

All PowerPoint Slides

5th Annual Long Term Care Insurance ExecuSummit September 12 & 13, 2023 Mohegan Sun Hotel & Convention Center, Uncasville, CT



FitchRatings

Long-Term Care

Property / Casualty and Life Insurance

Douglas Baker
Director, Fitch Ratings
North American Insurance

September 12, 2023





Long Term Care & Senior Living Underwriting Trends

Brittany Oliveira
Vice President
Senior Care Product Manager
IronHealth/Ironshore

Randy Stimmell
Senior Vice President
Risk Specialties
Willis Towers Watson

Drew Graham (Moderator)
Aging Services Practice
Leader
Hall Booth Smith, PC
New York, NY

Market concerns

Insured concerns

Impact of current litigation

Predictions

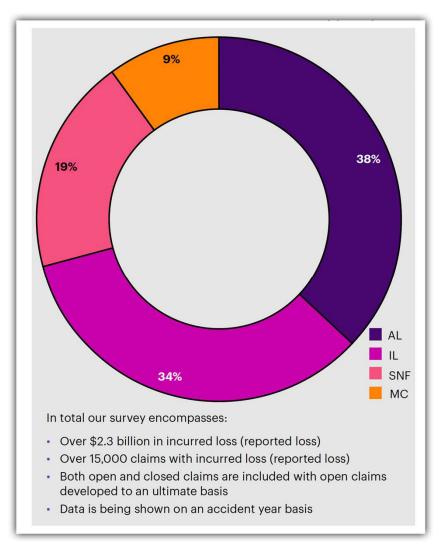
Primary

Reinsurance

Excess

Captives & RRGs

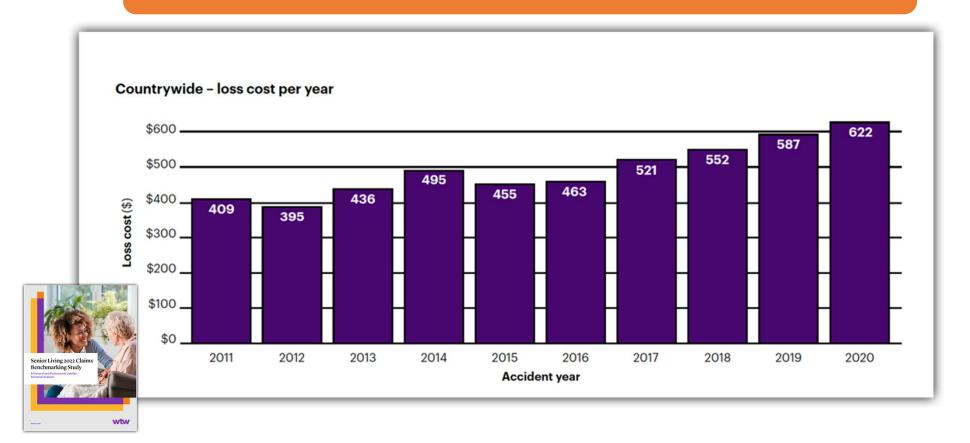


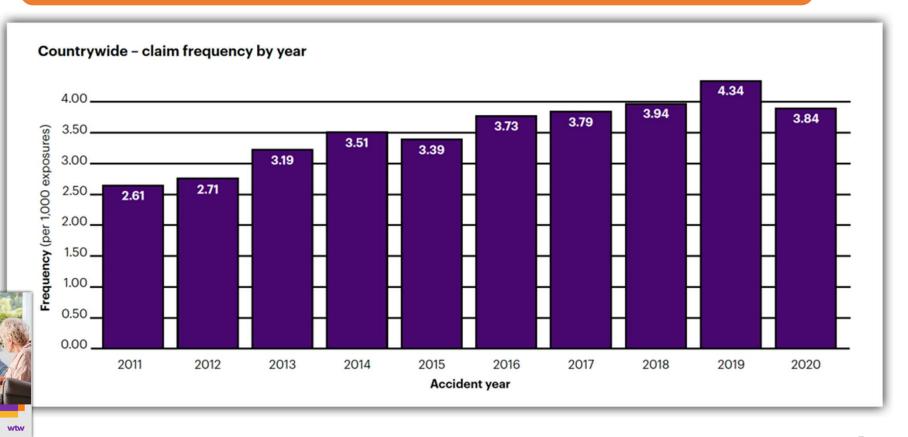


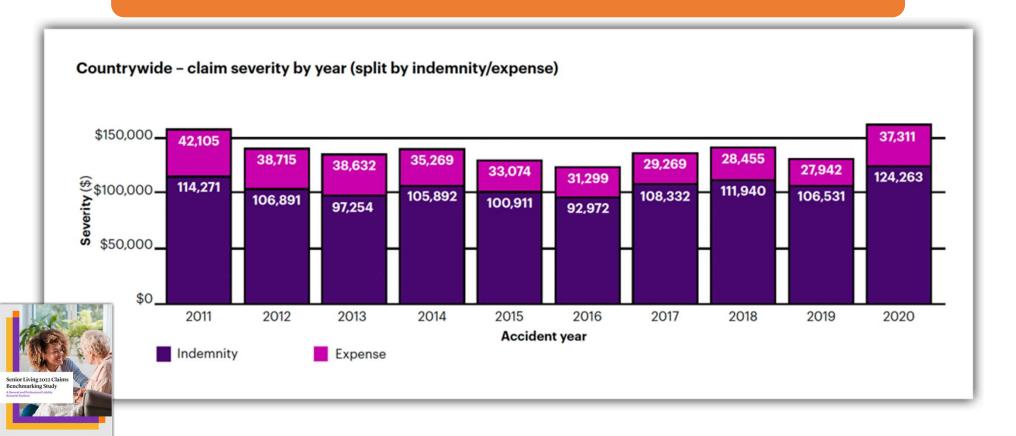
2022 finding of loss cost, average severeity, frequency

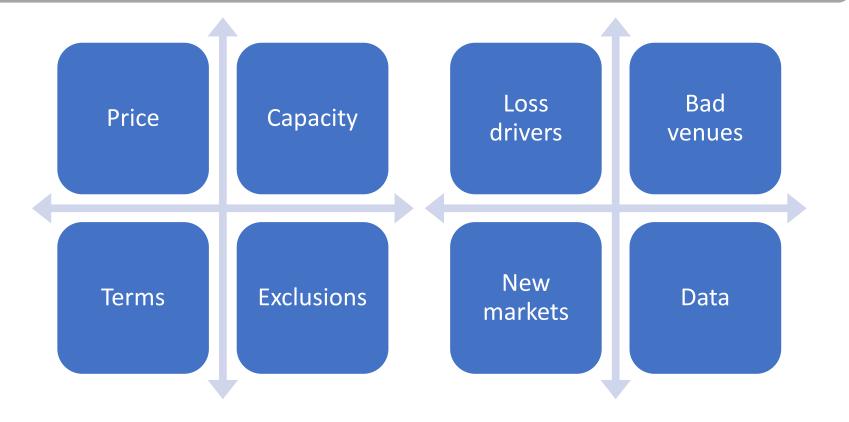
	2022 projections assisted living basis	Trend indications
Loss cost	650	4.00%
Frequency (per 1,000 exposures)	4.64	0.50%
Severity	140,000	3.50%

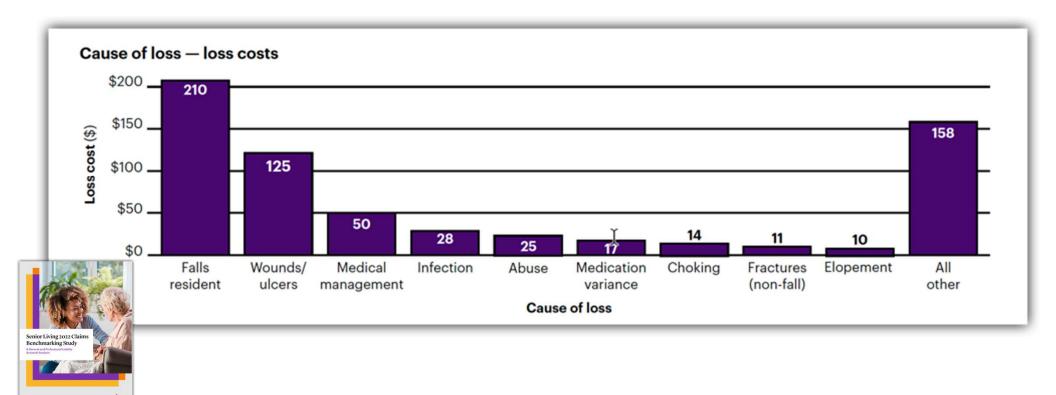


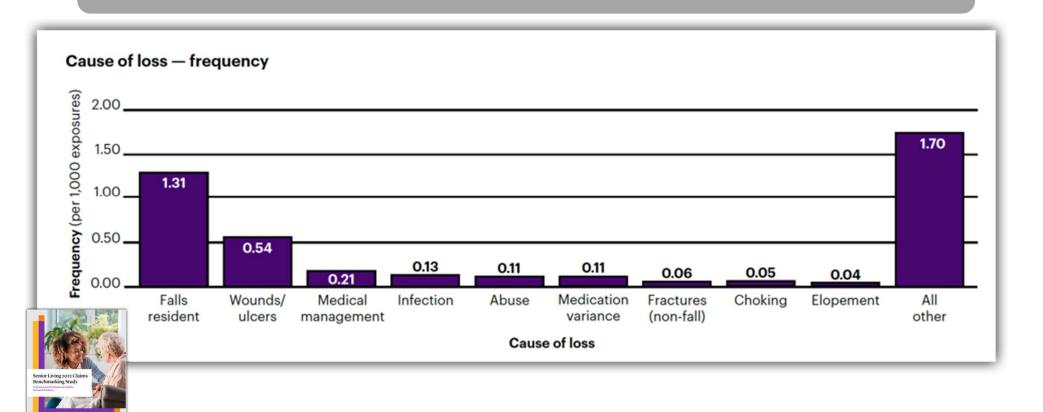


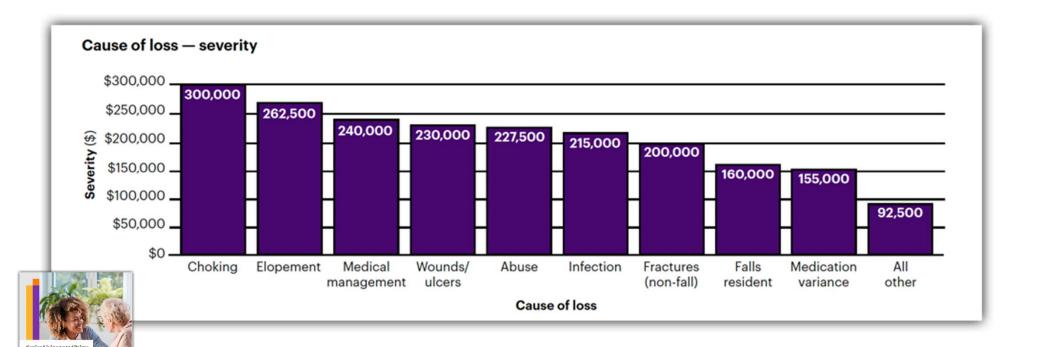




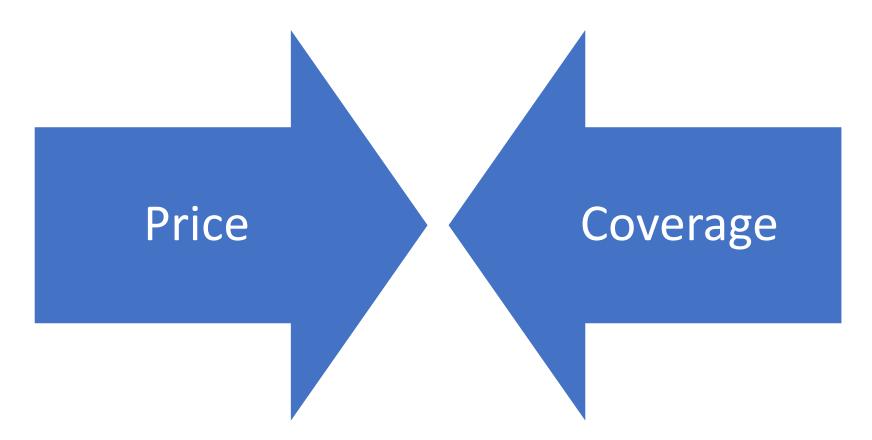








Insured concerns



Impact of current litigation

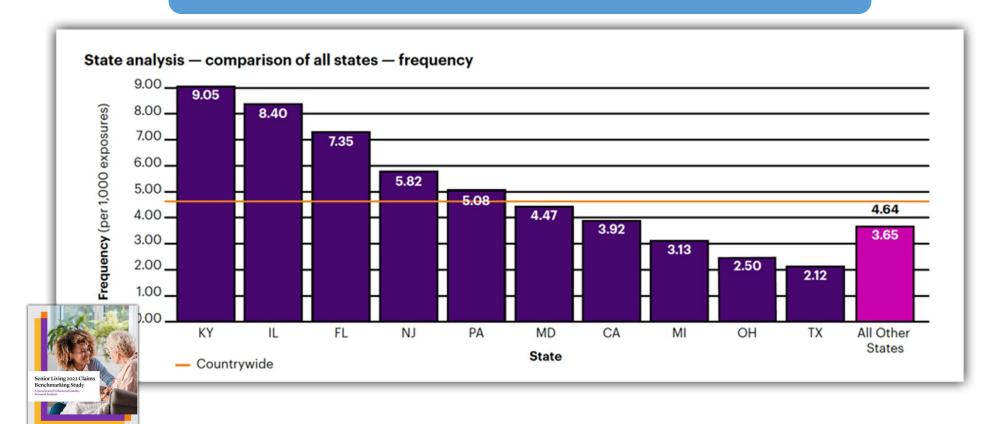
Verdicts

Arbitration

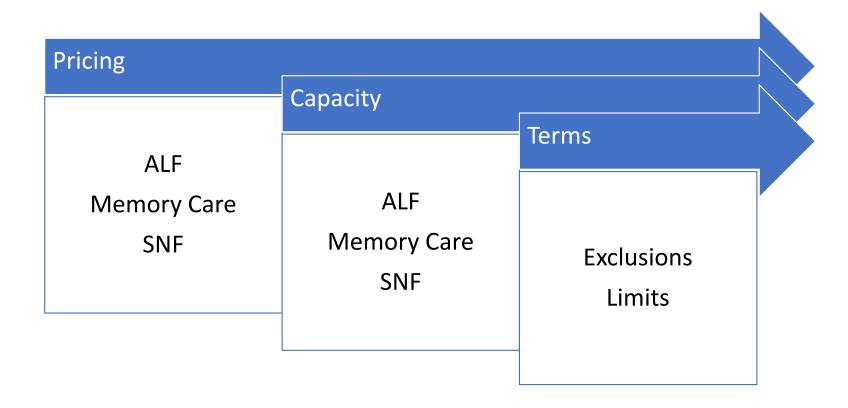
Settlements

Demands

Impact of current litigation



Predictions for 2024



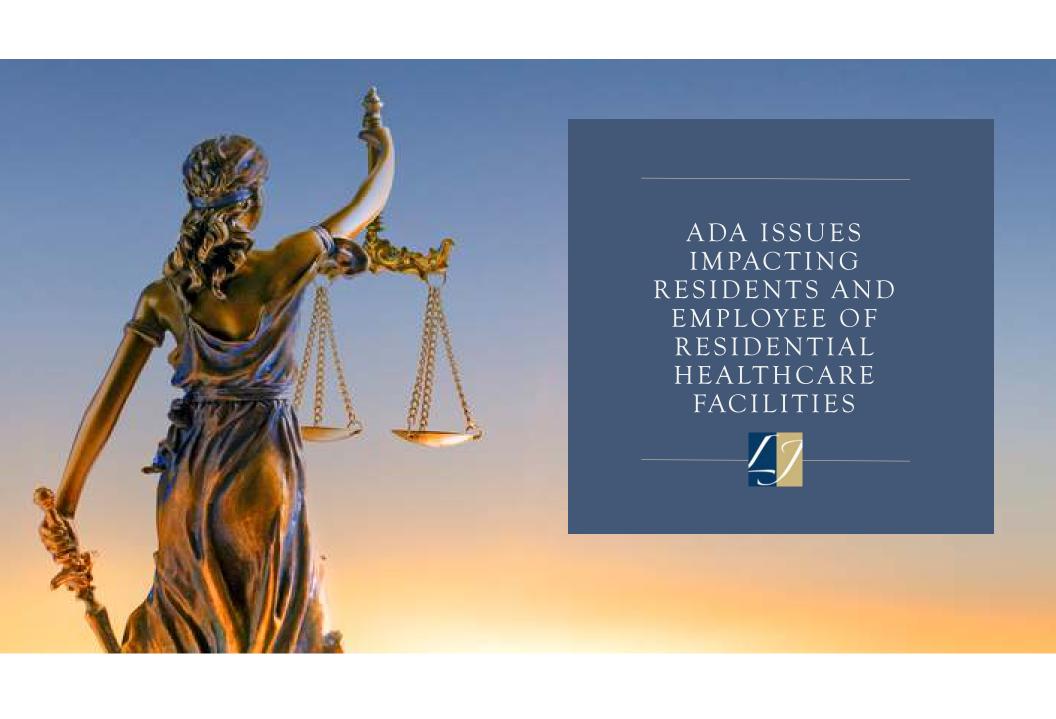


Long Term Care & Senior Living Underwriting Trends

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New York, NY



PRESENTERS



Michael J. Del Piano

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HOT TOPICS UNDER ANTI-DISCRIMINATION STATUTES AFFECTING RESIDENTIAL HEALTHCARE FACILITIES



