



TORT REFORM AND NURSING HOMES

**A Study by the Center for Medicare Advocacy, Inc.
March 2003**

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Advancing Fair Access to Medicare and Health Care

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TORT REFORM AND NURSING HOMES

Executive Summary

Study by Center for Medicare Advocacy Dispels Myths about Tort Reform and Nursing Homes

The Center for Medicare Advocacy recently completed a study entitled *Tort Reform and Nursing Homes* that deflates the myths that pervade the nursing home industry's discussion of tort litigation. It found that cases about nursing home abuses are not frivolous.

The civil justice system compensates victims of grossly inadequate care or gross failures of care. When nursing home care kills or injures vulnerable elderly nursing home residents, tort litigation is necessary to hold facilities accountable. The civil justice system also complements the public regulatory system in its efforts to improve the quality of care for all residents, current and future. Tort litigation can lead to significant changes in facilities' care practices and can remove providers that refuse to give residents good care.

Myths About Civil Litigation Against Nursing Homes Are Deflated By The Study's Findings

- ***Cases are not frivolous***

First and foremost, the cases are not frivolous. Cases represent situations where residents have been seriously injured and died. They involve deaths by strangulation on bedrails or other physical restraints, pressure sores, malnutrition, and dehydration.

- ***There is no explosion of litigation***

While the number of cases has increased, there has not been an explosion in tort litigation, as the industry contends. The Center's evaluation of litigation in Maryland found few filings statewide and no reported decisions at all at the appellate level.

Moreover, while a handful of facilities have many cases filed against them, most have few or none. The *Orlando Sun* found that litigation is generally concentrated in relatively few facilities.

Compared to the amount of abuse, neglect, and grossly poor care suffered by residents each day, as documented by the General Accounting Office and others, the number of cases filed against nursing homes in fact remains small.

- *Recoveries are not astronomical*

While cases involving hundred million dollar jury verdicts receive attention in the media, these verdicts are publicized because they are in fact both large and unusual. The study finds that actual settlements and pay-outs are considerably lower than these multi-million dollar verdicts. Judges may reduce large verdicts in post-trial motions and cases are often settled for lower amounts during appeal. As a consequence, one insurer reported that its average claim payment increased nationally from \$25,599 in 1995 to \$59,370 in 2000, considerably less than the multi-million dollar verdicts publicly reported in the press.

- *Litigation supplements the public regulatory system*

The distribution of cases against facilities is not random. Facilities with large numbers of verdicts and settlements recorded against them are the same facilities that have been the subject of significant public enforcement activity. Frequently-sued facilities have usually been cited with large numbers of deficiencies by state survey agencies. Civil litigation may also bring about quasi-regulatory results in specific facilities and permanent changes to facility practices, benefitting future residents.

Viewed in this light, civil litigation is an important adjunct of the public regulatory system. Like the public enforcement system, it serves an important public function of improving care for all residents.

- *Civil litigation is not the cause of rising liability insurance premiums*

Finally, the Center's study demonstrates that tort litigation is not the cause of rising liability insurance premiums. Various analyses identify multiple causes for increased rates that include, but go far beyond, tort litigation:

- The profit-motivated insurance industry, which has minimal experience with nursing homes and little competition for business;
- The insurance industry's unregulated status with respect to pricing nursing home liability policies;
- The insurance industry's not finding in nursing homes the types of risk management programs that are standard in other health care settings;
- Poor quality nursing home care;
- Insurance companies' raising premiums based on national, rather than state-specific, nursing home pay-out experience (so that states without significant tort litigation nevertheless experience significant rate increases);
- Rising commercial insurance rates, as a general matter; and
- The cyclical pattern in the insurance industry, so that insurance companies raise

- Rising commercial insurance rates, as a general matter; and
- The cyclical pattern in the insurance industry, so that insurance companies raise premiums based on financial matters unrelated to claims (e.g., (1) insurance industry invests premiums in the stock market to generate revenues; declining stock prices affect insurance companies' profitability; (2) insurance companies had substantial payouts as a result of September 11, 2001).

Study Consistent with Other Findings

The Center's findings about the serious failures of care reflected in tort litigation are consistent with findings of others who have looked specifically at civil justice litigation against nursing homes. As the Florida Task Force on the Availability and Affordability of Long-Term Care reported in December 2000, "the lawsuits are fundamentally about pressure sores, falls, dehydration, and malnutrition or weight loss." Cases described in the Appendix amply supported the finding. For example, the Florida Task Force described a May 20, 1999 settlement for \$1.5 million in Leon County:

Admitted 3/95; good condition. By spring 1995, contractures resulting in fetal position; falls, traumas, multiple bedsores (1/96); 3/96 gross mismanagement of feeding tube; weight loss of 43 pounds over the next 67 days. Died 10/11/96. Fraudulent and inconsistent charting entries included entries showing care during hospitalizations and day after death.

The Florida Task Force's findings were echoed by the Harvard study reported in *Health Affairs* (March 2003), which recently documented that more than half the cases in civil justice litigation against nursing homes involved residents' deaths.

Copies of the Study Available from the Center for Medicare Advocacy

The Center's report on tort litigation and nursing homes is available from the Center for Medicare Advocacy for \$25.00. Send order and payment to

Center for Medicare Advocacy
1101 Vermont Avenue, NW, Suite 1001
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Attention: Toby S. Edelman

TORT REFORM AND NURSING HOMES

INTRODUCTION

Enacting tort reform is a major public policy priority of the nursing home industry at both the state and federal levels. Arguing that rising liability premiums, caused by tort litigation, are consuming scarce financial resources intended for care and forcing good providers into bankruptcy, the industry calls for a variety of stringent limitations on tort litigation. This paper explores these issues as it presents and evaluates the discussion about tort reform in nursing home litigation.

Four appendices to this report describe (1) examples of recent verdicts and settlements in tort cases against nursing homes, (2) a methodology for identifying tort litigation in a state and implementation of that methodology in Maryland, (3) the major components of tort reform that are proposed and enacted at the state level, and (4) legal theories used by residents' advocates to complement or replace tort theories and strategies used by the nursing home industry to avoid tort litigation.

BACKGROUND

Limiting tort litigation on behalf of nursing home residents is a key legislative priority for the nursing home industry in many states.¹ The public debate has also moved to Congress² in recent months as nursing home providers have joined the healthcare industry's broader call for national tort reform for all healthcare providers.³ Media reports of large verdicts against nursing facilities,⁴ exponentially

¹ See American Health Care Association's Issue Brief, "Civil Justice Reform" (Mar. 2002).

² The House Subcommittee on Commercial and Administrative Law held an oversight hearing on June 12, 2002, "Health Care Litigation Reform: Does Limitless Litigation Restrict Access to Health Care?;" the House Energy and Commerce Committee held a hearing on July 17, 2002, "Harming Patient Access to Care: The Impact of Excessive Litigation."

Ten Members of Congress have requested that the General Accounting Office evaluate "the extent to which current market conditions and insurance company practices are contributing to an increase in medical malpractice premiums." Letter from Congressman John Conyers, Jr. and nine other Members of Congress to Comptroller General of the United States David M. Walker (Jul. 2, 2002).

³ In the summer 2002, the American Medical Association began one of its "most aggressive, ambitious lobbying efforts in recent years – a proposed \$15 million campaign to persuade Congress to enact federal tort reform measures." Michael Romano, "AMA's call to arms: \$15 million campaign aims to enact tort reform," *Modern Healthcare* (Jul. 15, 2002), <http://www.modernhealthcare.com/currentissue/pastpost.php3?rfid=8938>.

⁴ *The National Law Journal* reported in April 2001 that in the previous 12 months, juries had awarded verdicts of \$312 million and \$82 million in Texas. Margaret Cronin Fisk, "Juries Treat Nursing Home Industry with Multimillion Dollar Verdicts," *The National Law Journal* (Apr. 30, 2001). Michael Moss, "Nursing Homes Get Punished byirate Jurors," *The Wall Street Journal* (Mar. 6, 1998) (reporting then-record \$95.1 million verdict in California against Beverly Enterprises).

rising liability premiums for nursing facilities⁵ and other healthcare providers,⁶ well-publicized reports of healthcare providers leaving their professions or moving to states with lower insurance rates,⁷ and the Bush Administration's strong support for tort reform⁸ have all made tort reform a national issue as never before.

The definition of tort

A tort is a civil wrong that is not a breach of contract or trust. A tort occurs when there is intentional or negligent injury to an individual or to an individual's property or reputation. The individual who is harmed may be compensated with two types of money damages.⁹ *Economic damages* include such monetary losses as past and future medical expenses, past and future earnings, and use of property. *Non-economic damages* compensate individuals for non-tangible losses, such as pain and suffering, emotional distress, and loss of enjoyment of life. A third type of money damages, *punitive, or exemplary, damages*, does not compensate individuals, but is intended to deter and punish outrageous or malicious conduct.

