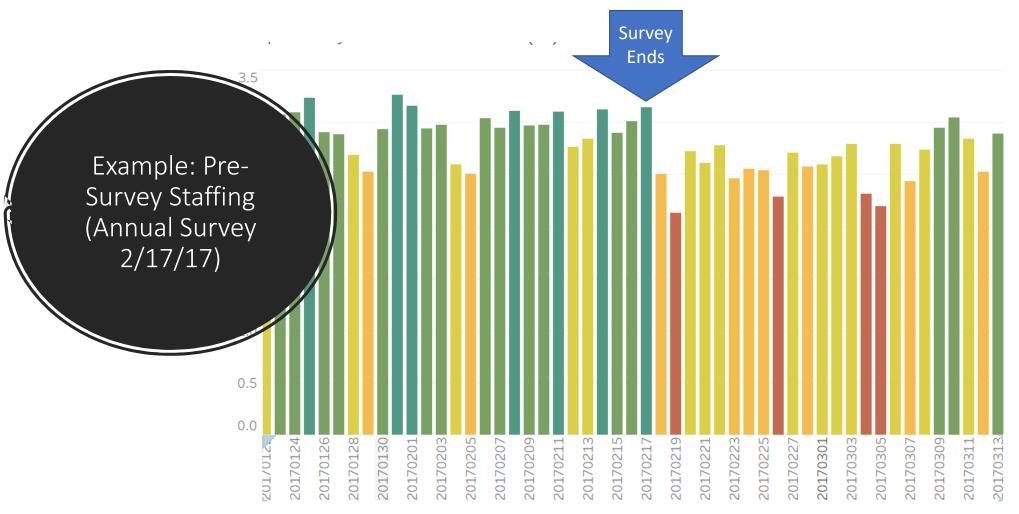




Map based on Longitude (generated) and Latitude (generated). Color shows average of PPD RN. The marks are labeled by average of PPD RN. Details are shown for State. The view is filtered on State, which excludes AK.







Plaintiff's PBJ Strategies

"Most nursing home quality problems are caused by inadequate staffing levels or poorly trained and educated nursing staff. Each litigation case should undertake an analysis of whether a skilled nursing facility provides adequate staffing."

A Checklist for Building a Nursing Home Staffing Case Charlene Harrington, RN, PhD, FAAN, Professor Emeritus, UCSF

http://canhr.org/publications/newsletters/NetNews/Feature_Article/NN 2018Q4.htm

Plaintiff's PBJ Strategies



Determine the collective acuity level of the residents at the facility



Determine the staffing levels at the facility



Compare the collective acuity and staffing levels at the facility with recognized staffing requirements

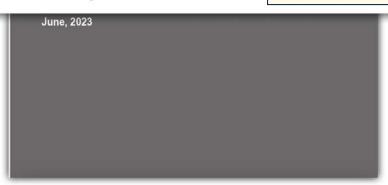
A Checklist for Building a Nursing Home Staffing Case
Charlene Harrington, RN, PhD, FAAN, Professor Emeritus, UCSF

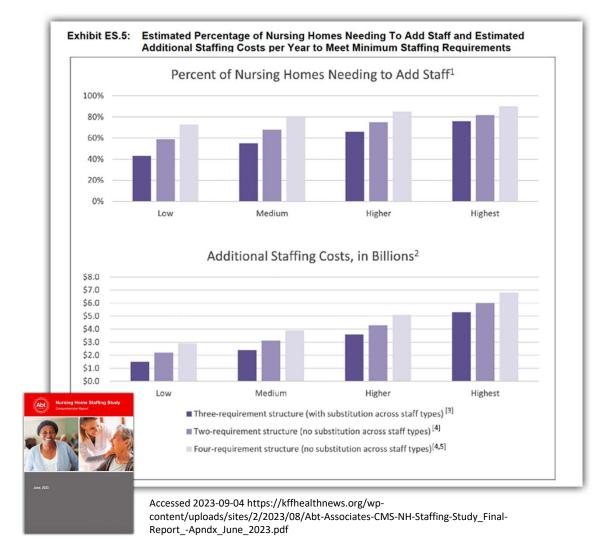
http://canhr.org/publications/newsletters/NetNews/Feature_Article/NN_2018Q4.htm



New federal staffing guidance for nursing homes Abt Report, June 2023

 Multivariate models show that quality and safety, as measured using claims, resident assessments, and health inspection data, increase with staffing levels, with no obvious plateau at which quality and safety are maximized or "cliff" below which quality and safety steeply decline.





