

## TRENDS

## The Rise Of Nursing Home Litigation: Findings From A National Survey Of Attorneys

The diversion of substantial resources now required to defend and pay for nursing home lawsuits is likely to have a negative impact on quality of care.

by David G. Stevenson and David M. Studdert

**ABSTRACT:** Lawsuits against nursing homes are a relatively recent phenomenon. Despite a growing sense of alarm among policymakers, little is known about these lawsuits' scale, dynamics, or outcomes. To describe these characteristics, we conducted a Web-based survey of attorneys nationwide who bring and defend this litigation. Our respondents and their firms were involved in 4,677 and 8,256 claims, respectively, in 2001; more than half of these claims were in Florida and Texas. The costs of nursing home litigation are substantial, both in the aggregate and per claim, especially in states where the litigation is most prevalent. These findings elevate concerns about quality of nursing home care and indicate that litigation diverts resources from resident care, which may fuel quality problems.

LAWSUITS AGAINST nursing homes are a new feature on the health law landscape. The legal system's traditional response to concerns about the quality of long-term care has been regulation, rendering nursing homes among the most highly regulated entities in American health care.<sup>1</sup> Although these laws generally preserve private rights to sue, the conventional wisdom is that the elderly face access problems in civil litigation.<sup>2</sup> This view holds that the elderly are not attractive clients to plaintiffs' attorneys, because the lack of associated economic losses makes the damages (and fees) recoverable for their injuries relatively small.<sup>3</sup>

For reasons that are not clear, this situation began to change dramatically during the 1990s.<sup>4</sup> Nursing home litigation is now widely recognized as one of the fastest-growing areas of health care litigation. In several states, most

notably Florida, claims rates and nursing homes' liability insurance premiums have soared.<sup>5</sup> State statutes that set forth residents' rights and permit third parties to bring lawsuits on behalf of residents for violations of those rights appear to have provided a legal basis for many of these claims.<sup>6</sup> Citing concerns about the financial viability of long-term care facilities, the Florida legislature recently enacted sweeping reforms designed to stem the volume and cost of nursing home lawsuits.<sup>7</sup> Other states have passed similar measures.<sup>8</sup>

Despite a growing sense of alarm among policymakers about lawsuits against nursing homes, little is known about their scale, dynamics, or outcomes. Previous studies of this litigation have focused primarily on one state: Florida.<sup>9</sup> We surveyed a national sample of plaintiff and defense attorneys who practice in the area of nursing home litigation about the

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details of the claims they steward. We were particularly interested in what such descriptive statistics might imply about the relationship between litigation and the quality of nursing home care.

**Study Methods**

■ **Survey sample.** To identify plaintiff and defense attorneys who devote a substantial amount of time to nursing home litigation, we searched the Martindale-Hubbell legal directory, which is freely accessible on the Internet and lists approximately 90 percent of attorneys in private practice.<sup>10</sup> We selected all attorneys who listed “nursing home” or “long-term care” law among their practice areas. We limited selections to one attorney per firm.<sup>11</sup> The final sample consisted of 464 attorneys from forty-three states (Exhibit 1). More than one-third of the sample came from Florida (22 percent) or Texas (15 percent), states that together account for approximately 10 percent of nursing home residents nationwide. California, which accounts for approximately 7 percent of nursing home residents, had the next-largest representation of attorneys (5 percent).

■ **Survey content and administration.** Using a Web-based survey instrument, we elicited information from attorneys about their nursing home litigation practices, including volume, compensatory value, and outcomes of

claims they handled. A “claim” was defined as a formal demand for compensation made orally or in writing, whether or not it involved a formal lawsuit.<sup>12</sup> The survey contained questions about the injuries alleged and the characteristics of plaintiffs and defendants.

We also asked about “primary initiators” of claims, defined as the person who took the most responsibility for bringing the claim, whether or not that person was the injured party or the named plaintiff. We also sought respondents’ opinions about litigation trends over the past five years. A draft version of the instrument was pretested on a small sample of plaintiff and defense attorneys, as well as several academicians with relevant expertise.

We administered the survey in November 2001 by sending e-mail messages containing an Internet link to a secure study Web site. To maximize response, we conducted intensive e-mail and telephone follow-up over the subsequent two months. Survey participation was voluntary and uncompensated.<sup>13</sup>

■ **Analysis.** Descriptive statistics relating to the proportion of claims were weighted by the number of claims in which individual respondents were involved. We calculated national aggregates (practice, caseload, alleged injuries, and claims disposition) as well as state-specific statistics for Florida and Texas. We tested for statistically significant differ-

**EXHIBIT 1**  
**Sample Overview And Context, Survey Of Attorneys Involved In Nursing Home Litigation, 2001**

	Florida	Texas	National
<b>Population</b>			
Population age 75+ <sup>a</sup>	1,355,421	929,924	16,600,767
Nursing home residents <sup>b</sup>	69,122	87,299	1,490,155
Nursing home residents per 1,000 age 75+	51.0	93.9	89.8
<b>Attorneys</b>			
Nursing home lawyers <sup>c</sup>	103	70	464
Nursing home lawyers per 1,000 residents	1.5	0.8	0.3

**SOURCES:** See below.

<sup>a</sup> Bureau of the Census.