HOT TOPICS UNDER ANTI-DISCRIMINATION STATUTES AFFECTING RESIDENTIAL HEALTHCARE FACILITIES



- Litigation and Statutory Developments Affecting Residential Healthcare Facilities as Employers
 - Wrongful termination claims by former employees that failed to get
 COVID-19 vaccination
 - · Proliferation of Pay transparency laws
 - Recent amendments to New York City Human Rights Law expanding the pool of protected classes to include obesity

HOT TOPICS UNDER ANTI-DISCRIMINATION STATUTES AFFECTING RESIDENTIAL HEALTHCARE FACILITIES



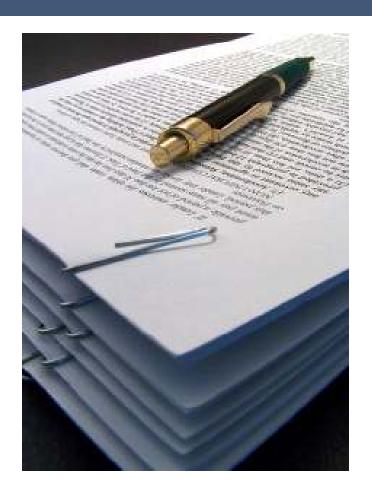
- Litigation and Statutory Developments Affecting Residential Healthcare Facilities as Employers
 - Increased activity by Civil Divisions of US Attorneys offices throughout the country
 - Investigations and extraction of large settlements alleging that Nursing Home policies that preclude acceptance of patients with Opioid Use Disorder ("OUD") who receive Medically Assisted Treatment ("MAT") is unlawful discrimination under the Americans with Disabilities Act





LITIGATION

- Wrongful termination claims under the Americans with Disabilities Act related to terminations for failure to get COVID-19 vaccination
- · Claims often filed pro se
- · Claims are usually three-pronged:
 - Discrimination under the ADA for being regarded as having a disability.
 - Retaliation under the ADA for opposing the employer's COVID-19 vaccination policy.
 - Illegally requiring medical inquiries and examinations that are not job-related or consistent with business necessity.



Litigation

- Claims of this type have been rejected by two District Courts in the Second Circuit.
 - Sharikov v. Philips Medical Systems MR, Inc., -- F. Supp. 3d --, 2023 WL 2390360, 22-cv-00326-BKS-DJS (N.D.N.Y. Mar. 7, 2023)
 - Librandi v. Alexion Pharm., Inc., 2023-WL 3993741, 22-cv-1126-MPS (D. Conn. Jun. 14, 2023)





Litigation

- · Claims of this type have been similarly rejected by courts in other Circuits
 - Bobner v. Astra Zeneca, -- F. Supp. 3d --, 2023 WL 3340466 (N.D. Oh. May 9, 2023)
 - Schneider v. Cnty. of Fairfax, 2023 WL 233305, at * 4 (E.D.Va. Mar. 2, 2023)
 - Gallo v. Washington Nationals Baseball Club, LLC, 2023 WL 2455678 (D. D.C. Mar. 10, 2023)
 - Shklyar v. Carboline Co., 616 F. Supp. 3d 920 (E.D. Mo. 2022); aff'd 2023 WL 1487782 (8th Cir. Feb. 3, 2023)
 - Applegate v. St. Vincent Health, Inc., 2023 WL 3603975 (S.D. Ind. May 23, 2023)
 - Ludstrom v. Contra Costa Health Services, 2022 WL 17330842 (N.D. Ca. Nov. 29, 2022)
 - Linne v. Alameda Health Sys., 2023 WL 3168587 (N.D. Cal. Apr. 28, 2023)



- Statutory Developments
 - Pay Transparency Laws
 - Several states and localities have passed laws requiring employers to disclose wage or wage ranges to prospective candidates and/or current employees



- Locations with Pay Transparency Laws
 - · California
 - · Colorado
 - Connecticut
 - Maryland
 - Nevada
 - · Jersey City, New Jersey
 - New York (Whole State Effective 9/17/2023), New York City, Westchester County, and Ithaca, New York
 - · Cincinnati, Ohio and Toledo, Ohio
 - · Rhode Island
 - Washington



- New York Pay Transparency Law
 - · Applies to employers with four or more employees
 - · Applies to all positions that will be performed, at least in part, in New York
 - Requires employers to disclose "compensation ranges" in advertisements and job postings, including for new hires and internal promotions
 - The range is the lowest and highest annual salary or hourly range of compensation that the employer believes in good faith to be accurate at the time of posting
 - · Job postings must also include job description
 - Employers must maintain a history of compensation ranges and job descriptions



- Best Practices to Comply with Pay Transparency Laws
 - · Develop accurate job descriptions for each role in the organization
 - · Conduct an internal audit of current pay practices to determine current salary ranges for each role in the organization, determine if there are any pay equity issues for existing employees, and identify any steps that need to be taken to remedy those issues
 - Ensure that ranges are accurate and specific to job descriptions

- Statutory Developments
 - Federal law does not prohibit size discrimination
 - With limited exceptions, the vast majority of courts have held that obesity is not a disability under the ADA or state level equivalents unless it is caused by an underlying health condition (e.g., diabetes).
 - In recent years, some courts have held that obesity could fall in the "regarded as" disabled category
- Expansion of Protected Classes under New York City Human Rights Law
 - Legislation has been signed into law amending NYCHRL 8-101 and 8-107 to prohibit discrimination on the basis of a person's height or weight in employment, housing, and public accommodation
 - Exceptions







- Residential Healthcare Facilities are places of public accommodation under the ADA and many state laws
- Under ADA and applicable laws, it is unlawful for a place of public accommodation to deny services because of any person's actual or perceived disability



- · OUD is recognized as a disability that is protected under the ADA
- 28 CFR 35.108(b)(2) specifically includes drug addiction among other physical mental impairments



- Medically Assisted Treatment ("MAT")
- The determination whether an impairment substantially limits a major life activity is made without regard to the effect that ameliorating measures—including medication—may have on the impairment. 42U.S.C. § 12102(4)(E)(i); 28 C.F.R. § 35.108(d)(1)(viii).
- Common MAT
 - Methadone
 - Suboxone



- Increased investigatory and enforcement activity into alleged ADA violations against various industries for having policies prohibiting services to persons with OUD who receive MAT
- Industries/Sectors Impacted
 - · Indiana Board of Nursing
 - · Massachusetts Department of Corrections
 - Massachusetts Trial Courts
 - · Private Sector Residential Healthcare Facilities in Colorado, Massachusetts, and Virginia
 - · Private Sector Orthopedic Surgeon Practice in Massachusetts



- · Penalties for Non-Compliance with ADA Requirements
 - · Damages to affected patients
 - Civil fines
 - · Continuing monitoring and oversight by the U.S. Attorney's Office



- Investigations lead by Civil Divisions from the U.S. Attorney's Office
- Most active jurisdiction has been the U.S. Attorney's Office for the District of Massachusetts
- · Increased investigatory action in other states, including New York
- Anticipate continued scrutiny over policies that refuse to treat patients with OUD who receive MAT



- Best Practices to Avoid Investigations
 - Eliminate any policies that prohibit treatment of persons with OUD that receive MAT in an absolute sense
 - Conduct an individualized assessment for patients who are identified as having OUD and receive MAT to determine whether acceptance of that patient would constitute an undue burden
 - · Preserve records of any such individualized assessment if there is a denial of the patient to demonstrate the basis for an undue burden in the event of a claim or investigation



LEADING WITH LOVE IN LONG TERM CARE:

Effectuating an Accountable Culture, Job Satisfaction and Better Quality of Care

What is Love?

(baby don't hurt me)

The broader question is:

How does it work in our facilities

What it means and how it works

- Working as a team with good communication
- ▶ Putting others before yourself
- ► Focusing on humanity
- NOT sweeping problems under the rug
- ► Support, accountability, trust
- Willing to listen

WHAT IS THE FACILITY/ WORKPLACE ENVIRONMENT

- Do team members feel supported
- Is there a definitive hierarchy
- Is the environment heavy on politics
- ► Is it accurate?

PSYCHOLOGICAL SAFETY

- Amy Edmonson (Harvard)
- Medical filed research doc/nurses
- Comfort level re mistakes
- Willingness to share
- Less likely to repeat mistakes

120 DAYS – NO INJURIES/ACCIDENTS! KEEP IT UP!

(disaster waiting to happen...)

CREATES A CULTURE OF FEAR

Fear stops us from sharing – who wants to be the one who breaks the chain?

Creates the opposite effect of feeling good about "no mistakes"

Good intentioned but in this culture, the "accident" is the failure

* Failure to share

* No opportunity to learn a meaningful lesson

* Aides tend to get the brunt of the "bad publicity" and as such, without a supportive environment, cover ups occur and lessons aren't shared

MINDSET IS CONTAGIOUS

Three Essentials Attitudes:

➤ Flyer – you just leave/no skin the game, "I'm out of here"; avoidance

Fighter – distracts and deflects "It's not me, it's you!

Influencer – finds ways to support and teach others; approaches with curiosity rather than conflict

INCLUSION

- CEO to Janitorial staff
- Creates loyalty, innovation, creativity, empathy
- **▶** Retention

BE AWARE, BE AN ALLY

- Watch for those who need a voice
- Acknowledge
- Listen

JUMP IN THE HOLE

- Apathetic "what are you doing in that hole? Get out, there's work to do!"
- ► Sympathetic "I'm sorry you are in that hole. That's terrible."
- Empathetic *jumps in the hole*

 "Alright, let's get out of here. How can I help?"

SIGNS OF TRUST

* team members know that deficiencies won't be used against them

* quick to resolve disputes/conflicts w/each other

* act without concern for protecting themselves

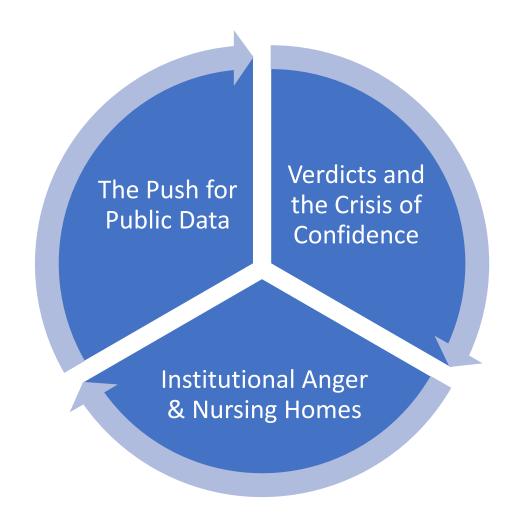
FACILITY BENEFITS

- * Consistent care
- * Staffing retention
- * Burn-out lowered
- * Fewer claims
- * Staff working with all teams

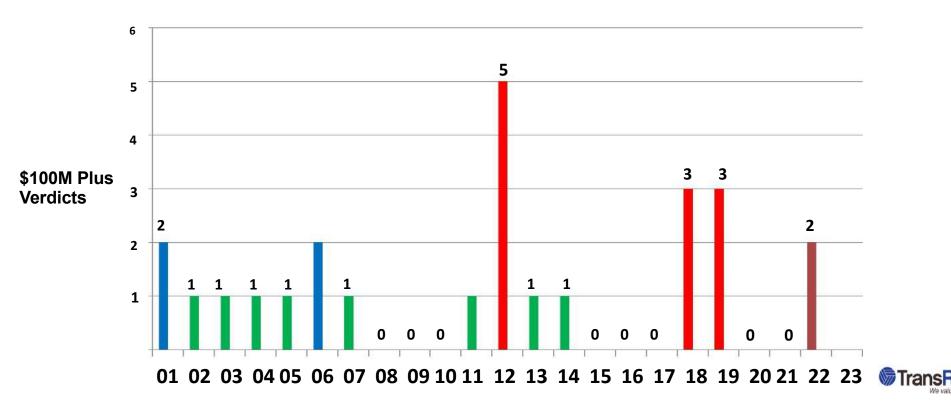
Senior Care: Current Liability, Licensure, and Regulatory Risk