New federal staffing guidance for nursing homes Abt Report, June 2023

"The total costs of additional staffing to meet a minimum staffing requirement range from \$1.5 to \$6.8 billion for the four potential minimum staffing requirement options presented in this report..."

New federal staffing guidance for nursing homes Abt Report, June 2023

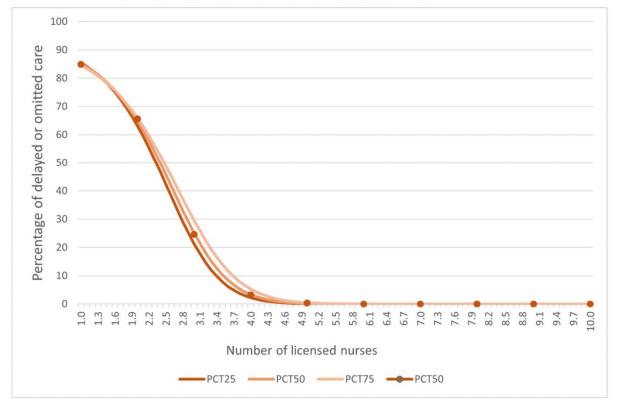
• A state-level minimum staffing requirement introduced in Massachusetts in 2020 penalizes its nursing homes with total nurse staffing below 3.58 HPRD with a 2 percent reduction in their quarterly Medicaid payments. This requirement increased staffing levels among low-staffed nursing homes with high Medicaid resident shares, with the effect most pronounced for nurse aides. However, the impacts of the requirement on quality and safety were not statistically significant. This may be related to findings in previous literature suggesting that modest increases in nurse aide staffing do not affect quality and safety. For safety outcomes, the lack of significant findings could also be related to data issues in health inspection measures. Specifically, as of December 2021, more than one-third of nursing homes did not have updated health inspection data since the beginning of the COVID-19 public health emergency (PHE) and the policy change.





APPENDIX F. SIMULATIONS OF DELAYED/OMITTED CLINICAL CARE SUPPLEMENTAL MATERIALS

Exhibit F.14: Predicted Delayed and Omitted Care Across Staffing Levels Based on a Seconddegree Binomial Model of the Simul8 Simulation Results



New federal staffing guidance for nursing homes Abt Report, June 2023



"Under CMS's proposal, nursing homes participating in Medicare and Medicaid would be required to meet specific nurse staffing levels that promote safe, high-quality care for residents. Nursing homes would need to provide residents with a minimum of 0.55 hours of care from a registered nurse per resident per day, and 2.45 hours of care from a nurse aide per resident per day, exceeding existing standards in nearly all states. CMS estimates approximately three quarters (75%) of nursing homes would have to strengthen staffing in their facilities."

Accessed 2023-09-04 https://www.cms.gov/newsroom/press-releases/hhs-proposes-minimum-staffing-standards-enhance-safety-and-quality-nursing-homes



"CMS also proposes to require states to collect and report on compensation for workers as a percentage of Medicaid payments for those working in nursing homes and intermediate care facilities."

