APPENDIX I

EXAMPLES OF RECENT VERDICTS AND SETTLEMENTS IN NURSING HOME TORT CASES

This Appendix describes recent multi-million dollar verdicts and settlements in nursing home tort cases that illustrate a range of factual situations underlying tort litigation against nursing homes.

JURY VERDICTS

Alabama negligence; $5.35 million verdict (including $3.5 million in punitive damages) (June 2002)

At about 5:30 in the morning of August 23, 1999, Lucille Devers was found by a nursing home worker sitting in a chair in her room. When Mrs. Devers stood, ants flowed out of her mouth, nose, ears, and hair. The worker immediately put Mrs. Devers in the shower, "removing globs of ants from her body cavities."[1]

Mrs. Devers suffered from hundreds of fire ant bites, which led to Staph infection and aggravation of her delusional condition, according to plaintiffs.

On June 28, 2002, Mrs. Devers and her daughter were awarded $5.35 million by an Alabama jury, including $3.5 million in punitive damages.[2]

Washington State wrongful death; $4.65 million (no punitive damages) (February 2002)

In February 2000, Enid Conrad was admitted to the Alderwood Manor nursing facility to recover from a stroke. On June 7, 2000, she was taken to an acute care hospital, where she was treated for a broken leg. The nursing facility did not know how Mrs. Conrad's leg had been broken. After Mrs. Conrad returned to the nursing facility, her fracture compounded and the bone pierced through her skin. Mrs. Conrad's leg was amputated above the knee. Back in the nursing facility, in September 2000, Mrs. Conrad slipped from her wheelchair and broke her neck. The attendant had failed to replace the wheelchair armrest. Mrs. Conrad then developed pressure sores. After 11 months, Mr. Conrad brought his wife home. She died four months later.[3]

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[1] *Devers v. Greystone Retirement Community and Terminix International Co.* No. CV-1999-2477 (Ala. Cir. Ct. Madison Co., Jun. 28, 2002), "Nursing Home, Exterminator Liable for Swarm of Ants Covering Woman," http://verdictsearch.com/sub/demo/demo_report.jsp.

[2] Rozalia Jovanovic, "Ant-bite case yields $5.35 award; Elderly woman in nursing home swarmed by fire ants," *The National Law Journal* (Jul. 22, 2002), http://www.nlj.com/special/072202vow.shtml.

[3] *Tay Conrad v. Alderwood Manor, et al.*, No. 01 200251-6 (WA Super. Ct., Spokane Co., Feb. 14, 2002), http://verdictsearch.com/sub/demo/demo_report.jsp.

The jury awarded Mrs. Conrad's estate and her husband a total of $4.65 million. The verdict did not include punitive damages.[4]

Texas negligence, wrongful death, survival, gross negligence; $21.5 million verdict (including $17.25 million in punitive damages) (December 2001)

Three and a half months after moving to the Hill Country Rehabilitation and Nursing Center, Rose Bonton suffocated to death when the charge nurse negligently forced a suction tube into Mrs. Bonton's throat, causing her to gag, vomit, and aspirate the vomit and mucous.[5] Plaintiffs also alleged that the facility failed to respond to the emergency or to call 911.

Defendants contended that they were not negligent, that the nurse did not force the tube into Mrs. Bonton's throat, and that the vomitus was caused by Mrs. Bonton's previous medical condition.

The jury returned a verdict of $21.5 million against the facility and other defendants.

Arkansas negligence; $78.4 million jury verdict (including $63 million in punitive damages) (June 2001)

Margaretha Sauer had lived in the Rich Mountain Nursing and Rehabilitation Center for five years when she was taken to the hospital on July 19, 1998. She died there of dehydration.[6]

At the 9-day trial, witnesses testified about understaffing, shortages of supplies, and unanswered complaints. Testimony indicated that Mrs. Sauer had "multiple bedsores, including one at the tailbone the size of a grapefruit as well as an untreated vaginal infection."[7] Records had gaps "and former workers testified that the facility was chronically understaffed."[8] The Arkansas jury awarded $78.4 million to Mrs. Sauer's estate and surviving sons. The case is on appeal to the state Supreme Court.

Florida wrongful death action; $23 million verdict (including $20 million in punitive damages)

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[4] *Id.*

[5] *Phillip Lavalis, Individually and as Representative of the Estate of Rose Ronton v. Copperas Cove*, et al, No. 183,293-B (Tex. Dist Ct., Bell County, 146th Dist., Dec. 11, 2001), http://www.andrewspub.com/rptr_desc.asp?pub=NLI.

[6] *Sauer v. Advocat, Inc.*, discussed in Doug Smith "Big Money in Mena," *Arkansas Times* (Dec. 7, 2001), as reproduced at http://www.wilkesmchugh.com/nursing_home_abuse/nursinghomeabusearticle.asp?ArticleID=57.

[7] *See also* Scott Shepard, "Nursing home firm ordered to pay $78 million," *American City Business Journals, Inc.* (Jul. 13, 2001).

[8] *Id.*

(September 2000)

Charles McCorkle, Jr., a retired long-distance truck driver, moved to the Colonia Care Center in June 1997 following a fall at his assisted living facility. His aunt moved him to a different facility in May 1998. Mr. McCorkle died in August 1998.

A Pinellas County, Florida jury awarded $3 million in compensatory damages[9] and $20 million in punitive damages[10] in a wrongful death action in September 2000. The 65-year old resident had lost weight, developed pressure sores that became gangrenous, and was left to lie in his waste. Plaintiffs argued that the key issue was short staffing.[11]

SETTLEMENTS

Missouri neglect and negligence; $2.5 million settlement (March 2001)

Family members sued Claywest House nursing facility claiming that their relatives' injuries or deaths were caused by neglect or abuse.[12] "One of the Plaintiffs reported finding her mother dead in her bed, with her body completely covered with ants."[13]

The consolidated cases against American Healthcare were settled for $2.5 million.[14]

Texas wrongful death and survival action; $2.475 million settlement (January 2001)

In the early morning of February 4, 1999, Kate May began to complain of persistent nausea. Her pain relief medication often upset her stomach. Between 5:20 and 6:00 A.M., she asked three times to be taken to the hospital. She had a pain in her chest and between her shoulders, her blood pressure had dropped, and she had 3+ pitting edema. At 6:10 A.M., JoAnn Maddox, the charge nurse, contacted the hospital emergency room and started working on papers to transfer Mrs. May, but she

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[9] Mike Brassfield, "Family awarded $3-million in suit against nursing home," *St. Petersburg Times* (Sep. 27, 2000), http://www.sptimes.com/News/092700/TampaBay/Family_awarded_3_mill.shtml.

[10] Mike Brassfield, "Jury to nursing home: Pay $20-million; The verdict is the largest against a nursing home in Florida history. Nursing home giant Extendicare Inc. plans to appeal," *St. Petersburg Times* (Sep. 28, 2000), http://www.sptimes.com/News/092800/TampaBay/Jury_to_nursing_home_.shtml.

[11] *Id.*

[12] *Stringer*, (MO Cir. Ct., St. Charles Co., Mar. 12, 2001), http://verdictsearch.com/sub/demo/demo_report.jsp.

[13] "Wrongful death," http://verdictsearch.com/sub/demo/demo_report.jsp.

