The public availability of federally mandated quality data drove an unprecedented wave of lawsuits in the mid-1990s for the skilled nursing industry. Costs of professional liability claims soared from $200 per bed to more than $10,000 per bed in some instances.

Plaintiffs became skilled at using state survey scores, for example, to effectively put the facility on trial thus inflating claims costs. Professional liability claims, fueled with a history of survey discrepancies, resulted in verdicts of more than $100 million in some cases. Strategies involving organizational structure, tort reform, increased use of alternative dispute resolution, increased investment in quality initiatives, and reduced insurance limits ("throw the keys") somewhat arrested this trend. However, since the passing of The Patient Protection and Affordable Care Act of 2010 (PPACA), history is repeating itself. Plaintiffs, armed with more publicly available data, are poised to employ similar strategies against hospitals and physicians.

Since the passing of The Patient Protection and Affordable Care Act, history is repeating itself. Plaintiffs, armed with more publicly available data, are poised to employ similar strategies against hospitals and physicians.
Why Is PPACA Impacting the Long-Term Care Industry?

PPACA dramatically increased the amount of regulatory oversight regarding nursing homes and makes regulatory supervision and inspection reports more widely available to the public. As required by PPACA, Centers for Medicaid and Medicare Services (CMS) began adding a vast amount of information to the Nursing Home Compare website, including the outcome of substantiated complaints and links to Internet sites citing deficiencies and plans of correction. Following the increase of more publicly available information, the number of plaintiffs’ cases that included regulatory arguments against nursing homes radically increased, along with the dollar amount of jury verdict awards. In each of these cases, publicly available quality data adversely impacted the outcomes.

<table>
<thead>
<tr>
<th>Year</th>
<th>State</th>
<th>Verdict</th>
</tr>
</thead>
<tbody>
<tr>
<td>2010</td>
<td>California</td>
<td>$667,000,000¹</td>
</tr>
<tr>
<td>2012</td>
<td>Florida</td>
<td>$200,000,000²</td>
</tr>
<tr>
<td>2012</td>
<td>Florida</td>
<td>$900,000,000³</td>
</tr>
<tr>
<td>2013</td>
<td>Florida</td>
<td>$1,100,000,000⁴</td>
</tr>
</tbody>
</table>

In part, this increase can be explained by the fact that private regulatory-compliance actions are easier to prove than negligence cases. While overall resident care has improved, lawsuits have not been the driving force. Studies have shown little relationship between high damage awards and the subsequent resident care.⁵

How Could This Impact Hospitals and Physicians?

There is an emerging risk-management consideration for hospitals as litigation involving hospitals parallels litigation involving nursing homes. Plaintiffs are attempting to bring in conditions of participation (CoPs) applicable to hospitals in negligence per se claims, as evidence of the standard of care. As with nursing homes, more information about hospitals’ care of patients is now available to the public through the Hospital and Physician Compare website and will continue to increase in the coming years. This information can and will be used by attorneys and other professionals who selectively pick certain damaging details to use against providers. Jury verdict sizes in medical malpractice claims against hospitals could meet the same fate as those against nursing homes.

KEY PUBLICLY AVAILABLE DATA OF CONCERN

Risk-Adjusted Quality Based Reimbursements
Hospital Readmissions
Hospital Acquired Conditions
Patient Surveys
Care Transitions

Courts have inconsistently granted and denied defendants’ motions to preclude any reference to the CoPs for hospitals.⁶ Unfortunately, if courts are not consistent in their evidentiary rulings, more CoPs will be admitted, and more plaintiffs will use those regulatory tools as evidence of the standard of care. When providers are faced with these types of claims, they must rely on sophisticated defense counsel who understand regulations and can make strategic arguments to exclude plaintiffs’ bringing CoPs into evidence to set the standard of care.
Risk Management Strategies

Risk managers in smaller hospitals with responsibilities beyond risk management, or risk managers within an “enterprise risk management” program may have a greater awareness of the CMS survey process and new quality metrics, and may already consider compliance with CoPs part of managing risk. In contrast, risk managers in larger hospitals or health systems with a traditional “clinical” risk management program may have limited awareness of CoPs and their significance.

Managing expanded risks related to the use of CoPs to bolster negligence claims means risk managers will need a basic knowledge of CoPs and need to understand whether and to what extent they have the expertise and authority to manage those risks. A starting place for risk managers may be to find out:

- Who within the organization monitors the publicly available hospital and physician data and the Hospital Compare and Physician Compare websites?
- Are the Quality or Performance Improvement strategies of the organization tied to the public data?
- Is physician data taken into account when hiring or credentialing physicians?
- Is risk management involved in survey readiness preparations?

Malpractice Insurance Implications

Discussions with prominent medical malpractice insurers domiciled in the US, London, and Bermuda suggests a wait and see attitude regarding impact of the PPACA on medical malpractice premiums. One suggests that the differences between the risk profiles of hospital medical malpractice and skilled nursing professional liability exposures are a consideration. Duration of stay, complexity of services, typical patient/resident profile, and public perception differ greatly between these care providers that often serve to reduce comparative liability costs for hospitals and physicians relative to the skilled nursing home environment.

Another consideration is claims brought without allegation of a specific bodily injury necessary to trigger a malpractice insurance policy. In one such case, class status was given to a case brought against a nursing home provider. The plaintiff successfully argued that the lack of adequate staffing, as evidenced by historical state survey scores, created a culture of profits over care. The resulting verdict of $677 million did not trigger an insurance policy response since no allegation of bodily injury was contained in the complaint.
We have been here before; watching as jury verdicts exploded in nursing home cases before and after the PPACA increased the publicly available quality and plaintiffs started using regulatory data in their negligence complaints. We are now warned that the amount of publicly available information for hospitals and physicians will increase in the near future; therefore, we expect more litigation against hospitals. It is critical to prepare for the coming wave of costly litigation.

Sources

2. Nunziata versus Trans Health Florida 05-854OCI

T. Andrew Graham, Grace Mann, Abe Varner, and Francis Parker of Hall Booth Smith, P.C. (agraham@hallboothsmith.com)

Nancy Lamo of Lockton Companies (nlamo@lockton.com)