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

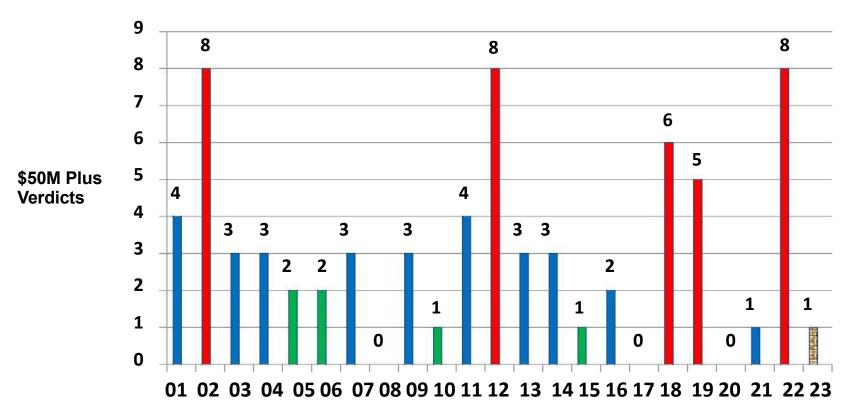




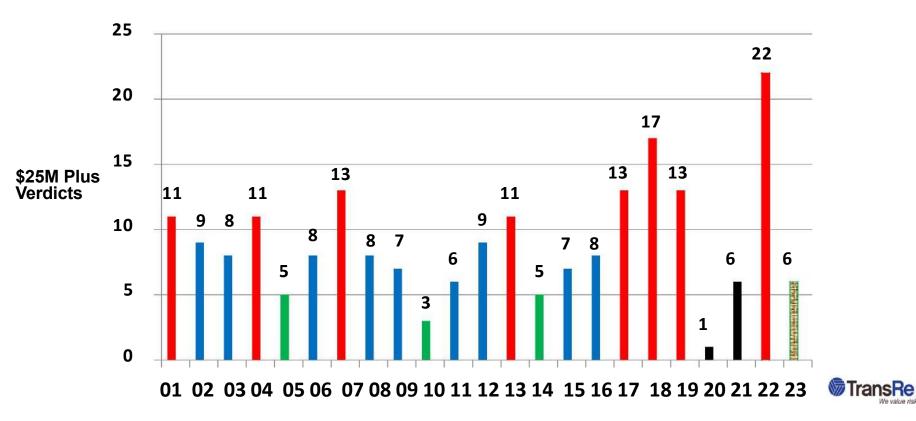
\$100M + Verdicts from 2001 – 2023



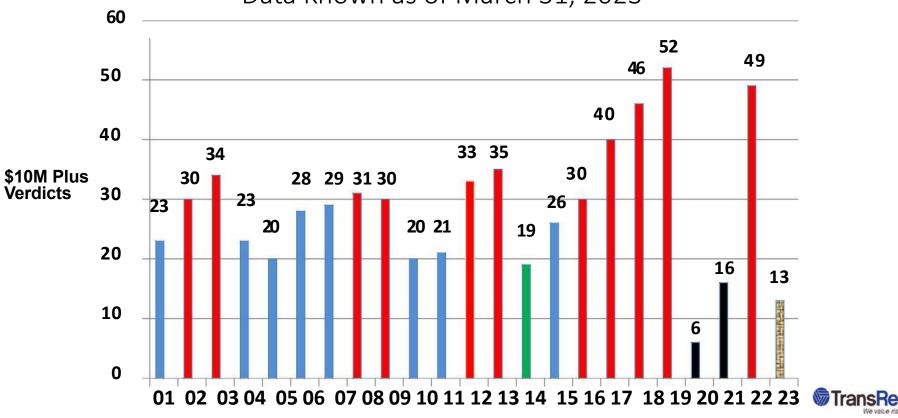
\$50M + Verdicts from 2001 – 2023



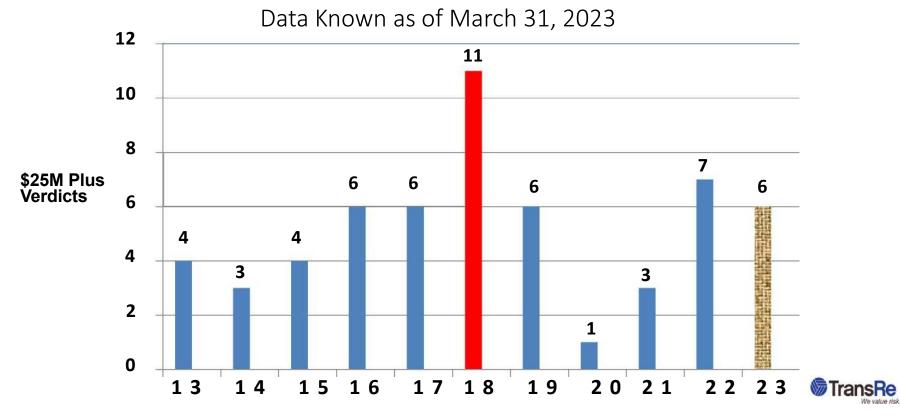
\$25M + Verdicts from 2001 – 2023



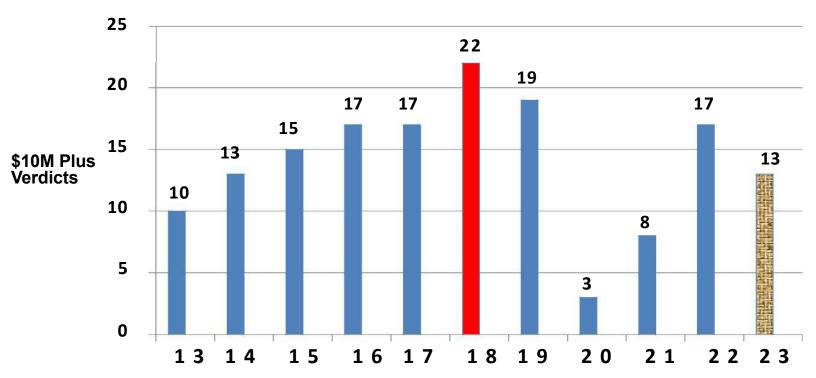
\$10M + Verdicts from 2001 – 2023



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



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

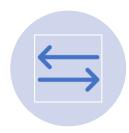




"But these are just verdicts..."



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

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

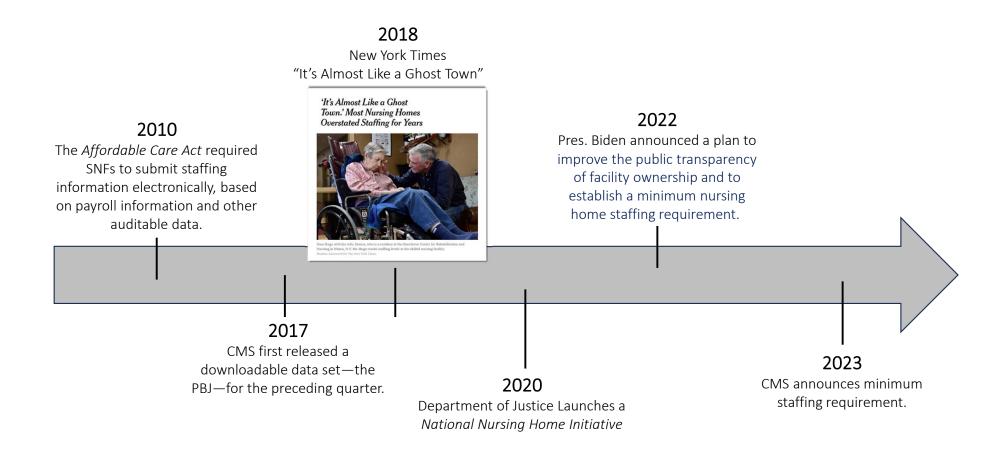
"A subcommittee survey made in 1973-74, indicates that the 106 publicly held corporations controlled 18 percent of the industry's beds and accounted for one-third of the industry's \$3.2 billion in revenue (as of 1972)"

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

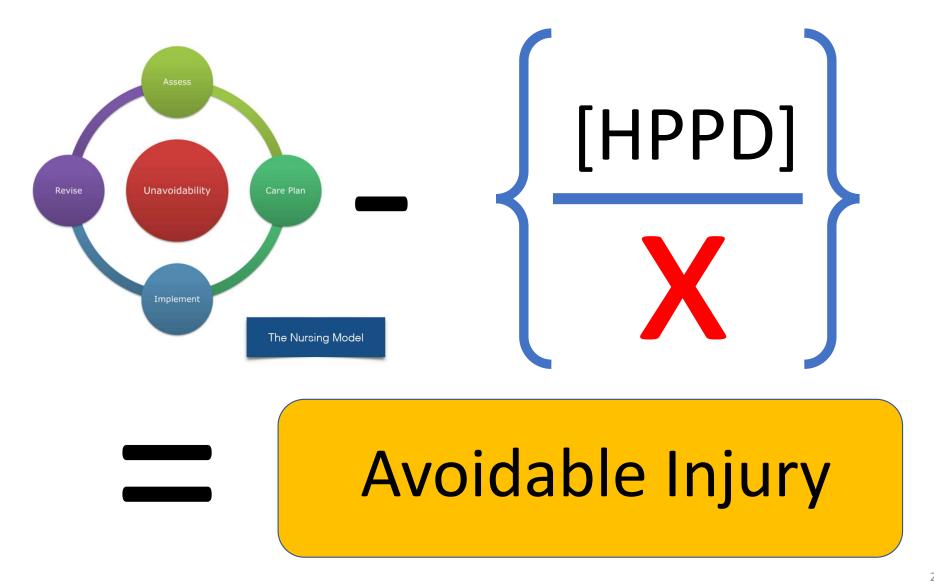
Turnover

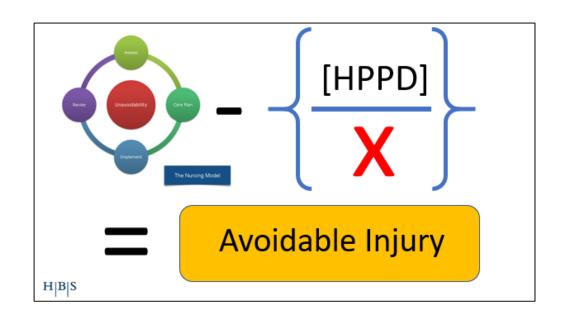
Ownership

Change of Ownership (CHOW)

The Role of Staffing in SNF Litigation



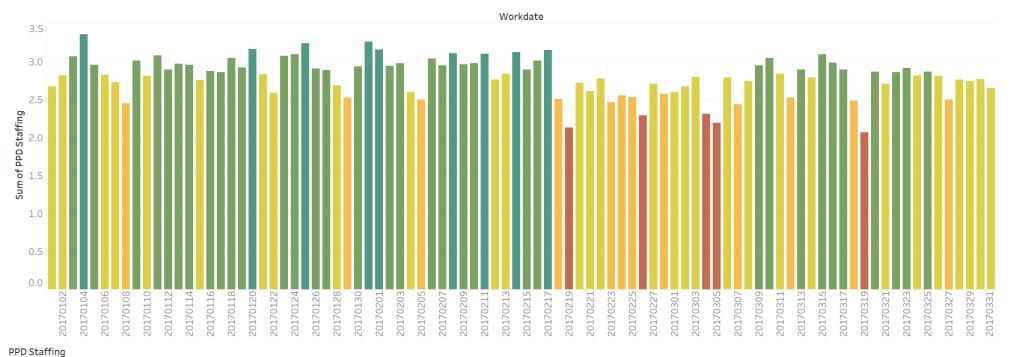




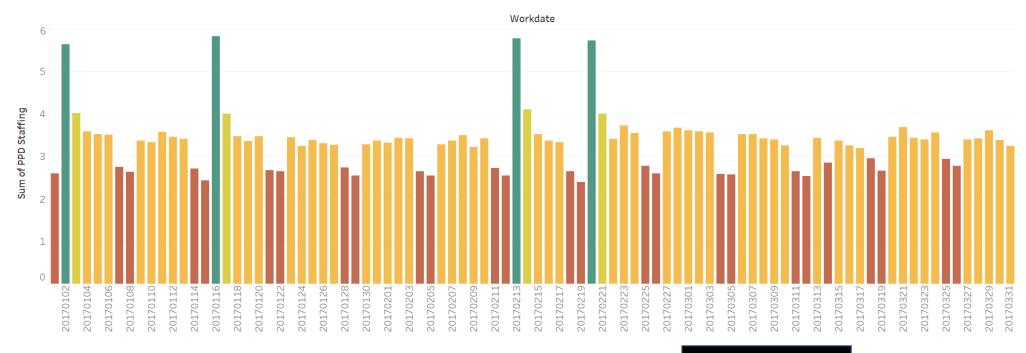


Staffing reductions implemented to maximize profitability

Example 1: HPPD Staffing (by Work date)



Example 2: HPPD Staffing (by Work date)



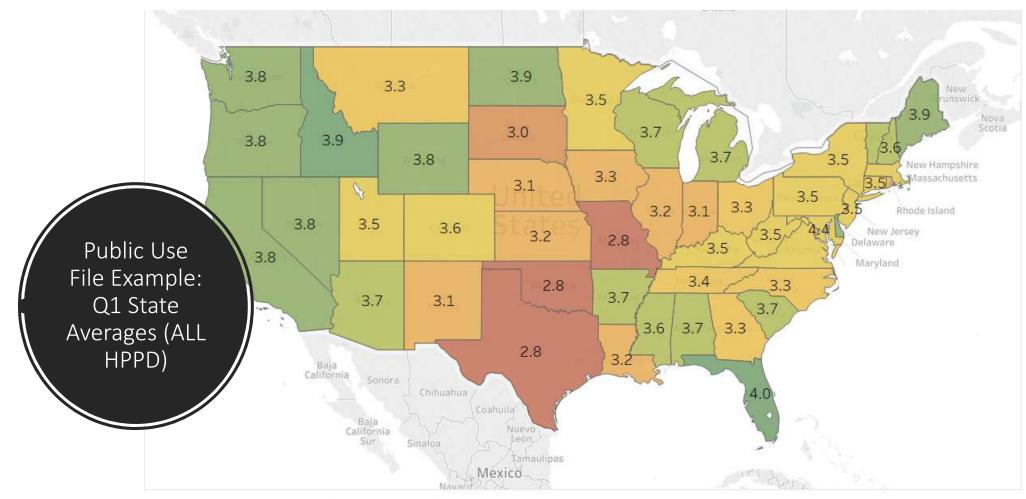
Sum of PPD Staffing for each Workdate. Color shows average of PPD Staffing. The data is filtered on Provname and State. The Provname filter keeps members. The view is filtered on Workdate, which keeps 90 of 90 members.

The State filter keeps 51 of 51

PPD Staffing

2.392 5.817

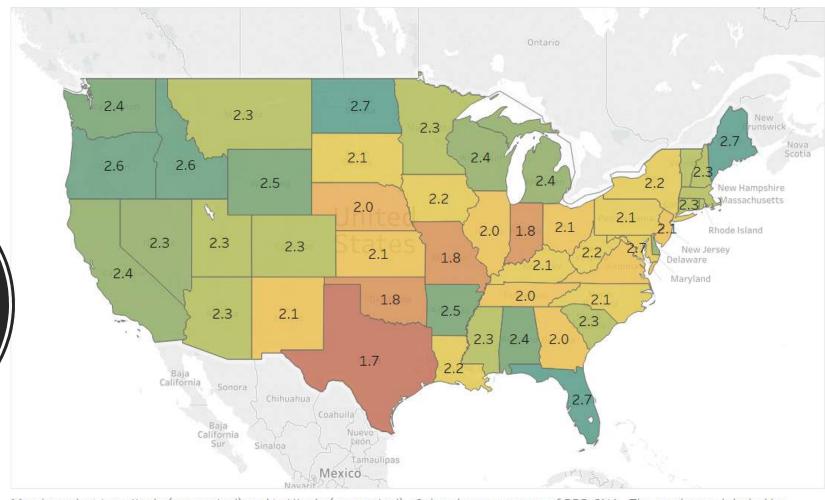
27



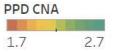
Map based on Longitude (generated) and Latitude (generated). Color shows average of PPD Staffing. The marks are labeled by average of PPD Staffing. Details are shown for State. The view is filtered on State, which excludes AK.

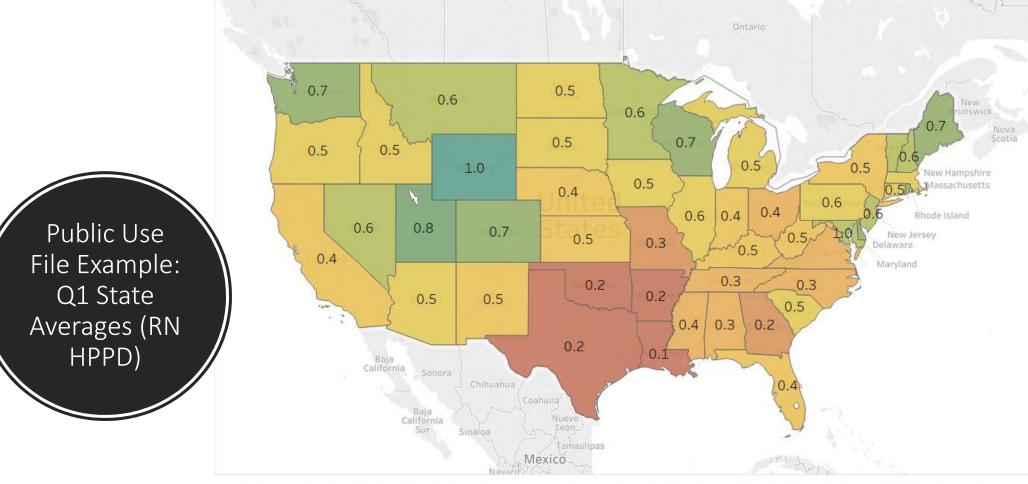


Public Use File Example: Q1 State Averages (CNA HPPD)

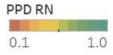


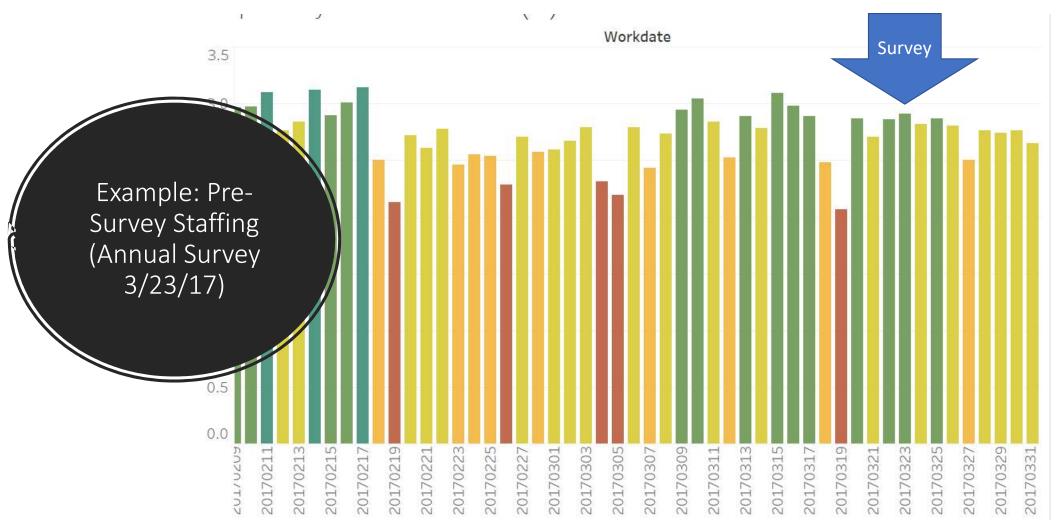
Map based on Longitude (generated) and Latitude (generated). Color shows average of PPD CNA. The marks are labeled by average of PPD CNA. Details are shown for State. The view is filtered on State, which excludes AK.