[14] *Id.*

took a smoking break and never called an ambulance. Mrs. May died at the nursing home at 6:20 A.M.[15]

Plaintiffs' theory in the wrongful death case filed by Mrs. May's two sons was that Maddox "failed to recognize and respond to the classic signs and symptoms of a heart attack."[16] A negligent hiring claim alleged that the facility "knew that Maddox had been fired from another job for improper and inadequate care."[17] Plaintiffs' experts believed that Mrs. May suffered from a myocardial infarction and would have survived had she been taken to the hospital.

Defendants argued that Maddox was not negligent and that Mrs. May's medical history and pain medication masked her symptoms. They also argued that Mrs. May suffered from a massive pulmonary embolism, which was untreatable and fatal, not from a treatable myocardial infarction.

Six months after Mrs. May's death, the charge nurse was indicted on abuse charges. She pleaded guilty.

The case was settled several weeks before the trial was scheduled to begin.

Texas negligence/wrongful death; $5 million settlement (April 1999)

Alta Irene David was admitted to a Texas nursing facility in September 1996 after suffering a stroke. The 79-year old woman received therapy and showed signs of improving until a pressure sore on her coccyx made her unable to continue with therapy. Restorative care that was ordered was not provided. In February 1997, when Mrs. David was transferred to the hospital, she was completely bedridden, dehydrated, and suffering from multiple infections in her Stage IV pressure sore. The hospital recommended that she receive hospice care. In March, she returned to the hospital, again dehydrated and infected. She died April 2, 1997.[18]

The family alleged that for 34 days, facility staff ignored the development of a pressure sore that went to Mrs. David's coccyx bone and failed to give her 40% of her pain medication.

There were several unusual features of this case. First, the Texas Department of Human Resources wrote a 50-page statement of deficiencies following a survey of the facility and one-third of the survey report addressed the care of Mrs. David. Second, the insurance company contended that the

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[15] *May v. Diamond Care, Inc.*, No. 00-05-19720 (Tex. Dist. Ct., Ward Co. Jan. 3, 2001) (settlement), http://www.marksfirm.com/Disclaimer/About_Our_Cases/settlements_death.htm, reprinted from *Nursing Home Litigation Reporter*, Vol. 3, Issue 10 (Feb. 23, 2001).

[16] *Id.*

[17] *Id.*

[18] *Id.* Http://www.marksfirm.com/Disclaimer/About_Our_Cases/Articles_2000/Alta_...alta_david.htm.

facility's admissions of repeated neglect during depositions constituted "habitual neglect" that voided insurance coverage. Third, plaintiffs' counsel proposed binding arbitration on the issue of insurance coverage after the parties agreed that $5 million was a reasonable settlement. Under the terms of the arbitration, if the panel found insurance coverage, plaintiffs would receive $5 million; if the panel found no coverage, plaintiffs would receive nothing. The arbitration panel agreed with plaintiffs.[19]

Texas negligence (strangulation on vest restraint); $4 million settlement (June 1999)

Geraldine Jones Pyle moved to a Dallas nursing home in November 1995 after she suffered severe injuries in a head-on automobile accident. In February 1996, she was found in her room in the nursing home, strangled to death on the vest restraint attached to her wheelchair. The Dallas County medical examiner's office "determined Pyle died after the restraint compressed her chest and prevented her from breathing."[20]

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[19] *Id.*

[20] *Lynne Fitzhugh v. Telesis/Walnut Place Nursing Home, Inc.*, Cause No. DV98-01632-1 (Dallas Co. District Ct. Apr. 1999).
Http://www.marksfirm.com/Disclaimer/About_Our_Cases/Pyle_Blue_sheet/pyle_blue_sheet.html.

APPENDIX II
PART A

METHODOLOGY FOR IDENTIFYING TORT CASES IN A STATE

PART I Gathering Research Materials

A) Identify current and former names of state nursing homes, names of parent corporations, and names of homes and corporations that have gone out of business (if available) within the time-frame of interest.

1) With Internet Access:
   - i) Go to http://www.medicare.gov/nhcompare/home.asp to identify current names of existing nursing homes
   - ii) Go to state licensing department website to identify current and former names of state nursing homes, names of parent corporations, and names of facilities and corporations that have gone out of business (if available) within the time-frame of interest

2) Without Internet Access:
   - i) Contact CMS (formerly HCFA) at 1-800- MEDICARE to identify current names of existing nursing homes
   - ii) Search local phone book to identify current names
   - iii) Contact state licensing department for current and former names of state nursing homes, names of parent corporations, and names of homes and corporations those that have gone out of business (if available) within the time-frame of interest

B) Determine under what tort theory (negligence, wrongful death, assault & battery, etc.) the actions may be brought and whether there is a state statutory provision.

1) With Internet Access:
   - i) westlaw.com
   - ii) lexis.com
   - iii) findlaw.com
   - iv) Search website(s) of plaintiff's medical malpractice/negligence firm(s) in state

2) Without Internet Access:
   - i) Contact state department of legislative services' library and/or state law library
   - ii) Contact a plaintiff's tort attorney/firm in your state
   - iii) Manual research at local library

PART II Determining How the Tort System Works in Your State

A) Identify procedural requirements victim must satisfy in order to bring a tort claim against a nursing home in applicable state. For instance, it is important to identify whether there is a mandatory arbitration review panel or screening process prior to filing a lawsuit in court.

1) With Internet Access:
   - i) westlaw.com
   - ii) lexis .com
   - iii) findlaw.com
   - iv) Search website of state health department
   - v) Search website(s) of plaintiffs' medical malpractice/negligence firm(s) in state

2) Without Internet Access:
   - i) Contact state department of legislative services' library and/or state law library
   - ii) Contact state health department
   - ii) Contact plaintiff's tort attorney/firm in your state
   - iii) Manual research at local library

B) If state has a mandatory arbitration review panel or screening process, contact state Health Care Claims Arbitration Office (or analogous agency).

1) Determine how to review docket (i.e., determine whether there is an on-line system to review arbitration cases or whether information may only be obtained on hard copy and where hard copies may be obtained)

C) If victim is not required to go through the arbitration process, victim can file directly in state trial level court. Contact county clerk's office.

1) Determine how to review dockets (i.e. determine whether there is an on-line system to review trial level cases or whether information may only be obtained on hard copy)

PART III, Collecting Information: Identifying Cases and Nursing Home Inspection Reports

A) Search both arbitration dockets and court dockets for the selected county by former and current nursing home name, parent corporation, type of action, or other field within tracking system to identify cases.

1) If on-line, cases may be found on:
   - i) westlaw.com
   - ii) lexis.com
   - iii) findlaw.com
   - iv) state website

2) If not on-line:
   i) Go to county courthouse and search via its internal system

3) Review case files for:
   i) Docket number
   ii) Date of alleged harm
   iii) Date filed
   iv) Plaintiffs' contact information (for potential interviews)
   v) Plaintiffs' attorney's contact information (for potential interviews)
   vi) Procedural history
   vii) Legal theory
   vii) Facts alleged in complaint
   ix) Legal Analysis
   x) Judgment or settlement and damage award, if applicable

B) Collect nursing home facility inspection reports/ survey information for the time period of the alleged harm for the nursing homes identified in cases.