<sup>b</sup> American Health Care Association, *Facts and Trends: The Nursing Facility Sourcebook, 2001* (Washington: AHCA, 2001).

<sup>c</sup> Martindale-Hubbell.

ences (t-tests) in alleged injuries and claims disposition by separately comparing Florida and Texas with national averages (exclusive of the comparator state). Finally, to investigate the potential for reporting bias, we tested for statistically significant differences (t-tests) in practice, caseload, and disposition data across attorney type (plaintiff/defense).

## Study Results

■ **Attorney respondents.** We received responses from 278 attorneys in thirty-seven states, a response rate of 60 percent. Florida and Texas were home to the practices of 23 percent and 16 percent of respondents, respectively (Exhibit 2).<sup>14</sup> California, the next most heavily represented state, accounted for 5 percent of respondents.

Based on their client profile, we classified 61 percent of respondents as plaintiff attorneys and 36 percent as defense attorneys.<sup>15</sup> The vast majority (91 percent) acted exclusively for one side. Eight attorneys could not be classified because of an even split in their practices or missing data.

■ **Practices and caseloads.** Respondents reported personally handling a total of

4,677 nursing home claims in the twelve months prior to the survey. Respondents' firms were involved in 8,256 claims, more than half of which were in Florida and Texas (Exhibit 2).

Defense attorneys, on average, practiced at larger firms, devoted more of their personal practice to nursing home litigation, and were involved in more nursing home claims than plaintiff attorneys were, especially at the firm level. The total number of claims personally handled by plaintiff and defense attorneys were similar, but the firm-level aggregates differed (Exhibit 2).

■ **Types of claims.** State statutes (49 percent) and common-law causes of action (36 percent) figured prominently as the primary legal bases of claims nationwide, although these bases varied across states. For instance, most claims in Florida (83 percent) relied on the nursing home residents' rights statute in that state as the primary basis of the claim.<sup>16</sup> Attorneys in other states, including Arkansas, Georgia, Kentucky, Louisiana, Maine, Ohio, and Texas, cited such statutes, but less frequently than their counterparts in Florida did.

Recognizing that claims may allege multi-

## EXHIBIT 2 Practice And Caseload Characteristics Of Attorneys Conducting Nursing Home Litigation, 2001

	Florida (n = 63)	Texas (n = 44)	National (n = 278)	Plaintiff <sup>a</sup> (n = 170)	Defense <sup>a</sup> (n = 100)
<b>Practice</b>					
Firm size (mean)	15.4	34.6	22.7	5.1	54.1
Nursing home litigation as share of practice (mean)	38.7%	36.0%	35.2%	31.7%	41.2%
<b>Caseload</b>					
Claims, by individual (mean)	25.0	18.8	16.8	13.7	22.5
Claims, by firm (mean)	52.3	40.1	29.7	18.7	49.7
Total claims, by individual	1,576	827	4,677	2,327	2,247
Total claims, by firm	3,298	1,765	8,256	3,172	4,971
Years in practice (mean)	16.1	17.2	16.9	16.8	17.1
Years doing nursing home litigation (mean)	9.0	8.5	8.0	7.4	9.2

**SOURCE:** Authors' analysis of survey data.

**NOTES:** A claim is defined as a formal demand for compensation made orally or in writing; it will often, but not necessarily, involve the formal filing of a lawsuit. All claims volume statistics relate to claims reported as being open in 2001.

<sup>a</sup> "Plaintiff" is defined as any attorney who reported practicing plaintiff work more than 50 percent of the time; "defense" is defined as any attorney who reported practicing defense work more than 50 percent of the time. Lawyers who did not respond to this question or who indicated that their practice broke out evenly were not classified as either plaintiff or defense.

ple injuries, more than half of claims nationwide involved deaths (Exhibit 3). The next most frequent harms alleged were pressure ulcers/bed sores, dehydration/weight loss, and emotional distress. The leading injury types in Florida and Texas were similar to those nationally, with three exceptions. In Texas the proportions of claims that alleged death and pressure ulcers/bedsores were significantly higher than the national average; in Florida, the proportion of claims that alleged falls was significantly higher than the national average.

**■ Resident and plaintiff characteristics.** Children of nursing home residents were the primary initiators of the majority of claims, followed by residents' spouses and residents themselves (Exhibit 4). A large proportion of the litigation involved chronic, long-stay nursing home residents. Claimants also were commonly Medicaid beneficiaries and people with dementia or Alzheimer's disease. Fewer claims involved people in nursing homes for post-acute care and those under age sixty-five.