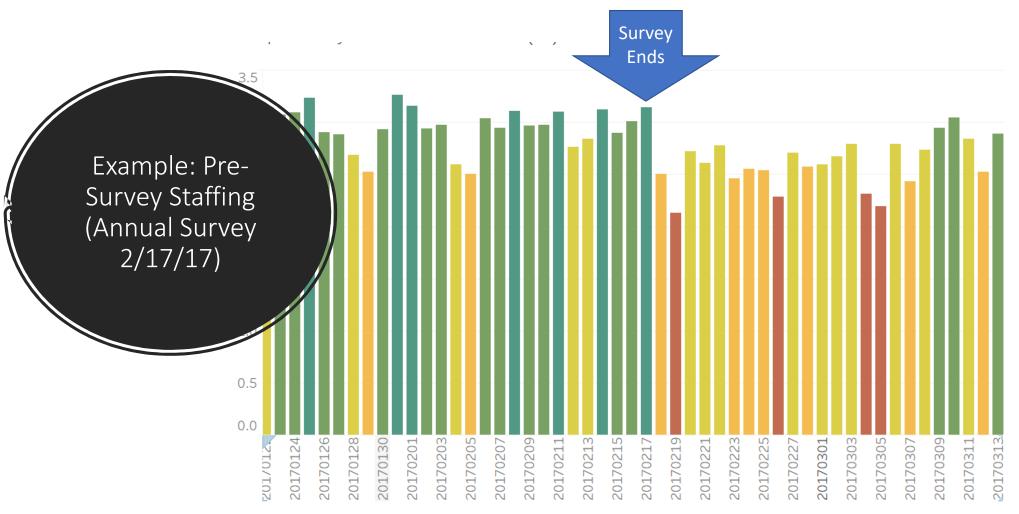




Map based on Longitude (generated) and Latitude (generated). Color shows average of PPD RN. The marks are labeled by average of PPD RN. Details are shown for State. The view is filtered on State, which excludes AK.







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

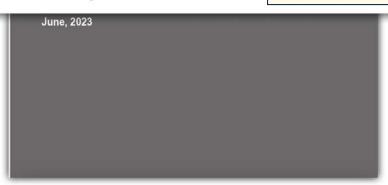
A Checklist for Building a Nursing Home Staffing Case
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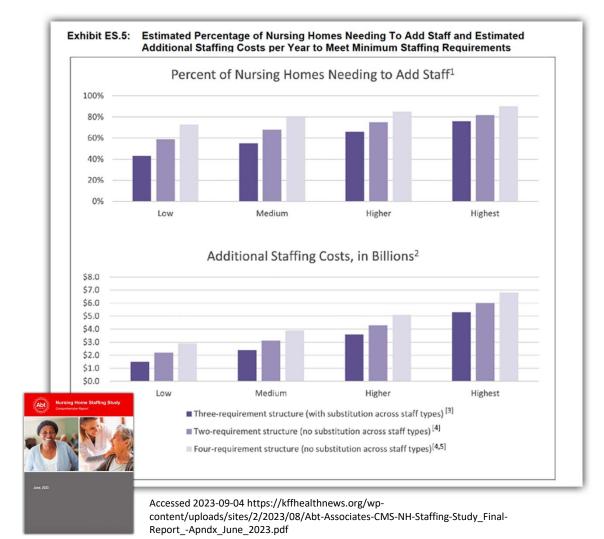
http://canhr.org/publications/newsletters/NetNews/Feature_Article/NN_2018Q4.htm



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

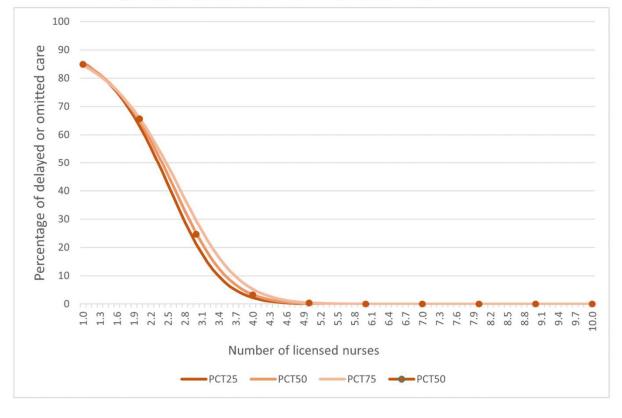
• A state-level minimum staffing requirement introduced in Massachusetts in 2020 penalizes its nursing homes with total nurse staffing below 3.58 HPRD with a 2 percent reduction in their quarterly Medicaid payments. This requirement increased staffing levels among low-staffed nursing homes with high 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
4	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

ollection of mation costs r 24/7 RN 3.35 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
7,461,504.00	\$24,176,448.00	\$0.00	\$0.00	\$0	\$	\$31,637,952
7,633,864.74	24,734,923.95	213,764,107.41	0.00	0	0	246,132,896
7,810,207.02	25,306,300.69	218,702,058.29	146,603,030.04	3,662,915,945		4,061,337,541
7,990,622.80	25,890,876.24	223,754,075.83	149,989,560.03	3,747,529,303		4,155,154,438
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
8,364,053.45	27,100,850.35	234,210,911.55	156,999,113.64	3,922,664,876	821,935,19	5,171,274,997
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
8,754,935.86	28,367,370.92	245,156,432.95	164,336,248.98	4,105,985,167	860,347,19	5,412,947,346
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
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
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
1	7,461,504.00 7,461,504.00 7,633,864.74 7,810,207.02 7,990,622.80 8,175,206.19 8,364,053.45 8,557,263.08 8,754,935.86 8,957,174.88 9,164,085.62	mation costs for facility assessment (§ 483.71 facility assessment) 7,461,504.00 7,633,864.74 7,810,207.02 7,990,622.80 8,175,206.19 8,364,053.45 8,557,263.08 8,754,935.86 8,957,174.88 9,164,085.62	Transition costs for facility assessment (§ 483.71 facility assessment) 7,461,504.00 7,633,864.74 7,810,207.02 7,990,622.80 8,175,206.19 8,364,053.45 8,364,053.45 8,754,935.86 8,754,935.86 8,957,174.88 9,164,085.62 Information costs for facility assessment (urban facilities) 24/7 RN requirement (urban facilities) \$0.00 213,764,107.41 213,764,107.41 223,754,075.83 228,922,794.98 234,210,911.55 234,210,911.55 239,621,183.61 245,156,432.95 29,693,080.57	Transition costs for facility assessment (§ 483.71 facility assessment) 7,461,504.00 7,633,864.74 7,810,207.02 7,990,622.80 8,175,206.19 8,364,053.45 8,557,263.08 8,754,935.86 8,957,174.88 9,164,085.62 1010 requirement (urban facilities) 24/7 RN requirement (urban facilities) \$0.00 \$	Table Tabl	Information costs for facility assessment (§ 483.71 facility assessment) 7,461,504.00 7,633,864.74 7,810,207.02 7,990,622.80 8,175,206.19 8,364,053.45 8,3657,263.08 8,754,935.86 8,754,935.86 8,957,174.88 9,164,085.62 1,006,107 1,007

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 Docur	ment 1 Filed 06/14/22 Page 1 of 140					
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA						
UNITED STATES OF AMERICA,)					
Plaintiff.)					
Plaintill,) Civil Action No:					
v.)					
AMERICAN HEALTH FOUNDATION.)					
INC.: AHE MANAGEMENT	5					

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, 2018).

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



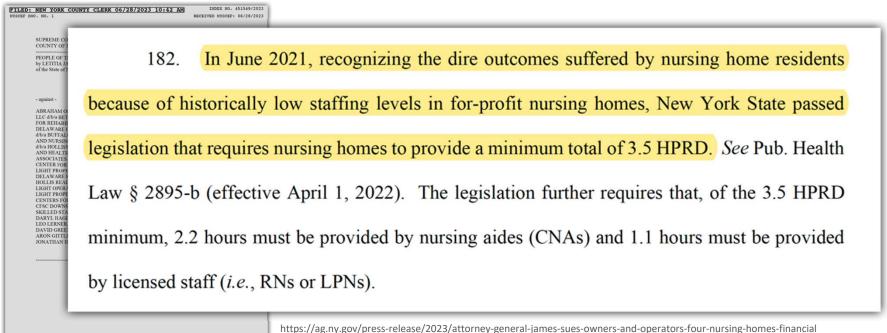
Respondents Operated the Nursing Homes with Chronic Insufficient Staffing But Continued Resident Admissions, to Maximize Their Fraudulent Up-Front Profit Taking



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



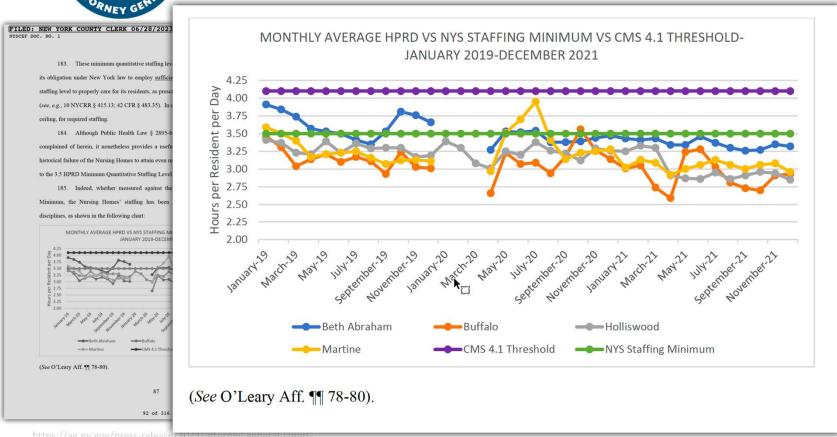
Attorney General James Sues Owners and Operators of Four Nursing Homes for Financial Fraud and Resident Neglect June 28, 2023





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

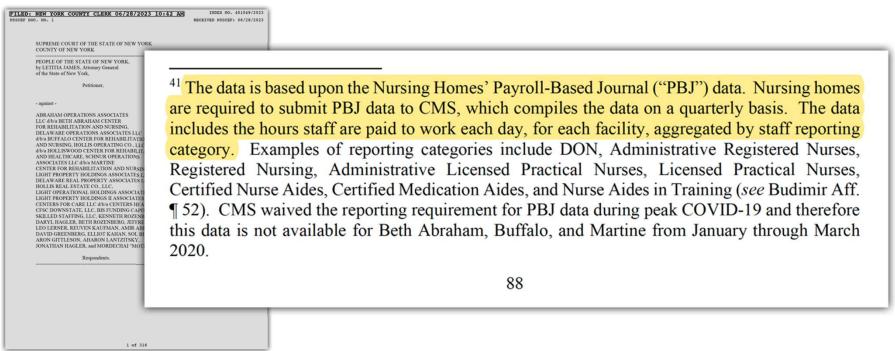
June 28, 2023



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

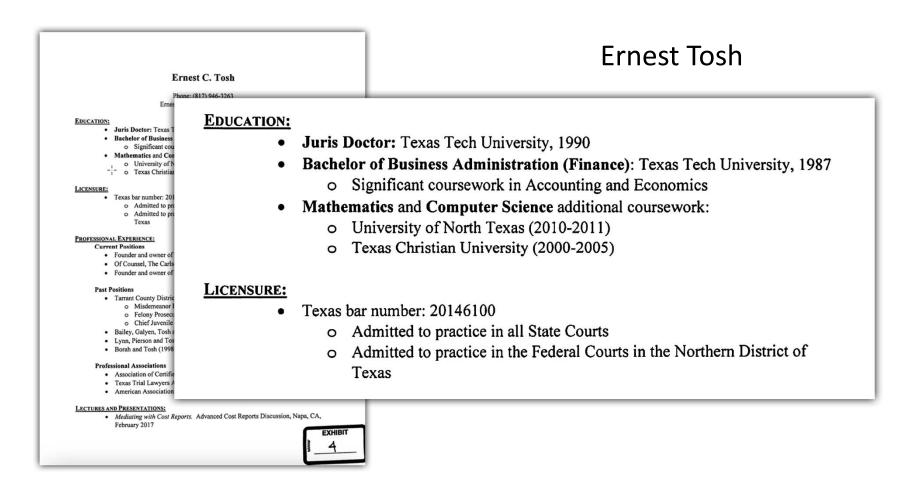


Attorney General James Sues Owners and Operators of Four Nursing Homes for Financial Fraud and Resident Neglect June 28, 2023



[Example] Staffing focused negligence actions

Comparison of Available Staffing Information



Comparison of Available Staffing Information

Ernest Tosh (Feb. 2021)

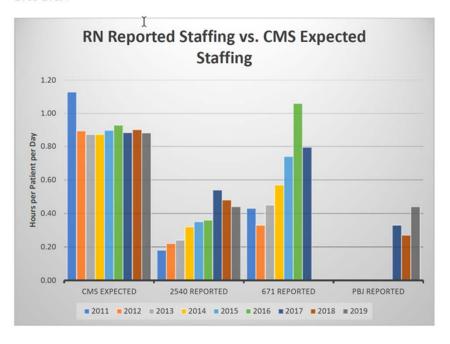
Financial and Staffing Analysis for Robinson Nursing and Rehabilitation

- 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



"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 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

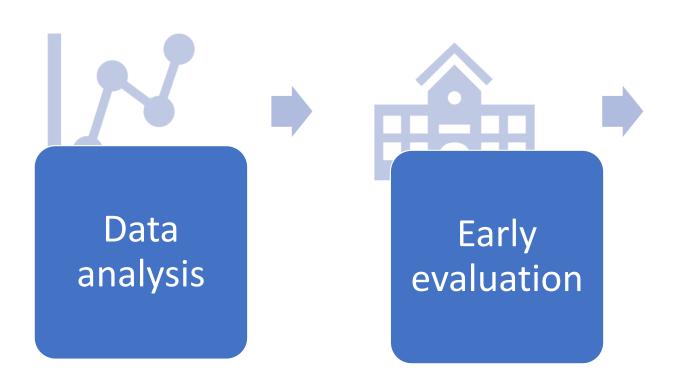
Although Plaintiff sues on behalf of an estate and on his own behalf, the Court refers to him in the singular. Because there were multiple defendants at the time these motions were filed, the Court refers to Defendants in the plural.



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









Significant Verdicts in the Post-Covid Era

Michael W. Bootier and Caitlin L. Cardene September 2023



Agenda

Background
\$9 Million Verdict from Maryland
\$189 Million Verdict from Pennsylvania
\$25.9 Million Verdict from Pennsylvania
\$19 Million Verdict from Pennsylvania
\$30.9 Million Verdict from California
\$2.3 Million Verdict from Pennsylvania
Takeaways

Buchanan Ingersoll & Rooney

Background and Themes

Background

- Post-Covid, the admiration for our "healthcare heroes" has subsided.
 - Heroes to villains
- Uptick nationally in large verdict nursing home negligence and medical malpractice cases.
- What are the trends that we are seeing?
 - Corporate negligence theories and narratives regarding staffing, profits, etc.;
 - Criticism regarding "stale" defenses; and
 - A need for flexibility and empathy.



Themes

- Healthcare generally is a person-centered industry; approach cases with a similar mindset on behalf of your client at the outset of the case.
- Be creative in formulating defenses; tell a story a jury wants to hear and will understand.
- There is a "new generation" of Plaintiff's attorneys; make a strategy to be flexible and address avenues for relief at the outset of the case.



\$9 Million SNF Verdict from Maryland

Facts

- 64-year-old gentleman admitted for long-term care to a local nursing home. He was married with children and was a pastor in the community.
- He developed a pressure ulcer to his tailbone, which reportedly worsened to a Stage IV.
- His records did not show that the staff were turning and repositioning him every two hours.
- Other evidence adduced at trial showed that the resident would be left laying in his urine and feces for extended periods of time.
- Died at the age of 64, and an autopsy completed revealed the cause of death to be the pressure ulcer.



Evidence Considered

- Experts on behalf of Plaintiff opined that defendant nursing home did not monitor and implement an appropriate care plan to prevent and treat the pressure injury.
- Defendant retained a dermatology expert, but it was noted that it had never consulted a dermatologist to treat the resident while he was still living.
- The jury also considered the fact that the resident was charged approximately \$1,000 a day, despite evidence that staff were not turning him and leaving him to lay in his own feces and urine.
- Net assets defendant (which were over \$50 million)



The Jury's Findings

- The jury found that resident died from the pressure injury caused by the negligence of the nursing home.
- After a seven-day trial and five hours of deliberations, the jury issued an award of over \$9 million.



