

# Recent Developments: Trends, Legislation, Verdicts, Decisions and the Harvard Study

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## Introduction

Discussion of developments in nursing home litigation that have evolved during the past year

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## Highlights

- The Harvard Study
- AON Actuarial Analysis of Long-Term Care
- Case Law
- Legislation
- Recent Verdicts/Settlements
- Risk Management Consideration

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## The Harvard Study

- Harvard Study – The Study
- Harvard Study – The Results
- Harvard Study – Predictive Value

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## Harvard Study – The Study

- The study is a web-based survey of attorneys nationwide who were involved in nursing home litigation.
- The survey was administered over the internet via e-mail beginning in November 2001.
- The survey was sent to any attorney listed in Martindale-Hubbell who identified a practice area of “nursing home” or “long-term care”.

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## Harvard Study – The Study (cont.)

- Surveyors accumulated responses from 278 attorneys in 37 different states.
- Attorneys who responded were 61% plaintiffs’ attorneys and 36% defense attorneys.
- Those who responded to survey reported handling 4,677 nursing home claims during the 12 months prior to survey.

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## Claims Filed

- Wrongful Death (more than 50% of claims nationwide)
- Pressure Sores
- Falls
- Dehydration/Weight Loss
- Emotional Distress

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## Claims Filed (cont.)

- Improper Restraints
- Medication Errors
- Sexual Assault

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## The Plaintiffs

- Children of residents were primary initiators in majority of claims
- 63.5% - Chronic long-stay nursing home residents
- 21.7% - Medicaid recipient
- 2.6% - Under 65 years of age

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## The Defendants

- Virtually all claims name the nursing home facility
- 28% name nursing home administrator
- 20% name physicians, nurses, caregivers

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## Harvard Study – The Results

- Only 8% of the claims proceeded to trial and nearly half of those resulted in verdicts for the plaintiff.
- Plaintiff attorneys report 61% win rate.
- Defendant counsel report plaintiff win rate of 32%.

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## Harvard Study – The Results (cont.)

- Survey reports 88% of cases filed resulted in payment to the plaintiff.
- Average amount of compensation, in or out of court, was \$406,000 per claim.
- Florida and Texas amounts were significantly higher than national average.

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## Punitive Damages

- Plaintiff attorneys reported 17% of payments included punitives.
- Texas attorneys reported 30% of cases involved punitive awards.

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## Harvard Study – Predictive Value

- Costs of litigation are “staggering”
- 2001 – Value of claims \$1.4 billion
- State-specific studies
- Substantial growth over past five years

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## Harvard Study – Predictive Value (cont.)

- Persistent questions about quality of care.
- The required diversion of substantial resources will further impact on the quality of care.
- The nursing home industry is suffering due to the cost of this increasing litigation.

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## Harvard Study – Predictive Value (cont.)

- The diversion of substantial resources to defend litigation and pay settlements and verdicts is likely to have an independent negative impact on the quality of care.
- Focus of industry must be redirected to quality of care issues.
- Litigation rates will respond to increase in quality of care.

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## AON Actuarial Analysis of Long-Term Care, General Liability and Professional Liability

- Objectives
- Findings
- Trends

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## AON Actuarial Analysis: Objectives

1. The identification of national trends and the cost of general liability and professional liability claims for the long-term care industry;
2. The identification of state specific trends and their correlation to currently observed and future expected national trends;

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## AON Actuarial Analysis: Objectives

3. The identification of trends in commercial insurance affordability and availability;
4. Estimation of the portion of general liability and professional liability loss, costs paid as indemnification to claimants versus the portion paid for litigation costs;
5. The identification of the distribution of losses by size of loss.

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## Costs

Cost per occupied long term care is increasing at an annual rate of 24% per year.

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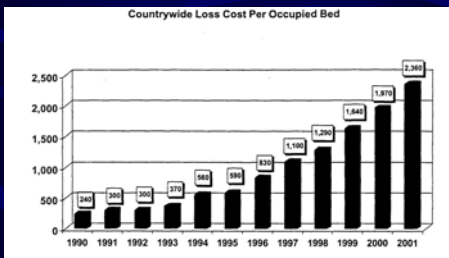
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## Countrywide Long Term Care GL/PL Trends

GL/PL Loss Costs in the United States are significantly increasing.



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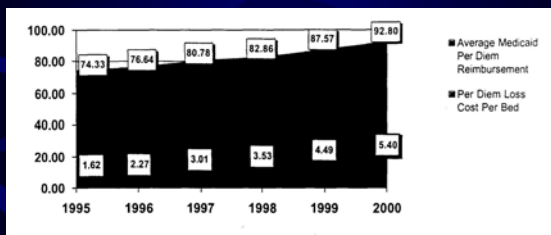
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## Cost vs. Medicaid Reimbursement



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## Claims

The annual number of claims per 1,000 beds is 3 times higher than 12 years ago.