1) With Internet Access:
   i) Go to http://www.medicare.gov/nhcompare/home.asp (The data on this website refer to the regulatory requirements that the nursing home failed to meet but do not reflect the entire inspection report. Be sure to obtain summary reports for the time period that correlates with the alleged harm.)
   ii) Search internet to determine whether entire inspection reports can be obtained

2) Without Internet Access:
   i) Contact state department of health to determine how to obtain entire inspection reports

PART IV Evaluating Information Collected from Cases and Nursing Home Inspection Reports

A) Compare various factors including:

1) Whether the number of deficiencies and/or the severity of the deficiencies correlates to the number of claims filed during the same time period

2) Whether there is a specific deficiency that correlates with the alleged harm during the same time period

APPENDIX II
PART B

A REVIEW OF TORT LITIGATION IN MARYLAND

I. INTRODUCTION

This section examines tort actions brought against nursing homes in five circuit courts in the state of Maryland: Baltimore City, Baltimore County, Frederick County, Montgomery County, and Prince Georges County. Our goals were to test our method of identifying tort litigation in a state, to determine how difficult or easy it is to collect information about nursing home cases in a state, and to learn what the cases said about tort litigation in the state of Maryland. Specifically, we focused on the number of lawsuits and their legal theories, whether certain nursing homes were being sued more than others, whether the cases appeared frivolous, and, to the extent possible, what kinds of verdicts and settlements residents and their families received. The hypothesis was that there were few cases, that some facilities might have significantly more cases filed against them than other facilities, that claims would reflect serious care deficiencies, and that recoveries would not be public information.

II. METHODOLOGY

Our first step was identifying names of nursing facilities in each of the five counties.[1] We identified facilities by using "Nursing Home Compare," a database developed and maintained by the US Department of Health and Human Services (HHS), located at http://www.medicare.gov/nhcompare/home.asp. Next, we used the nursing home names to search the electronic or hard copy databases (in either the "defendant" or "party" field) at each of the five circuit courts. After identifying the cases labeled as tort or contract cases, we obtained and reviewed the court files. Using our "Case Data Template" (Appendix II-B) we recorded the factual allegations pleaded in the complaints, defenses raised by the nursing facilities, and outcomes of the lawsuits. Finally, we entered this information into the "Examples of Nursing Home Cases -- Maryland Circuit Courts" table (below).

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[1] For Baltimore County, by contacting the state licensing agency, we also identified facilities' former names, the names of facilities that were no longer in business, and the names of parent companies.

III. FINDINGS

A. General

We searched a total of 175 nursing facilities[2] from the five Maryland counties for the past three to five to years.[3] Only three nursing homes that we reviewed were sued multiple times: Stella Maris in Baltimore County, Manor Care (Silver Spring or Wheaton) in Montgomery County, and Mariner Health in Prince Georges County.

The majority of these cases were negligence actions. Other theories included negligence per se (based on survey deficiency), wrongful death, assault, battery, breach of contract, medical malpractice, intentional/negligent infliction of emotional distress, intentional/negligent misrepresentation, and non-disclosure fraud.

B. Allegations

The following allegations were made in the 27 files we were able to find and review:

- Failure to take precautions/protect resident from harm/maintain safe environment (about 18 times);
- Failure to provide proper/adequate medical treatment (about 7 times);
- Failure to properly supervise/train/hire employees (about 6 times);
- Neglect (about 4 times); and
- Failure to transfer resident/coordinate care with other health care provider (about 3 times).

C. Defenses

Common defenses were contributory negligence, assumption of the risk, failure to state a claim, and expiration of statute of limitations. Other defenses raised were failure to mitigate damages, charitable immunity, lack of standing, res judicata, collateral estoppel, damage caused by third parties over whom defendant exercised no control or right of control, bankruptcy, and the statutory cap on non-economic damage (Md. Cts. Jud. Proc. Code Ann. 11-108).

D. Results

Of the 15 non-pending cases, 11 were dismissed with prejudice or settled (with unreported settlement

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[2] These nursing facilities were identified on Nursing Home Compare and include 15 additional facilities from Baltimore County that are currently closed.

[3] The timeframe used to obtain data for Montgomery County, Prince Georges County and Baltimore County was from January 1, 1989 to date research was conducted. The timeframe for Frederick County and Baltimore City was January 1, 1995 to date research was conducted.

amounts), one was dismissed for failing to pursue claim through the Health Claims Arbitration Office, one was dismissed without prejudice for lack of prosecution, one order granted defendants' motion for dismissal, one order granted defendants' motion to stay pending outcome of the Health Claim Arbitration Office proceeding.

IV. PROBLEMS IN COLLECTING DATA

Our experience indicates that the circuit court system in Maryland may not be conducive to this type of data collection. In the five circuit courts we visited, information was accessible only by going to the courthouse and searching by nursing facility name, either electronically or on hard copy. This method of data collection is a problem since the nursing facilities' names may have changed, facilities may be listed under another name or parent name, or data may have been mistakenly entered into the court database by a clerk. One specific problem was trying to search for subacute units within hospitals because the cases were labeled by the hospital name. Identifying these cases would require searching every file in which the hospital itself was sued. In addition, since the courts' databases did not provide descriptions of the cases, it was necessary to review every file identified as tort or contract. This process caused us to request and review many inappropriate files. Moreover, a number of the circuit courts we visited had limits on the number of cases that could be identified at one time. In addition, some files were kept in judges' chambers or were otherwise unavailable.

V. CONCLUSION

On the substantive merits, our findings suggest that there is not a significant number of civil actions brought against nursing facilities in the state of Maryland and that cases appear to identify serious failings in care.

VI. RECOMMENDATIONS

*Determine whether the HCAO is resolving these cases before they are filed in Circuit Court. If so, determine whether the HCAO process is a reasonable substitute for other types of reform, or whether the HCAO process itself is unnecessary or overly burdensome or discourages appropriate cases from being filed in court.

*Collect survey reports corresponding to nursing home defendants with multiple suits identified above and corresponding dates of alleged harm.

EXAMPLES OF NURSING HOME CASES -- MARYLAND CIRCUIT COURTS

Baltimore City Circuit Court

Date: 7/25/01
Cases Filed: Approx. 01/01/96 to 07/25/01
Facilities: 45

Nursing Home	Date of Alleged Harm	Circuit Court Result	Factual Allegations/Answers
Church Hospital Corp/ Recover Care. 24-C-97-356035	7/11/96	DWP	**COMPLAINT** *Defendants are a nurse and the facility. *Plaintiff is a paraplegic. In 1908 he had a sacral ulcer. In 1996 it recurred. 6/27/96 he was admitted to Church Hospital. 7/3/96 he was transferred to Recover Care. 7/11/96 he received an injection of intramuscular medicine *Plaintiff complained of pain and numbness after the shoot. It was found that he had severe radial neuropathy and severe partial denervation. *The injury was allegedly caused by the nurse's negligent injection technique. 7/27/96 he was discharged. 10/16/96 more studies were conducted on plaintiff. The studies found his condition had worsened and he had complete denervation. **ANSWER** *CN., AoR., SoL, Failed to state a claim, charitable immunity, Recover Care is not a separate legal entity and its corporate existence should therefore be denied, non-economic damages may not exceed statutory cap in accord with Md.Cts. & Jud. Proc. Code Ann. 11-108.
Manor Care of	1996	DWP and	**COMPLAINT**

Rossville, Inc. 24-C-96-323046.		def pays $35 court fees	*Plaintiff says Defendant failed to send her deceased husband to hospital when he warranted emergency care and he died. *Plaintiff alleges wrongful death, medical malpractice, failure to provide respiratory therapy and medication, failure to provide adequate medical care treatment and to have medical doctor examine and treat, failure to transport to hospital, nursing facility disobeyed direct order to transport, pecuniary loss, expenses to substitute service for those lost by death by husband, mental anguish, emotional pain and suffering, companionship. Plaintiff seeks $1million. **ANSWER** CN, AoR, SoL
Haven Nursing Home. 24-C-01-002084.	7/25/00	Pending	**COMPLAINT** *ceiling collapsed causing heavy plaster, plaster lathing, and other debris to crash upon patient. *Plaintiff alleges breach of duty to provide resident with clean, safe, and healthy living environment, free from dangerous defects, reasonable care, to inspect physical plant of nursing facility premises on regular basis given the premises' advanced age, and to make necessary repairs so that a helpless resident will not be subject to harm. **ANSWER** *Plaintiff lacks standing, AoR, CN
Levindale Hebrew Geriatric Center and Hospital, Inc. 24-C-98-267117	Approx 8/31/97	Dismissed because plaintiff failed to pursue claim first through	**COMPLAINT** *Resident transferred to facility for heightened supervision and treatment of dementia *Given evaluation: "high risk" for falling, trouble with mobility.