The Aftermath

- This case stirred discussion regarding Maryland's cap on economic damages.
- Md. Code Ann., Cts. Jud. Proc. § 3-2A-09 provides that an award or verdict for noneconomic damages for matters arising between 2005-2008 shall not exceed \$650,000. Every year thereafter, the limitation will increase by \$15,000.
 - In a wrongful death action with two or more beneficiaries, the total amount awarded for noneconomic damages shall not exceed 125% of the above-mentioned limitation.
- Therefore, the award to the Plaintiff was reduced to just over \$1 million.
- Plaintiff's Counsel: "Corporations that all too often act with careless disregard for the law and human life deserve no special treatment. Maryland law should no longer demean the suffering of victims of nursing home and health care malpractice through this discriminatory, unjust limit on human damages."
- Articles cited to a 2014 federal study which showed that 22% of nursing home residents suffer "adverse incidents."



Takeaways

- This case highlights one of the trends we discussed at the outset: corporate negligence and the associated narratives.
- The jury took into account the fact that the company made millions in the prior calendar year, yet failed to consult a dermatologist while the plaintiff was alive, choosing instead to pay an expert \$30,000.
- The jury also took into account the cost of the Plaintiff's stay compared to the care that he received; i.e. "profits over people"



Possible Strategies

- Combat plaintiff's "profits over people" narrative.
- Starts with the first client contact.
 - Get to know the staff. Why did they become healthcare providers? What is their story?
 - While the individual may not remember a specific patient, they will likely remember patterns and practices of treating patients with care.



\$182.7 Million Hospital Verdict from Pennsylvania

Facts

- Plaintiff sued a hospital system as well as individual physicians related to the delivery of her child
- Plaintiff claimed that due to the delayed Cesarean section, her son sustained permanent injuries, which would necessitate him needing lifetime care.
- Plaintiff's counsel adopted a "team" approach and argued that the "team" of hospital providers were collectively responsible for the harm to the Plaintiff, which relieved Plaintiff of her obligation to prove that a specific provider was negligent.
- At trial, Plaintiff dismissed the direct liability claim against the hospital, and the only surviving claim against the hospital was for vicarious liability.



The Jury's Findings

- The jury issued a verdict against the hospital for \$182.7 million under a theory of vicarious liability.
- No punitive damages were awarded.



The Aftermath

- Defendant called it a "runaway jury verdict"
- Defendant is presently appealing the verdict, seeking JNOV, or in the alternative: a new trial, remittitur of the verdict, or a new trial on damages.
- The primary argument for JNOV is that because the only surviving claim against the hospital was for vicarious liability, Plaintiff was required to prove liability against any one agent or employee of the hospital, which Plaintiff did not do.
- Defendant also claimed that the causation standard on the verdict slip did not require factual causation and did not list each individual defendant.
 - The judge stated during trial that the hospital had agreed that the doctors were agents of the hospital, and therefore, when the hospital attempted to make a last-minute argument disclaiming agency, the judge noted that it was too little too late.



Takeaways

- Some of the damages are not applicable in the senior care setting life care plan for a minor, with increasing medical expenses a significant driver of damages
- Plaintiff's counsel is from the "new generation."
 - Speed. Quick examinations.
 - Contrasted with complicated, technical defense
 - "All or nothing" approach on causation.



Possible Strategies

- At the outset of the case aggressively seek to dismiss all claims against corporate parents.
 - Have conversations with Plaintiff's counsel regarding stipulations or otherwise file motions.
- Through the course of discovery, explore avenues such as MSJs to challenge and potentially dispense of unsupported claims prior to trial.
- In a case where individual physicians and the hospital are named as defendants, consider additional strategies, such as whether the doctors should be represented by separate counsel.



\$25.9 Million Hospital Verdict in Pennsylvania

Facts

- 27-year-old man sued a hospital related to care that he received after he was kicked in the leg.
- Plaintiff claimed that the hospital did not properly or promptly treat the issues related to his leg, which lead to a below the knee amputation.
- Plaintiff was a father and a nursing assistant prior to the injury.



The Jury's Findings

- Plaintiff, a father and healthcare worker, made for a sympathetic plaintiff.
- Defendant's defenses ultimately were less compelling than the case developed by Plaintiff.
- The jury awarded a total of \$25.9 million:
 - \$20 million for past and future non economic loss, and
 - \$5.9 million for future medical expenses



The Aftermath and Other Considerations

- "Right out of the gate, the jury was presented with a highly compelling story on the Plaintiff's side and a hyper-technical medical critique from the Defendants, with no one witness from [the hospital] providing a face to the defense"
- After the trial had concluded, a hospital spokesperson provided a statement which acknowledged:
 - The hospital cares about their patients, and recognizes that when they fall short, there must be accountability.
 - The hospital provides care to the neediest of the community, and large verdicts are concerning.



Takeaways

- This case highlights the importance of telling a compelling story in light of the jury's rejection of a "stale" defense theory.
- The hospital did have a compelling story to tell, but they did not tell that story during trial.
- Instead, the hospital generally pointed to the actions of the plaintiff to deflect liability.



Possible Strategies

- Highlight the "good" and begin building a compelling narrative on your client's behalf.
- Starts with the first meetings, all the way through discovery.
 - Attempt to affirmatively elicit the "good" in depositions.
 - These stories are more compelling than a stale defense loaded with legalese.
- Through the course of discovery and trial proceedings, make clear to the jury that this was one bad day.
 - Accept responsibility when appropriate, and be empathetic



\$19 Million SNF Verdict in Pennsylvania

Facts

- Suit was filed against the nursing home and the corporate parents.
- 70 year old resident is admitted to a nursing home with pre-existing health issues.
- Her health began to decline, and she sustained a fall with hip fracture and a Stage IV pressure ulcer.
- Plaintiffs argued that these conditions lead to her death
- Plaintiffs claimed that the ownership deliberately understaffed the center, which lead to the breach in duty to the decedent.
- It was noted that the corporate defendants never appeared for trial, fanning the flames of "profits over people."



Evidence Considered

- Plaintiff's Complaint alleged that the corporate entities failed to employ qualified staff, failed to provide sufficient staff, failed to have policies and procedures to address the needs of Plaintiff.
- Plaintiff also alleged the center failed to comply with a series of regulations pertaining to the management of the facility.
- Unfortunately, staff from the nursing home testified that they raised concerns regarding staffing.
- There was also an insinuation in the expert reports that staff were terminated for raising concerns.



The Jury's Findings

- \$19 million total verdict: \$2 million for pain and suffering, \$2 million for wrongful death, and \$15 million for punitive damages.
- The Estate succeeded on its corporate negligence claims, ultimately allowing for a \$15 million punitive damages award.
- Ownership was found to be 60% liable for Plaintiff's harm. The nursing home itself was only found to be 15% liable.
- The three corporate entities were ordered to pay \$10 million of the \$15 million in damages.



The Aftermath

- A significant sticking point with the verdict highlighted the indifference of the corporate defendants, who failed to even show up to trial.
- This case set a precedent for the surrounding area regarding the public's attitude towards nursing homes and their ownership.
- Facts in the case were relatively typical, with an atypical award.



Takeaways

- This case highlights the corporate liability trend.
- The evidence at trial insinuating that employees were terminated for raising staffing concerns, coupled with the failure of corporate defendants to show up for trial, drove this high verdict.
- This case also highlights the need and importance of empathy.



Possible Strategies

- Simply put: if parent companies or corporate entities are named, a representative should be present for trial.
- However, at the outset of the case, it is important to pursue avenues to dismiss these entities.
- Witness management starts at the first meeting:
 - Here, former employee testimony was damning.
 - Create a rapport with both former and current employees.
 - Ensure that they know that you are there to support and defend the care he or she provided.
- With witnesses of the corporate entities, also important to manage witnesses
 - Importance of establishing their role, if any at the center, and be consistent with messaging.



\$30.9 Million Verdict in California

Facts

- 87-year-old admitted for short term rehabilitation after hospitalization for hip surgery.
- He was admitted with compromised skin to his bilateral heels and was noted to be high risk for skin breakdown.
- Plaintiffs' alleged that he developed pressure ulcers to his bilateral heels, despite not being discovered during his admission
- Ulcers advanced to Stage IV, and Plaintiffs' claim this lead to his death.
- Family sued the center and its corporate parents alleging elder abuse and neglect, constructive fraud, violation of patient's rights and wrongful death.
- Plaintiffs' claimed facility was understaffed to increase profits; staff was not properly trained or supervised.



Evidence Considered

- Plaintiffs argued the resident should have been repositioned every two hours to prevent skin breakdown.
 - The records indicated he was only repositioned once.
- Plaintiffs argued the center failed to initiate care plan interventions to prevent skin breakdown on his heels, to include floating the heels, specialty mattress, and regular skin checks.
- Plaintiffs also claimed that the center was regularly understaffed to increase profits.
- Defense argued that the resident was admitted with compromised heels
- Defense also argued that the wounds were not present at the center and were discovered two days after discharge; argued his family failed to offload his heels and properly reposition him.



The Jury's Findings

- Verdict totaled \$30.9 million:
 - \$5.9 million in compensatory damages
 - \$25 million in punitive damages
- The jury found the corporate defendants directly liable for the full amount of the verdict as well as under theories of aider and abettor and co-conspirator liability.



The Aftermath

- Plaintiffs filed a post-trial motion for attorney's fees pursuant to California's Elder Abuse Act that was granted, with a total award of \$4.6 million in attorneys fees.
- Defendants filed post-trial motions to conform the verdict to the appropriate statutory limitations and to the evidence.
- The judge denied these motions, stating:
 - "Substantial evidence supported a pattern and practice, supported by management supervision and policy directives, to drive profits and reduce services. Substantial direct and circumstantial evidence presented a nexus between such policies and practices and patient neglect and harm. The jury was presented with substantial evidence of a willful, and knowing disregard of the rights and safety of the vulnerable elderly clients entrusted to Defendants' care." The Order also stated, "Plaintiff here presented substantial evidence that Defendants' conduct was repeated, and the product of a policy to maintain understaffing, increase patient acuity, and drive cost-cutting, despite the awareness of probable consequences. The jury heard substantial direct and circumstantial evidence, including real-time emails, establishing a link between private equity investors' short - term quest for maximizing profits, and a reckless disregard for patient care."



Takeaways

- Given the jury found the corporate defendants directly liable for the entirety of the verdict, this case demonstrates the ongoing corporate negligence trend.
- In post-trial motion practice, the judge soundly declined any of defendants' theories that the punitive damages verdict was unconstitutional in light of the evidence presented.
 - The judge specifically mentioned email exchanges



Possible Strategies

- Recognize the risk early.
 - Sophisticated counsel
 - Honest assessment of your own facts
- As previously discussed, pursue all avenues to dismiss corporate entities.
- If these entities remain in the case, begin witness development at the very first meeting.
- Throughout fact development, determine whether damaging emails about staffing exist, and develop a strategy for how to combat these findings.
 - Consider whether to develop your client's testimony regarding these issues, should they exist.



\$2.3 Million SNF Verdict in Pennsylvania

Facts

- 92-year-old resident
- She sustained a fall in the shower and broke her hip. After the fall, staff attempted to move her in a way that, Plaintiff alleges, further aggravated her injury.
- DOH cited the facility for failing to keep the facility free of accident hazards and the failure to supervise.
- Plaintiff's family also filed a complaint with the DA, alleging elder abuse, though no criminal charges appear to have been brought
- The state Department of Health cited Green Ridge Care Center for failing to keep its facility free of accident hazards and for failing to supervise, according to the lawsuit.



The Jury's Findings

- Jurors found the center acted with "reckless indifference" to resident's rights
- The jury also found that the center knew the conduct of an employee amounted to reckless indifference.
- The jury handed down a verdict of \$300,000



The Aftermath

- The judge ordered another trial to assess punitive damages.
- While the reasoning is not yet known, a \$2 million verdict for punitive damages was issued.



Takeaways

- Be vigilant regarding corporate entities named in complaint. Attack the pleadings.
- Defense has to tell a story
 - Empathy, compassion
- Quick and simple defense themes
 - Avoid stale and overly complex narratives



Thank you





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Nancy F. Reynolds, Esq. Woods Rogers
Vandeventer Black PLLC

CONSUMER PROTECTION ACT CLAIMS IN LTC NEGLIGENCE CASES

Why Consumer Protection Act Claims?



TREBLE DAMAGES AND ATTORNEYS' FEES

Virginia § 59.1-204

Pennsylvania §201-9.2

Texas Business and Commerce Code § 17.50

Colorado Revised Statutes §6-1-113

New Hampshire Statutes Title XXXI, § 358A-10

Ohio Revised Code § 1345.09

Massachusetts Gen. Laws Part 1, Title XV, Ch. 93A § 9



RED FLAG



DISCOVERY REQUESTS FOR ADVERTISING & MARKETING MATERIALS

STATUTORY INTENT OF CPAs

- Remedial Legislation
- Promoting Fair and Ethical Standards of Dealings
- Between Suppliers and the Consuming Public



APPLICATION TO LTC CASES

Suppliers: Seller or Professional Who Advertises, Solicits or Engages in

Consumer Transactions

Consumer Transaction: Advertisement, Sale or Offering for Sale of Goods or Services

DEFENDING CPA CLAIMS

- 1. CPA STATUTORY EXCLUSIONS/EXEMPTIONS
- 2. LACK OF STANDING
- 3. NATURE OF THE CLAIM

STATUTORY EXCLUSIONS

Ohio §1345.12 – Excludes personal injury or death claims

Texas Bus. & Comm. Code §17.49 – Excludes actions for bodily injury or death

VA Code § 59.1-199: Excludes aspects of a consumer transaction authorized under VA or US laws, regulations or advisory opinions.

Colorado Cons. Prot. Act: §6-1-106: Excludes transactions in compliance with a regulation, statute or court order

Mass. Gen. Laws, Pt. 1, Title XV, Ch. 93A, §3 – Exempts transactions otherwise permitted under laws and administered by regulatory boards.

SANCTIONED OR CONDONED BY STATUTE

IS IT ENOUGH THAT A PARTICULAR SERVICE OR CONDUCT IS ADDRESSED IN A STATUTE?

DOES THE STATUTE OR REGULATION SANCTION OR CONDONE SUBSTANDARD CARE?

WHAT IF IT IS IN A STATUTE, BUT THE STATUTE IS NOT FOLLOWED?

PARTICULAR ASPECT

Manassas Autocars, Inc. v. Couch, 274 Va. 82 (2007)

The exclusion applies to aspects of a consumer transaction that are sanctioned or condoned by statute or regulation, not to entire industry. Conduct simply addressed in a statute or regulation does not constitute authorization.

Wingate v. Insight Health Corp., 87 Va. Cir. 227 (2013)

No law would authorize misrepresentations. To be condoned, the law would have to involve advertising and sale of the good or service.

BEATY v. MANOR CARE, INC.

2003 U.S. Dist. LEXIS 25044 (E.D.Va.)

- Advertising brochure with statements on staff training, 24-hour supervision, high staffing ratios that were not provided.
- **❖ VCPA Demurrer: VA Code § 63.1-174 only need adequate staff to provide services and State Board regulates adequate staffing claims.**
- Ruling: The alleged transaction was inducement to enter the contract, not deficiency of care. The regulations do not cover misrepresentations made regarding degree of supervision. To qualify, the regulation would have to be about advertising and sales.

EXEMPT BY REGULATION

Evans v. Diamond Healthcare 73 Va. Cir. 502 (2007)

Nursing home sued for improper disclosure of confidential information is heavily regulated under 45 C.F.R. §§ 164.501, 506 and is exempt from the CPA claim.

Caruth v. Clark, 2017 U.S.D.C. LEXIS 57077 (E.D.Va.)

Dentist advertising services for which he lacks experience is exempt from CPA. Dental profession is regulated by Board of Dentistry that establishes qualifications, licenses and disciplines.

BROGAN V. NATIONAL HEALTHCARE CORP. 103 F.SUPP. 2D 1322 (N.D.GA. 2000)

Plaintiff claimed deficient levels of care from poor CNA training, poor nutritional support, and failure to provide timely nursing care in a skilled care facility. These services are highly regulated by state and federal agencies. The Georgia Fair Business Practices Act does not apply to actions or transactions regulated by state or federal agencies and the claims were dismissed.

LACK OF STANDING DEFENSE

- **CPA CLAIMS ARE STATUTORY CLAIMS**
- NOT COMMON LAW CLAIMS
- *** FOR FRAUD IN CONSUMER TRANSACTIONS**
- **❖** STATE PROBATE CODE APPOINTING ADMINISTRATOR = FOR PERSONAL INJURY OR WRONGFUL DEATH CLAIMS

APPOINTMENT OF ADMINISTRATOR

Appointment Under § 64.2-454



An administrator may be appointed in any case in which it is represented that either a civil action for personal injury or death by wrongful act or both,..., is contemplated,..., on behalf of the estate,..., and an executor or administrator has not been appointed under § 64.2-500-502.

CPA CLAIMS

PERSONAL INJURY? WRONGFUL DEATH?