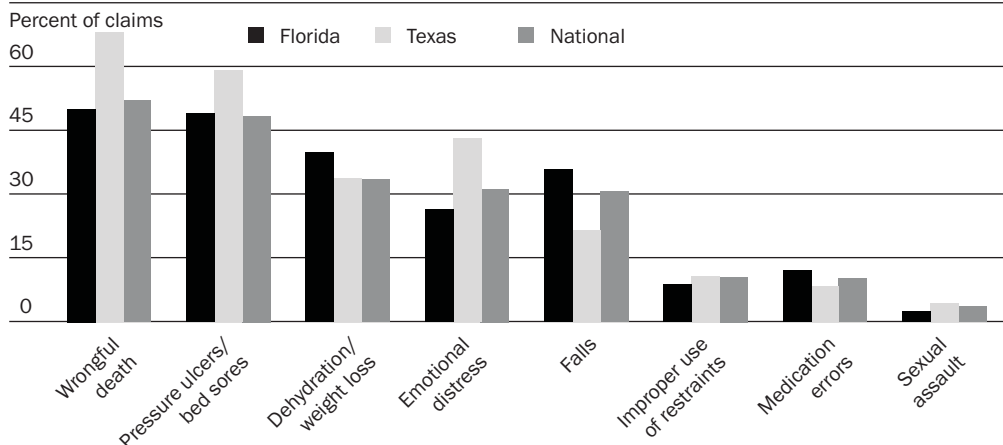
Virtually all claims named the nursing home itself as a defendant. Other professional staff were also frequent targets of the litigation.

Nursing home administrators were named in 28 percent of claims. Nearly one in five claims named physicians, and approximately the same proportion named nurses. However, the proportion of claims in which professional staff members were sued varied considerably across states. For example, physicians were named as defendants in 8 percent of Florida claims and 24 percent of Texas claims.

**■ Disposition of claims.** Attorneys reported that approximately 8 percent of claims reached trial and that nearly half of these resulted in verdicts for the plaintiff (Exhibit 5). The trial rate was significantly lower among Florida claims. Plaintiff attorneys reported higher trial rates on average than their defense counterparts, although the difference was not statistically significant. With respect to trial outcomes, on the other hand, the divergence was statistically significant: Plaintiff attorneys estimated winning 61 percent of trials, compared with defense attorneys' estimate of 32 percent for plaintiff wins.

Among claims resolved out of court, 88 percent involved compensation payment to the plaintiff; this is nearly three times the rate of

### EXHIBIT 3 Nursing Home Litigation, By Type Of Alleged Injury, 2001



**SOURCE:** Authors' analysis of survey data.

**NOTES:** Weighted by number of claims of individual respondent. Numbers do not add to 100 percent because multiple injuries might be alleged in a single claim. Other alleged injuries identified by respondents (not reported here) included assault/battery, wandering/elopement, and inadequate care/supervision. The proportions of alleged injuries involving death and pressure ulcers or bed sores are significantly higher in Texas than the national average excluding Texas ( $p < .01$ ). The proportion of alleged injuries involving falls is significantly higher in Florida than the national average including Florida ( $p < .01$ ).

## EXHIBIT 4 Characteristics Of Nursing Home Litigants, 2001

Resident characteristic	Frequency among claims (1–5 scale) <sup>a</sup>	Primary initiator of claim	Percent of claims <sup>b</sup>	Named defendant	Percent of claims <sup>b</sup>
Chronic, long-stay nursing home resident	4.4	Child of resident	63.5%	Nursing home/nursing home ownership	99.4%
Medicaid recipient	4.2	Spouse of resident	21.7	Administrator/executive director	28.2
Dementia or Alzheimer's disease	4.0	Nursing home resident	7.7	Nurse	19.7
Posthospital, short-stay resident	2.6	Other	4.1	Physician	18.8
Younger than age 65	1.9	Corporate guardian	2.6	Nurse aide	7.2
				Other	3.0

**SOURCE:** Authors' analysis of survey data.

<sup>a</sup>Scores are averages on a five-point Likert scale with 1 indicating "very rare" and 5 indicating "very common."

<sup>b</sup>Weighted by number of claims of individual respondent. Primary initiator of claim category adds to 100%; named defendant category does not.

payment typically observed among medical malpractice claims. There was much closer agreement among attorneys about this figure, with no statistically significant variation between plaintiff and defense attorneys.

Finally, the average recovery amount among paid claims—whether resolved in or out of court—was approximately \$406,000 per claim, nearly twice the level of a typical medical malpractice claim (\$207,000). Average recovery amounts in Florida and Texas were higher than the national average (\$311,000, exclusive of Florida and Texas). Plaintiff attorneys nationwide reported a higher level of payment than defense attorneys, but they agreed that approximately 17 percent of payments included punitive damages. In Texas, punitive damages were significantly more common than elsewhere in the country, forming part of the compensation package in 30 percent of paid claims.