		Health Claims Arbitration Office	*allowed to wander around the facility without assistance or supervision from staff *Resident fell and fractured hip and was bruised *Plaintiff alleges Defendant and nursing staff breached duty not to create or allow any unreasonable risk of harm while under care, preventive measures should have been taken. –Respondeat Superior.
Wesley Home, Inc.	1/5/97	Dismissed without prejudice for lack of prosecution	**COMPLAINT** *12/28/96 transferred from assisted living section to nursing section. Resident tried to leave the facility. She said she was "going home" or "going to work." She was disoriented. On 1/5/97, in an attempt to leave the facility unsupervised, she fell 30 feet out a window. Window was either unlocked or capable of being unlocked. *Plaintiff alleges behavior should have been anticipated. Facility had actual knowledge of relocation trauma, disorientation, and exit-seeking behavior. *Facility breached duty of care to supervise and properly monitor to protect from harm. Failure to correct known harm. **ANSWER** *CN, AoR, SoL
Villa St. Michael Nursing & Rehab Center	1996	Settled-costs paid by Defendant * If Defendant fails to pay within 30 days, liable	**COMPLAINT** *Subsequent to death, resident had been pushed, shoved and hit during care and treatment by nursing home employee. *<u>Negligence:</u> Breach of standard of care of reasonable facility by using physical force on resident. *<u>Negligent Supervision:</u> Breach of duty to supervise employees by failing to

		for $23,450.	learn that employee was pushing, hitting, shoving resident; failing to alter conduct; encouraging employee to continue manner of treatment by making her a supervisor and allowing her to train other staff members. *Battery **ANSWER** *CN, AOR, FSC, SOL

Baltimore County Circuit Court

Date: 7/5/01
Dates Covered: Approx. 01/01/97 to 07/05/01
Facilities: 63

Nursing Home	Date of Alleged Harm	Circuit Court Result	Factual Allegations/Answers
Ivy Hall Geriatric Center (Darrell Cammack, Jr.) Baxter v. -03-c-99-001754	7/12/97	DWP	**COMPLAINT** *Defendant knew victim was partially paralyzed and could not speak due to stroke. *Employee attempted to turn and rotate patient, however employee was not strong enough or trained sufficiently to move patient alone, and therefore patient was dropped from bed, injuring left leg on floor. *Defendant breached duty of care by failing to move patient in a safe manner to avoid unreasonable risk of injury. *Defendant had duty to establish and enforce procedure to move patients and to train its employees to do so or to hire qualified employees **ANSWERS** *CN, AoR, SoL

Stella Maris Inc. Duke v. Stella Maris Inc- 03-C-01-002996-	4/26/98 5/2/98 5/4/98 1995-98	Pending	**COMPLAINT** *Battery: black eye, facial bruising, and dry blood on face. *Battery: daughter found father with bruise on forehead. *Battery: staff found resident with black eye, bloodshot. Because of dementia, resident could not explain who injured him. *Negligence: victim's chart is replete with information indicating he was being handled improperly (prior to 1998), which might include abuse • skin tears and bruising that was never adequately explained • in addition to failing to adequately investigate staff, facility failed to develop a care plan to deal with his attempts at biting • after 1998, facility took no steps to determine who was committing abuse or to prevent it from happening again. • Contrary to law and the standard of care, facility failed to have patient examined by physician after he was discovered with badly bruised face and failed to file a report with proper law enforcement agencies. Failure to adequately deal with the April abuse led to the two other batteries. *From 1995 to June 1998, the medical record is full of incidents in which staff failed to notify family of problems. As resident's state deteriorated, the nursing facility failed to adequately assess his condition and failed to develop appropriate care plans to deal with his condition. These failures led to inappropriate medication orders, failure to transfer resident to hospice wing in a

			timely fashion, and failure to provide adequate and timely reviews of resident's care and condition. *Breach of contract - defendant failed to use skill and care of a reasonably competent facility in providing medical, nutritional, and emotional care, as well as an environment that was safe from abuse. **ANSWER** *Failed to state a claim, CN, AoR, SoL, res judicata, collateral estoppel, failed to mitigate damages, charitable immunity, *two affidavits from physicians for Stella
Stella Maris- Norwood v. SM Inc- 03-C-00-000929	4/23/99	Settled-DWP	**COMPLAINT** *Defendant knew victim had propensity to wander and victim was found wondering in institution several times. Accordingly, facility personnel were required to provide necessary surveillance of resident to prevent her from endangering herself. *Decedent was permitted to wonder onto a loading dock unsupervised; she fell from a 3-foot retaining wall and suffered serious subdural hematoma. **ANSWER** *Failed to state a claim, CN, AoR, SoL, res judicata, collateral estopple, did not mitigate damages, charitable immunity, *two affidavits from physicians for Stella
Stella Maris- Pitman v. SM- 03-C-00-001097	*	DWP	**COMPLAINT** *Victim was sent to facility for rehabilitation from coronary bypass surgery. Facility knew she wanted to be resuscitated in event of emergency *Victim was having trouble breathing and instead of doing something, the doctor told the nurse to await instruction from the hospital physician. That doctor never called nurse back after three calls by nurse. The family insisted on sending patient to hospital, which staff eventually did, but patient died 5 minutes before ambulance arrived and the staff did not

			attempt to revive her. The ambulance personnel succeeded in resuscitating her but she was severely brain damaged/ brain dead and the family eventually decided to pronounce her as do not resuscitate status. She died that day. *Count 1: wrongful death *Count 2: survival action (including pain, suffering, medical and funeral expenses) *negligence of defendants and their agents, servants, employees was a direct and proximate cause of the death of victim. **ANSWER** *Failure to state a claim, CN, AR, SoL, charitable immunity, all non-economic damages are limited by Section 11-108 of the Courts & Judicial Proceedings Article. All damages, if any, were caused by the actions or inactions of third parties over whom this defendant has no control or right of control
Irvington Knolls Care Cntr. II Cornwell v. 03-C-00-09369	11/15 to 11/18/97	Pending	**COMPLAINT** *On repeated occasions, resident was allowed to rest in own feces, receiving incorrect diet, missing meals, improper hydration, lack of assistance when eating, lack of attention to debilitating bed sores, missed required dialysis treatments. Plaintiff was readmitted to hospital with chronic intractable diarrhea, dehydration, altered mental status probably related to dehydration, and decubitus ulcers on buttocks and heals. He became stuporous within three days. **ANSWER** FSC, CN, AoR, subject to limitation on non-economic damages