⁵ Diane Levick, "Liability Headaches For Caregivers," *The Hartford Courant* (Aug. 31, 2001); Phill Trewyn, "Nursing home liability insurance on the rise," *The Business Journal of Milwaukee* (Jul. 13, 2001), <http://milwaukee.bccentral.com/milwaukee/stories/2001/07/16/focus2.html?t=printable>;

⁶ Insurance premiums for physicians in the New York area increased by 20-40% in 2002. Joseph B. Treaster, "New York Doctors Facing Big Jump in Insurance Rates: Coverage Is Among Most Expensive in U.S.," *The New York Times* A25 (Mar. 22, 2002); Joseph B. Treaster, "Malpractice Rates Are Rising Sharply; Health Costs Follow," *The New York Times* (Sep. 10, 2001).

⁷ Joseph B. Treaster, "Rise in Insurance Forces Hospitals to Shutter Wards," *The New York Times* A1 (Aug. 25, 2002) (reporting closures of obstetric wards, reduced trauma services, and closure of rural clinics "as a result of soaring costs for medical malpractice insurance."); Marilyn Werber Serafini, "Risky Business," *National Journal* (May 18, 2002); Karla Dooley, "Doctors Seek Cure for Skyrocketing Insurance; Malpractice Rates Take Toll on Medical Care," *The Lexington Herald Leader* (KY) (Feb. 24, 2002); Carol Ann Campbell, "Jersey physicians run for coverage - Malpractice insurers vanishing," *The Star-Ledger* (Newark, NJ) (Feb. 18, 2002); Roger F. Mecum, "Medical liability crisis threatens quality health care," *York Daily Record* (PA) (Jan. 20, 2002); Patricia V. Rivera, "Malpractice rates take feverish leap: Texas doctors hit hard by increases which insurers say are needed," *The Dallas Morning News* (Jan. 20, 2002) (reporting increases of 30-200%); Rafael Gerena-Morales, "Rising Malpractice Premiums Hit Florida Doctors Hardest," *The Tampa Tribune* (Dec. 19, 2001); John Porretto, "Costs Lead Rural Doctors to Drop Obstetrics," *The Washington Post* (Nov. 23, 2001);

⁸ "President Proposes Major Reforms to Address Medical Liability Crisis" (Speech by President George W. Bush at High Point University, Greensboro, NC, Jul. 25, 2002); Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services, *Confronting the New Health Care Crisis: Improving Health Care Quality and Lowering Costs By Fixing Our Medical Liability System* (Jul. 24, 2002); and Council of Economic Advisors, *Who Pays for Tort Liability Claims? An Economic Analysis of the U.S. Tort Liability System* (Apr. 2002).

⁹ *The American College Dictionary* (1970).

Tort reform defined

“Tort reform” is the term used to describe legislative proposals and legislation to change how lawsuits about torts are brought and pursued in court. Tort reform legislation usually includes a number of similar provisions that restrict the ability of an individual to sue a nursing home that caused harm, limit the type of evidence that the individual can present in court, and limit the financial recovery, including attorneys’ fees, that a court can award.¹⁰

Tort reform may involve healthcare, broadly defined, or it may be focused specifically on nursing home care. Some nursing home-specific tort reform proposals seek to include nursing home litigation within medical malpractice, although there are differences between the two. While medical malpractice often involves a single instance of negligence by a healthcare professional, nursing home torts typically involve a larger number of workers, most of whom are not healthcare professionals, and poor care occurring over a longer period of time.

Tort reform provisions typically require individuals to take certain actions before filing a lawsuit. Individuals may be required to mediate complaints before filing a lawsuit. They may be required to file the lawsuit within a short period of time and to submit a sworn declaration from a healthcare professional in the same discipline as the defendant confirming that malpractice has occurred.

Tort reform provisions often limit the evidence that individuals can submit. Nursing home-specific tort reform legislation restricts or eliminates the right of a plaintiff to introduce state survey reports and statements of deficiencies as evidence. Such evidence demonstrates a facility’s prior knowledge of deficiencies and may be presented in court to support an award of punitive damages.

Tort reform provisions also limit the money damages that individuals can recover, particularly non-economic compensatory damages. Limiting non-economic damages is especially significant for nursing home residents. Since residents generally do not have lost wages or long life expectancies, traditional measures of economic damages, and since their medical costs may be small or non-existent, economic damages are usually not a significant part of recoveries for residents. Punitive damages are also rare. Consequently, non-economic damages are the primary damages that residents and their families recover in tort litigation against nursing homes.

Participants in the discussion about tort reform

The nursing home industry is the leading supporter of nursing home tort reform. State and national nursing home trade associations, representing both for-profit and not-for-profit providers, are the primary advocates for nursing home tort reform legislation. They join other health care providers in seeking broad tort reform on a national level. An additional nursing home trade group has taken an active role in tort reform legislation. The Alliance for Quality Nursing Home Care, an association formed in 1999 by 12 investor-owned multi-state nursing home corporations, has added tort reform

¹⁰ A fuller discussion of typical features of tort reform legislation appears in Appendix III.

to its original mission of increasing Medicare reimbursement.¹¹

Healthcare providers from a variety of disciplines have formed several coalitions to advance tort reform both at the state level and nationally: the Health Care Liability Alliance,¹² the Tort Reform Institute, and the American Tort Reform Association. Most recently, Common Good has been formed and joined the debate, supporting even broader reform of the entire civil justice system.¹³

Opponents of tort reform are not as organized as its supporters. While the American Trial Lawyers Association is concerned with tort reform and medical malpractice reform as a general matter,¹⁴ older people's advocates and nursing home advocacy groups have typically become involved in the issue only when nursing home litigation is threatened in the legislature. AARP has taken a strong position in opposition to tort reform in a number of states.

METHODOLOGY

The project compiled and analyzed articles and reports on tort reform, interviewed participants in the nursing home tort reform debate, and developed a methodology to collect and analyze tort litigation in a state. The project then tested this methodology in the state of Maryland in the summer 2001.

¹¹ "Fighting Back: Long-Term Care Industry Pursues Solutions to Funding Crisis," *Repertoire* (Jul. 2001), at http://www.medicaldistribution.com/rep/Rep_2001_July_629012562090.htm.

There is some irony in the Alliance's interest in tort reform. "The large national chains are, for the most part, self-insured" and do not purchase liability insurance on the commercial market. Aon Risk Consultants, Inc., *Long Term Care General Liability and Professional Liability; Actuarial Analysis* 34 (Feb. 28, 2002). As a consequence, rising insurance premiums, the primary factor identified in support of tort reform legislation, do not directly affect Alliance members.

A second irony is that the largest tort verdicts and judgments are typically imposed against the large chain providers. To the extent that insurance premiums are based on insurers' experiences with the nursing home industry as a whole, these verdicts are driving up premiums for the rest of the nursing home industry.

¹² The Health Care Liability Alliance describes itself as "a group of medical organizations dedicated to rescuing the nation's health care system from an out-of-control legal system that is severely damaging the delivery of health care and hurting patients." <http://www.hcla.org/html/contacts.htm>. Its mission statement describes its "strong belief that federal health liability laws are needed to bring greater fairness, timeliness and cost-effectiveness to our system of civil justice. We also believe legal reform is the best way to protect medical progress and to ensure that affordable health care is accessible to all Americans."

¹³ The Common Good was formed in April 2002 "to call for a radical overhaul of America's lawsuit culture." Common Good: Why We Have Come Together, <http://www.ourcommongood.com/>. See also, George McGovern and Alan K. Simpson, "We're Reaping What We Sue," *The Wall Street Journal* (Apr. 17, 2002) (announcing formation of Common Good and calling for "a basic overhaul of our legal system.").

¹⁴ ATLA's website, <http://www.atla.org>, includes materials about tort reform. See, e.g., "Critical Questions about Medical Malpractice 'Reforms,'" <http://www.atla.org/CJFacts/medmal/critical.ht#anchor335382>.

THE DISCUSSION ABOUT TORT REFORM

Supporters of tort reform argue that there is an explosion in tort litigation, that the cases are frivolous, that recoveries are astronomical, that the tort system does not efficiently compensate individuals who are harmed or injured, and that, because of tort litigation, insurance premiums are rising dramatically to unaffordable amounts, leading to facilities' bankruptcies and creating financial drains on resources that should go to resident care.

MYTH 1: There Is an Explosion in Tort Litigation

Supporters of nursing home tort reform argue that the number of lawsuits filed against nursing facilities has escalated dramatically. A survey by Aon Risk Consultants, Inc., commissioned by the American Health Care Association, described "an explosion in litigation that started in a handful of states and is spreading to a multitude of regions throughout the country."¹⁵ In March 2002, AHCA reported that "the massive increase of litigation that has spread to quality facilities" and the "proliferation of lawsuits" threaten the future of long-term care.¹⁶

While cases alleging appalling failures in care and/or large verdicts are reported in the media with increasing frequency,¹⁷ there is no evidence that tort cases against nursing homes are in fact flooding the courts. Now, as before, many families are told by lawyers whom they consult for advice and representation that cases involving their family members have little legal merit and are not worth filing, when the resident was frail and sick and would have died soon anyway, regardless of whatever the facility did or did not do.¹⁸ These arguments also remain common defenses to cases that are filed.