Accessed 2023-09-04 https://www.cms.gov/newsroom/press-releases/hhs-proposes-minimum-staffing-standards-enhance-safety-and-quality-nursing-homes



Federal Register/Vol. 88, No. 171/Wednesday, September 6, 2023/Proposed Rules

61401

TABLE 15—ANNUAL COST FOR 24/7 RN REQUIREMENT—Continued

Year	Collection of information costs for 24/7 RN (§ 483.35 nursing services)	24/7 RN requirement (urban facilities)	24/7 RN requirement (rural facilities)	Total cost
0	7,990,622.80	223,754,075.83	149,989,560.03	381,734,258.67
	8,175,206.19	228,922,794.98	153,454,318.87	390,552,320.04
	8,364,053.45	234,210,911.55	156,999,113.64	399,574,078.64
	8,557,263.08	239,621,183.61	160,625,793.16	408,804,239.85
	8,754,935.86	245,156,432.95	164,336,248.98	418,247,617.79
	8,957,174.88	250,819,546.55	168,132,416.34	427,909,137.76
	9,164,085.62	256,613,478.07	172,016,275.15	437,793,838.85



Federal Register/Vol. 88, No. 171/Wednesday, September 6, 2023/Proposed Rules

TABLE 20—ANNUAL COST FOR THE COMPREHENSIVE MINIMUM NURSE STAFFING REQUIREMENT

Year	Collection of information costs for 24/7 RN (§ 483.35 nursing services)	Collection of information costs for facility assessment (§ 483.71 facility assessment)	24/7 RN requirement (urban facilities)	24/7 RN requirement (rural facilities)	0.55 RN and 2.45 NA HPRD requirement (urban facilities)	0.55 RN and 2.45 NA HPRD requirement (rural facilities)	Total cost
1	\$7,461,504.00	\$24,176,448.00	\$0.00	\$0.00	\$0	Su	\$31,637,952
2	7,633,864.74	24,734,923.95	213,764,107.41	0.00	0		246,132,896
3	7,810,207.02	25,306,300.69	218,702,058.29	146,603,030.04	3,662,915,945		4,061,337,541
4	7,990,622.80	25,890,876.24	223,754,075.83	149,989,560.03	3,747,529,303		4,155,154,438
5	8,175,206.19	26,488,955.48	228,922,794.98	153,454,318.87	3,834,097,230	803,377,17	5,054,515,685
6	8,364,053.45	27,100,850.35	234,210,911.55	156,999,113.64	3,922,664,876	821,935,192	5,171,274,997
7	8,557,263.08	27,726,879.99	239,621,183.61	160,625,793.16	4,013,278,435	840,921,89	5,290,731,450
8	8,754,935.86	28,367,370.92	245,156,432.95	164,336,248.98	4,105,985,167	860,347,19	5,412,947,346
9	8,957,174.88	29,022,657.19	250,819,546.55	168,132,416.34	4,200,833,424	880,221,21	5,537,986,430
10	9,164,085.62	29,693,080.57	256,613,478.07	172,016,275.15	4,297,872,676	900,554,32	5,665,913,916
10 Year Total							
Cost	82,868,918	268,508,343	2,111,564,589	1,272,156,756	31,785,177,057	5,107,356,98	40,627,632,652

61407

Data-driven litigation against SNFs is amplifying the theory that staffing and ownership are responsible for "the problem" in nursing homes.

[Example] False Claims Act



Department of Justice Launches a National Nursing Home Initiative March 3, 2020

"Attorney General William P. Barr announced today the launch of the Department of Justice's National Nursing Home Initiative, which will coordinate and enhance civil and criminal efforts to pursue nursing homes that provide grossly substandard care to their residents."



Its Affiliates for Providing Grossly Substandard Nursing Home Services June 15, 2022

Case 2:22-cv-02344 Docu	ument 1 Filed 06/14/22 Page 1 of 140
	ATES DISTRICT COURT
FOR THE EASTERN	DISTRICT OF PENNSYLVANIA
UNITED STATES OF AMERICA,)
)
Plaintiff,)
) Civil Action No:
v.)
AMERICAN HEALTH FOUNDATION.	
INC : AHE MANAGEMENT	(

530. The Defendants knowingly presented or caused to be submitted false or fraudulent claims for payment by the Medicare and Medicaid programs, in violation of the False Claims Act, 31 U.S.C. § 3729(a)(1)(A). These claims were for nursing home care and services that were non-existent, grossly substandard, or in violation of the NHRA.