Frederick County Circuit Court

Date:
Dates Covered:
Facilities: 10

O CASES IDENTIFIED

Montgomery County Circuit Court

Date: 6/21/01
Dates Covered: 01/01/98 to 6/21/01
Facilities: 38

Nursing Home	Date of Alleged Harm	Circuit Court Result	Factual Allegations/Answers
Maplewood Park Place Rosalyn Weis v. Marriott Corp. #202856	6/26/98	DWP	**COMPLAINT** *Maintenance employees cleaning carpets placed cord across floor near elevator without a warning device where it was foreseeable that resident would walk. *Resident tripped over cord and fractured pelvis. *Negligence: Facility breached duty to maintain premises in safe and reasonable manner and to use ordinary care in cleaning premises so as not to create dangerous conditions. **ANSWER** *CN, AoR. Bright orange cord was clearly visible.
Global Health Care Center Burns v. #193385	9/13/95	DWP	**COMPLAINT** *Victim left in room where he could leave by way of open window on second story. *Victim fell from nursing home suffering severe and permanent damages as a result of the fall. *Defendant failed to monitor victim despite behavior and condition. *Facility negligently took resident off medications *Facility failed to take precautions. **ANSWER**

			*CN, AoR
Bedford Court Nursing Home Adams v. HMC Retirement Properties #201095	12/26/98	DWP	**COMPLAINT** *Telephone on night stand became dislodged and struck resident in face causing injury to face and eyeball. Husband found injured resident unattended and took her to hospital. *Negligence: *Facility breached duty to make premises safe by exposing resident to hazardous condition which she was unable to recognize. *Failure to provide medical attention and treatment *Facility left resident unattended. *Failure to supervise and employ qualified/trained personnel.
Manor Care (Silver Spring-Wheaton) Bennett v. MC Corp. #200758	1/10/96	Pending	**COMPLAINT** *After being transferred from hospital with bed sores, defendant allowed bed sores to become infected. *Defendant knew or should have known plaintiff had bed sores, as well as open wound on right hip as a result of surgery that was susceptible to infection. *Defendant placed plaintiff in room in such conditions as to subject her to infection. As a result of this exposure and failure to properly care and treat, diagnose or assess, plaintiff developed serosanguinous drainage and infection.
Manor Care - Medbridge Wheaton Nursing Facility Freeman vs. #190807	8/95	Defendant's Motion to Dismiss Granted	**COMPLAINT** Negligence Per Se: Following death of resident, Department of Health and Mental Hygiene (DHMH) investigated death and found facility not in compliance with regulations (deviation from standard of care). *Defendant failed to intervene when plaintiff displayed signs of confusion,

			failed to meet fluid needs, and failed to provide necessary care to prevent deterioration. Breach of contract IIED NIED
Manor Care Thurmond v. #183604	6/17/96	Settled in ADR	**COMPLAINT** *Resident fell on bathroom floor and sustained head injuries. It was the third time in nine days that resident had fallen. *Failure to assess medical condition, perform studies and evaluation to determine propensity of plaintiff to falls. *Failure to provide safe environment. *Failure to give personal assistance to resident when ambulating.
Manor Care (Silver Spring) Yeabower v.	10/26/99	Motion to Stay Pending Outcome of HCAO Proceeding	**COMPLAINT** *Physician order stated that resident was "at risk for falls." Resident given shower by employee, fell and suffered left femoral fracture. *Negligence *Failure of employees to adequately and properly attend to resident.
Mariner Health of Kensington, Inc. Estate of Tomasello v. #221053)	3/99	Pending	**COMPLAINT** *Resident was choked, burned, cut, allowed to fall or strike body parts and injure herself. *Resident was allowed to remain in conditions where her feces were smeared in hair and nails, experienced weight loss, medications may not have been given, rashes. Negligence: Lack of supervision. Assault & Battery: By employee who violently grabbed resident by neck and shook her. Breach of contract: Failure to provide security and treat resident well.

Prince George's County Circuit Court

Date: July 23, 2001
Dates Covered: 01/01/98 to 07/07/01
Facilities: 19

Nursing Home	Date of Alleged Harm	Circuit Court Result	Factual Allegations/Answers
Bradford Oaks Nursing & Retirement Center (Alexander v. CAL00-12899)	3/24/97 6/15/97	DWP	**COMPLAINT** Decedent (who suffered from Alzheimer's, had a history of falls, multiple myocardial infections, and coronary heart disease) fell from chair onto floor on two occasions in the same day. Although decedent complained of hip pain after first fall, defendant did not send decedent to hospital until after second fall. Decedent suffered hip fracture. *Failure to take adequate steps to protect decedent from falling even though facility was aware that decedent was very confused and could not keep still. *Decedent diagnosed with necrosis in the sacral area (tailbone) resulting in need for transfusion, weight loss, and need for surgical intervention to the spinal area. *Failure to properly position decedent according to an appropriate turning schedule to reduce the potential for bedsores. *Failure to utilize various mattress systems designed to significantly reduce the risk of pressured ulcers, especially in the area of bony prominence such as sacrum *Failure to take appropriate preventive measures to avoid the development of painful ulcers that led to the surgical intervention. **ANSWER** *Defendant claims pre-existing condition, not proximate cause, caused by others not

			in their control.
Gladys Spellman Specialty Hospital Nursing Center (Robinson v. CAL00-03573)	10/01/96	Pending	**COMPLAINT** *Decedent was wheeled out onto the terrace and left unattended. Blanket draped over her body caught on fire. Decedent was severely burned, endured lengthy treatment, and eventually died.
Heartland Health Care Center of Adelphi (Willingham v. CAL01-02653)	08/14/97	Pending	**COMPLAINT** *While in nursing homes care, Stage II decubitus sacral ulcer (bed sore) developed into Stage IV. Decedent died from septic shock as result. *Failure to position resident properly in bed and medically treat ulcer to prevent deterioration, exacerbation, propagation, growth, contamination, and/or infection.
HillHaven Nursing Center (Schlesinger v. CAL00-022959)	01/28/99	Pending	**COMPLAINT** *Decedent fell out of wheelchair and struck her head, sustaining a right subdural hematoma that led to her demise. *Failure to minimize and prevent decedent from falling out of her wheelchair. *Failure to do a resident assessment when there was a significant change in decedent's status that required a change in her care plan. *Failure to provide adequate supervision and assistance devices to prevent accidents/falls by decedent.
Mariner Health Care of Greater Laurel Reid v. CAL99-26122	Approx. 10/30/96	Pending	**COMPLAINT** *Son received call from employee that mother had fallen from chair and suffered a not serious bruise. On November 3, son found mother in bed, groggy, apparently highly drugged, and incoherent. Employee said medications were raised due to heart condition. Doctor examined victim and found hematoma on leg "size of softball," which required immediate surgery and skin grafting. Son learned that injury was the result of being kicked by facility employee.