■ **Litigation trends.** Attorneys reported substantial increases over the past five years in both the number of nursing home claims they handled and the average size of recoveries. On a five-point Likert scale (1 = decreased substantially; 3 = stayed about the same; 5 = in-

creased substantially), the average score for trends in claims volume was 4.2, with approximately half of all respondents selecting the highest possible response category. With respect to damages payments, the average score was 4.0, and a little more than 40 percent of attorneys selected the highest possible response category. Despite the much higher volume and cost of claims in Florida and Texas, attorneys in these states reported rates of increase that were slightly lower than the national average.

## Discussion

■ **Scale of the litigation.** The attorneys we surveyed were personally involved in litigating nearly 4,700 claims in the preceding twelve months, and their firms handled approximately 8,300 claims. More than four-fifths of these claims would recover damages at an average of \$406,000 per claim.

The implications of these data in terms of the volume and cost of nursing home litigation are staggering. Using the conservative assumption that plaintiff and defense attorneys who responded to our survey represent opposite sides of the same disputes, their firms were involved in litigating claims in 2001 estimated

## EXHIBIT 5 Disposition Of Nursing Home Litigation Claims, 2001

	Florida	Texas	National	National malpractice data <sup>a</sup>	Plaintiff	Defense
<b>Process</b>						
Percent to mediation	92.0% <sup>b</sup>	83.1% <sup>b</sup>	74.6%	— <sup>c</sup>	72.2%	77.3%
Percent to arbitration	1.8	0.6 <sup>b</sup>	2.3	— <sup>c</sup>	2.0	2.5
Percent to trial	2.4 <sup>b</sup>	9.7	7.9	5.3%	9.4	6.3
<b>Outcomes</b>						
Percent trial verdicts for plaintiff	44.3%	43.7%	46.2%	30.1%	61.4% <sup>d</sup>	31.6% <sup>d</sup>
Percent out-of-court settlements with plaintiff compensation	91.7 <sup>b</sup>	89.1	87.8	33.1	90.0	85.3
<b>Damages</b>						
Average recovery amount	\$464,300	\$552,700	\$406,000	\$207,000	\$436,000	\$384,000
Percent of recoveries including punitive damages	12.9%	30.3% <sup>d</sup>	17.5%	— <sup>c</sup>	17.6%	16.9%

**SOURCE:** Authors' analysis of survey data.

**NOTE:** Weighted by number of claims of respondent.

<sup>a</sup> Data from medical malpractice claims closed between 1993 and 1999 are presented for comparative purposes. They come from a database of 45,100 claims from nineteen insurers operating in twenty-seven states, including Florida and Texas.

<sup>b</sup>  $p < .01$ . State comparisons are to national average, excluding that state. Plaintiff estimate compared to defense estimate.

<sup>c</sup> No data.

<sup>d</sup>  $p < .05$ . State comparisons are to national average, excluding that state. Plaintiff estimate compared to defense estimate.

to be worth approximately \$1.4 billion. If nonrespondents had litigation experiences that were similar to those of respondents, our data imply compensation payments of \$2.3 billion to plaintiffs nationwide, with claims in Florida and Texas accounting for \$1.1 billion and \$654 million, respectively.

These figures should be interpreted as a type of “unfunded liability,” rather than as strictly annualized estimates of litigation costs. Because of the time lag associated with resolution of claims, a portion of the reported claims would have closed in 2001; the rest will close in future years (and, of course, be joined by new claims). Nonetheless, to put the estimated worth of the open claims we analyzed in context, they represent 2.3 percent of the \$99 billion spent on nursing home care nationwide in 2001 (60 percent of which came from Medicaid and Medicare).<sup>17</sup> In Florida and Texas, they represent 23 percent and 15 percent, respectively, of annual nursing home expenditures in those states.

Several previous studies have attempted to measure the volume and costs of nursing home litigation in Florida.<sup>18</sup> Although these studies used different data sources, their estimates of claims, settlement amounts, and aggregate liability in Florida are remarkably consistent with our results. Direct comparison of our findings with those of two other surveys, one focused on Florida and one at the national level, are difficult because of methodological discrepancies, but the main estimates are again broadly consistent.<sup>19</sup>

■ **Growth and dynamics of the litigation.** Our results indicate that nursing home litigation is a new and growing industry. The average respondent had practiced law for seventeen years but had been involved in nursing home litigation for only eight, which suggests a mobilization of attorneys into this area in the mid-1990s. There was also a strong consensus among survey respondents from nearly every state about its substantial growth over the past five years. Among states with a sizable

representation in the study sample, attorneys from Arkansas, Georgia, Louisiana, and Oklahoma reported increases in both claims volume and average recovery amounts that were considerably higher than those of Florida, Texas, and the national average, highlighting these geographically proximate states as emerging strongholds.