- 1. How is the CPA constructed?
- 2. How are CPA claims treated in the Code?
- 3. What is the source of the duty?

LOOK AT THE CPA



- 1. Legislative intent: to promote fair and ethical standards of dealings between suppliers and the consuming public.
- 2. Prohibited Practices: series of "fraudulent acts" by suppliers in connection with a consumer transaction that are declared unlawful by statute.
- 3. Claims that CPA is a personal injury statute are looking at the remedy sought and not the cause of action.

DAMAGES DESCRIPTION

Any person who accepts a <u>cure offer</u> under this chapter may not initiate or maintain any other or additional action based on any cause of action arising under any other statute or common law theory if such other action is substantially based on the same allegations of fact on which the action initiated under this chapter is based.

ACCRUAL & LIMITATION OF ACTIONS

§ 59.1-204.1 A: Any individual action pursuant to § 59.1-204 ..., shall be commenced within two years after such accrual. The cause of action shall accrue as provided in § 8.01-230.

§ 8.01-230: Accrues from date of injury for <u>personal injury</u> actions; Defaults to §8.01-249 for VCPA cases.

§ 8.01-249: Accrual in <u>personal</u> actions: In actions for fraud, mistake and VCPA violations, when the fraud, misrepresentation, etc. is discovered.

SOURCE OF THE OBLIGATION

Tingler v. Graystone Homes, Inc., 834 S.E.2d 244

- Homeowner sued builder re: water leaking around doors causing mold
- Breach of contract; negligent construction and repair; negligence per se
- Duty: use of proper workmanship, due care in inspection and work supervision
- Issue: Contract or Negligence?



SOURCE OF DUTY

- In determining whether a cause of action sounds in tort or contract or both, the source of the duty violated must be ascertained.
- The mere fact that a plaintiff seeks recovery for pain and suffering does not convert a contract claim into a tort claim.
- To recover in tort, a common law duty must have been breached, not a duty created by contract.
- ❖ What about when the VCPA is the source of the duty? It is a statutory duty. Abi-Najm v. Concord Condominium, LLC, 280 Va. 350 (2010).

FRAUD DEFENSES - BOP

❖ THREE ELEMENTS:

False Representation Of A Material Fact
Reliance
Resulting Damage Or Injury



- TREBLE DAMAGES Knowingly & With Intent To Deceive
- ❖ PREPONDERANCE OF THE EVIDENCE Ballagh v. Fauber Ent., Inc., 29 Va. 120 (2015)

COMMON CPA ALLEGATIONS

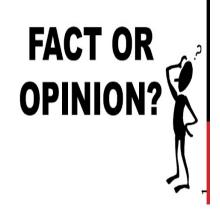
Prohibited Practices

- Misrepresenting that services have certain characteristics, such as a certain level of care.
- Misrepresenting that goods or services are of a particular standard or quality, such as repositioning every 2 hours.
- Using any other deception, fraud, false pretense, false promise, or misrepresentation in connection with a consumer transaction.

MATERIAL FACT

- FACT AND NOT OPINION
 - Diagnoses, Assessments, Evaluations Are Opinions

- **EXISTING AND NOT FUTURE FACT**
 - Prognosis Is Not Existing Fact
 - Projecting when a wound will heal



MISREPRESENTATION

Adams v. Children's Hospital of the King's Daughters 100 Va. Cir. 68 (Norfolk 2018)

- The Misrepresentation Must Be In Connection With A Consumer Transaction
- Consumer Transaction: Sale, Advertisement Of Medical Goods Or Services = Cannot Be Related to Whether Goods or Services Were Provided Within the Required Level or Standard of Care

ADVERTISING FOR SERVICES YOU DO NOT PROVIDE

Beaty v. Manor Care, Inc., 2003 WL 24902409 (E.D.Va. 2003)

Advertising brochure with statements on staff training, 24-hour supervision, high staffing ratios that were not provided.

The transaction was the inducement to enter the contract.

This is about misrepresentations, not about deficiency of care.

QUALITY vs ABSENCE



STANDARD OF CARE

VS.

PROMOTING CARE NOT PROVIDED

SUMMARY

- 1.EXCLUSIONS: Compare the aspect of the transaction to the law or regulation
- 2. LACK OF STANDING OF ADMINISTRATOR
- 3. CPA CLAIMS ARE FRAUD CAUSES OF ACTION: Use standard fraud defenses



QUESTIONS ??



Thomas N. Lyons, Esq. Danaher Lagnese, PC

Angeline N. Ioannou Lewis Brisbois Bisgaard & Smith LLP

September 13, 2023

We have no conflicts to disclose.

Violence in nursing homes is endemic

- Very few studies
- According to the World Health Organization (WHO), rates of abuse of older people are high:
 - In one study, 2 out of 3 nursing home/long-term home care staff self-reported that they committed abuse in the past year
 - increased rates of abuse during the COVID-19 pandemic
- predicted to increase as many countries are experiencing rapidly aging populations
 - The global population of people aged 60 years and older will more than double, from 900 million in 2015 to about 2 billion in 2050.

Source - https://www.who.int/news-room/fact-sheets/detail/abuse-of-older-people

In a long-term care setting, violence is defined as:

Act carried out with the intention of causing physical harm, pain and injury.

- However, intention is not always clear
 - Consider, for example, a resident with dementia who cannot form intent



Risk Factors

- Generally, victims of elder abuse are:
 - Female
 - Women comprised up to 77.3% of the victims who reported psychological, physical and financial abuse
 - Statistically, nearly four out of the five residents in longterm care facilities in North America are women

Risk Factors (cont'd)

- Victims of elder abuse usually have a cognitive impairment and disability
 - Between 3.4% and 18.5% of the residents who have been abused by staff had dementia
- Older than 74 years old
 - the risk of dependency increases with age
 - victims of abuse in institutional settings reported frailer health and greater dependency on the staff for assistance in ADLs than non-victims

Source – Drennan J, Lafferty A, Treacy M, et al. Older People in Residential Care Settings: Results of a National Survey of Staffresident Interactions and Conflicts. Dublin, 2012.



Topics for Discussion:

- 1. Staff to resident violence
- 2. Resident to resident violence
- 3. Resident to staff violence
- 4. Visitor/Guest/Family Member to staff violence
- 5. Questions



Staff to Resident Violence



 One study based on self reports by older adults (or their proxies) estimated the prevalence of elder abuse in institutional care settings is

86.9% for neglect in the USA

Source – Griffore RJ, Barboza GE, Mastin T, et al. Family members' reports of abuse in Michigan nursing homes. J Elder Abuse Negl 2009;21:105–14.

Nursing home cited for failing to prevent sexual abuse of residents

Accused resident was known to the staff as 'Captain McFeelypants'

BY: CLARK KAUFFMAN - AUGUST 28, 2023 5:04 PM







Nursing home in CT accused of neglect, staffing shortages

Jenna Carlesso and Dave Altimari, CTMirror.org

Feb. 1, 2023

LOCAL

'Stripped him of dignity': Son claims nursing home neglected, abused dad before death









By Hunter Sáenz, wsoctv.com

August 14, 2023 at 5:50 pm EDT

LOCAL NEWS

'I've been left sitting in feces and urine for 8 hours' | Georgia nursing home patient alleges abuse, neglect

11Alive investigators pulled police records and found officers in Lilburn have investigated at least three recent allegations of abuse allegations at the facility.



Table 1 Institutional abuse reported by older adults and staff

Elder abuse types	Pooled estimates (%)	Lower limit (%)	Upper limit (%
Reported by older adults	over past year		
Psychological (3 studies)	33.4	6.3	78.9
Physical ^a (4 studies)	14.1	1.9	58.3
Sexual (3 studies)	1.9	0.03	59.2
Neglect (3 studies)	11.6	0.4	81.8
Financial (3 studies)	13.8	0.7	78.3
Reported by staff over pa	st year		
Overall (4 studies)	64.2	53.3	73.9
Psychological ^a (5 studies)	32.5	16.1	54.6
Physical ^a (5 studies)	9.3	4.4	18.4
Sexual (3 studies)	0.7	0.04	11.7
Neglect ^a (4 studies)	12.0	2.6	41.4

Adjusted for publication bias.

Source: Yongjie Yon et al., The prevalence of elder abuse in institutional settings: a systematic review and meta-analysis, European Journal of Public Health, Volume 29, Issue 1, February 2019, Pages 58–67, https://doi.org/10.1093/eurpub/cky093



Long-term care settings are stressful

- Staff attributed their experience of stress to:
 - staff shortages
 - A significant correlation was found between abuse and high ratio of residents to registered nurses
 - It was further found that an increased presence of qualified nurses was associated with a reduction in resident abuse risk.
 - time pressure
 - research has found that staff who self-reported committing abuse described themselves as emotionally exhausted

UConn Center on Aging Study

In 2007, the UConn Center on Aging conducted a study which asked 150 people who live in various supportive housing situations:

"Do you worry about retaliation if you were to report a complaint or concern?"



Retaliation and the fear of retaliation is a reality

23% of nursing home residents
13% of assisted living residents
19% of residential care home residents

indicated that they fear retaliation if they were to report an incident of abuse or neglect

Recommendations

- The Connecticut Long Term Care Ombudsman Program to serve as an outlet for complaints
- Provide and/or support continuing education to facility staff, residents, and families
- Formalize reporting procedures
- Sharing information with other LTC facilities on bad actors
- Not just "listening" to the complaints and concerns without taking action

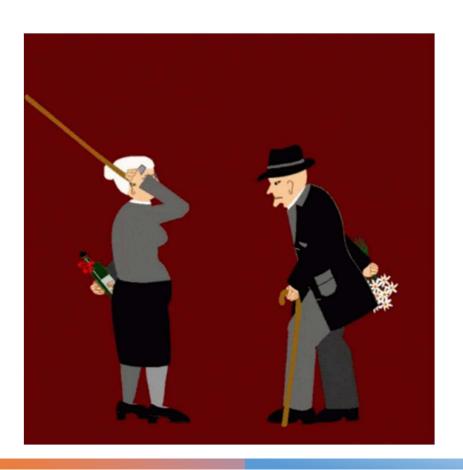


Jury Awards Family \$1.2 M in Nursing Home Abuse Case

By Michelle Llamas, BCPA

Publication Date: February 20, 2015

- An Oklahoma jury awarded \$1.2 million to the family of a 96-year-old woman who was abused in a nursing home by two employees.
- The video shows nursing home employees forcing 96-year-old woman to lie down by pushing her head and preventing her from breathing.
- One employee also shoved latex gloves into the 96-year-old woman's mouth as the other watched.
- The two employees were fired, and they face criminal charges. The jury found the nursing home guilty of negligence and abuse.



Patient to Patient Violence



Or "resident-to-resident elder mistreatment" (RREM)

- Defined as negative and aggressive physical, sexual, or verbal interactions between (longterm care) residents that in a community setting would likely be construed as unwelcome and have high potential to cause physical and/or psychological harm and distress.
- Has been established as a serious problem that has a negative impact on the safety, physical well-being, and quality-of-life of residents living in nursing homes.

Source – Teresi, J.A., Silver, S., Ramirez, M. et al. Resident-to-resident elder mistreatment (R-REM) intervention for direct care staff in assisted living residences: study protocol for a cluster randomized controlled trial. Trials 21, 710 (2020). https://doi.org/10.1186/s13063-020-04580-z



On the very same dementia unit of a South Plainfield, NJ nursing home:

76-year-old Audrey Fish (left) was taken to the emergency room after a resident allegedly hit her with a cane.

Two days before, 91-year-old Clara Sutowski (right) had been hurt by a different resident known to have behavioral issues.

She ultimately died from her injuries and her alleged assailant has since been charged with reckless manslaughter.





Source – NJ.com – A hidden danger, Why are more residents being attacked in N.J. nursing homes?

Published: Mar. 17, 2023, 7:15 am

Murder charge still pending against

102-year-old woman

AP

Published 4:56 p.m. ET June 20, 2014



Elizabeth Barrow celebrating her 100th birthday.

The Case of Laura Lundquist

The Oldest Murder Defendant in MA's History



On September 24, 2009, 100-year-old Elizabeth Barrow was found strangled in her Dartmouth, MA nursing home bed with a plastic bag tied around her head.

Her 98-year-old roommate, Laura Lundquist, was charged and indicted.

Lundquist was diagnosed with dementia and was deemed incompetent to stand trial.

According to the District Attorney, prosecutors pursued a second-degree murder charge because they didn't believe Lundquist had the cognitive ability to form premeditation, which must be proven in a first-degree murder case.

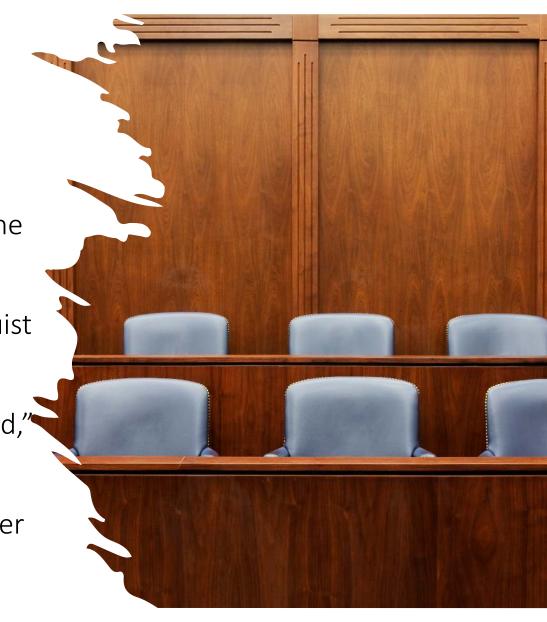
Nearly five years later, a second-degree murder charge was still pending against Lundquist at the age of 102.

The victim's son filed a wrongful-death lawsuit against the nursing home, its owners and operators.

In 2012, an arbitrator ruled in favor of the nursing home and found no negligence.

He said he has never pushed for Lundquist to be prosecuted.

"It would be like prosecuting a 2-year-old," he said. "It's just an awful thing that happened. How could she be held accountable for this when she's not in her right mind?"





RREM is the most common reason (89% of incidents) for police to be called to nursing homes in Connecticut.

Source – Lachs M, Bachman R, Williams CS, O'Leary JR. Resident-to-resident elder mistreatment and police contact in nursing homes: findings from a population-based cohort. J Am Geriatr Soc. 2007 Jun;55(6):840-5. doi: 10.1111/j.1532-5415.2007.01195.x. PMID: 17537083.

"There is almost total consensus that the most critical factor in improving conditions of care and work in LTC is enough staff."

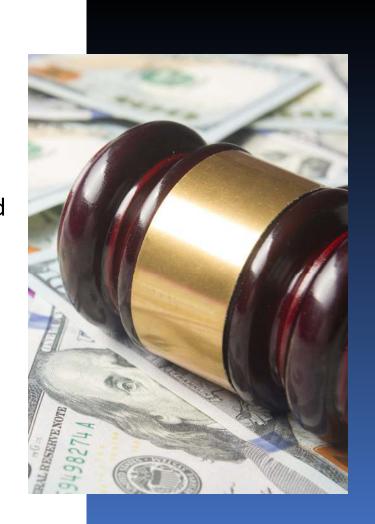
Ontario Health Coalition 2019 report

"Pretty much in all cases it comes down to the fact that there's just not enough staff on the ground or the staff that are there aren't qualified enough to provide the care needed."

– Jessica Wilson, Consumer New Zealand, 10.12.19

\$1.9 Million Settlement Against in Assisted Living Facility in California

- 88-year-old Olivia Deloney, with dementia in a "memory care" unit of Integral Senior Living LLC d/b/a The Point at Rockridge
- A 67-year-old man with early-onset Alzheimer's and history of "aggressive" behaviors followed her
- She broke her hip when he knocked her to the ground as she tried to get away from him
- She returned to the facility
- However, she was left unattended and broke the same hip
- She died 2 months later





A serious concern

- Workplace violence (WPV) against employees in the healthcare and social assistance sector is a serious concern.
- The Healthcare and Social Assistance sector is comprised of 20.9 million employees and is a major component of the U.S. economy.
- These workers are nearly six times more likely to face WPV that of workers in all other industries averaged.
- Primarily violent behavior of patients, clients, residents, or visitors in their workplaces.