			*Breach of Contract *Failure to provide adequate care, failure to notify son of nature and seriousness of injury. *Negligence *Employee kicked victim and son was not notified, so was precluded from investigating or procuring adequate medical attention. *Intentional and Negligent *Misrepresentation Negligent Supervision *Facility breached duty to use reasonable care to select an employee who was competent and fit. *Facility breached duty to supervise and train so that violent act would not occur. *Nondisclosure Fraud
Mariner Health of Southern Maryland (Cruz v. CAL00-15260)	07/05/99	Pending	**COMPLAINT** *Resident struck in face by a mentally handicapped resident and fell to ground; found unresponsive. *Defendant knew or should have known aggressor had a propensity towards violence. *Facility breached duty to prepare and take precautions with regard to its premises so as to maintain them in a reasonably safe condition. *Failure to warn of any dangers. **ANSWER** *Defendant claims Bankruptcy.
Mariner Health (Jones v. and Washington Hospital Center and Southern Maryland Hospital	12/4 – 12/9/97	Pending	**COMPLAINT** *PEG tube dislodged resulting in purulent (infected) fluid in the abdominal cavity resulting in resident's death. *Defendant admitted decedent with knowledge that resident recently had PEG tube inserted. *Failure to provide for personal observation, consultation, or treatment by a certified doctor (or to otherwise provide for

			the appropriate monitoring by qualified medical personnel). *Failure to coordinate, share and obtain relevant information (from/with hospitals) relating to the special care needs of the deceased in view of her medical history and conditions.
Pineview Extended Care (Palmer v. CAL01-03595)	2/94 to 99	Pending	**COMPLAINT** *Decedent's condition deteriorated, decedent became confused and incontinent (released bowels in bed). Son complained about bedding and fact that decedent soiled in own excrement. Decedent developed several decubitus ulcers, one escalating to Stage IV. *Defendant suffered numerous falls, was improperly restrained, found with foreign objects in mouth. *Failure to establish proper toilet schedule and/or bowel training program. *Failure to properly change and inadequate hygiene care. *Failure to provide adequate medical and nursing care, training, supervision, proper care plan, adequate staff, staff development, nursing procedures and staffing methods, human dignity, clean and orderly environment, skin care, hire sufficiently, physical examinations. *Negligence, Breach of Contract, Breach of State Regulations.

APPENDIX III

COMPONENTS OF TORT REFORM

Tort reform legislation has been enacted, and is under active consideration, in a number of states and in the United States Congress. In Ohio, legislation signed by the Governor on August 8, 2002 focused exclusively on nursing homes and residential care facilities. In other states, the primary motivation is unrelated to nursing home issues. In Nevada, for example, the Governor called a Special Session of the Legislature in 2002 to consider tort reform legislation after a trauma center closed. The tort reform legislation signed by the Governor on August 7, 2002 includes nursing homes within its broader tort reform provisions, however.

Tort reform proposals typically affect tort litigation across-the-board – from pre-litigation requirements to issues of proof to limitations on damages and attorneys' fees. The components of tort reform are similar across states. Some nursing home-specific tort reform bills seek to bring nursing homes within medical malpractice.

A. Pre-litigation requirements

Extensive pre-litigation requirements frequently delay the filing of litigation.

Before filing a lawsuit, the new Florida law requires a resident to conduct an investigation, obtain a verified medical opinion, and provide notice to the insurance company in order to allow for possible settlement.[1] The law also requires mediation.[2]

Including nursing homes within Louisiana's medical malpractice law means that the resident must submit the case to a medical review panel before filing a case in court.[3]

B. Who may file a lawsuit

Only a resident or legally authorized representative may file a lawsuit in Ohio. The law also permits the resident's spouse, parent, or adult child to sue.[4]

C. Requirements for complaint

Under the new Nevada law, a complaint must be accompanied by an affidavit by an expert that

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[1] Florida Statutes §400.0233.

[2] *Id.* §400.0233(11).

[3] Louisiana Senate Bill No. 713, Act No. 108, amending Revised Statutes 40:1299.41(A)(1) and (8).

[4] Ohio Am. Sub. Bill 412, amending Ohio Rev. Code §3721.17(I).

supports the allegations in the complaint; the expert must practice in an area that is "substantially similar" to the practice area dealt with in the case.[5]

D. Liability for actions of employees

A vulnerable adult has a private cause of action under Florida's Adult Protective Services Act to recover actual and punitive damages for abuse, neglect, or exploitation. However, a licensee or entity that operates a licensed facility "shall not be vicariously liable for the acts or omissions of its employees or agents or any other third party . . . ."[6]

A provision of the tort reform bill as introduced, but not enacted, in Ohio, would have insulated owners from the acts of their workers who were either "acting outside the scope of the employee's employment and authority" or "acting in violation of a written and implemented policy of the home or residential facility, provided the home or facility has in place a system for monitoring compliance with its written policy."[7] The facility would have been responsible, however, if it "had actual knowledge of the employee's actions and affirmatively failed to implement prompt and appropriate corrective action."[8]

E. Standard of care

The Florida law establishes as the standard of care the "level of care, skill, and treatment which, in light of all relevant surrounding circumstances is recognized as acceptable and appropriate by reasonably prudent similar nurses."[9] The law establishes the prevailing professional standard of care and makes clear that the standard set out in federal law may be evidence, but is not negligence *per se*.[10]

F. Limitations on use of evidence

1. Limitation on use of government survey reports

Tort reform bills and laws frequently limit the use of state survey agency reports as evidence setting the standard of care. They also limit use of the reports to establish notice of deficiencies, for

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[5] Nevada Assembly Bill No. 1 §8, amending NRS chapter 41A.

[6] Florida Statutes §415.1111.

[7] Ohio H.B.412, as introduced, would have added the quoted language to Ohio Rev. Stat. §3721.171(A)(1), (2).

[8] *Id.*, adding §3721.171(B).

[9] Florida Statutes §400.023(4).

[10] *Id.* 400.023(2)(d).

purposes of awarding punitive damages.

A new provision added to Louisiana law in 2001 allows survey reports to be introduced as evidence only

> . . . if the surveys and related documents are directly related to the type of injury allegedly sustained by the patient at issue in the civil action and the deficiencies have either been admitted by the healthcare provider or have been declared valid through the appellate process established by the administrative agency in charge of reviewing surveys.[11]

In addition, "When a party seeks to admit into evidence surveys, statements of deficiencies, and related documents, any party to a civil action may request and the court, using its discretion, may conduct a voir dire of the witness supporting the surveys and related documents to determine whether the deficiency is based on reliable evidence."[12]

In contrast, legislation enacted in Ohio prohibits the use of survey reports in litigation brought by residents under all circumstances. Survey reports may be used "solely to determine the home's compliance" with Ohio law or in a criminal investigation or prosecution.[13]

2. Limitation on introduction of evidence about other residents

A provision of the tort reform bill as introduced, but not enacted, in Ohio, would have excluded as inadmissible "evidence of the care and treatment rendered by the home or facility to any resident other than the resident or former resident who brought the action or on whose behalf the action was brought."[14]

G. Limitation on liability

Legislation enacted in Nevada eliminates "joint" liability and permits only several liability (i.e., the defendant is responsible only for "that portion of the judgment which represents the percentage of negligence attributable to the defendant.")[15]

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[11] Louisiana Senate Bill No. 763, Act. No. 206, adding a new subsection (e) to Revised Statutes 13:3715(G)(4)(e).

[12] *Id.*

[13] Ohio Am. Sub. Bill 412, amending Ohio Rev. Code §§3721.02(E), 5111.411.

[14] Ohio H.B. 412, as introduced, would have added the quoted language to Ohio Rev. Code §3721.17(H)(4).

[15] Nevada Assembly Bill No. 1 §6, amending NRS chapter 41A.