Several features of the litigation are distinctive. First, residents' children are the prime movers behind more than 60 percent of claims, a logical result given the high proportion of claims involving death and the prevalence of cognitive impairments among residents for whom claims were filed. Second, the average payment rate of 85 percent is remarkably high by civil litigation standards and nearly triple the average rate observed in medical malpractice litigation nationwide.

Third, average payments are large relative to medical malpractice and other types of personal injury litigation, a striking result given the absence of wage losses and financial dependents in a typical nursing home claim. The high rate of punitive damages, particularly in Texas, and the proportion of claims reportedly involving death would certainly buoy recovery amounts.<sup>20</sup> Fourth, nearly half of all nursing home claims involved wrongful death or pressure ulcers/bedsores, or both; smaller proportions alleged dehydration/weight loss, improper use of restraints, and falls. These findings are consistent with previous analyses of litigation against Florida nursing homes and with key problems identified in a recent review of the nursing home quality literature.<sup>21</sup>

■ **Litigation and quality.** The factors driving the recent trends in nursing home litigation are unclear. Public discussion often centers on two competing drivers: trial attorneys, who seek to maximize their incomes; and consumers, who are responding to unacceptable care in nursing homes and potential failures of regulatory oversight. Such polarized explanations must be situated in the context of the

broader debate about the relationship between litigation and quality.<sup>22</sup>

Consumer advocates and the plaintiffs' bar have long argued that lawsuits are essential to ensuring high-quality care. Yet providers and defense attorneys state, with some empirical justification, that lawsuits are haphazard, do little to improve quality, and impose serious financial burdens. In the nursing home sector, the battle lines are sharply drawn. Proponents of litigation can point to plentiful reports of substandard care as substantiating the need for the deterrent influence of tort law.<sup>23</sup> Nonetheless, critics counter that in a system that is already fiscally strained, litigation diverts resources from resident care.

The large body of litigation we detected elevates

existing concerns about the current standard of care in nursing homes across the country, as does the high rate of claim payments.<sup>24</sup> However, several important caveats are appropriate. First, considerations other than fault, such as the costs of running litigation, the risk of large awards, and the empathy jurors may have for particular types of plaintiffs, influence the decisions that insurers, defense attorneys, and defendants make about whether to pay claims.

Second, available quality indicators, such as Online Survey and Certification Assessment and Reporting (OSCAR) System deficiencies and staffing levels, do not flag Florida and Texas, in the aggregate, as performing markedly worse than other states.<sup>25</sup> Similarly, an in-depth, facility-level study of claims in one Florida county found no relationship between OSCAR deficiencies (including citations for insufficient staffing) and lawsuits.<sup>26</sup> Third, the recent rise in nursing home litigation does not appear to track any clearly documented, general deterioration of quality in this sector. On the contrary, although substantial problems are known to exist, the health services literature has painted a cautiously optimistic picture about quality improvement over the past

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two decades.<sup>27</sup> Of course, at least part of a discrepancy between litigation and quality trends is likely attributable to plaintiff attorneys' gaining ground on a reservoir of substandard care.

Regardless of the extent to which nursing home litigation effectively highlights and provides redress for problems with care, its sheer scale raises policy concerns about its net impact on quality. This is particularly true in Florida and Texas, where sizable portions of nursing home resources are being channeled toward litigation. Many litigants may need and deserve the compensation that such litigation provides. However, liability insurance premiums and payments may create a "death spiral" if their fiscal impact on defendant facilities feeds further quality problems and increases the probability of future lawsuits.

Representatives of the nursing home industry claim that the costs of litigation threaten the already tenuous financial solvency of many facilities.<sup>28</sup> There is also reasonable evidence of volatility in liability insurance markets across the country, especially in Florida.<sup>29</sup> Premiums for nursing home liability coverage in Florida were eight times higher than the national average, and several of the largest carriers have terminated this product line altogether.<sup>30</sup> Before the Florida legislature mandated coverage in January 2002, approximately one in five nursing facilities in the state were operating without insurance.<sup>31</sup>

■ **Study limitations.** One limitation of our study is that attorneys might bring their professional biases to bear on survey questions. They also might have had problems recalling and estimating specific details of their cases, such as average payment amounts. Our survey does not validate their reports, nor does it capture the perceptions of nursing home residents and their families, nursing home providers, liability insurance companies, or policymakers. Another limitation is that our cost and volume extrapolations involve generalizing respondents' experiences for nonrespondents; the latter's practice profile may have been systematically different, particularly if plaintiff and defense attorneys had different response rates.

We cannot directly compare these response rates because we had no basis, independent of survey response data, for classifying practice orientation.