¹⁵ Aon Risk Consultants, Inc., *Long Term Care: General Liability and Professional Liability; Actuarial Analysis*, Executive Summary 3 (Feb. 28, 2002).

¹⁶ American Health Care Association, *Issue Brief: Civil Justice Reform* (Mar. 2002), <http://www.ahca.org/brief/ib-tort.htm>.

¹⁷ *The National Law Journal* reported in April 2001 that in the previous 12 months, juries have awarded verdicts of \$312 million and \$82 million in Texas. Margaret Cronin Fisk, "Juries Treat Nursing Home Industry with Multimillion Dollar Verdicts," *The National Law Journal* (Apr. 30, 2001); Trebor Banstetter, "Nursing their wounds: Homes seek award limit, but activists balk," *Star-Telegram* (Mar. 26, 2001) (reporting \$313 million judgment against Horizon/CMS Healthcare Corp. to the family of a resident who died, having suffered from severe bedsores and malnutrition; a \$250 million judgment against HEB Nursing Center when a resident died from malnutrition; and a \$54 million judgment against Beverly Enterprises when a resident died of malnutrition.)

¹⁸ A woman who went to a Central Florida facility to recuperate from hip surgery was not bathed once during her two-week stay. When she complained, a nurse gave her a bucket of water and told her to bathe herself. She also reported that the incision on her hip broke open when she was left on a toilet for three hours. When she contacted several law firms about filing a lawsuit, she was told that her injuries were not sufficiently extensive to merit litigation. Greg Groeller, "Elderly care put to test," *Orlando Sentinel* (Mar. 4, 2001).

Those who complain about large numbers of cases point to increased numbers of claims,¹⁹ but only a relatively small number of cases with significant recoveries.²⁰

In addition, litigation is generally concentrated in relatively few facilities. A review of nursing home lawsuits filed between 1996 and 2000 in Central and South Florida found that 115 of the 231 facilities had been sued not at all (29 facilities), once (57 facilities), or twice (29 facilities).²¹ While the total number of lawsuits tripled, from 90 lawsuits in 1996 to 270 in 1999, with 231 lawsuits filed in 2000,²² a small number of facilities accounted for a large proportion of lawsuits. Of the 143 facilities in South Florida, ten facilities had 15 or more lawsuits each, a total of 174 of the 924 lawsuits filed in South Florida in the five-year period.

This project's study of litigation in Maryland found a small number of cases at all stages. There were few filings statewide and no reported decisions at all at the appellate level.²³

MYTH 2: Cases Are Frivolous

The American Health Care Association's Charles H. Roadman II has said that "a significant number

¹⁹ Aon's survey, accounting for 26% of the industry nationwide, reported "11 claims per year for every 1000 occupied skilled nursing care beds," an increase from the 3.6 claims per 1000 beds reported in 1990. Aon Risk Consultants, Inc., *Long Term Care: General Liability and Professional Liability; Actuarial Analysis*, Executive Summary 3 (Feb. 28, 2002). Most claims do not result in verdicts or judgments for residents or their families. See notes 31 and 32 and accompanying text.

Not all *claims* are the result of civil judgments. The Texas House Committee on Human Services has pointed out that closed claims can also include claims of fraud against the federal government, which it described as "an issue with some of the larger chains nationwide." Committee on Human Services, Texas House of Representatives, *A Report to the House of Representatives, 77th Texas Legislature* 32 (Interim Report, Dec. 5, 2000).

²⁰ In an April 1999 article in *Provider*, the American Health Care Association reported that St. Paul Fire and Marine Insurance Co., a Florida-based insurer, reported that between 1988 and 1992, it closed 2500 claims against nursing homes and that between 1993 and 1997, it closed more than 4200 claims against nursing homes. In the early period, one claim cost more than \$500,000; in the later period, the company paid 32 claims over \$500,000, including six claims that exceeded \$1 million. Markian Hawryluk, "Navigating Through A Legal Storm Wave of litigation catches up to long term care," *Provider* (Apr. 1999) (cover story).

The House Committee on Human Services of the Texas House of Representatives quoted an article in the *Austin Statesman* that civil judgment claims increased from 86 (worth \$10.4 million) in 1997 to 92 claims (worth \$26.1 million) in 1999. Committee on Human Services, Texas House of Representatives, *A Report to the House of Representatives, 77th Texas Legislature* 34 (Interim Report, Dec. 5, 2000).

²¹ Diane C. Lade, "Some well-kept nursing homes have never been sued," *Sun-Sentinel* (Mar. 5, 2001).

²² Greg Groeller (*Orlando Sentinel*) and Bob Lamendola (*Sun-Sentinel*), "Skyrocketing suits spur crisis in care," *Sun-Sentinel* (Mar. 3, 2001).

²³ See Appendix II.

of lawsuits are frivolous.”²⁴ A Florida defense attorney described cases as “frivolous” when they do not compensate anyone who suffered but simply punish a corporation. Punishment is the role of the regulatory system, he argued.²⁵ Another industry representative found it difficult to categorize cases, when so few go to trial, but pointed out that accidents that cannot be prevented may be treated the same as neglect and abuse, which are appropriately litigated.²⁶

Those who have independently reviewed the litigation have reported otherwise. The Florida Task Force on the Availability and Affordability of Long-Term Care, which was commissioned to study long-term care issues in Florida, described the tort litigation that it identified and reviewed in Hillsborough County, Florida as both significant and serious:

All of the complaints list one or more serious allegations pertaining to the resident’s physical condition and cite the violation of the statutory right to adequate and appropriate health care as the cause of action. These lawsuits are fundamentally about pressure sores, falls, dehydration, and malnutrition or weight loss among nursing home residents, and none of these conditions or incidents is a minor matter in this population, or any other.

* * *

If a Chapter 400 case has been filed in circuit court, . . . , it is most unlikely to be a frivolous lawsuit.²⁷

Other analyses have produced similar findings. In March 2001, the *Sun-Sentinel* and the *Orlando Sentinel* reported the results of their joint four-month investigation of tort litigation in Florida. Reviewing 924 lawsuits filed during the previous five years against facilities in eight counties of South and Central Florida (one-third of the state’s facilities), the newspapers found that the

²⁴ “Nursing homes bow to power of lawsuits,” *The Atlanta Journal Constitution* (Sep. 26, 2000), http://www.accessatlanta.com/partners/ajc/epaper/editions.../news_93da42a6310alf2007c.htm.

²⁵ Telephone interview with Andy McCumber (nursing facility defense attorney), Quintairos McCumber Prieto & Wood, Tampa, FL, (813) 875-1100, Sep. 5, 2002.

²⁶ Telephone interview with Suzanne M. Weiss, Senior Vice-President, American Association of Homes and Services for the Aging, Washington, DC, (202) 783-2242, Sep. 6, 2002.

²⁷ Florida Task Force on the Availability and Affordability of Long-Term Care 357 (Dec. 16, 2000, Second Draft Report). Cases described in the Task Force report’s Appendix amply support the finding. For example, the report describes a May 20, 1999 settlement for \$1.5 million in Leon County:

Admitted 3/95; good condition. By spring 1995, contractures resulting in fetal position; falls, traumas, multiple bedsores (1/96); 3/96 gross mismanagement of feeding tube; weight loss of 43 pounds over the next 67 days. Died 10/11/96. Fraudulent and inconsistent charting entries included entries showing care during hospitalizations and day after death.

allegations in the lawsuits were “anything but frivolous.”²⁸ Allegations included “rape, physically abusive staff, poor medical decisions and outright neglect, “festered bedsores that led to infections and amputations,” multiple falls, and malnutrition and dehydration, with nearly half the lawsuits claiming that the poor care led to the resident’s death.

The facts in nursing home cases with large verdicts can be appalling. Sadie McIntosh, an 80-year old woman, went to Pompano Rehabilitation and Nursing Center to recover from hip replacement surgery. *The National Journal’s* Verdict Search described what happened to Ms. McIntosh at the Kindred facility:

Her estate alleged that an aide accidentally ripped open a surgical incision on her right hip with a bedpan, while at the same time dumping urine and stool into the wound. The aide then allegedly left her lying in her own waste until she was discovered later that evening. The wound deteriorated into a stage 4 decubitus ulcer, which became infected, requiring two operations. McIntosh was sent to a hospice and subsequently died.²⁹

After trial, the jury found for the plaintiff on June 6, 2002 and awarded \$97,617 in medical expenses and \$2 million in pain and suffering. Post-trial motions are pending.³⁰

MYTH 3: The Tort System Does Not Efficiently Compensate Individuals Who Are Harmed or Injured

Those who support tort reform argue that the existing civil justice system is an inefficient mechanism to compensate victims of poor care. The American Medical Association argued before Congress in June 2002 that the medical liability litigation system “is neither fair nor cost effective in making a patient whole” and does not assure “prompt and fair compensation,” but instead, “has become an increasingly irrational ‘lottery driven by open-ended non-economic damage awards.’”³¹ The American Hospital Association agreed, calling the medical liability system “a costly and ineffective

²⁸ Greg Groeller (*Orlando Sentinel*) and Bob Lamendola (*Sun-Sentinel*), “Skyrocketing suits spur crisis in care,” *Sun-Sentinel* (Mar. 3, 2001), <http://www.sun-sentinel.com/news/daily/detail/0,1136,37500000000119584,00.html> (site visited Mar. 5, 2001).