This action arises from the Defendants' provision of non-existent and grossly substandard nursing home services to Medicare and Medicaid beneficiaries at Cheltenham (from at least January 1, 2016, to December 31, 2018), Wilmington Place (from at least January 1, 2017, to December 31, 2018) and Samaritan (from at least October 1, 2016, to December 31, 1)

https://www.justice.gov/opa/pr/justice-department-suesamerican-health-foundation-and-its-affiliates-providing-grossly



Justice Department Sues American Health Foundation and Its Affiliates for Providing Grossly Substandard Nursing Home Services June 15, 2022

308. In 2017 and 2018, CMS gave Cheltenham a rating of two out of five stars for its staffing, indicating that the facility's staffing levels were "below average." Cheltenham's registered nursing staffing received 2.5 stars, and 1.75 stars, respectively, in 2017 and 2018. In 2019 and 2020, Cheltenham's staffing rating was one star for both overall and registered nurse staffing. A one star rating meant that the facility's staffing levels were "much below average." Cheltenham currently has a one star rating for both overall and registered nurse staffing. These ratings were based on quarterly payroll data submitted to CMS, the number of residents at the facility, and the facility's case mix.

[Example] Attorney General Actions



Attorney General James Sues Owners and Operators of Four Nursing Homes for Financial Fraud and Resident Neglect June 28, 2023



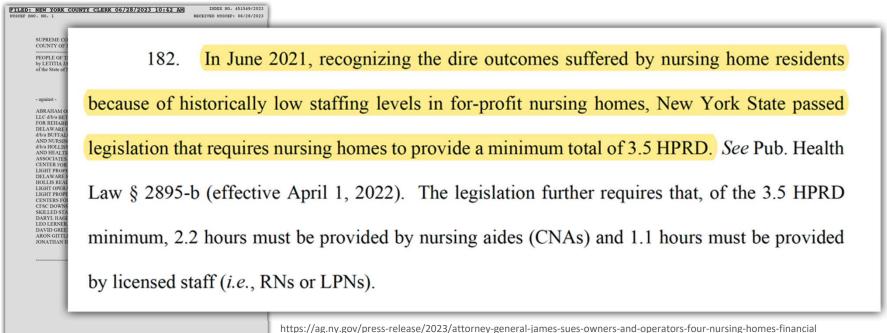
Respondents Operated the Nursing Homes with Chronic Insufficient Staffing But Continued Resident Admissions, to Maximize Their Fraudulent Up-Front Profit Taking



https://ag.ny.gov/press-release/2023/attorney-general-james-sues-owners-and-operators-four-nursing-homes-financial



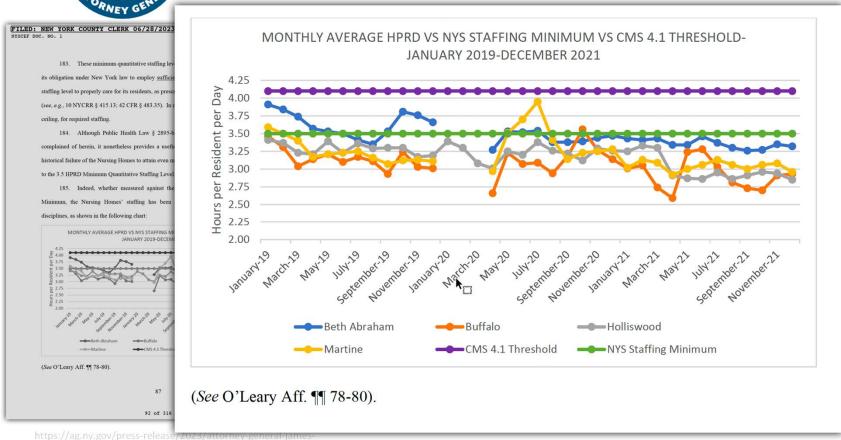
Attorney General James Sues Owners and Operators of Four Nursing Homes for Financial Fraud and Resident Neglect June 28, 2023