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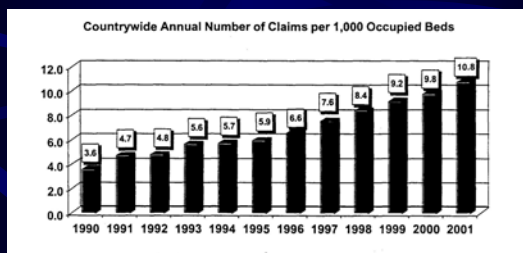
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## Countrywide Annual Number of Claims per 1,000 Occupied Beds



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## Verdicts/Settlements

- The average amount of claim is increasing at a rate of 13% per year.
- Current claim sizes are triple the average size of those claims from 1990.

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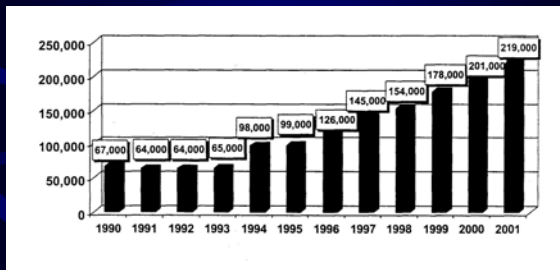
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## Countrywide Severity per Claim



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- There is an increase in the number of extremely large claims.
- Approximately 32% of the currently reported claims are in excess of \$50,000.00.

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## Loss Development

- It takes approximately 10 years before all claim costs are reported.

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## GL/PL Development Patterns



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## Costs

- 47% of the total amount of claim costs are devoted to litigation
  - 19% Defense Costs and Fees
  - 28% Plaintiff Attorney Fees

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## Distribution of Compensation



53% Patient/Family Compensation  
28% Plaintiff Attorney Fees  
19% Defense Costs

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## State Specific Trends

- Alabama
- Arkansas
- California
- Florida

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## State Specific Trends (Cont.)

- Georgia
- Mississippi
- Texas
- West Virginia

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## AON Actuarial Analysis: Findings

1. Average cost per annual occupied skilled nursing bed has increased at an annual rate of 24% per year.
2. Long-term care operators reported \$1.9 billion in liability claims that occurred between 1990 and 2001. Expected ultimate cost of these claims is \$3.7 billion.

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## AON Actuarial Analysis: Findings (cont.)

3. The providers have been projected to incur \$1 billion in claims in the year 2002 alone.
4. The average size of a claim has tripled from \$67,000 in 1990 to \$219,000 in 2001.
5. Nationally, long-term care operators now incur 11 claims per year for every 1,000 occupied skilled nursing beds.

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## AON Actuarial Analysis: Findings (cont.)

6. Florida and Texas continue to be the leaders in driving the increase of claims costs for the long-term care industry. Specifically, the cost of claims per bed in Florida has risen to \$11,000 and the costs of claims per bed in Texas has risen to \$5,500.
7. Numerous states across the country are indicating similar annual trends, including Georgia (50%), West Virginia (50%), Arkansas (45%), Mississippi (40%), Alabama (31%), and California (29%).

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### AON Actuarial Analysis: Findings (cont.)

8. General liability and professional liability claims costs have absorbed 20% of the country-wide average Medicaid reimbursement rate during the years 1995 to 2000.
9. Almost half of the total amount of claims costs paid is going directly to the attorneys.

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### AON Actuarial Analysis: Trends

1. Annual commercial insurance premium levels increased on an average 130% between 2000 and 2001.
2. On average, \$250,000 more of premium was charged per insured for almost \$500,000 less in coverage per claim.

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### AON Actuarial Analysis: Trends (cont.)

3. Per occurrence, available limits were reduced on average by just under \$500,000 per insured.
4. Annual aggregate limits of liability available from the commercial insurance marketplace were reduced on average by \$2.3 million per insured.

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## Case Law

- *Integrated Health Care Services, Inc., et al. v. Pauline Lange-Redway, etc.* (840 S.2d 974 December 12, 2002, rehearing denied, March 13, 2003)

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## Florida Statute

- Guarantee for residents
- Healthcare services
- Protective and supportive services
- Therapeutic services
- Rehabilitative services

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The Florida medical malpractice statute will only apply where the plaintiff must rely upon the medical negligent standard of care to prove his case.

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## Case Law

- *Betty Lou Eads v. Heritage Enterprises, Inc., et al.* (787 N.E.2d 771 (2003))

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## Illinois Nursing Home Care Act

- Failure to supervise
- Failure to respond
- Failure to equip
- Failure to provide adequate staff
- Failure to attend to residents' needs

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## The Question of Law

Where plaintiff sues a nursing home for injuries sustained as a result of violation of the Act, is the plaintiff required to comply with the mandates of the Healing Arts Malpractice Act?

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## The Answer

Where the plaintiff asserts a private right of action under the Act, they are not required to comply with the dictates of the medical malpractice statute.

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## Legislation

- *Louisiana:*
  - Pain and suffering damages capped at \$250,000;
  - Capped all non-economic damages at \$500,000;
  - Cut statute of limitations from ten years to three;
  - Limits the plaintiff to injunctive actions;
  - Legislation to ban recovery of attorney fees in nursing home cases failed.