²⁹ *McIntosh v. Persana Care of Pompano West, Inc.*, No. 01-373421 (Fla. Cir. Ct., Broward Co. Jun. 6, 2002) (jury verdict). The case was described in *The National Journal’s* “Verdict Search” (Aug. 19, 2002), at <http://www.verdictsearch.com/news/verdicts/>.

³⁰ Appendix I contains additional examples of recent verdicts and settlements.

³¹ Testimony of Donald J. Palmisano, MD, JD, testifying on behalf of the American Medical Association before the House Judiciary Committee’s Subcommittee on Commercial and Administrative Law, Oversight Hearing on Health Care Litigation Reform: *Does Limitless Litigation Restrict Access to Health Care?* 7 (Jun. 12, 2002).

way of resolving health care liability claims and compensating injured parties.”³²

Although the civil justice system may be flawed, there is no other system that compensates individuals who are harmed in nursing homes. The public regulatory system does not compensate individuals who are harmed or injured. Instead, it is intended to assure that facilities comply with federal standards of care and provide high quality care and high quality of life to their residents. Although the system reviews the care of individuals in deciding whether a facility meets public standards of care, it is not designed to compensate the specific individuals who are harmed when the facility fails.³³ Even when the regulatory system identifies failures in care for particular residents, any enforcement action is imposed by the state in its own name and on its own behalf. As a result, facilities pay financial penalties to the regulatory agency, not to the victims who were harmed by the poor care. Tort litigation compensates residents and families for harm they suffer and encourages nursing facilities to make necessary changes and improve the care they provide to all residents.³⁴

Moreover, the relatively small amounts of financial penalties typically imposed against facilities under the federal regulatory system³⁵ – and the even smaller amounts paid by facilities after appeal³⁶ – lead families to look for another way to express their concerns about the poor care their family members received. Many family members who file suits report that they sue in order to assure that another family will not have to suffer as their family did.

MYTH 4: Recoveries Are Astronomical

The nursing home industry and its supporters point to a handful of enormous verdicts against nursing homes to support the argument that verdicts are astronomical.

³² Testimony of Stuart H. Fine, testifying on behalf of the American Hospital Association before the House Energy and Commerce Committee’s Subcommittee on Health, *Harming Patient Access to Care: The Impact of Excessive Litigation* 7 (Jul. 17, 2002), <http://energycommerce.house.gov/107/hearings/07172002Hearing648/Fine1113.htm>.

³³ Mark Englehart, “Nursing Home Litigation in the 90’s: Not Just ‘Old Folks in a Home,’” No Nonsense Seminar sponsored by the Alabama Trial Lawyers Association (Aug. 21-23, 1997).

³⁴ Interview with Steven Levin, Chicago, IL (Apr. 10, 2002). Those who support the current civil justice system argue that tort litigation leads to improvements in products, health care providers’ procedures, workplaces, and the environment. See Center for Justice & Democracy, *Lifesavers: CJ&D’s Guide To Lawsuits That Protect Us All* (2002).

³⁵ The maximum civil money penalty imposed per day is \$10,000, regardless of the amount of harm suffered by residents and regardless of the number of residents who are harmed. 42 C.F.R. §488.438(a)(1). The federal rules also authorize a 35% reduction in the amount of a civil money penalty if the facility foregoes an appeal. *Id.* §488.436(b).

³⁶ Fines are often further reduced by settlement during appeal or are reduced by Administrative Law Judges following an administrative hearing.

While cases involving hundred million dollar jury verdicts receive attention in the media, these verdicts are publicized because they are in fact both so large and so unusual.³⁷ Large verdicts may also differ considerably from the amounts actually paid by defendants. Judges frequently reduce large verdicts in post-trial motions and cases are often settled for lower amounts during the appeal.

In 2001, two juries in Fort Worth, Texas awarded multi-million dollar verdicts against the same facility owned by Horizon/CMS Health Care Corp.: a \$312.8 million verdict (including \$310 million in punitive damages) and a \$82 million verdict (including \$75 million in punitive damages).³⁸ These jury awards received considerable national attention,³⁹ but both awards were significantly reduced. The \$312.8 million verdict was settled for \$20 million and the \$82 million verdict was also reduced to \$20 million based on a "high/low agreement."⁴⁰ Both cases involved residents who died of malnutrition and bedsores.⁴¹

Studies of actual settlements and pay-outs also reflect smaller amounts than reports of jury verdicts. A joint report by the *Sun-Sentinel* and the *Orlando Sentinel*, published in March 2001, found that although most of the 440 settlements were confidential, the 56 settlements that were publicly disclosed had an average payout of \$304,000.⁴²

CNA HealthPro, "a leading insurer of nursing homes" nationwide, reported that its average claim payment increased nationally from \$25,599 in 1995 to \$59,370 in 2000,⁴³ once again, considerably less than the multi-million verdicts reported in the press.

³⁷ Large verdicts are reported because of their novelty. "Juries Treat Nursing Home Industry With Multimillion Dollar Verdicts," *National Law Journal* (Apr. 23, 2001) (reporting verdicts in the previous 12 months, \$312 million and \$82 million in Texas, \$5 million in California, \$20 million in Florida, and \$3 million in Arkansas); Gail Diane Cox, "End of Life Valued; Suits alleging abuse or wrongful death of nursing home patients draw big settlements and awards," *National Law Journal* (Mar. 2, 1998) (reporting on a \$6.3 million jury award when a resident wandered away from a nursing home, fell in a nearby pond, and drowned, *Hamilton v. First Healthcare Corp.* (Florida, Feb. 11, 1998)).

³⁸ "Texas juries award 2 of 2001's largest verdicts," *Dallas Business Journal* (Jan. 9, 2002).

³⁹ See, e.g., "Texas juries award 2 of 2001's largest verdicts," *Dallas Business Journal* (Jan. 9, 2002); Trebor Banstetter, "Nursing their wounds: Homes seek award limit, but activists balk," *Star-Telegram* (Mar. 26, 2001); Margaret Cronin Risk, "Juries Treat Nursing Home Industry with Multimillion Dollar Verdicts," *The National Law Journal* (Apr. 30, 2001); Mary Alice Robbins, "No Defense: Its pleadings struck because of alleged delay tactics, nursing home owner gets hit with \$312.8 million verdict," *Texas Lawyer* (Feb. 20, 2001).

⁴⁰ "Texas juries award 2 of 2001's largest verdicts," *Dallas Business Journal* (Jan. 9, 2002).

⁴¹ *Id.*

⁴² Greg Groeller (*Orlando Sentinel*) and Bob Lamendola (*Sun-Sentinel*), "Skyrocketing suits spur crisis in care," *Sun-Sentinel* (Mar. 3, 2001).

⁴³ Diane Levick, "Liability Headaches For Caregivers," *The Hartford Courant* (Aug. 31, 2001).

Finally, a recent survey of providers, conducted by Aon Risk Consultants, Inc. for the American Health Care Association, reported 211 claims equaling or greater than \$1 million, including ten claims in excess of \$5 million. More than two-thirds of the reported claims (67.8%), however, were between zero and \$50,000.⁴⁴

In the broad area of medical malpractice, payouts have remained “virtually unchanged for the past decade.”⁴⁵

Verdicts and settlements reflect the facts of the cases. Large verdicts and punitive damages reflect the community’s voice and values and indicate jurors’ outrage about poor care that harms residents.⁴⁶ Punitive damages, by definition, are intended to deter and punish outrageous or malicious conduct.

MYTH 5: Large Proportions of the Recoveries Go to Litigation Costs and Attorneys’ Fees

Supporters of tort reform argue that large proportions of recoveries are paid as litigation costs, including amounts paid to attorneys, rather than as payments to residents who were allegedly harmed. Aon Risk Consultants, Inc. reported that approximately 47% of total claim dollars go to litigation costs.⁴⁷ Representatives of nursing homes contend that lawyers take money that should be spent on resident care.⁴⁸

The amounts they count as attorneys’ fees frequently include amounts paid to *defense* counsel. Aon

⁴⁴ Aon Risk Consultants, Inc., *Long Term Care General Liability and Professional Liability; Actuarial Analysis* 8 (Feb. 28, 2002), http://www.ahca.org/brief/aon_ltcanalysis.pdf.

Malpractice jury verdicts exceeding \$1 million increased from less than 1% of paid claims in 1985 to almost 6% in 2000. Marilyn Werber Serafini, “Risky Business,” *National Journal* (May 18, 2002). These data mean that nearly 95% of claims paid in 2000 were lower than \$1 million.

Industry complaints about the size of verdicts may reflect confusion about the difference between median (the mid-point number) and mean (average). A few extremely large verdicts or settlements inflate the average verdict or settlement, which remains relatively low.