Attorney General James Sues Owners and Operators of Four Nursing Homes for Financial Fraud and Resident Neglect

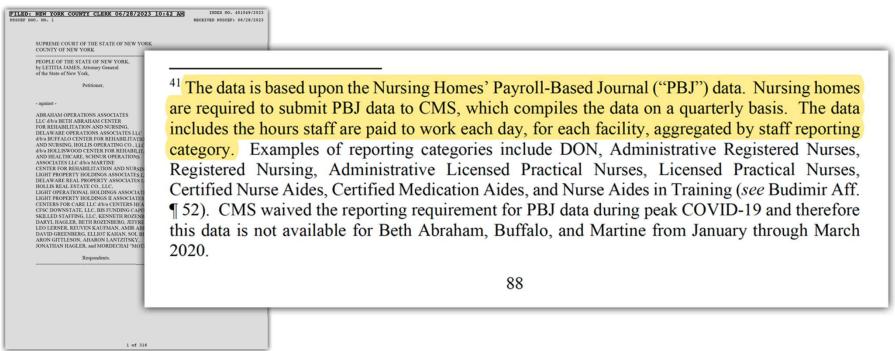
June 28, 2023



nttps://ag.ny.gov/press-release/2023/attorney-general-jam sues-owners-and-operators-four-nursing-homes-financial

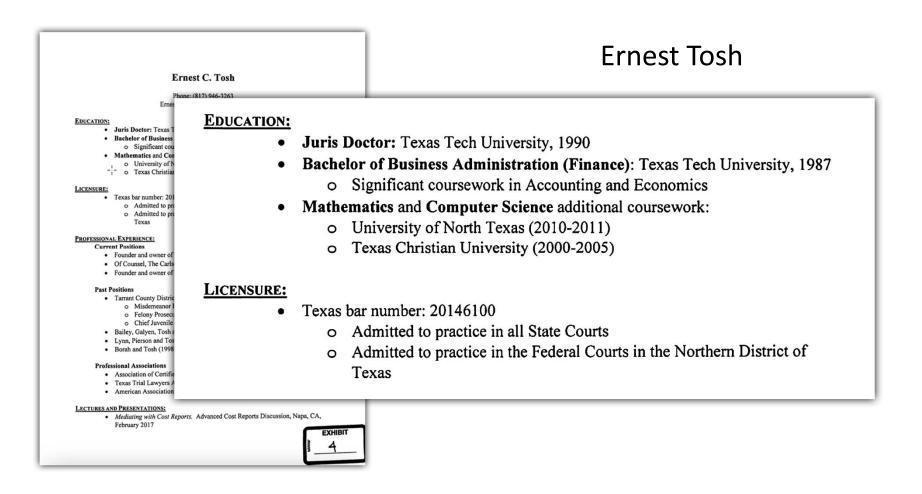


Attorney General James Sues Owners and Operators of Four Nursing Homes for Financial Fraud and Resident Neglect June 28, 2023



[Example] Staffing focused negligence actions

Comparison of Available Staffing Information



Comparison of Available Staffing Information

Ernest Tosh (Feb. 2021)

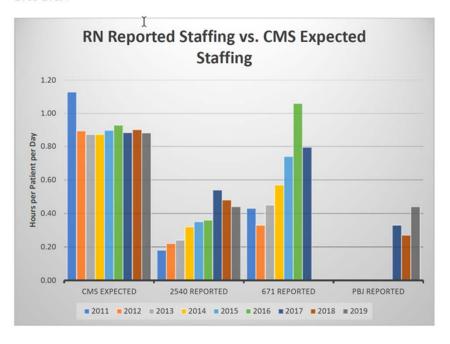
Financial and Staffing Analysis for Robinson Nursing and Rehabilitation