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## Legislation (cont.)

- *Texas:*
  - Non-economic damages capped at \$250,000 per defendant, with a maximum of three defendants per case;
  - Limit on admissibility of inspection reports at trial.
- *West Virginia:*
  - Pain and suffering damages capped at \$250,000.
- *Mississippi:*
  - Pain and suffering damages capped at \$500,000.

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## Legislation (cont.)

- *Arkansas:*
  - Raised the punitive damages standard in civil suits requiring plaintiff to show by “clear and convincing” evidence that nursing home either intentionally or negligently caused the injury;
  - Bill pending that would limit the use of nursing home inspection records in lawsuits.

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## Legislation (cont.)

- *North Carolina:*
  - Bill pending that would limit the use of nursing home inspection records in lawsuits;
  - Bill pending that would cap non-economic damages at \$250,000 and limit recovery of contingency fees.

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## Legislation (cont.)

- *Oklahoma*
  - Banned recovery of attorney fees in nursing home cases
- *Alabama*
  - State Senate passed bill in early July that places a monetary cap on wrongful death suits against nursing homes. Bill is pending in the state’s House.

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## Recent Verdicts/Settlements

*Arkansas: 5/2003, \$26,400,000 (Verdict)*

Resident died as a result of poor care and treatment by her nursing home that included malnourishment and multiple pressure ulcers. Verdict was reduced to this value by the Supreme Court of Arkansas.

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## Recent Verdicts/Settlements (cont.)

*Mississippi: 11/2002, 7,000,000 (Verdict)*

Resident was malnourished and left with multiple pressures sores while under the care of defendant nursing home. Plaintiff also alleged her bed was continually soaked in urine and feces.

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## Recent Verdicts/Settlements (cont.)

*Alabama: 6/2002, \$5,350,000 (Verdict)*

Plaintiff was found in a chair covered in red ants. Defendant contended that the ant invasion was recent and that the incident was unforeseeable.

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## Recent Verdicts/Settlements (cont.)

*Texas:* 1/2003, \$1,438,395 (Verdict)

Mentally disabled resident sued residence for allowing male resident to gain access and to have sex with resident. Plaintiffs alleged staff knew the man posed a danger and did not put him under special restrictions. Defendants maintained the encounter was "agreed upon" and denied negligence.

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## Recent Verdicts/Settlements (cont.)

*Texas:* 11/2002, \$5,300,000 (Settlement)

Resident's family alleged improper care resulting in resident's death. Family alleged nursing homes failure to properly turn and reposition resident, properly staff the facility, and hydrate and feed the resident.

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## Recent Verdicts/Settlements (cont.)

*Washington:* 2002, \$2 million (Settlement)

Nursing home and doctor paid almost \$2 million to the son of a resident who died after having both legs amputated as a result of gangrenous sores and untreated circulation problems.

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## Recent Verdicts/Settlements (cont.)

*Texas: 5/2003, \$1,500,000 (Verdict)*

Plaintiff, 81, was found in bed covered with fire ants and thousands of bites resulting in death due to system failure secondary to insect envenomation. Plaintiffs alleged negligence, gross negligence, and malice. Plaintiffs also argued that employees had seen fire ants on the premises prior to this event.

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## Recent Verdicts/Settlements (cont.)

*California: 11/2002, \$600,000 (Settlement)*

Plaintiff's family claimed damages for wrongful death resulting from improper care of resident. Family alleged nursing staff noticed resident's leg was "loose and dangling" and failed to check it for three to four days. Upon x-ray, the leg was fractured. Family also contends that the facility failed to properly clean and maintain resident's Foley catheter. Resident died due to complications from an uro-sepsis infection.

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## Risk Management Trends in Prevention of Claims

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Setting Realistic Expectations  
Extended Care Products, Inc.  
Resident Admission Video

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“An attempt to depict correctly  
and honestly the realities of life  
in a nursing home.”

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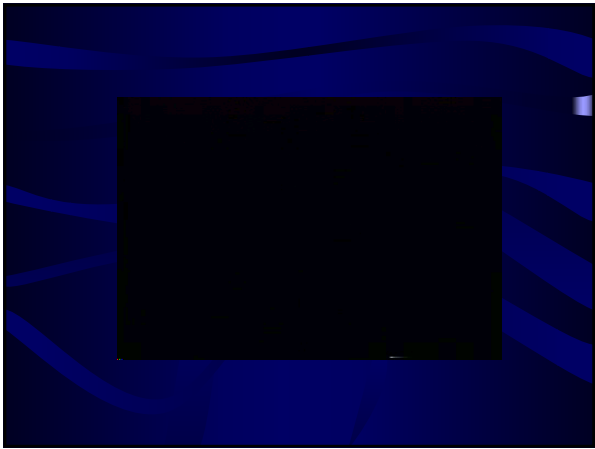
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