⁴⁵ “[T]he current average medical malpractice insurance payout is about \$30,000 and has been virtually unchanged for the past decade.” Joanne Doroshow, Executive Director, Center for Justice & Democracy, Testimony before the House Judiciary Committee’s Subcommittee on Commercial and Administrative Law, Oversight Hearing on Health Care Litigation Reform: *Does Limitless Litigation Restrict Access to Health Care?* 2 (Jun. 12, 2002).

⁴⁶ Mark Curriden, “Power of 12: How jury decisions are impacting public policy,” *ABA Journal* 36 (Aug. 2001).

⁴⁷ Aon Risk Consultants, Inc., *Long Term Care General Liability and Professional Liability; Actuarial Analysis* 9 (Feb. 28, 2002), http://www.ahca.org/brief/aon_ltcanalysis.pdf.

⁴⁸ Telephone interview with Andy McCumber (nursing facility defense attorney), Quintairos McCumber Prieto & Wood, Tampa, FL, (813) 875-1100, Sep. 5, 2002.

Risk Consultants, Inc. reported that "19% of total losses are allocated loss adjustment expenses, which represent defense costs such as investigation and attorney fees."⁴⁹ The Florida Task Force also reported that the costs of legal *defense* to a tort case range from \$100,000 to \$200,000.⁵⁰ Defense attorneys' fees are a significant part of the overall costs of tort litigation.⁵¹

MYTH 6: As a Result of Tort Litigation, Liability Insurance Premiums Are Rapidly Rising and Becoming Unaffordable

The primary argument made by proponents of tort reform today is that tort litigation is the cause of escalating liability insurance premiums that are leading the industry to bankruptcy or, at the very least, consuming large portions of Medicare and Medicaid rates that are intended for nursing home care.⁵² The American Health Care Association described the "landslide of lawsuits and the associated insurance affordability and availability crisis" as endangering "patient access to quality care."⁵³ The American Association of Homes and Services for the Aging agreed, calling the cost of liability insurance "the single biggest threat to the financial viability of our country's nursing homes."⁵⁴

Arguments about liability insurance, while compelling, are overstated. Although it is indisputable that insurance premiums are rising rapidly in many states,⁵⁵ the multiple causes of increased rates

⁴⁹ *Id.*

⁵⁰ Florida Task Force on the Availability and Affordability of Long-Term Care 360 (Dec. 16, 2000, Second Draft Report).

⁵¹ Plaintiffs' counsel are generally paid on a contingency basis, receiving payment only if they win or favorably settle a case. In addition, their payment is typically a proportion of the amount recovered for the plaintiff. These factors mean that attorneys agree to take cases only where they believe a large recovery is likely. In contrast, defendants' attorneys are paid regardless of outcome. If defense counsel are paid on an hourly basis, they have little incentive to resolve cases quickly.

⁵² Aon Risk Consultants, Inc. reported that large portions of states' Medicaid rate increases between 1995 and 2000 went to pay for increased liability premiums: 70% (\$18.90) in Florida; 50% (\$8.85) in Texas; 39% (\$4.36) in Arkansas; 23% (\$4.85) in Alabama; 28% (\$4.11) in Mississippi; 30% (\$5.21) in Georgia; 17% (\$2.41) in California; and 8% (\$2.68) in West Virginia. Aon Risk Consultants, Inc., *Long Term Care General Liability and Professional Liability; Actuarial Analysis*, 15, 18, 20, 22, 24, 26, 28, 30, respectively (Feb. 28, 2002).

⁵³ "AHCA Backs Introduction of New Medical Liability Report Bill; Passage of 'The Health Bill' Would Safeguard Patient Access to Quality Care: Additional Safeguards for Long Term Care, Assisted Living Recommended" (News Release, Apr. 25, 2002), <http://www.ahca.org/brief/nr020425.htm> (supporting the HEALTH Act of 2002).

⁵⁴ News Release supporting the HEALTH Act of 2002, which would establish tort reform on a national level (Apr. 25, 2002), http://www.aahsa.org/public/press_release/PR234.htm.

⁵⁵ A Woodland, California facility's premiums went from \$8000 to \$170,000 in 2001. Kathy Robertson, "Without a net: With liability-insurance premiums skyrocketing, nursing homes across the state are going without

include, but go far beyond, tort litigation.

A. A case study in Florida

The most sustained analysis of tort litigation occurred in Florida in 2000-2001, when the state was considering comprehensive tort reform legislation that it later enacted.

- 1) Florida Task Force on the Availability and Affordability of Long-Term Care rejected industry myths about insurance

The Florida Task Force on the Availability and Affordability of Long-Term Care identified a variety of factors that led to increased insurance premiums.

“First and foremost, insurance companies are in business to make money.”⁵⁶

“The long-term care industry is poorly understood by most insurers, and relatively few have been active in this market at any point in time. Developing sophistication in individualized risk assessment is hampered by a lack of sufficient interest, as the total long-term care market is very small relative to other markets (homeowners or car insurance, for example), lack of data and limited experience overall. Many insurers have entered this market and quickly exited, after sustaining losses. Very few companies have a long track record writing policies for the long-term care industry to contribute to an information base for underwriting.”⁵⁷

“Further, insurers familiar with the broader health care market find it vexing that few long-term care providers have facility-based risk management programs that are standard in the acute care setting. There is consensus of opinion that the implementation of comprehensive risk management programs would be an extremely important component of an effort to resuscitate the long-term care insurance market in Florida. Risk management programs are successful in loss prevention and serve to improve quality of care, as issues are continually identified and addressed. Aggressive risk management programs are expensive to implement, but it’s difficult to imagine how the long-term care industry can afford to be

coverage and living dangerously,” *Sacramento Bee* (Feb. 1, 2002), <http://sacramento.bcentral.com/sacramento/stories/2002/02/04/focus1.html>; Arkansas: “Solutions sought to lack of insurance coverage for nursing homes,” Little Rock AR, AP Wire (Sep 20, 2001), http://www.thecabin.net/stories/092001/sta_0920010043.shtml; “Commissioner says nursing home insurance not reasonably available,” Little Rock, AR, AP Wire (Oct. 2, 2001), http://www.thecabin.net/stories/100201/sta_1002010057.shtml. South Carolina: “Higher insurance rates raise nursing home costs,” Charleston, SC, AP Wire (Sep. 16, 2001), <http://www.jacksonville.com/tu-online/apnews/stories/091601/D7EIKK401.html>;

⁵⁶ Florida Task Force on the Availability and Affordability of Long-Term Care 369 (Dec. 16, 2000, Second Draft Report).

⁵⁷ *Id.* 369.

without them any longer.”⁵⁸

“Finally, premiums are likely to remain prohibitively high as long as insurers are operating in a non-competitive market. With only a handful of E & S companies writing policies, there is no incentive to lower rates and no regulatory authority to review pricing practices.”⁵⁹

The Task Force found that the profit-motivated insurance industry has minimal experience with nursing homes and little competition for business. The insurance industry is unregulated with respect to pricing nursing home liability policies. When it looks at the nursing home industry, it does not find the types of risk management programs that are standard in other healthcare settings. These factors, in addition to increases in tort litigation, led the liability insurance industry to raise its premiums for Florida’s long-term care providers. These findings of the Task Force also support a conclusion that problems in the nursing home industry (poor care outcomes for residents and absence of risk management programs) and financial incentives in the insurance industry contributed to the increased liability insurance premiums that the nursing home industry in Florida experienced. Tort litigation has been a factor in rising premium rates, but not the sole cause.

- 2) Florida insurance commissioner identified poor nursing home care as a cause of high premiums

When the Florida Task Force was considering tort reform legislation, the state Department of Insurance conducted research to determine the status of the liability insurance market in the state. The Department’s September 2000 report to the Task Force indicated that the insurance market for long-term care facilities had shrunk considerably in Florida. For example, of the 17 insurers reporting that they currently wrote policies in Florida, six actually wrote no policies, five wrote one policy, and two wrote only two policies in 2000.⁶⁰ The Deputy Commissioner also acknowledged that nursing homes claims “are growing in both frequency and severity.”⁶¹ Nevertheless, a summary of the survey results indicated that companies that were withdrawing from the insurance market in Florida were doing so as part of a *national* strategy: all 14 companies that said they were

⁵⁸ *Id.* 369-70.

⁵⁹ *Id.* 370. The Texas House Committee on Human Services reported in December 2000 that the state regulates insurance rates for only a small portion of the insurance market that insures not-for-profit facilities. All for-profit facilities, and many not-for-profit facilities as well, purchase insurance from the “surplus market,” which the state does not regulate. “[O]nly about five to ten percent of the Texas nursing home market purchases coverage from the regulated market which, since subject to rate controls, must submit rates to TDI [Texas Department of Insurance].” Texas House Committee on Human Services, Interim Report 2000, 30 (Dec. 2000).