Nonetheless, several considerations bolster our estimates. First, a crude check of response rates within attorney types is firm size: Average firm sizes for respondents and the full study sample are twenty-three and twenty-six attorneys, respectively. Since average firm size for plaintiff and defense attorneys differs considerably (five attorneys per firm for plaintiffs, fifty-four for defense), nonresponse may not be markedly different for plaintiff and defense attorneys. Second, breakdowns of the main results by attorney type show fairly good internal consistency.<sup>32</sup> Third, our findings and extrapolations are consistent with other Florida studies that relied on different data sources.

On the other hand, a few study design features suggest that total claims are higher than our extrapolations. Attorneys who did not list relevant practice expertise in Martindale-Hubbell were excluded from the sample. In addition, our cost estimates are tied only to compensation, omitting the costs of defense attorneys, the judicial system, and the non-monetary or uninsurable costs (such as litigants' time) associated with lawsuits. Similarly, the costs of any reactive measures to the threat of litigation that did not cost-effectively improve the quality of care would not be included in our estimates.

## Conclusion And Policy Implications

Our findings about the rates and outcomes of nursing home litigation highlight persistent questions about quality of care in this sector. We can only speculate about the mix of salutary and damaging effects on care generated by the body of claims we identified, since we did not measure litigation performance directly—in particular, the extent to which the litigation reliably tracks negligence, deters substandard care, and compensates worthy claimants. Yet the overall scale of the litigation is extremely sobering. In states with a high volume of litiga-

tion, the diversion of substantial resources now required to defend and pay nursing home lawsuits is likely to have an independent, negative impact on quality.

How can policymakers respond? One response is to enact tort reform of the kind recently attempted in Florida and being considered by other state legislatures. The goal of tort reforms, such as caps on damage awards and attorney fees, is to stabilize the nursing home and liability insurance markets without eliminating the incentives that litigation may provide to deliver high-quality care. Yet stakeholders' fiercely competing political interests make these reforms difficult to advance.

An alternative approach is to rely on redoubled quality improvement and assurance efforts to remove the basis of lawsuits. In contrast to tort reforms, whose litigation-reducing capacities have been documented, the impact of a quality-oriented approach to litigation is less certain.<sup>33</sup> Its effectiveness clearly hinges on both the extent to which quality gains can be realized and the extent to which litigation rates will then respond to such gains. There are considerable uncertainties associated with each of these elements.<sup>34</sup>

Perhaps the greatest obstacle to the quality improvement approach is that increased staffing ratios and other favored strategies call for substantial investments, a difficult sell in the current fiscal climate.<sup>35</sup> The recent, government-led Nursing Home Quality Initiative is a comparatively inexpensive intervention, emphasizing access to information and its potential to spur consumer empowerment and competition on quality.<sup>36</sup> Although it is too soon to evaluate the impact of this particular effort, policymakers should include a broad range of potential benefits when considering the affordability of such interventions. Quite apart from the ability of these investments to improve nursing home residents' quality of care and life, their potential to reduce the number and severity of lawsuits should be an important consideration in evaluating their cost-effectiveness.

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## NOTES

1. Institute of Medicine, *Improving the Quality of Care in Nursing Homes* (Washington: National Academy Press, 1986); 42 U.S. Code, secs. 1395 and 1396; and M.B. Kapp, "Quality of Care and Quality of Life in Nursing Facilities: What's Regulation Got to Do with It?" *McGeorge Law Review* 31, no. 3 (2000): 707-731.
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3. D. Bragg, "Dealing with Nursing Home Neglect: The Need for Private Litigation," *Southern Texas Law Review* 39, no. 1 (1997): 1-22; and S.J. Hemp, "The Right to a Remedy: When Should an Abused Nursing Home Resident Sue?" *Elder Law Journal* 2, no. 2 (1994): 195-224.
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5. T. Bourdon and S. Dubin, *Long Term Care: General Liability and Professional Liability, Actuarial Analysis* (New York: Aon Actuarial Solutions, 2002); T. Bourdon and S. Dubin, *Florida Long-Term Care: General Liability and Professional Liability Actuarial Analysis* (New York: Aon Actuarial Solutions, 2001); J. Williamson, "The Siren Song of the Elderly: Florida's Nursing Homes and the Dark Side of Chapter 400," *American Journal of Law and Medicine* 25, nos. 2 and 3 (1999): 423-443; and L. Polivka-West, H. Tuch, and K. Goldsmith, "A Perfect Storm of Unlimited Risks for Florida Nursing Home Providers," *Ethics Law and Aging Review* 7 (2001): 81-99.
6. J. Spitzer-Resnick and M. Krajcinovic, "Protecting the Rights of Nursing Home Residents: How Tort Liability Interacts with Statutory Pro-