- 1. My name is Ernest Tosh. I am an attorney, licensed in the states of North Carolina, Oklahoma and Texas, with experience in health care finance. I received my Bachelor of Business Administration Finance degree in 1987 from Texas Tech University and my Juris Doctor in 1990 from Texas Tech University. I am the owner of Full Financials, LLC. Full Financials provides consulting services for the analysis of nursing home financial, operational and staffing practices.
- The Reddick Moss Law Firm and Campbell Law Firm have retained me in this case to provide opinion, summary, historical and explanatory information concerning the financial, operational and staffing information for the skilled nursing industry and the defendant entity in the instant case.
- 3. The following records have been provided and reviewed:
 - · Facility records including survey reports, cost reports, financial reports.
 - · Nursing home staffing records including census data and staffing data.
 - Public information including but not limited to CMS data, government reports and website information.
 - · State and Federal nursing home laws and regulations.
 - Valerie Gray's Robinson Nursing and Rehabilitation Report and related calculations.
- According to the records reviewed Robinson Nursing and Rehabilitation (Robinson) is a skilled nursing facility in North Little Rock, AR. It is a for-profit one hundred and ten (110) bed facility that participates in the Medicare and Medicaid programs.
- 5. SNFs serve the needs of both post-acute care patients (typically funded by Medicare or Managed Care providers) and long-term care residents (typically funded by Medicaid or private resources). Often the individuals receiving services from the SNF are referred to as residents of the nursing home but the terms "patient" and "resident" are often used interchangeably.
- 6. Most skilled nursing facilities, including Robinson, receive the majority of their revenues from government programs including Medicare, Medicaid and the Veterans Administration. Robinson is both a Medicare and Medicaid provider, it is therefore required to comply with both federal and Arkansas laws and regulations.

EXHIBIT D

Comparison of Available Staffing Information

43. Robinson reported staffing to CMS using CMS Form 2540-10 and to CMS's Five-Star System using CMS Form 671 and the PBJ system. The following graph displays these three reported RN staffing levels as compared to CMS' expected RN staffing levels for 2011-2019.



Andrew PHILLIPS, et al., v. Robinson NURSING and Rehabilitation Center, LLC., et al., 2021 WL 9036286

Congressional Testimony Oversight Subcommittee Hearing on Examining Private Equity's Expanded Role in U.S. Health Care

Mar 25, 2021 01:01:29 PM

Committee on
Ways & Means

Virtual Hearing

Ernest Tosh

"America's nursing home industry is dominated by for-profit chains, including chains owned by private equity firms. Understaffing is a chronic problem in for-profit nursing homes and leads to an increase in negative outcomes for the residents. The solution to this problem is to increase staffing."

Staffing expert opinion excluded (12/2022)

Case 2:19-cv-02148-HLT Document 245 Filed 12/20/22 Page 1 of 8

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

CHARLES MURRAY, Individually, and as Special Administrator of the estate of

As discussed below, the Court grants Defendants' motion to exclude the opinion of Kathleen Hill-O'Neill regarding staffing levels as measured against a 1995-1997 staff time measurement ("STM") study because Hill-O'Neill testified that neither the standard of care nor state or federal regulations require nursing homes to staff to STM levels, and her opinions on this issue are therefore not relevant. The Court also grants Defendants' motion to exclude the opinions

state or federal regulations require nursing homes to staff to STM levels, and her opinions on this issue are therefore not relevant. The Court also grants Defendants' motion to exclude the opinions

Although Plaintiff sues on behalf of an estate and on his own behalf, the Court refers to him in the singular. Because there were multiple defendants at the time these motions were filed, the Court refers to Defendants in the plural.



The new litigation paradigm

- Understand the public data available
- Evaluate the public data
- Provide a realistic initial evaluation (90 days)
- Establish a reasonable value
- Develop an end-in-mind resolution plan
- Defend the data in appropriate cases

The New Data Defense Paradigm