⁶⁰ Letter From Susanne K. Murphy, Deputy Insurance Commissioner, Department of Insurance, The Treasurer of the State of Florida, to The Honorable Frank Brogan, Lieutenant Governor of Florida and Chairman of the Task Force on the Availability and Affordability of Long-Term Care 2 (Sep. 20, 2000).

⁶¹ *Id.*

withdrawing from the Florida nursing home market said that the reason was a national decision.⁶² The Deputy Insurance Commissioner concluded her letter to the Task Force with the statement: "We believe that any solution [to the insurance problem] must include risk management controls and mechanisms to ensure a high degree of quality of care."⁶³

B. Insurance companies raise premiums based on national, rather than state-specific, nursing home pay-out experience

Insurance companies raise premiums for facilities that have had no claims filed against them⁶⁴ and some insurance companies increase premiums in states despite the absence of any claims whatsoever in the state or despite only limited tort litigation. In Ohio, the threat of tort litigation that had not materialized was sufficient to lead to tort reform legislation.⁶⁵

The director of rates and forms at the South Carolina Department of Insurance explained this apparent anomaly with the observation that since insurance carriers write policies nationally, increased claims in one state can affect other states.⁶⁶ A similar view was expressed by the managing director of the insurance company CNA HealthPro, who acknowledged that rate increases in Connecticut reflected both Connecticut and national claims experience. As the article recounted, "the company has too little data for Connecticut alone to be statistically credible."⁶⁷ Large rate increases in Wisconsin also represent claims filed elsewhere, since Wisconsin has one of the lowest rates of liability claims nationwide.⁶⁸ Consequently, increased numbers of cases in Florida affect insurance premiums nationwide, even in states having no tort litigation at all or only limited tort litigation.

⁶² *Id.* An update of the information, obtained during an informal telephone survey in February 2001, indicated that another insurance company had left Florida for the same reason.

⁶³ *Id.*

⁶⁴ Diane Levick, "Liability Headaches For Caregivers," *The Hartford Courant* (Aug. 31, 2001). *See also* House Committee on Human Services, Texas House of Representatives, Interim Report 2000, 32 (Dec. 2000) (reporting premium increases for facilities with "no judgments against them and a clean operating history").

⁶⁵ "Editorial: Putting limits on lawsuits," *The Cincinnati Post* (Mar. 8, 2002), <http://www.cincypost.com/2002/mar/08/edita030802.html>.

⁶⁶ South Carolina: "Higher insurance rates raise nursing home costs," Charleston, SC, AP Wire (Sep. 16, 2001), <http://www.jacksonville.com/tu-online/apnews/stories/091601/D7EIKK401.html>.

⁶⁷ Diane Levick, "Liability Headaches For Caregivers," *The Hartford Courant* (Aug. 31, 2001).

⁶⁸ Phill Trewyn, "Nursing home liability insurance on the rise," *The Business Journal of Milwaukee* (Jul. 13, 2001), <http://milwaukee.bcentral.com/milwaukee/stories/2001/07/16/focus2.html>.

C. Insurance companies are raising premiums for healthcare providers in addition to nursing facilities; commercial rates in general are rising

Liability insurance premiums are rising for many categories of health care providers. Medical malpractice insurance premiums have risen dramatically in many parts of the country.⁶⁹ The second largest malpractice insurer for physicians raised rates an average of 24% in 25 states, by 65% in Ohio and Mississippi, and by 30 - 50% in a dozen states, including Florida and Texas.⁷⁰ St. Paul Companies, the nation's fourth largest business insurer, announced on December 12, 2001 that it would exit the medical malpractice insurance business entirely, "ending coverage for 750 hospitals, 42,000 physician and 73,000 other health care workers nationwide."⁷¹ The ramifications of this decision are still being felt.

Public Citizen reports that insurance rates have also risen in areas totally unrelated to healthcare, including automobiles, property/casualty, homeowners, and commercial and workers' compensation.⁷² The Consumer Federation of America testified before the House Committee on Energy and Commerce in July 2002 about rising commercial insurance rates in areas unrelated to healthcare.⁷³

D. The insurance industry is cyclical and insurance companies raise premiums based on financial matters unrelated to claims

While some insurance industry blames tort litigation as the sole cause of rising premiums, other analysts identify other causes as more significant. A critical factor is insurance companies' use of the stock market to generate revenues. Insurance companies invest the premiums they receive in the market. In the 1990s, many insurers "kept prices artificially low while competing for market share

⁶⁹ Joseph B. Treaster, "Doctors Face a Big Jump in Insurance," *The New York Times* (Mar. 22, 2002); Joseph B. Treaster, "Insurers Raise Doctors' Rates At Rapid Pace: Malpractice Coverage Jumps 10% or More," *The New York Times*, A1 (Sep. 10, 2001).

⁷⁰ *Id.*

⁷¹ Milt Freudenheim, "St. Paul Cos. Exits Medical Malpractice Insurance," *The New York Times* (Dec. 13, 2001).

⁷² Public Citizen, Congress Watch, *Equal Opportunity Rate Hikes: Rising State Insurance Premiums Not Unique to Medical Malpractice* 4-12 (Jul. 2002) (state-by-state analysis of insurance increases and discontinuance of policies in areas unrelated to healthcare; for example, State Farm Insurance announced in June 2002 that it would stop writing new homeowner policies in 17 states).

⁷³ Testimony of Travis Plunkett, Legislative Director, Consumer Federation of America, before the Subcommittee on Health of the House Committee on Energy and Commerce (Jul. 17, 2002), <http://energycommerce.house.gov/107/hearings/07172002Hearing648/Plunkett1121.htm>.

and new revenue to invest in a booming stock market.”⁷⁴ When the stock market stopped “booming,” insurance companies reported, in 2001, a 30% decline from 1998 in realized capital gains⁷⁵ and became more selective in the companies and industries they would insure.⁷⁶ This pattern of the interplay between insurance premiums and the stock market is cyclical.⁷⁷

The Consumer Federation of America described this cyclical pattern in Congressional testimony in July 2002:

[T]he practices of the insurance industry itself are to [sic] largely to blame for the wildly gyrating business cycle of the last thirty years. Each time the cycle turns from a soft to a hard market the response by insurers is predictable: they shift from inadequate under-pricing to unconscionable over pricing, cut back on coverage and blame large jury verdicts for the problem. It is particularly appalling to see a crisis caused by insurer action being blamed, by the very insurers that caused the problem, on others. Insurers seem to expect legislators and the American public to swallow the dubious line that trial lawyers have managed to time their million-dollar jury verdicts to coincide precisely with the bottom of the insurance cycle three times in the last thirty years. Medical malpractice insurance rates are now rising fast. Insurers tell the doctors it is the fault of the legal system and urge them to go to state legislatures or to Congress and seek restrictions on the rights of their patients. Physician associations, unfortunately, are only too willing to accept this faulty logic.⁷⁸

⁷⁴ Joseph B. Treaster, “Insurers Raise Doctors’ Rates At Rapid Pace: Malpractice Coverage Jumps 10% or More,” *The New York Times*, A20 (Sep. 10, 2001).

⁷⁵ *Id.* The *Memphis Business Journal* made similar findings in July 2001: “Carriers can still turn a profit even when their loss ratios exceed 90%, provided investments they make with premium dollars continue to perform. The high-tech bust and a chronically soft stock market have wiped out that revenue stream.” Scott Shepard, “Insurance rates soar as fear of litigation mounts,” *The Memphis Business Journal* (Jul. 13, 2001). See also Phill Trewyn, “Nursing home liability insurance on the rise,” *The Business Journal of Milwaukee* (Jul. 13, 2001), <http://milwaukee.bcentral.com/milwaukee/stories/2001/07/16/focus2.html>.

⁷⁶ Reed Branson, “Tort reform faces tough Miss. fight,” GoMemphis, http://www.gomemphis.com/cr/cda/article_print/1,1250,MCA_437_951563,00.html (“As the stock market began retreating last year, insurance companies – whose profits are closed tied to investments – have clearly become more selective in their coverage, both here and around the nation.”)

⁷⁷ Andy Gotlieb, “Insurance crisis widens,” *Philadelphia Business Journal* (Mar. 4, 2002), <http://philadelphia.bizjournals.com/philadelphia/stories/2002/03/04/story1.html?t=printable>. Insurers who in the 1990s paid out \$1.12 in claims and expenses for every \$1.00 they collected in premiums are raising premiums now to “catch up.” *Id.*

⁷⁸ Testimony of Travis Plunkett, Legislative Director, Consumer Federation of America, before the Subcommittee on Health of the House Committee on Energy and Commerce (Jul. 17, 2002), <http://energycommerce.house.gov/107/hearings/07172002Hearing648/Plunkett1121.htm>.