Source: Report of the Small Business Advocacy Review Panel on OSHA's Potential Standard for Prevention of Workplace Violence in Healthcare and Social Assistance

Figure-1

Annual Number and Rate of WPV Injuries for Industry Sectors in the Contemplated Scope, 2019

Sector	NAICS	Industry	Injuries	Rate per 10,000 FTE
General hospitals, incl. emergency departments	622000	Hospitals	7,160	17.8
	622200	Psychiatric and substance abuse hospitals	1,600	152
Behavioral Health	623200	Residential behavioral health facilities	3,120	58.2
	621112	Offices of Physicians, Mental Health Specialists	130	26.6
Residential care facilities	623100	Nursing care facilities	780	19.1
	623300	Continuing care retirement communities and assisted living facilities for the elderly	3,280	14.4
Home healthcare	621600	Home healthcare	520	6.1
Emergency medical services	621910	Ambulance Services	260	18.6
Social assistance services		Individual and Family Services	300	20.5
	624200	Community Food and Housing, and Emergency and Other Relief Services 140		8.9
	624300	Vocational Rehabilitation Services	530	21.8

Source: BLS, Survey of Occupational Injuries and Illnesses, Tables R4, R8, 2019.

Source: Report of the Small Business Advocacy Review Panel on OSHA's Potential Standard for Prevention of Workplace Violence in Healthcare and Social Assistance



Workplace violence is underreported.

Source: Report of the Small Business Advocacy Review Panel on OSHA's Potential Standard for Prevention of Workplace Violence in Healthcare and Social Assistance

Three Barriers to Change

- Acceptance
- Ignorance
- Inaction
 - Violence seen as routine feature of nursing home life





Strategies to Minimize Risk

- Behavioral assessment to identify prior history of aggressive or combative behavior (Broset Score)
- Resident care plan intervention if a resident's behavioral assessment identifies a potential for aggressive behavior
- Communicate individual interventions to staff to help minimize or eliminate the behavior.
- Work closely with the care team, including family, to develop a plan to manage, contain, and where possible, prevent combative incidents.
- Staff training on recognizing and responding to violence in the workplace



Strategies to Minimize Risk (cont'd)

- De-escalation: When confronted with situations where the resident is becoming combative or has begun to be combative:
- Redirection: Provide options for other activities or places if appropriate.
- Environmental control: If a resident is becoming violent, assess the surrounding areas and move other residents to a safer location and, where possible, remove objects the resident could use to harm themselves or others.
- Teamwork: Staff communication is an essential tool in addressing combative behavior. Staff should share information about situations that might be troubling a resident or techniques that have helped de-escalate a resident in the past.

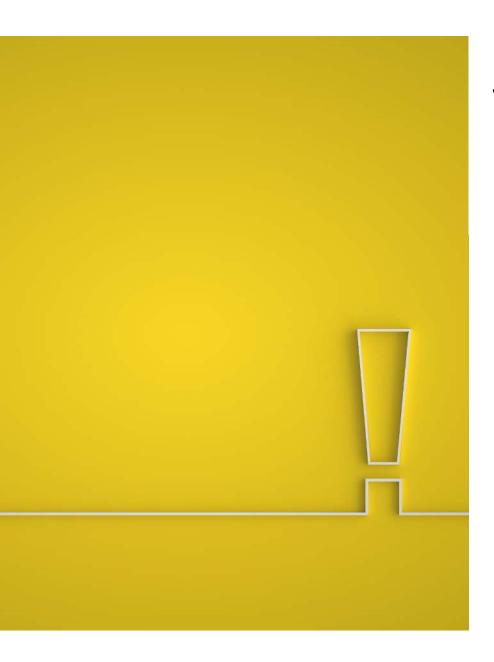


External Threats of Violence Visitor/Guest/Family Member to Staff Violence

External Threats

- Approximately 25% of registered nurses report being physically assaulted by a patient or family member, while over 50% reported exposure to verbal abuse or bullying.
- Verbal abuse is the most common type of abuse directed toward nurses in health-care settings.
- Many studies indicate that violence against nurses is underreported.

Source – Al-Qadi MM. Workplace violence in nursing: A concept analysis. J Occup Health. 2021 Jan;63(1):e12226. doi: 10.1002/1348-9585.12226. Erratum in: J Occup Health. 2021 Jan;63(1):e12301. PMID: 33960074; PMCID: PMC8103077.



Visitor/Guest/Family Member to Staff Violence

- Frequently presents as a domestic disturbance or a family member unsatisfied with the treatment of their loved one.
- Family members often become emotionally charged when interacting with staff, especially when there is any type of perceived mistreatment or lack of treatment toward the resident, and this may result in an assault on staff.

Source – International Association for Healthcare Security and Safety Foundation (IAHSS)

Bills creating harsher penalties for assaulting health workers pass the Michigan House

BY: **ANNA LIZ NICHOLS** - JUNE 27, 2023 6:38 PM

"Health care workers in Michigan are at a "breaking point"

"We have had colleagues off work for injuries such as concussions, internal bleeding of a pregnant woman, a fractured jaw, dislocated shoulders, severe anxiety from assault, are some examples," Pena said during the June 13 committee meeting. "Unfortunately ... I was informed that one of our colleagues suffered three fractured facial bones and is under the care of a plastic surgeon."

- Health professionals...noted that many of the reported assaults by their colleagues were suffered at the hands of patients' loved ones who believed their loved one wasn't getting adequate care.
- An emergency nurse, representing the Michigan Emergency Nurses Association, recalled getting a urine sample thrown all over him by a patient's significant other who said they were waiting too long to get an X-ray.

Katherine L. McCrink Leslie A. Wheelin September 13, 2023

Returning to In-Person: Initial Discovery Through Trial



Initial Case Work-up

- Meeting with witnesses and building a rapport is critical prior to depositions as witnesses will be more comfortable
- Visiting a facility is helpful in determining the location of rooms, staffing, and initial impressions that could affect the case assessment

Benefits of Remote Court Conferences

- Reduced cost for travel and reduced time waiting in Court
- In some Courts in New York the proposed Court order may be reviewed by multiple attorneys prior to submission to the Court – permitting junior associates to participate



Drawbacks of Remote Court Conferences

- Remote conferences hinder the ability to develop and enhance relationships with opposing counsel which is vital to facilitating settlement
- Remote conferences include situations where plaintiff's counsel has added requirements to Orders without Court approval
- Junior attorneys, who have begun practicing during the pandemic have never been before a Court in person





Benefits of Remote Depositions

- Reduced cost for travel
- Plaintiffs are often more relaxed in their own homes and more forthcoming
- Gain insight into the witness' home or work environment
- Defense depositions tend to be shorter



Challenges of Remote Depositions

 Technology challenges including inaccurate transcripts due to 'freezing'
 WHEN YOU ACCIDENTALLY

Attorneys cannot see/control environment

No "off the record" observations

 Managing exhibits can be difficult, particularly when videos are involved



SHARE THE WRONG SCREEN

Mediations

- Virtual mediations can assist with avoiding grandstanding behavior on the part of plaintiff's counsel and dramatic exits
- This can also be an opportunity to assess plaintiff's home environment
- However, virtual mediations permit plaintiff's counsel to limit access to their client and may prevent mediators from engaging with the plaintiff
- There may be less pressure to settle on plaintiff as they are appearing virtually



Pre-Trial Conferences

- In-person Court attendance of the plaintiff can assist with settlement. If the plaintiff appears remotely they may feel less pressure to settle
- Courts with increasingly busy dockets do not have the time to devote to multiple conferences with all parties in person



Trials

- Often include remote testimony; jurors are distracted
- Need to understand and coordinate with Court about forms of admissible evidence if remote





Return to Office

- While there are benefits to remote work, there is benefit to time in the office
 - Greater opportunity to collaborate and enhance defense strategy.
 - Build rapport with colleagues and support staff required to report to the office more frequently
 - Junior associates practice non-email communication skills, and are ultimately better communicators with clients
 - Better overall training of junior associates with office time. More ground covered in-person and better relationships are established



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Contents

Section	title	Slide no.
#1	North American Property / Casualty Insurance: Sector Outlook	3
#2	Long-Term Care Facilities: Current View	7
#3	Facilities: Methodologies and Limitations	10
#4	Industry Exposure and Underwriting Performance	12
#5	Facilities Ratings Impact	16
#6	North American Life Insurance: Sector Outlook	18
#7	Long-Term Care: Current View	21
#8	Methodologies and Limitations	23
#9	Industry Exposure and Reserve Adequacy	26
#10	Ratings Impact	30

FitchRatings





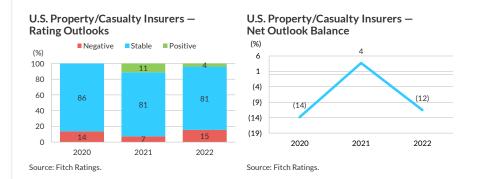
"Following weaker profits and declines in surplus for the U.S. property/casualty insurance industry, results are anticipated to stabilize and modestly improve in 2023 due to commercial and personal lines price increases and higher investment yields."

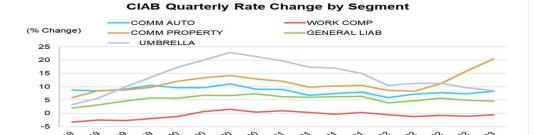
James Auden, Managing Director Fitch Ratings, Inc.

Property / Casualty Outlook: Neutral

What to Watch

- Personal auto results slow to recover despite large rate increases
- Convective storm activity drives high 2023 catastrophe losses
- Can pricing keep pace with loss cost trends amid high inflation
- Capital strength maintained following 2022 investment losses
- Reinsurance market in position for better profits





Source: Council of Insurance Agents & Brokers Quarterly Commercial Market Survey.



Note: CM - Claims made. Occ - Occurrence. MPLI - Medical Professional Liability Source: S&P Global Market Intelligence.

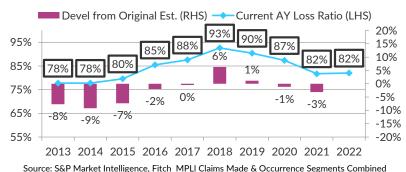
FitchRatings

Property / Casualty Outlook: MPLI

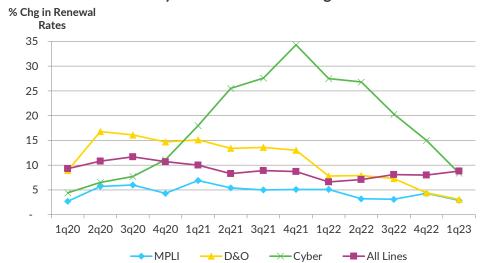
What to Watch

- Operating results improved in 2022
 - Return to long-term underwriting profitability not likely
- Claim volatility to remain elevated
 - Litigation environment
 - Settlement costs

P/C Industry MPLI Accident Year Loss & LAE Ratios



MPLI Price Increases Trail Industry and Other Volatile Segments



Source: Council of Insurance Agents & Brokers Quarterly Commercial Market Survey **Fitch**Ratings

Long-Term Care Facilities: Current View



Broader Macroeconomic Environment

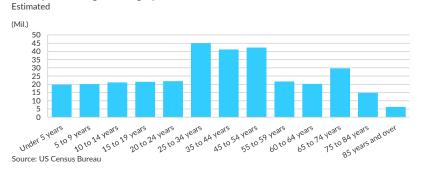
Macroeconomic Environment

- Core Inflation remains elevated
 - Wage inflation and cost of services likely to keep healthcare costs trending up
- Interest Rate Environment
 - Expect the Fed to continue to move rates up to 5.75%
 - Asset yields expected to benefit insurers
- Credit conditions tightening
 - Banking crisis
 - Recession fears
- Population demographics continue to support demand
 - Will continue to be substantial need for senior living / skilled care facilities
 - Cost to the individual will continue to be an issue

US Macroeconomic Forecast							
(%)	Annual Average 2018-2022	2022	2023F	2024F			
GDP Growth	2.1	2.1	1.2	0.5			
Inflation (end of period)	3.6	6.5	3.6	2.7			
Interest Rates (end of period	od)						
US Fed Funds Rate	1.40	4.50	5.75	4.25			
US 10-year yield	2.05	3.88	4.25	4.00			
6 Fill D !!							

Source: Fitch Ratings

US Population Age Demographics



Long-Term Care Facilities: Current View and Looking Ahead

Current View

- Industry remains concentrated in the top writers
 - Top 5 are 55% of total industry direct written premiums
- Pandemic related concerns have largely passed
 - Industry shifting losses did not emerge
 - Occupancy still lagging pre-pandemic levels modestly
- Staffing issues remain key issue
 - Temporary solutions can introduce additional issues
- Litigation environment
 - Litigation financing
 - Higher defense costs
 - Volatility in severity

Looking Ahead

- Pricing momentum shows signs of fading
- Material reductions in litigation risk through legislative reform seem unlikely
 - Increased severity could also result from additional consumer protection laws
- Consolidation within industry could further entrench large underwriters
- M&A activity expected to remain muted
 - Larger multi-line's unlikely to have an interest in acquiring additional broad MPLI business.

FitchRatings

Long-Term Care Facilities: Methodologies and Limitations



Facilities: Methodologies and Limitations

US Statutory Financial Statements

- Primary source of data utilized in Fitch's analysis
 - Aggregated to group level
 - Utilize either S&P Capital IQ Groups or Combined Statements
- Underwriting data
 - Supplement A of Schedule T (Direct Premiums and Losses)
 - IEE Product Line Allocations
 - Schedule P analysis
- Filings present several challenges
 - Granularity is hard to come by
 - Several product lines grouped under single broader category
 - Affiliated and un-affiliated reinsurance impacts ratios
 - Shifting of business into captives further clouds the industry picture



Top 15 Insurance Groups by Direct Premium

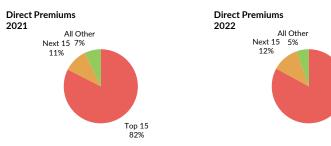
Campany Nama	Al-l :t:	Insurer Financial	Outland	Direct Written Premium: Facilities	% of Total Direct Written
Company Name	Abbreviation	Strength Rating	Outlook	(\$US Mil.)	Premiums
National Indemnity Company (Berkshire Hathaway)	BRK	AA+	Stable	421,865	0.7%
Liberty Mutual Insurance Company	LMG	WD	WD	247,565	0.5%
Continental Casualty Company (CNA Financial Corp.)	CNA	A+	Stable	211,096	1.7%
The Doctors Company, An Interinsurance Exchange	TDC	Α	Stable	106,996	8.0%
Munich Reinsurance America, Inc.	Munich	AA	Stable	85,007	2.1%
American International Group, Inc.	AIG	A+	Stable	72,961	0.5%
Arch Capital Group (U.S.) Inc.	ACGL	AA-	Stable	72,023	1.4%
Assorted Markel Insurance Companies	MKL	WD	WD	65,455	0.8%
Health Care Industry Liability Reciprocal*	HCL	NR	NR	60,413	100.0%
ACE American Insurance Company (Chubb Limited)	ACE	AA	Stable	59,948	0.2%
Caring Communities a Reciprocal RRG*	CCR	NR	NR	59,060	94.8%
Coverys	COV	NR	NR	54,742	7.4%
Allied World Assurance Holdings Group	AWA	NR	NR	41,448	1.3%
Church Mutual Insurance Company, S.I.	CMIC	NR	NR	35,773	2.9%
MMIC Insurance, Inc.	MMIC	NR	NR	31,557	15.4%

 $NR-Not\ Rated.\ WD-Withdrawn.\ ^*-Individual\ company,\ all\ other\ reported\ based\ on\ YE\ 2022\ combined\ statement\ data.$

Direct Premium and Loss Trends

Direct Premiums and Losses

- Represents Direct Premiums Written for Industry as a Whole
 - Industry continues to be driven by Top 15 underwriters
 - Top 5 wrote majority of business in 2022
 - New entrants may impact pricing to some extent
- Direct Losses a Good Indicator of Overall Health of the Line
 - Agnostic to reinsurance arrangements
 - Premium growth outpacing losses in recent years
 - Median direct loss ratio for 15 largest underwriters was 42% and high was 73%



Source: Fitch Ratings, S&P Market Intelligence

Source: Fitch Ratings, S&P Market Intelligence

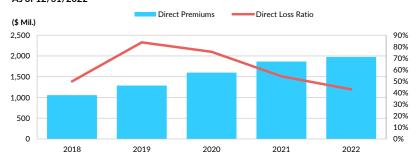
Top 5

were

55%

Top 15

Direct Premium and Loss Trends As of 12/31/2022



Source: Fitch Ratings, S&P Market Intelligence

FitchRatings

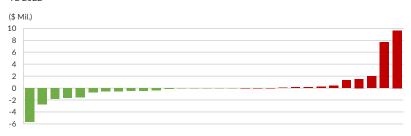
13

Long-Term Care Facilities LOB

Reserve Development and Statutory Underwriting

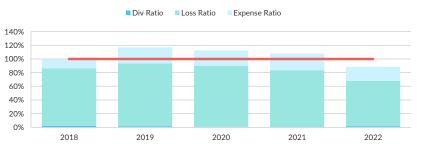
- Favorable 1 and 2 Year Statutory Reserve Development
 - Based on a review of 42 statutory entities representing 29% of direct written premiums
 - 12 Companies who reported zero development were removed from chart
 - Overall development was \$6 mil. favorable at 1 year and \$22 mil. over 2 years
- Statutory Combined Ratio Improving
 - Benefitting from rate increases and underlying loss trends
 - Risks remain as litigation costs continue to rise and staffing issues persist
 - Some distortion from reinsurance

Statutory Reserve Development - 1 Year YE 2022



Source: Fitch Ratings, S&P Global Market Intelligence

Statutory Combined Ratio



Source: Fitch Ratings, S&P Global Market Intelligence

FitchRatings

Long-Term Care Facilities: Ratings Impact



Long-Term Care Facilities: Ratings Impact

Limited Ratings Impact

- Limited relative exposure among Fitch rated companies
- Broader commercial lines trends may impact ratings

Company Name	Abbreviation	Insurer Financial Strength Rating	Outlook	Company Profile Score	2021 Prism Score	Underwriting Risk Allocation
National Indemnity Company (Berkshire	/ ISSI CVICTION	Justing Thating	Gallook	30010	30010	7 (110 cation
Hathaway)	BRK	AA+	Stable	aa+	Ex. Strong	NA
Continental Casualty Company (CNA Financial Corp.)	CNA	A+	Stable	aa-	Ex. Strong	11%
The Doctors Company, An Interinsurance Exchange	TDC	А	Stable	a-	Ex. Strong	17%
Munich Reinsurance America, Inc.	Munich	AA	Stable	aa+	NA	NA
American International Group, Inc.	AIG	A+	Stable	aa	Strong	20%
Arch Capital Group (U.S.) Inc.a	ACGL	AA-	Stable	aa-	Ex. Strong	NA
ACE American Insurance Company (Chubb Limited)	ACE	AA	Stable	aa+	Very Strong	11%





"Macroeconomic conditions will remain volatile in 2023. Favorably, life insurers will benefit from rising interest rates and their strong balance sheets are viewed as a partial mitigant against a recession and resulting credit losses that could emerge."

