

SURVEY OF LEGAL PRESSURE IN ASSISTED LIVING

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ABSTRACT

One of the most important Public Health issues in the United States regards how society manages its rapidly aging population. Assisted Living Facilities (ALF) have emerged as a popular alternative to conventional nursing homes by emphasizing a resident's choice in their care, dignity, autonomy, and privacy. Environmental pressures such as age demographics, policy issues, economics, and disjoint regulation – stemming from the federal government's apprehension to regulate the industry – have resulted in wide variation in standards of care from state to state. In response to these pressures and variation, ALFs have begun to accept more individuals with complex care needs such as severe dementia. Lawsuits, claims, and settlements have targeted these variations in standards of care and may reshape the principles upon which Assisted Living was founded. Typically, nursing homes are medically focused and regard resident safety as the most important value. Legal pressure, however, may force Assisted Living facilities to function in a similar regulatory environment as nursing homes. This thesis measures opinion-based survey responses from Assisted Living administrators concerning the prevalence of legal pressure in the Assisted Living industry. Surveys were sent out to facilities in the eastern, middle, and western US (ranging from north to south in each region) and accounting for 10 total states. Responses were gathered by mail or electronic means. Analysis of responses showed that most administrators have noticed an increase in lawsuits, claims, and settlements over the past five years. Furthermore, most administrators associated this increase with an effect on values such as dignity, privacy, choice and safety.

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1.0 INTRODUCTION

As the United States' elderly population (65 and older) reaches over 20% between 2030 and 2040 (Ortman and Velkoff, 2014), the US must develop a better understanding of how care should be structured to accommodate elderly individuals along the spectrum of care needs. Throughout recent scholarly Assisted Living literature, three key themes emerge: 1) regulatory variation with regards to standards of care; 2) increasing cognitive impairment ratios in ALFs; and 3) the maintenance of degradation resident values. The coexistence of these themes creates for an uncertain and unsustainable future for the industry. In other words, a facility that accommodates a higher percent of residents with cognitive impairment and insufficient staffing, will likely jeopardize the care and values of independence, privacy, autonomy, dignity, and safety for the resident. Given the variability in regulation, standards of care, reimbursement, etc., it is reasonable to assume that a force will act on this variation and bring the standards of care up to some defined 'par' level. This thesis poses that the force acting on assisted living facilities is legal pressure and that the 'par' has become nursing home standards of safety. The three themes, (cognitive impairment percentage, variability in regulation, and maintenance or degradation of resident values) are interrelated factors that form the basis for some anecdotal references to an increase in lawsuits against Assisted Living Facilities.

One of the most notable observers of this trend is Rebecca Adelman, a lawyer who focuses on the Assisted Living Sector. According to Adelman,

"...the United States is experiencing an increase in lawsuits across the country against assisted living communities...Plaintiff's attorneys are now targeting assisted living

communities after decades of focusing on attention on nursing homes. [They] have a “nursing home lawsuit” playbook in hand that they are using on the field against assisted living communities.” (Adelman, 2013)

If a push to nursing home level safety requirements continues, the principles such as independence, autonomy, dignity, privacy, and choice, may be at risk. Inevitably, given the future population projections, there will exist a cohort of individuals (largely middle class who won’t qualify for Medicaid) who won’t remain at home and will not need the medically focused care of a nursing home. These individuals should have a place where their independence can be maintained as long as possible. To ensure that Assisted Living values survive, the US needs to recognize the effect of legal pressure as well as understand the limits of Assisted Living. This paper aims to better understand whether the belief that legal pressure is reshaping the industry is shared by Assisted Living Administrators across the country, and how this may be affecting the values mentioned above.

1.1 BACKGROUND OF ASSISTED LIVING AND RESIDENT VALUES

In 2015, the National Council for Assisted Living (NCAL) published guiding principles for Assisted Living Facilities. The first principle, entitled *Person Centered Care*, describes an ideal environment for elderly individuals living in any long-term care setting, regardless of type of facility, physical limitation, cognitive state, or income level. The principle describes that,

“Person-centered caring focuses on meeting the individual resident’s needs. Decision making is directed by the resident to maximize their independence, and staff assistance is not task-oriented. Person-centered caring is based on the concept that the staff and management knows each resident, and understands their medical and personal history, their needs, preferences, and expectations. The staff form meaningful relationships with the residents and their family members.” (NCAL, 2014.)