See also Testimony of Joanne Doroshow, Executive Director, Center for Justice & Democracy, Testimony before the House Judiciary Committee’s Subcommittee on Commercial and Administrative Law, Oversight Hearing on Health

CFA's Plunkett testified that an actuarial analysis conducted by CFA's Director of Insurance, J. Robert Hunter, found that:

1. inflation-adjusted medical malpractice premiums have declined by one-third in the last decade;
2. Medical malpractice as a percentage of national health care expenditures are a fraction of the cost of health care in this nation. Over the last decade, for every \$100 of national health care costs in the United States, medical malpractice insurance cost 66 cents. In the latest year (2000) the cost is 56 cents, the second lowest rate of the decade.
3. There is no "explosion" in the severity of medical malpractice claims.
4. Medical malpractice insurance losses have risen very slowly.
5. Medical Malpractice profitability over the last decade has been excellent [12.3%].⁷⁹

The healthcare industry monthly business journal *Modern Healthcare* published an editorial on July 15, 2002, "Back on the tort reform merry-go-round," that made this exact point:

Care Litigation Reform: *Does Limitless Litigation Restrict Access to Health Care?* 3 (Jun. 12, 2002) (describing previous "volcanic eruptions in insurance premiums for doctors" and the insurance crisis of the mid-1980s that led to tort reform but no impact on insurance rates).

⁷⁹ Testimony of Travis Plunkett, Legislative Director, Consumer Federation of America, before the Subcommittee on Health of the House Committee on Energy and Commerce, 6-7 (Jul. 17, 2002), <http://energycommerce.house.gov/107/hearings/07172002Hearing648/Plunkett1121.htm>.

Similar findings and conclusions were made when the last "liability insurance crisis" occurred in the mid 1980s. After studying the earlier crisis, the Ad Hoc Insurance Committee of the National Association of Attorneys General concluded:

The facts do not bear out the allegations of an "explosion" in litigation or in claim size, nor do they bear out the allegations of a financial disaster suffered by property/casualty insurers today. They finally do not support any correlation between the current crisis in availability and affordability of insurance and such a litigation "explosion." Instead, the available data indicate that the causes of and therefore solutions to, the current crisis lie with the insurance industry itself.

Francis X. Bellotti, Attorney General of Massachusetts, et al., *Analysis of the Causes of the Current Crisis of Unavailability and Unaffordability of Liability Insurance* (Ad Hoc Insurance Committee of the National Association of Attorneys General, May 1986), as quoted in Center for Justice & Democracy, *Premium Deceit: The Failure of "Tort Reform" to Cut Insurance Prices* 4 (1999).

Business Week agreed in a January 1987 editorial:

Even while the industry was blaming its troubles on the tort system, many experts pointed out that its problems were largely self-made. In previous years the industry has slashed prices competitively to the point that it incurred enormous losses. That, rather than excessive jury awards, explained most of the industry's financial difficulties.

Id.

Those of us who have been around a while are used to the cyclical nature of medical malpractice insurance. Every 10 years or so there's a huge jump in premium costs, always accompanied by a clamor for limiting plaintiffs' right to sue and collect for pain and suffering. And each time around, providers have joined in pursuit of the wrong culprit.

* * *

In truth, the medical liability insurance crisis has very little to do with jury awards and everything to do with an out-of-control insurance industry.⁸⁰

Beyond their losses in the stock market, however, insurance companies' affected by large pay-outs as a result of the terrorist attacks of September 11 have also sought to remove "high-risk" industries like nursing homes from their books.⁸¹

Some insurers agree with this analysis:

"During the soft market," said Moreno, "many carriers jumped into the marketplace, and the premiums were priced competitively—and much too low. The stock market problems of the past few years have added to the profitability problems of the overall insurance market. Thus, those insurance carriers that have been writing coverages for the long-term care marketplace have been hit by losses that have been unexpectedly higher than anticipated. Premiums that are too low, losses that are higher than expected, the reduction of investment income and the increases in the cost of reinsurance as a result of September 11 – all these add to the increase in pricing and the lack of availability for this class of business."⁸²

MYTH 7: Tort reform will lead to reduced insurance costs and will keep providers in the state

Supporters of tort reform argue that liability insurance premiums will be reduced and that nursing homes will continue to provide care in the state when tort reform is enacted. They also argue that enacting positive incentives – such as increasing reimbursement – will be more effective than negative incentives, such as tort litigation, in improving care. The promised benefits are not realized, however, when tort reform legislation is enacted.

⁸⁰ Todd Sloane, "Back on the tort reform merry-go-round," *Modern Healthcare* (Jul. 15, 2002), <http://www.modernhealthcare.com/currentissue/pastpost.php3?refid=8939>.

⁸¹ Kathy Robertson, "Nursing homes priced out of insurance," *East Bay Business Times* (Mar. 18, 2002), <http://eastbay.bizjournals.com/eastbay/stories/2002/03/18/focus.html>; Andy Gotlieb, "Insurance crisis widens," *Philadelphia Business Journal* (Mar. 4, 2002) (describing the World Trade Center attack as "batter[ing] the reinsurers who assume the risk from insurance companies."), <http://philadelphia.bizjournals.com/philadelphia/stories/2002/03/04/story1.html?t=printable>.

⁸² Maria Moreno, Vice President of Aon/Huntington T. Block (American Association of Homes and Services for the Aging Property/Casualty Program), as quoted in Linda Boyle, "I. Risky Business: A Liability Insurers Roundtable," *Nursing Homes; Long-Term Care Management* (Aug. 2002), http://www.nursinghomesmagazine.com/Current_issue.htm?CD=207&ID=725.

A. Liability insurance premiums are not reduced when tort reform is enacted

The expectation that tort reform will reduce liability insurance premiums is not realized when tort reform is enacted. Reviewing data from every state from 1985 through 1998, the Center for Justice and Democracy categorized states on their "tort reform" efforts and evaluated the relationship with insurance premiums. The Center found that "States with little or no tort law restrictions have experienced the same level of insurance rates as those states that enacted severe restrictions on victims' rights."⁸³

To the extent that insurance companies set rates on a national basis, the enactment of tort reform in a particular state will have no effect on premiums.

B. Providers and insurance companies may still abandon states even after tort reform is enacted

After tort reform was enacted in Florida, Beverly Enterprises sold all its Florida facilities.⁸⁴ Insurance companies have not returned to the state.

C. Proposals for additional tort reform continue after tort reform is enacted

Tort reform was enacted in Florida in the spring 2001 along with increased reimbursement to facilities to meet (effective January 1, 2002) increased nurse staffing ratios. Supporters of tort reform persuaded the legislature that lawsuits drained funds that could otherwise be spent on staffing. Legislative relief for providers did not deter additional provider demands.

Complaints from the industry that facilities could not find workers to meet the new higher staffing ratios, combined with the state's budget shortfall, led to proposals in the fall 2001 to delay the increased staffing requirements.⁸⁵ Industry demands for additional relief from tort litigation also continued in Florida in 2002, with the Alliance for Quality Nursing Home Care asking for strict caps on litigation and arbitration panels, instead of litigation.⁸⁶

⁸³ Center for Justice and Democracy, *Premium Deceit: The Failure of 'Tort Reform' to Cut Insurance Rates*, Executive Summary (Jul. 29, 1999).

⁸⁴ Nathan Childs, "The Lingering Insurance Question; The cost and availability of liability coverage can sometimes trump even the best demographic profiles," 29 *Provider* 29 (Apr. 2002); Phil Galewitz, "Beverly sells 49 facilities," *Palm Beach Post* (Jul. 17, 2001) (reporting that the Florida facilities accounted for 10% of Beverly's \$2.6 billion in revenues in 2000, but about 70% of the corporation's liability costs).

⁸⁵ Lloyd Dunkelberger, "Nursing Home care may fall victim to budget woes," *Gainesville Sun* (Oct. 19, 2001).

⁸⁶ Mary Ellen Klas, "Nursing home chains ask for liability caps," *Palm Beach Post* (Feb. 20, 2002), http://www.gopbi.com/partners/pbpost/epaper/editions/to.../news_c.337d207e67b703d0054.htm.

MYTH 8: Nursing Homes Are Victims

Ultimately, the fundamental argument in support of tort reform is that facilities are mistreated by the litigation system. The concluding paragraph under the heading "Policy Reasons against the Use of Litigation to Enforce Quality of Care," in a 2002 study by The John C. Stennis Institute of Government at Mississippi State University, states in its entirety:

The long-term care industry is the target of an unprecedented amount of prosecutorial activity. This activity comes in the form of allegations that long-term care facilities are providing an insufficient quality of care. In Mississippi, the facts contradict these assumptions. Predatory litigation strategies do little to improve the quality of care, rather these practices drain resources and capital from the industry, escalate insurance premiums, increase the cost of providing long-term care, and divert scarce financial resources away from care. Increasing litigation has already begun to drive providers from the market, particularly those who provide services to Medicaid patients and smaller operators. There is a very narrow window of opportunity to prevent a future crisis in long-term care.⁸⁷

The full report concludes:

Tort reform is needed, in general, because of the inefficiencies, increased transaction costs, and perverse incentives caused by an increasingly litigious society. Tort reform is even more essential in an industry crucial to the care and protection of those least able to protect or care for themselves. This is particularly true with the use of the tort system as a mechanism for destroying an industry and compensating persons other than those who are actually injured, rather than for punishing abuses and compensating losses.⁸⁸

A CONCLUDING ISSUE

An issue that is not thoroughly explored in the public discussion about tort reform is the extent to which tort litigation both complements and supplements the public regulatory system to help assure that residents receive high quality nursing home care. In many industries, tort litigation serves an important public role of identifying dangerous products and practices in ways that lead to changes that benefit the public at large.⁸⁹

⁸⁷ Charles A. Campbell, et al., *An Independent Study of the Long-Term Care Industry in Mississippi*, 25, The John C. Stennis Institute of Government, Mississippi State University (Jan. 2002). Unlike the Florida Task Force report, the 83-page Mississippi report does not analyze any of the tort cases litigated in Mississippi, but cites a survey of 22 Mississippi facilities that reported increased insurance premiums between 2000 and 2001. *Id.* 6.