H. Burden of proof

The Ohio law allows an award of compensatory damages for a violation of residents' rights if plaintiff demonstrates, by a preponderance of the evidence, that the violation of the resident's rights resulted from a negligent act or omission of the person or home and that the violation was the proximate cause of the resident's injury."[16]

I. Limitations on damages

Tort reform laws generally do not limit economic damages for lost wages or medical bills, but frequently restrict non-economic compensatory damages, which are awarded for such intangible harm as pain and suffering. Since most residents do not have lost wages and may not have medical bills, their primary compensatory damages are non-economic.

1. Caps on compensatory non-economic damages

Nevada's new legislation limits each plaintiff to a cap on non-economic damages of $350,000 per defendant unless there is "gross malpractice" or the judge, following the return of the verdict by the jury, finds "exceptional circumstances" justifying a higher award. In addition, non-economic damages "must not exceed the amount of money remaining under the professional liability insurance policy limit covering the defendant after subtracting the economic damages awarded to that plaintiff."[17]

Bills in Iowa[18] and Mississippi[19] would cap non-economic damages at $250,000.

2. Punitive damages

The new Florida law contains many provisions about punitive damages that address the standards, amounts, consequences, and use of punitive damages.

Standards for assessment of punitive damages: The Florida law permits punitive damages to be assessed against individuals "only if the trier of fact, based on clear and convincing evidence, finds

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[16] Ohio Am. Sub. Bill 412, amending Ohio Rev. Code §3721.17(I)(2)(a).

[17] Nevada Assembly Bill No. 1 §5, amending NRS chapter 41A.

[18] Iowa House File 387 would create a new code section 613.22, Limitation on Liability of Health Care Facilities.

[19] Mississippi Senate Bill No. 2276 §1 (Regular Session 2002) would amend Mississippi Code 11-1-65(k)(2).

that the defendant was personally guilty of intentional misconduct or gross negligence."[20] "Intentional misconduct" is defined to mean that a defendant had "actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury and damage."[21] "Gross negligence" means conduct that is "so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct."[22]

Separate provisions govern punitive damages against corporations. Florida law allows punitive damages to be assessed against corporations and other legal only if the entities "actively and knowingly participated in such conduct,"[23] "condoned, ratified, or consented to such conduct,"[24] or "engaged in conduct that constituted gross negligence and that contributed to the loss, damages, or injury suffered by the claimant."[25]

Amounts of punitive damages: Under Florida law, punitive damages are also limited in amount to the greater of three times the amount of compensatory damages or $1 million.[26] Punitive damages may be four times compensatory damages or $4 million when the fact finder

> . . . determines that the wrongful conduct . . . was motivated primarily by unreasonable financial gain and determines that the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was actually known by the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant, ...[27]

No cap on punitive damages exists when the defendant "had a specific intent to harm the claimant" and did harm the claimant.[28]

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[20] Florida Statutes §400.0237(2).

[21] *Id.* §400.0237(2)(a).

[22] *Id.* §400.0237(2)(b).

[23] *Id.* §400.0237(3)(a).

[24] *Id.* §400.0237(3)(b).

[25] *Id.* §400.0237(3)(c).

[26] *Id.* §400.0238(1)(a).

[27] *Id.* §400.0238(1)(b).

[28] *Id.* §400.0238(1)(c).

Consequences of punitive damages: When an award of punitive damages is supported by the findings of fact, the clerk of the court is required to refer to the case "to the appropriate law enforcement agencies" for purposes of initiating a criminal investigation.[29]

Use of punitive damages: Finally, Florida law requires that half of any punitive damage award be deposited in the Quality of Long-Term Care Facility Improvement Trust Fund.[30] This fund may be used for

(a) "development and operation of a mentoring program . . . for increasing the competence, professionalism, and career preparation of long-term care facility direct care staff, including nurses, nursing assistants, and social service and dietary personnel;"

(b) "development and implementation of specialized training programs for long-term care facility personnel who provide direct care for residents with Alzheimer's disease and other dementias, residents at risk of developing pressure sores, and residents with special nutrition and hydration needs;"

(c) "provision of economic and other incentives to enhance the stability and career development of the nursing home direct care workforce, including paid sabbaticals for exemplary direct care career staff to visit facilities throughout the state to train and motivate younger workers to commit to careers in long-term care;" and

(d) "promotion and support for the formation and active involvement of resident and family councils in the improvement of nursing home care."[31]

In determining the amount of punitive damages, the trier of fact in Ohio must now consider the ability of the facility to pay punitive damages, "whether the amount of punitive or exemplary damages is sufficient to deter future tortuous conduct," and the ability of the facility to provide care, "both currently and in the future."[32]

The standard of proof for punitive damages would be "beyond a reasonable doubt"[33] and punitive damages would be limited to five times the amount of total economic damages awarded to the

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[29] *Id.* §400.0238(1)(e).

[30] *Id.* §400.0238(4).

[31] *Id.* §400.0239(2)(a)-(d).

[32] Ohio Am.Sub. H.B. No. 412, amending Ohio Revised Code §2315.21(E)(1)-(3).

[33] Mississippi Senate Bill No. 2276 §1 (Regular Session 2002) would amend Mississippi Code 11-1-65(1)(a).

plaintiff, not exceeding $250,000, in legislation introduced, but not enacted, in Mississippi.[34] The same bill would also have prohibited an award of punitive damages if the defendant complied with applicable federal or state regulations.[35]

3. Requiring plaintiffs to deposit part of any damages award in a state fund to pay for facility education and training projects

As discussed above, the Florida law requires that half of all punitive damages be deposited in an account called the Quality of Long-Term Care Facility Improvement Trust Fund.[36]

J. Statute of limitations

Various bills and laws reduce the time by which a lawsuit must be filed. Louisiana requires that lawsuits be filed within one year of the date of the alleged action, omission, or neglect, or within one year from the date of discovery, but in no cases, later than three years.[37] Nevada requires litigation to be filed no later than 3 years after the date of injury or 2 years after the plaintiff discovers the injury, whichever occurs first.[38] Florida requires that lawsuits be filed generally within 2 years of the incident giving rise to the action, but no later than 4 years after the date of the incident or occurrence.[39]

K. Limitations on attorneys fees

Florida authorizes a reasonable attorneys' fee, not exceeding $25,000, solely for "injunctive or administrative relief and not for any claim or action for damages."[40]

Fees awarded on a contingency basis would have been limited on a sliding scale (40% of the first $50,000 recovered; 35% of the next $50,000; 25% of the next $500,000; and 15% of amounts exceeding $600,000) in legislation introduced, but not enacted, in Mississippi in 2002.[41]

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[34] *Id.* amending Mississippi Code 11-1-65(h).

[35] *Id.* amending Mississippi Code 11-1-65(k).

[36] Florida Statutes §400.0238(4).

[37] Louisiana Senate Bill No. 497, Act No. 95, amending Revised Statutes 9:5628(A).

[38] Nevada Assembly Bill No. 1 §11, amending NRS 41A.097 2.

[39] Florida Statutes §400.0236.

[40] *Id.* §400.023(1).

[41] Mississippi Senate Bill No. 2276 §1 (Regular Session 2002) would amend Mississippi Code 11-1-65(k)(3).

APPENDIX IV

ADDITIONAL STRATEGIES

As tort reform legislation is proposed and enacted (or defeated) across the country, both the plaintiffs' bar and the nursing home industry/defense bar are developing alternative strategies and legal theories to avoid tort theories and tort litigation.

Plaintiffs' bar

The plaintiffs' bar has developed new legal theories to challenge poor care outcomes for residents.[1] Using alternative theories, such as those described below, may avoid statutory limitations on plaintiffs' recoveries under negligence theories.