It is NCAL’s expansion of this definition that places the *Person-Centered Care Guiding Principle* in the context of Assisted Living. NCAL recommends achieving person centered care through, “maximizing the resident’s dignity, autonomy, privacy, socialization, independence, choice, and safety” (NCAL, 2014). The Assisted Living sector has seen a rapid expansion over recent years. This growth can largely be attributed to its model of care which emphasizes resident independence, autonomy, privacy, and dignity (Mollica, 1998; Zimmerman, 2001) in addition to becoming the primary provider of residential care for older adults with dementia (Zimmerman, Sloane, Reed, 2014; Carder, 2017).

Independence, autonomy, privacy, and dignity have been pillar terms in the establishment of the assisted living concept. The first period of Assisted Living, 1979 to 1985, was fueled by a “distaste for nursing facilities and idealistic values regarding residential environments, service capacity, and consumer care philosophy” (Brown, 2007). There was a demand for a facility “that offer[ed] a level of attention and independence between those offered by nursing homes (providing for those needing a high acuity of medically focused care) and independent living (those needing a lower acuity, non medically focused level of care)” (assistedlivinghistory.com). The concept of Assisted Living has greatly evolved over the past 30 years into various models as well as hybrid, hospitality, housing and healthcare models (Brown, 2007). The diversity of care

models and care provision across the industry in the United States has been fundamental in the evolution of Assisted Living.

1.2 REGULATION OF ASSISTED LIVING

Regarding regulation in the United States, there is not only great disparity across the United States, but facilities vary within State lines, as well. There is large variation with respect to facility size, admission policies, level of complex care needs, and dementia care capability (Han, Trinkoff, Storr, 2016). Indeed, the federal government's reluctance to set industry standards for staffing levels, staff training, or allowable service offered has compounded the variation and adaptation that exists within the industry, nevertheless has also contributed to the rate of the industry's growth. The period of Assisted Living, from 1994 through 2000, was characterized as a period of expansion on the backs of Wall Street money. Dr. Karen Brown describes this period as one of "dilution of ideals and emerging quality concerns" (Brown, 2007). Furthermore, Assisted Living facilities can charge whatever the market can bear for their services. To capitalize on the demand for innovative, non-nursing care models – and to maintain margins – Assisted Living facilities began admitting residents with higher levels of care needs. With the average care needs of residents increasing, the US may be seeing an increase in lawsuits directed at Assisted Living Facilities – some of the most common being, Common Law Negligence, Violations of the Consumer Protection Act, Violations of the Adult Protection Act or Vulnerable Adult Act, among others. If lawsuits are increasing as care needs in Assisted Living increase, this problem will likely persist. Given recent policy changes involving Medicare and Medicaid, age demographic changes, along with resident and family preference will

accentuate the level of care demanded of Assisted Living facilities, thereby continuing the legal pressure.

Governmental policies such as Managed Long Term Care Services and Supports (MLTSS), encourage those eligible for Medicare and Medicaid and who do not need a level of higher acuity and medically focused care, at home (Medicaid.gov). Those elderly individuals who can now seek home support services (through MLTSS) historically would have been those that would opt for assisted living services. As the level of care needs in Assisted Living Facilities continue to rise, compounded by disjoint standards of care being provided, legal precedents will target facilities that can't meet the increasing needs of their resident population. This can be viewed as a correction for the industry or it can be viewed as a force that will reshape the Assisted Living Industry to more closely resemble Nursing Home regulation. If the latter happens, the principles on which the industry was established – independence, autonomy, privacy, and dignity – may be impossible to foster under the pressure of a higher safety considerations. Although the shift in regulatory environment seems to be inevitable, the demographics of assisted living facilities are already measurably changing.

1.3 COGNITIVE IMPAIRMENT IN ASSISTED LIVING

More than half of Assisted Living Facilities admitted residents with considerable healthcare needs requiring nursing care, including transfers, medications, and eating/ dressing needs. Although this case mix indicates a population with higher care needs, staffing remains inadequate. Staffing is in large part composed of patient care aides and less than half of Assisted living facilities have a registered nurse on staff or licensed practical nurse hours. (Han Trinkoff,

Storr, et al., 2016). As alluded to above and verified in Han, Trinkoff, Storr, et al, the researchers found that despite the overlap between the populations of nursing homes and assisted living facilities, assisted living regulations lag far behind that of nursing homes.