⁸⁸ *Id.* 67.

⁸⁹ The Center for Justice and Democracy, *Lifesavers* (Feb. 2001) (compilation of tort cases leading to reform in the areas of aircraft, consumer and household products, crimes, drugs and medical devices, environmental hazards, firearms, hospital and medical procedures, public spaces, toys and recreational products vehicles, and work-related injuries); see also American Trial Lawyers Association, *Cases that Made a Difference*,

Tort litigation can serve important public purposes of compensating residents who were injured, holding facilities accountable for the poor care they provide, and improving care for all residents. Consumer advocates describe the liability insurance crisis as a smokescreen to enact tort reform that denies compensation to residents and their families who are harmed by poor care.⁹⁰

Tort Litigation Is an Important Supplement to the Regulatory System

The tort system also supports and complements the regulatory system, both as a general matter and in specific cases.

1. The same facilities often have large numbers of verdicts/settlements and public enforcement actions taken against them

Facilities with the largest number of verdicts/settlements and/or the cases involving the largest dollar values are frequently the same facilities that state survey agencies have identified and cited with large numbers of deficiencies. In other words, poor performing facilities are subject to both tort litigation and public enforcement actions. The two legal systems are separate and have different functions, but complement each other.

The *Sun-Sentinel* and *Orlando Sentinel* in Florida evaluated tort litigation filed in the state between 1996 and 2000 and compared the results with the state agency's survey findings. They reported a "commonality . . . among infrequently sued homes:" "they had few violations on their inspections reports," while facilities with "many violations were three times more likely to be sued."⁹¹ Between 1996 and 2000, the 10 facilities (out of 143 in South Florida) that had 15 or more lawsuits filed against them had an average of 48.7 deficiencies during the period (ranging from 24 to 72). During the same five-year period, the 25 facilities with zero lawsuits had an average of 20 deficiencies (ranging from 1 to 44).

Similar correlations of extensive deficiencies (or other civil and/or criminal litigation) and large tort recoveries are found in other states. A Denver, Colorado facility that had been the subject of two multi-plaintiff tort cases was also the subject of significant deficiencies and state enforcement actions.⁹² A former employee of a Missouri facility pleaded guilty to elder abuse, and was sentenced

<http://www.atla.org/CJFacts/cases/casemenu.ht#anchor443498> (describing removal from sale of faulty surgical ventilators and flammable children's pajamas, recall of the Dalkon Shield IUD, among other changes resulting from tort litigation).

⁹⁰ California Advocates for Nursing Home Reform, *Liability Crisis: Only an Excuse for Elder Abuse* (Jun. 2001), <http://www.canhr.org/LTCPro/LRSpro/NetNews/NN0106.html#LiabilityCrisis>.

⁹¹ Diane C. Lade, "Some well-kept nursing homes have never been sued," *Sun-Sentinel* (Mar. 5, 2001), <http://www.sun-sentinel.com/news/daily/detail/0,1136,37500000000120653,00.html> (site visited Mar. 8, 2001).

⁹² Ann Imse, "A question of care: Denver nursing home group runs into repeated problems with regulators," (Nov. 3, 2001), [http://www.rockymountainnews.com/cr/cda/article_print/1,1250,DRMN\)15_866880,00.html](http://www.rockymountainnews.com/cr/cda/article_print/1,1250,DRMN)15_866880,00.html).

to 15 years in prison, the month before the facility settled cases with six families for nearly \$2.5 million.⁹³ A Beverly Enterprises facility in California was sued 15 times by residents' families at the same time the state Department of Justice was opening a criminal investigation.⁹⁴ Beverly Enterprises recently pleaded guilty to felony elder abuse in a case that also resolved civil claims against the corporation for its operation of its 60 facilities in California.⁹⁵

2. Tort litigation may bring about quasi-regulatory results in specific facilities

Large tort recoveries can also lead to change of ownership of a facility, a quasi-regulatory result that survey agencies are usually unable to achieve directly on their own.

The Florida Task Force reported that the three facilities in Hillsborough County that had been sued most frequently (more than 20 times each) "have subsequently undergone transformation: two properties have changed ownership and the third has permanently closed."⁹⁶ Tort litigation may have helped play an important public role in bringing about critical changes in ownership and/or management of nursing facilities that provided exceptionally poor care to a large number of individuals.

American Healthcare Management of Chesterfield sold 11 of its 12 St. Louis, Missouri facilities, with 1500 beds, following seven lawsuits in three years alleging wrongful death and neglect of 11 residents, settlement with six families for nearly \$2.5 million, state regulatory enforcement actions, and the no-contest plea to criminal elder abuse by a former employee.⁹⁷

3. Tort litigation can also result in permanent changes to facility practices that improve care for residents

Although tort litigation has financial compensation for individuals as its primary focus, some attorneys have also used the vehicle of a settlement to bring about permanent changes in facility practices in order to benefit future residents. Tort litigation may change facility practices through

⁹³ Michele Munz, "American Healthcare Management sells local nursing homes," *St. Louis Post-Dispatch* (Jul. 11, 2001).

⁹⁴ Joshua Molina, "Family's suit: Patient died of neglect," *News-Press* (Jun. 29, 2001).

⁹⁵ *California v. Beverly Enterprises, Inc.*, Case No. 01096941 (Cal. Super. Ct., Santa Barbara Co., Jul. 31, 2001); "Attorney General Lockyer, Santa Barbara D.A. Sneddon Announce Major Enforcement Action Against Nation's Largest Nursing Home Chain" (Attorney General Lockyer, News Release, Aug. 1, 2002).

⁹⁶ Florida Task Force on the Availability and Affordability of Long-Term Care 350 (Dec. 16, 2000, Second Draft Report).

⁹⁷ Michele Munz, "American Healthcare Management sells local nursing homes," *St. Louis Post-Dispatch* (Jul. 11, 2001).

quasi-injunctive relief.

In one case in Texas, a resident died in a nursing facility when she strangled after being pinned between her bed and the bedrail. Settlement of the wrongful death case against the facility included a lengthy written agreement requiring the facility to establish extensive new policies and procedures to reduce its use of physical restraints.⁹⁸ The facility reduced its use of restraints by more than 90%. A separate tort action against the parent corporation of the bedrail manufacturer led to payment of \$3 million to the family and the corporation's sending a *Safety Alert Concerning Entrapment Hazards with Bed Side Rails* to all of its customers. The *Alert* described proper use of the bedrail and attached a copy of the Food and Drug Administration's 1995 Safety Alert, *Entrapment Hazards with Hospital Bed Side Rails*.⁹⁹ Tort litigation serves an important public role of identifying dangerous products and practices in ways that lead to changes that benefit the public at large.¹⁰⁰ This attorney continues to establish similar types of relief in his cases.¹⁰¹

CONCLUSION

Tort reform is in the news. Healthcare providers, including the nursing home industry, identify litigation against them as the primary cause of insurance premiums that are escalating to unaffordable levels. They call for state and national tort reform that would restrict access to the courts and limit the damages that individuals could collect. Opponents of tort reform argue that litigation is not the cause of rising insurance premiums, that rising premiums are a cyclical issue unrelated to tort litigation, and that the civil justice system serves important roles of compensating victims of poor care and complementing the regulatory system.

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⁹⁸ *Trew v. Smith and Davis Manufacturing Co., Inc.*, No. SF 95-354(C) (N.M. Dist. Ct. Jul. 1996).

⁹⁹ Telephone conversation with plaintiffs' attorney, Jeff Rusk, Austin, TX, Mar. 12, 1997.

¹⁰⁰ The Center for Justice and Democracy, *Lifesavers* (Feb. 2001) (compilation of tort cases leading to reform in the areas of aircraft, consumer and household products, crimes, drugs and medical devices, environmental hazards, firearms, hospital and medical procedures, public spaces, toys and recreational products vehicles, and work-related injuries).

See also American Trial Lawyers Association, *Cases that Made a Difference*, <http://www.atla.org/CJFacts/cases/casemenu.ht#anchor443498> (describing removal from sale of faulty surgical ventilators and flammable children's pajamas, recall of the Dalkon Shield IUD, among other changes resulting from tort litigation).

¹⁰¹ Telephone conversation with Jeff Rusk, The Rusk Law Firm, Austin, TX, Sep. 4, 2002. See <http://www.shields-rusk.com/rusk.htm>.