Elder abuse

Use of the Elder Abuse and Dependent Adult Civil Protection Act was upheld in *Delaney v. Baker*, 20 Cal.4th 23 (1999). Relying on the legislative history of the Act, the California Supreme Court held that the Elder Abuse Act created a cause of action for neglect that was different from negligence and that could be privately enforced. In *Delaney*, Rose Wallien, plaintiff's mother, went to a nursing home to recuperate from a fractured ankle. In fewer than four months, she had died, with stage III and stage IV pressure sores on her ankles, feet, and buttocks. The Court affirmed applicability of the Elder Abuse Act and the award of damages and attorneys' fees.

Since *Delaney*, the Elder Abuse Act has been used in other nursing home litigation, including a Sacramento, California case that alleged that the facility's neglect of a resident led to bedsores that went to the bone and amputation of both of her legs.[2]

Breach of contract

A facility's failure to maintain sanitary conditions, as expressed in the contract, gave rise to a cause of action in Alabama where plaintiff alleged that her mother, a resident of the facility, "'was forced to live in unsafe and unsanitary conditions; she was relegated to an ant infested bed; she was frequently dressed in unclean and urine soiled clothing; her unit smelled of urine; and her unit was

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[1] Ira M. Gottlieb, "An Overview: The Insurance Crisis For Long Term Care Facilities: Where To Go Next?" *Mealey's Litigation Report: Nursing Home Liability* 19, 20 (Mar. 2002) (describing a variety of legal theories, including elder abuse statutes, deceptive business practices, deceptive advertising, negligent supervision and hiring).

[2] Nancy Weaver Teichert, "Patient wins $3 million in neglect suit; The Fair Oaks nursing home's violations constituted elder abuse, the woman's attorney says," *Sacramento Bee* (Jul. 27, 2002).

infested with flies.'"[3]

Deceptive trade practices

Misrepresentation of the quality of care, as promised in promotional materials, may also be the basis of litigation against nursing homes. In February 2001, a Colorado facility was ordered to pay $28.25 million plus interest to 10 residents or their families or estates in a case alleging violation of the state's deceptive trade practices act.[4]

Residents' rights law

A cause of action alleging violation of a state's residents' rights law does not need to be submitted to a medical review panel, as would a case alleging medical negligence. The Louisiana Court of Review affirmed a decision by the trial court allowing a case to go forward under the state's residents' rights law involving the death of a resident who fell from her wheelchair and fractured her skull[5]

Intentional tort

An intentional tort does not need to be submitted to a medical review panel under the state's health care malpractice act.[6]

Nursing home industry

In addition to improving risk management programs, in-service training, records control, and accurate data input, working towards legislative reforms that cap awards, and looking for alternatives to commercial insurance,[7] the nursing home industry is also seeking additional ways to reduce tort litigation.

Mandatory arbitration clauses

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[3] *Callens v. Jefferson County Nursing Home*, No. CV-97-03715 (Ala. S. Ct. Feb. 11, 2000) (quoting plaintiff's affidavit).

[4] Wendy L. Bonifazi, "Troubles in Colorado: A $30 million wrongful deaths settlement and an FBI investigation raise questions about the state's nursing home survey system" (Feb. 23, 2001).

[5] *Pender v. Natchitoches Parish Hospital*, 2002 WL 986810 (La.Ct.App. 2002), *as discussed in* National Senior Citizens' Law Center, *Nursing Home Law Letter* 19, 2002 Issue No. 2 (May 31, 2002).

[6] *Richard v. Louisiana Extended Care Centers, Inc.*, 809 So.2d 1248 (La.Ct.App. 2002), *as discussed in* National Senior Citizens' Law Center, *Nursing Home Law Letter* 19, 2002 Issue No. 2 (May 31, 2002).

[7] Ira M. Gottlieb, "An Overview: The Insurance Crisis For Long Term Care Facilities: Where To Go Next?" *Mealey's Litigation Report: Nursing Home Liability* 19 (Mar. 2002).

A new practice promoted by industry representatives in some states requires residents and their families to waive the right to sue and to agree to binding arbitration of all disputes. Arbitration clauses have been identified in Texas[8] and in Oklahoma, among other states.[9] Providers' assumption is that arbitration results in lower awards than jury trials.

Following a federal district court decision holding that an arbitration clause in a nursing home admissions contract could be enforced in court,[10] some nursing home industry lawyers have suggested that facilities consider using arbitration clauses as a risk management strategy.[11]

Appellate courts have treated arbitration clauses in different ways. Some courts have dismissed complaints and allowed arbitration to proceed,[12] while other courts have required an evidentiary hearing on whether the arbitration clause was unconscionable.[13]

Residents' advocates argue that arbitration clauses violate the nursing home reform law.[14]

Informing families of potential risks at admission

Advising families of incoming residents of "the potential risk of accidental occurrences" should be done "whenever possible."[15] At least one nursing home chain has developed a video for families to watch before admission. The video is reported to advise families that bad outcomes may happen in nursing homes through no fault of the facility.

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[8] John Reynolds, "Group Seeking to End Nursing Home Plans," *Lubbock Avalance-Journal*, 10A (Sep. 20, 2001).

[9] Peak Medical Corporation, a regional chain based in Albuquerque, New Mexico, uses arbitration clauses that require binding arbitration of all claims other than non-payment, limit the statute of limitations to nine months, require all arbitrations to be conducted in Albuquerque, and prohibit an award of punitive damages, among other features. "Focus on Arbitration," National Senior Citizens' Law Center, *Nursing Home Law Letter*, 2002 Issue No. 1 (Mar. 20, 2002) (describing the arbitration clause used by a Tulsa facility and its reporting in the *Tulsa World*, Mar. 1, 2002).

[10] *Smithson v. Integrated Health Services*, Civ. Action No. 99-199 (D. KY Aug. 13, 1999).

[11] Marie C. Infante and Laura J. Oberbroeckling, *Arbitrating Malpractice Claims in the Long Term Care Setting* (undated memorandum from Mintz Levin Cohn Ferris Glovsky and Popeo, PC).

[12] *See, e.g., Eldridge v. Integrated Health Services, Inc.*, 2001 WL 1503363 (Fla. Dist. Ct. App. 2001)

[13] *See, e.g., Blanchard v. Central Park Lodges (Tarpon Springs, Inc.)*, 2001 WL 1104283 (Fla. Dist. Ct. App. 2001).

[14] "Mandatory Arbitration Forbidden For Nursing Facility Residents Reimbursed through Medicare or Medicaid," National Senior Citizens' Law Center, *Nursing Home Law Letter* 2, 2002 Issue No. 2 (May 31, 2002).

[15] Ira M. Gottlieb, "An Overview: The Insurance Crisis For Long Term Care Facilities: Where To Go Next?" *Mealey's Litigation Report: Nursing Home Liability* 19 (Mar. 2002).

Non-disclosure of survey reports

Arguing that insurance companies review the state's website and raise premiums if they find deficiencies cited by the survey agency, legislators in Iowa introduced a bill to prohibit public disclosure of deficiencies until a decision is made on the facility's appeal.[16] Limitations on the use of survey reports in civil litigation, or outright prohibitions on their use, are discussed in more detail in Appendix III.

[16] Clark Kauffman, "Bill would seal violation reports," *Des Moines Register* (Feb. 11, 2002), http://desmoinesregister.com/news/stories/c478-03417298675.html.