Expansion of Publicly Available Quality Data Driving Unprecedented Verdicts

Plaintiffs have a history of success employing federally mandated survey scores to bolster professional liability claims outcomes. Starting in the 1990s, this public availability quality data drove an unprecedented wave of lawsuits in the skilled nursing industry. Costs of professional liability claims soared from $200 per bed to over $10,000 per bed in some instances. Plaintiffs became skilled at using state survey scores to effectively put the facility on trial which inflated claims outcomes. Professional liability claims fueled with a history of survey discrepancies, resulted in verdicts over $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 somewhat arrested this trend. With the expansion of more publicly accessible information under PPACA and subsequent legislation, the number of plaintiffs’ cases that included regulatory arguments against nursing homes is on the rise along with the dollar amount of jury verdict awards.
Nursing Home Legislation and Regulation

The Affordable Care Act is the first legislation to expand quality of care-related conditions of participation (CoPs) since OBRA ’87. The bill (which incorporates the Nursing Home Transparency & Improvement Act of 2009) includes new provisions to improve transparency and accountability that will substantially increase data useful to plaintiffs.

Increases in Public Data Leads to Unprecedented Verdicts

Professional liability costs for nursing homes, after stabilizing between 2005 and 2009, are now adversely trending. National loss costs have increased 41 percent during the period 2009 to 2014. Additionally, claims frequency is rising 3 percent annually. Following the increase of more publicly available information under PPACA, the number of plaintiffs’ cases that included regulatory arguments against nursing homes materially increased, along with the dollar amount of jury verdict awards. In part, this increase can be explained by the fact that private regulatory-compliance actions are easier to prove than negligence cases. But 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.

Unprecedented Nursing Home Verdicts

<table>
<thead>
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<th>Year</th>
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<tbody>
<tr>
<td>2010</td>
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<tr>
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<tr>
<td>2011</td>
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<td>2013</td>
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Ownership Structures Challenges

Beginning in the late 1990s, owner/operators monetized real estate as a means to free up capital to use to expand operations. A side-effect of separating real estate assets from operations is the reduction of assets available to potential litigants, possibly reducing incentives for plaintiffs and their attorneys to bring lawsuits and to purchase traditional levels of insurance coverage. Most of these operators purchased very low limits of liability insurance which further discouraged litigation. Frequency and severity of claims in difficult venues dropped materially for such operators. We are already
seeing expensive litigation attempting to increase assets available to service claimants.\textsuperscript{9} If nothing else, expanded information on ownership structures will lead to more costly legal challenges.

**Poor Scores Will Increase Frequency & Severity**

As a general rule, people sue providers that they don’t like. The expanded availability of data will provide a means to expand the universe of prospective plaintiffs. Lawsuits typically allege that patients were harmed not just by neglect or medical errors but because the corporate owners skimp on patient care to boost profits. The use of historic staffing information to evidence “putting revenue before residents” profit over patient safety culture is not new. However, more specific data regarding staffing levels will prove to further bolster such claims. Data in staffing levels, turnover, and tenure is being added to the Nursing Home Compare website.\textsuperscript{10} HHS must redesign Medicare cost reports to require separate reporting of SNF expenditures for wages and benefits for direct care staff, including nurses and other medical and therapy staff. Such data will serve a more specific fodder to adversely impact claims outcome. In coming years additional data including readmission rates and financial penalties will be found in the public domain.

**High Scores Won’t Protect You**

In the case of Mary Dwyer versus Harbor View Healthcare, the jury awarded plaintiff $13.5 million. According to Nursing Home Compare, Harbor View Healthcare Center (now known as Alaris Health at Harbor View) is a 4 star facility, which is indicative of an above average facility. While used as part of the defense strategy, the high quality rating didn’t prevent this sizable verdict.\textsuperscript{11} In August, Extendicare Health Services Inc. said it would lease its 22 skilled-nursing homes in Pennsylvania, Delaware, and West Virginia to a third-party operator. It cited a fourfold increase in liability claims in those states in recent years “despite a strong and improving quality record.”\textsuperscript{12}

**Risk Management Strategy**

Risk managers in 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 data at Nursing Home Compare websites?
- Are the Quality or Performance Improvement strategies of the organization tied to the public data?
- 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. The general soft market and successful tort reform efforts by several states have a favorable impact for buyers. Of significant consideration is claims brought without allegation of a specific bodily injury necessary to trigger a malpractice insurance policy which can increase expensive coverage litigation between insurer and insured. 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, evidenced 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.13 As a result we may see insurers remove exclusions to regulatory actions but in the process, providing a meaningless sublimit of liability. This strategy was successfully employed by property insurers to more effectively address disputes arising from environmental claims in the past. We expect the professional liability insurance market to remain competitive, however since many insured’s carry high self-insured retentions or buy no insurance at all, the impact of this negative trend can be profound.

Conclusion

The goal of the PPACA’s enhancement to publicly available data is to allow consumers to make more informed decisions relative to skilled nursing care. In this regard, the public is well served. While there is little evidence that such information improves care outcomes, it will unfortunately improve claims outcomes for plaintiffs. The frequency of plaintiffs using regulatory data in their negligence complaints is on the rise. We are now warned that the amount of publicly available information for skilled nursing homes will expand further in the near future; therefore, we expect more litigation and larger settlements and verdicts. It is critical that we prepare for the coming wave of costly litigation.

Sources

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9Family and Estate of Mary Dwyer v. Harbor View Healthcare Center: NJ Case Number: L 004819 11
10http://www.wsj.com/articles/lawsuits-rattle-nursing-home-chains-1412369400
12T. Andrew Graham, Grace Mann, Abe Varner, and Francis Parker of Hall Booth Smith, P.C.
14PPACA § 6101
15Family and Estate of Mary Dwyer v. Harbor View Healthcare Center: NJ Case Number: L 004819 11
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