- tections,” *Nova Law Review* (Winter 1995): 629–646.
7. Florida Senate Bill 1202, signed into law in May 2001. In addition to tort reforms, the bill also included provisions to increase nursing home staffing and tighten regulatory standards.
  8. Ohio House Bill 412, passed in August 2002, focuses more narrowly on tort reforms than Florida S.B. 1202 does. Other states such as Mississippi, Nevada, and Pennsylvania have recently passed more general malpractice reforms. The U.S. House of Representatives also recently passed H.R. 4600 restricting medical malpractice lawsuits.
  9. Bourdon and Dubin, *Florida Long-Term Care*; D. Hedgecock and J. Salmon, “Lawsuits and Liability Insurance Experience of Florida Nursing Facilities” (Tampa: Florida Policy Exchange Center on Aging, University of South Florida, 2001); Florida Association of Homes for the Aging and Florida Health Care Association, “Nursing Home Tort Survey Results,” 6 March 2002, [www.fhca.org/fhca/news/tortsurvey\\_files/frame.htm](http://www.fhca.org/fhca/news/tortsurvey_files/frame.htm) (11 December 2002); and M. Oakley and C.E. Johnson, “Liability and Long-Term Care Viability,” in *Informational Report of the Task Force on Availability and Affordability of Long-Term Care for the Florida Legislature in Response to House Bill 1993* (Tampa: Florida Policy Exchange Center on Aging, University of South Florida, 2001).
  10. See [www.martindale.com](http://www.martindale.com). Information from Chris Pelzer, assistant marketing manager, Martindale-Hubbell, personal communication, 23 October 2001.
  11. At firms with multiple attorneys practicing in the areas of interest, we chose the senior lawyer. We also limited the sample to attorneys with e-mail addresses listed, which excluded forty-two otherwise eligible attorneys. In addition, because our practice specifications were not unique to litigators—for example, some attorneys’ nursing home practices were confined to regulatory or corporate work—we further refined our sample through confirmatory telephone contacts with the subsample for whom area of specialization was unclear.
  12. This definition comes from the Harvard Medical Practice Study. For more information, see P.C. Weiler et al., *A Measure of Malpractice: Medical Injury, Malpractice Litigation, and Patient Compensation* (Cambridge, Mass.: Harvard University Press, 1993).
  13. The study design and the survey instrument were approved by the human subjects committee at the Harvard School of Public Health.
  14. Response rates in Florida (61 percent) and Texas (63 percent) were comparable with the overall response rate.
  15. We are unable to calculate precise response rates for plaintiff and defense attorneys, as these characteristics were not identified in the initial attorney listings. However, based on firm-size characteristics of the full sample and of respondents, we believe that response rates for plaintiff and defense attorneys are quite similar. See our discussion of potential study limitations for more detail.
  16. Florida Statutes, secs. 400.022–400.023.
  17. K. Levit et al., “Trends in U.S. Health Care Spending, 2001,” *Health Affairs* (Jan/Feb 2003): 154–164.
  18. Hedgecock and Salmon, *Lawsuits and Liability Insurance Experience of Florida Nursing Facilities*; Oakley and Johnson, “Liability and Long-Term Care Viability”; and Florida Association of Homes for the Aging and Florida Health Care Association, “Nursing Home Tort Survey Results.”
  19. Bourdon and Dubin, *Florida Long-Term Care* (2001 and 2002).
  20. Because attorneys were asked to report averages only, we cannot determine the extent to which very-high-worth claims drive the average payment amount. See, for example, “Trial Judge Affirms \$78 Million Verdict in Elder Abuse Case,” *Nursing Home Litigation Reporter*, 24 August 2001. However, based on our pilot work, we believe it is likely that many respondents reported dollar amounts that more closely resembled medians (typical claims) than means.
  21. Hedgecock and Salmon, “Lawsuits and Liability Insurance Experience”; and G.S. Wunderlich and P.O. Kohler, eds., *Improving the Quality of Long-Term Care* (Washington: National Academy Press, 2001).
  22. P.C. Weiler, *Medical Malpractice on Trial* (Cambridge: Harvard University Press, 1991).
  23. A recent U.S. General Accounting Office (GAO) report, for example, found that more than one-fourth of the nursing homes it studied had deficiencies causing actual harm to residents or placing them at risk of serious injury, and that 40 percent of these facilities were repeat offenders. GAO, *Nursing Homes: Additional Steps Needed to Strengthen Enforcement of Federal Quality Standards*, Pub. no. GAO/HEHS-99-46 (Washington: GAO, 1999). See also R. Pear, “Unreported Abuse Found at Nursing Homes,” *New York Times*, 2 March 2002; M. Thompson, “Fatal Neglect,” *Time Magazine*, 27 October 1997; GAO, *California Nursing Homes: Care Problems Persist Despite Federal and State Oversight*, Pub. no. GAO/HEHS-99-202 (Washington: GAO, 1998); and GAO, *Nursing Homes: More Can Be Done to Protect Residents from Abuse*, Pub. no. GAO-02-312 (Washington: GAO, 2002).