Jamie Tucker, Senior Director Fitch Ratings, Inc.

Life and Annuity Outlook: Neutral

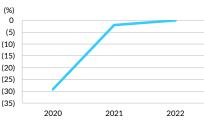
What to Watch

- Macroeconomic Volatility to Affect Profitability
- Rising Rates Materially Beyond Expectations
- Legacy Underpriced Business
- Alternative Investment Manager / Life Insurance Tie-ups

North American Life Insurers -**Rating Outlooks**

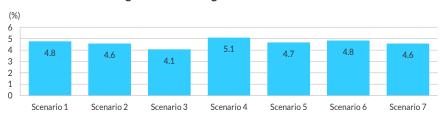


North American Life Insurers -**Net Outlook Balance**



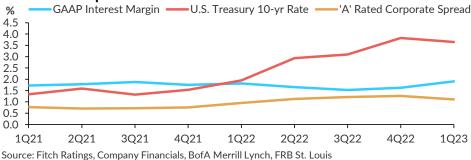
Source: Fitch Ratings.

2021 Cash Flow Testing - Reserve Margin



Note: Scenario 1: Level. Scenario 2: +5% over 10 years then level. Scenatrio 3: +5% over five years than negative 5% over five years. Scenario 4: Up 3%. Scenario 5: Negative 5% over 10 years than level, subject to a floor. Scenario 6: Negative 5% over five years subject to a floor than +5% for five years. Scenario 7: Negative 3% subject to a floor. Source: Fitch Ratings.

Yields and Spreads



FitchRatings

FitchRatings

Long-Term Care Insurance: Current View



Long-Term Care: Current View and Looking Ahead

Current View

- Overall industry exposure represents roughly 34% of total adjusted capital, up from 28% in 2021
 - Top 15 are 90% of total industry reserves
- Continues to be one of the riskiest product lines in Fitch's view
 - Long-term, correlated assumptions
 - Necessary rate increases can be hampered by regulatory authorities
 - Very sensitive to investment yields and movements in interest rates
- Regulatory environment
 - Consumer protections
- Growth in hybrid life products
- Third-party solutions still difficult to accomplish

Looking Ahead

- Pandemic claim and severity trends nearer to "normal" levels
 - Pandemic trend towards home care normalizing
- Increased mortality may still linger
 - Impacted by demographics and attained ages
- Higher interest rates benefitting reserves and operating results
 - Stronger investment returns
- Despite recent improvements, Fitch's expectation is that reserves will continue to require strengthening in the future



Long-Term Care Insurance: Methodologies and Limitations



Methodologies and Limitations

US Statutory Financial Statements

- Primary source of data utilized in Fitch's analysis of long-term care
 - Aggregated to group level
 - Reserve adjustment for domestic captives and offshore affiliated entities
 - Analysis includes captive capital
- Long-term care data scattered across multiple schedules
 - Exhibit 6
 - Accident and Health Policy Experience Form
 - Long-Term Care Supplement
 - Analysis of Operations by LOB
 - Exhibit 8
- Filings present several challenges to analysis
 - Inconsistent data across and within exhibits
 - Differing approaches across companies
 - Accounting treatment differs across schedules
 - Incomplete filings

Methodologies and Limitations

US GAAP and IFRS Statements

- Utilized as a complimentary source of data in Fitch's analysis
 - Better visibility into reserve assumptions and sensitivities to macroeconomic factors
- Limitations
 - Disclosures vary across the industry
 - Relatively minor differences in assumptions lead to large changes in reserve levels
- Introduction of Long-duration Targeted Improvements
 - Changes in interest rates having material impact on reported equity and reserves
 - Fitch views these movements as non-economic

FitchRatings

Long-Term Care Insurance: Industry Exposure and Reserve Adequacy



Top 15 Insurance Groups by Reserves

Company Name	Abbreviation	Insurer Financia Strength Rating		Reserves (\$US Mil.)	Reserves / Statutory Capital
Genworth Financial, Inc.	GNW	NR	NR	32,403	Very High
Manulife Financial Corporation (John Hancock)	MFC	AA-	Stable	30,105	Very High
General Electric Company ¹	GE	NR	NR	28,483	Very High
MetLife, Inc.	MET	AA-	Stable	17,214	Very High
Unum Group	UNM	A-	Positive	16,508	Very High
Prudential Financial Inc.	PRU	AA-	Stable	9,618	Moderate
Northwestern Mutual	NWM	AAA	Stable	7,861	Low
Aegon N.V. (Transamerica)	AEG	NR	NR	6,452	Very High
Thrivent Financial	TFL	NR	NR	6,182	Moderate
New York Life	NYL	AAA	Stable	4,258	Low
Continental General Insurance Co.	CGIC	NR	NR	3,476	Very High
Mutual of Omaha	МОН	NR	NR	3,463	Very High
Reinsurance Group of America, Inc.	RGA	Α	Positive	3,384	Very High
Ameriprise Financial ²	AMP	NR	NR	2,917	Very High
Wilton Re Ltd.	WRE	Α	Stable	2,673	High

NR – Not Rated. 1 - Fitch does not rate General Electrics' insurance subsidiaries, but maintains a 'BBB' issuer default rating with a Stable outlook on General Electric Company. 2- Fitch does not rate Ameriprise's insurance subsidiaries, but maintains an 'A-' issuer default rating with a stable outlook on Ameriprise Financial.

Reserve Adequacy: Overview

Company Name	Reserves / Covered Life	Individual Business Share	Exposure to Legacy Business	Benefit Ratio	Interest Adjusted Benefit Ratio
Genworth Financial, Inc.	Strong	Strong	Strong	Adequate	Strong
Manulife Financial Corporation (John Hancock)	Adequate	Very Strong	Strong	Adequate	Very Strong
General Electric Company ¹	Very Strong	Adequate	Somewhat Weak	Somewhat Weak	Somewhat Weak
MetLife, Inc.	Strong	Very Strong	Very Strong	Somewhat Weak	Strong
Unum Group	Somewhat Weak	Very Strong	Somewhat Weak	Somewhat Weak	Adequate
Prudential Financial Inc.	Very Strong	Very Strong	Strong	Somewhat Weak	Very Strong
Northwestern Mutual	Strong	Adequate	Very Strong	Adequate	Strong
Aegon N.V. (Transamerica)	Adequate	Strong	Adequate	Adequate	Strong
Thrivent Financial	Very Strong	Adequate	Somewhat Weak	Somewhat Weak	Adequate
New York Life	Adequate	Strong	Strong	Adequate	Strong
Continental General Insurance Co.	Very Strong	Strong	Adequate	Adequate	Very Strong
Mutual of Omaha	Somewhat Weak	Strong	Very Strong	Adequate	Strong
Reinsurance Group of America, Inc.	Somewhat Weak	Adequate	NA	Strong	Adequate
Ameriprise Financial ²	Strong	Strong	Somewhat Weak	Somewhat Weak	Strong
Wilton Re	Very Strong	Adequate	NA	Somewhat Weak	Very Strong

Source: Fitch Ratings, Inc., company filings, S&P Global Market Intelligence

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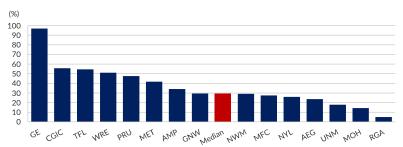
Reserve Adequacy

Reserves Per Covered Life

- Represents statutory reserves allocated per life covered
 - Considered relative to median of Top 15 writers
 - Does not account for differences in group versus individual business or policy year vintage
- General Electric Co. and Unum Group have permitted practices in place with their respective regulators allowing them to strengthen reserves over time.
 - Can be indicator of appropriate level of reserves per covered life
 - Policy type may also play and impact as indemnity only policies typically require lower reserve levels
- Trend for many companies has been positive as interest rates have risen.

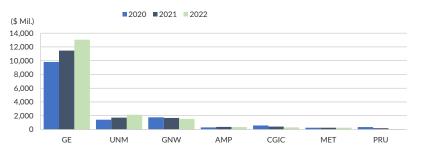
Reserves per Covered Life

As of 12/31/2022



Source: Fitch Ratings, S&P Global Market Intelligence

Additional Actuarial Reserves



Source: Fitch Ratings, S&P Global Market Intelligence

Reserve Adequacy

Underwriting Performance

- Benefit ratio
 - Premiums continue to be inadequate to support claims
 - Investment performance and interest earned on reserves continues to be pivotal factor in underwriting performance.
 - Benefitting from current higher interest rate environment

2022 Underwriting Performance



Source: Fitch Ratings, S&P Global Market Intelligence



Company Profile

Company Name	Abbreviation	Insurer Financial Strength Rating	Outlook	Company Profile Score	Considers LTC
Manulife Financial Corporation (John Hancock)	MFC	AA-	Stable	aa	Yes
General Electric Company ¹	GE	NR	NR	NR	Yes
MetLife, Inc.	MET	AA-	Stable	aa+	No
Unum Group	UNM	A-	Positive	а	Yes
Prudential Financial Inc.	PRU	AA-	Stable	aa+	Yes
Northwestern Mutual	NWM	AAA	Stable	aa+	Yes
New York Life	NYL	AAA	Stable	aa+	Yes
Reinsurance Group of America, Inc.	RGA	Α	Positive	aa-	Yes
Wilton Re	WRE	Α	Stable	a-	Yes

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Capitalization

Company Name	Abbreviation	Insurer Financial Strength Rating	Outlook	Capitalization and Leverage Score	Fitch Prism Score
Manulife Financial Corporation (John	7 ISST CVIACION	raan ₆	Janoon	00010	00010
Hancock)	MFC	AA-	Stable	aa	NA
General Electric Company ¹	GE	NR	NR	NA	NA
MetLife, Inc.	MET	AA-	Stable	aa-	Very Strong
Unum Group	UNM	A-	Stable		Strong
Prudential Financial Inc.	PRU	AA-	Stable	a+	Strong
Northwestern Mutual	NWM	AAA	Stable	aaa	Extremely Strong
New York Life	NYL	AAA	Stable	aaa	Extremely Strong
Reinsurance Group of America, Inc.	RGA	Α	Positive	a	NA
Wilton Re	WRE	Α	Stable	a-	Strong

NR – Not Rated. NA – Not applicable. 1 - Fitch does not rate General Electrics' insurance subsidiaries, but maintains a 'BBB' issuer default rating with a Stable outlook on General Electric Company.

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Q&A



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Fitch Ratings: Company

Overview

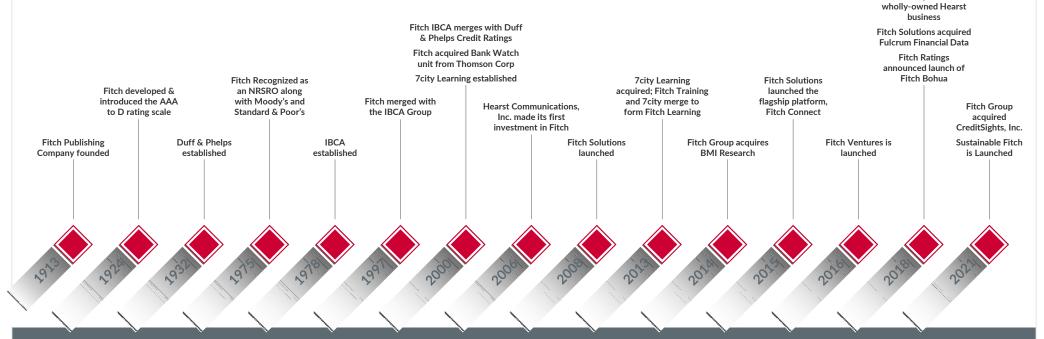


Fitch Group Corporate History

Founded December 1913 as Fitch Publishing Company, Inc.

Owned by Hearst, a diversified media and information company.

Dual-headquartered in London and New York.



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Fitch Group became a

Global Ratings Coverage



5,650Financial Institutions

- 2,906 Banks
- 744 Non-Bank Financial Institutions
- 1,319 Insurance
- 681 Fund and Asset Management



3,815
Corporates

- 1,492 North America
- 1,023 EMEA
- 659 Latin America
- 641 Asia-Pacific



119 Sovereigns 29

Supranationals



538 Global Infrastructure



3,256U.S. Public
FinanceTransactions

880

IPF issuers

- 510 local and regional governments
- 370 government entities



6,316Structured Finance

- 119 Covered Bonds
- 1,263 ABS
- 787 CMBS
- 3,029 RMBS
- 1,121 Structured Credit

Data as of June 30, 2019

Fitch Ratings Awards

Finance Sustainable Investment Awards	Environmental Finance Sustainable Investment Awards: Winner of The Most Transparent Credit Rating Agency - 2019
FOCUS AUTO FORCED BOOKS 2019	Focus Economics Analyst Forecast Awards: U.S. Interest Rate, Italian Inflation, and Korea Exchange Rate - 2019
C F D D D D D D D D D D D D D D D D D D	China Securitization Forum: Extraordinary Contributions Award – 2019
Global Capital	GlobalCapital Bond Awards: Best Rating Agency for Emerging Market Bonds, 1st Place – 2017, 2019





The Asset AAA Awards:

Best Rating Agency for Islamic Finance - 2017, 2018 Public Finance Rating Agency of the Year - 2015, 2016, 2017, 2018 Corporate Rating Agency of the Year - 2015, 2016, 2018 Project Finance Rating Agency of the Year - 2016, 2018 Sovereigns Rating Agency of the Year - 2017, 2018 Investment Grade Rating Agency of the Year - 2018



FinanceAsia's China Awards: Best International Ratings Agency - 2018, 2019



Wallstreet Trader's Chinese Offshore Fixed Income Market: Outstanding Credit Ratings Agency - 2017



CFI.co Awards: Best International Ratings Agency - 2017



Biographies



Douglas Baker

Director

Douglas R. Baker is a Director in Fitch Ratings' North American insurance group.

Since joining Fitch in 2011, Doug has been responsible for leading the analytical coverage of insurers across the broader life industry as well as the title insurance sector. Doug has authored numerous industry reports covering a wide range of topics as they relate to the life and title insurance sectors and continues to represent Fitch through ongoing discussions with issuers, investors, regulators and the media Doug also manages the group responsible for issuing and maintaining ratings on funding agreement backed notes.

Prior to joining Fitch, Doug worked in Washington DC at the United States Department of Treasury in the Office of Fiscal Projections, where he was responsible for helping create and maintain daily cash position forecasts used to determine the size and timing of the government's financing operations.

Doug earned a BS degree in Decision Sciences from the Farmer school of business at Miami University in 2008.

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39

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