24. These findings also highlight the potential for claims information to provide a valuable repository of data for informing and targeting quality improvement efforts. See, for example, B. LaMendola and G. Groeller, "Quality Violations Often Lead to Suits—Even the Best Home Can End Up in Court," Special Report: Nursing Homes on Trial, *South Florida Sun Sentinel*, 6 March 2001.
25. C. Harrington et al., "Nursing Facilities, Staffing, Residents, and Facility Deficiencies, 1995–2001," August 2002, [nccnhr.newc.com/public/50\\_155\\_3801.cfm](http://nccnhr.newc.com/public/50_155_3801.cfm) (24 January 2003).
26. Oakley and Johnson, "Liability and Long-Term Care Viability."
27. Wunderlich and Kohler, eds., *Improving the Quality of Long-Term Care*; and C. Hawes, *Assuring Nursing Home Quality: The History and Impact of Federal Standards in OBRA-87* (New York: Commonwealth Fund, 1996).
28. Polivka-West et al., "A Perfect Storm of Unlimited Risks"; and Florida Health Care Association, "Nursing Home Litigation Reform Will End the Crisis That Threatens Florida's Elderly," March 2001, [www.fhca.org/fhca/legis/pdf/legislative\\_sheets.pdf](http://www.fhca.org/fhca/legis/pdf/legislative_sheets.pdf) (April 2002). One large nursing home chain recently cited these costs as a primary reason for selling its more than fifty facilities in Florida. V. Galloro, "Beverly to Sell Florida Properties," *Modern Healthcare* (23 July 2001): 28.
29. Associated Press, "Pickens Says Nursing Home Insurance Not Reasonably Available" (1 October 2001); "Higher Insurance Rates Raise Nursing Home Costs," *State*, 17 September 2001; Texas Department of Insurance, "Best Practices Adopted to Curb Nursing Home Claims," 4 December 2001, [www.tdi.state.tx.us/commish/nr12041a.html](http://www.tdi.state.tx.us/commish/nr12041a.html) (11 December 2002); and K. Stefanova, "Suits Boost Nursing Homes' Premiums," *Washington Times*, 4 September 2001.
30. Bourdon and Dubin, *Florida Long-Term Care*; and L.W. Hann, "Driven Out: As Nursing Home Liability Costs Soar, Exiting Carriers Spur Market Crisis," *Best's Review* (March 2000): 84.
31. Hedgecock and Salmon, "Lawsuits and Liability Insurance Experience."
32. The exception was the percentage of trial verdicts for the plaintiff. However, because few claims proceed to trial, this difference has a negligible impact on our estimates of scale.
33. R.R. Bovbjerg, "Legislation on Medical Malpractice: Further Developments and a Preliminary Report Card," *U.C. Davis Law Review* 22, no. 2 (1989): 499–566; F.A. Sloan, P.M. Mergenhagen, and R.R. Bovbjerg, "Effects of Tort Reforms on the Value of Closed Medical Malpractice Claims: A Microanalysis," *Journal of Health Politics, Policy and Law* 14, no. 4 (1989): 663–689; S. Zuckerman, R.R. Bovbjerg, and F.A. Sloan, "Effects of Tort Reforms and Other Factors on Medical Malpractice Insurance Premiums," *Inquiry* 27, no. 2 (1990): 167–182; and P.M. Danzon, "The Frequency and Severity of Medical Malpractice Claims: New Evidence," *Law and Contemporary Problems* 49, no. 2 (1986): 57–84. But compare with W.P. Gronfein and E.D. Kinney, "Controlling Large Malpractice Claims: The Unexpected Impact of Damage Caps," *Journal of Health Politics, Policy and Law* 16, no. 3 (1991): 441–464.
34. There is considerable debate about the most effective way to improve nursing home quality. See IOM, *Improving the Quality of Long-Term Care*, for more detail. For the question of whether litigation responds to changes in quality, see D.M. Studdert, T.A. Brennan, and E.J. Thomas, "Beyond Dead Reckoning: Measures of Medical Injury Burden, Malpractice Litigation, and Alternative Compensation Models from Utah and Colorado," *Indiana Law Review* 33, no. 4 (2000): 1643–1686.
35. R. Pear, "Nine of Ten Nursing Homes Lack Adequate Staff, Study Finds," *New York Times*, 18 February 2002.
36. See CMS, "Nursing Home Quality Initiative," 4 December 2002, [cms.hhs.gov/providers/nursinghomes/nhi](http://cms.hhs.gov/providers/nursinghomes/nhi) (11 December 2002); and CMS, "Nursing Home Compare," 1 October 2002, [www.medicare.gov/nhcompare/home.asp](http://www.medicare.gov/nhcompare/home.asp) (11 December 2002).