Currently, 7 out of 10 residents in Assisted Living Facilities have some form of cognitive impairment, with 29% having mild impairment; 23% having moderate impairment; and 19% of having severe impairment. (Zimmerman, Sloane, Reed, 2014). Furthermore, hospitalization rates for moderate to severe dementia residents were 69% and 42% higher in Assisted Living as opposed to similar participants in nursing homes. (Sloane, Zimmerman, Gruber-Baldini, et al., 2005). A possible explanation for this is inadequate staff levels and training. Assisted Living Facilities target residents with cognitive impairments to market “memory care units” (specialized units for individuals with dementia related illnesses) – and are charging more for this care. Per Zimmerman, Anderson, Jonas, et al., residents in these special care (or memory care) units in assisted living facilities experienced more functional decline than those who were not. (Zimmerman, Anderson, Jonas, et al., 2013) Considerable criticism surrounds the Assisted Living “memory care units”, the most common claim being that that these units are an avenue for facilities to charge the resident more with little added benefit. For example, per Pennsylvania Assisted Living requirements, a memory care unit caregiver needs only 8 additional dementia specific hours of training within the first 30 days of hire, and 8 additional hours per year going forward – a seemingly low value to care for one of the most complex patient populations (aspe.hhs.gov). The increasing population of dementia residents, both in size and severity of cognitive impairment, may result in an increase in claims, lawsuits, and settlements. This association is further compounded by a presumably inadequate level of care provided to these residents.

1.4 LEGAL PRESSURE IN ASSISTED LIVING

In 2014, Medicaid contributed \$160 billion to Long Term Care Services; \$80.6 billion (roughly 53%) was spent on Home and Community Based Services (HCBS), under which most assisted living facilities were covered. (*medicaid.gov*) Despite this funding, the federal government plays a very limited role in the regulation of Assisted Living Facilities. Policy experts hypothesize that although Medicaid spending will increase over the next twenty years, federal government will remain absent in regulating the industry. (Center for Medicaid Advocacy, 2013) Ultimately, the regulatory powers will presumably remain exclusively delegated to the States. Given the relatively short history of ALFs in the United States, the body of law governing Assisted Living is far less established than that of nursing homes. Per Yang, state regulation can be grouped into three basic categories: (1) States that regulate Assisted Living Facility licensure, (2) States that regulate Assisted Living Facility standards of care, and (3) States that create a cause of action against Assisted Living Facilities. (Yang, 2015)

States Regulation of Licensure makes the acuity the focal point of licensing. States are required to become either single level or multi-level providers. Single level providers are required to accept and keep any resident whose care needs fall at or below a specified threshold. Any individual whose care needs exceed this threshold are denied admittance to the single level facility. Comparatively, a multi-level system gives states the ability to license varying levels of care needs. For example, a state can have low, moderate, and high level assisted living facilities, with respect to the degree of patient care needs each can serve. Multi-level Assisted Living

Facilities are victim to a higher frequency of lawsuits, due to residents being discharged prematurely or individuals discharged too late. If a facility elects not to house necessary emergency equipment but instead opts to discharge residents from their facility at the onset higher needs of care, the facility may be liable under the “Americans with Disabilities Act”. This is an example of a premature discharge. Conversely, when a resident’s care needs exceed the capabilities of the facility resulting in some form of adverse mental or physical outcome results, the facility may attract litigation due to a late discharge. Facilities that are accused of late discharges are often liable for much greater damages. Moreover, cases surrounding too late discharge typically involve simple tort law which will be described in more detail in proceeding sections. (Yang, 2015)

The second form of state regulation focuses on Standards of Care. Standard of Care Regulation is typically done in conjunction with licensure requirements and regulates “disclosures, the facility’s scope of care, third-party scope of care, move-in and move-out requirements, management of medication facility requirements, patient capacity, staff training and hiring levels, continuing education, and payment policies” (Yang, 2015). Regulation of standards of care is the most encompassing type of regulation, by leveraging the facility’s license, the State mandates compliance with one or all of the aforementioned standards.

Lastly, state-created causes of action enable plaintiffs to compound existing causes of action in tort or provide the opportunity for the resident to seek damages for “exclusive new causes of action” for residents who experienced damages. Although this is somewhat rare, as most cases are brought forth under common tort, state created causes of action give residents the ability to bring their case although it may not fit the mold of common tort law. This form of

regulation has facilitated the entrance of legal pressure into the industry and has given attorneys an environment to succeed (Yang 2015).

State regulation of licensure, standards of care, and created causes of action all vary state by state, and are often compounded by common tort litigation. Common tort litigation – chiefly claims of negligence – represent the most common type litigation against Assisted Living Facilities. For an Assisted Living Facility (or individual staff member) to be liable for negligence, three criteria must be met:

1. The Assisted Living Facility (and/or assisted living staff member) must have owed a duty to the resident to adhere to a standard of care.
2. The Assisted Living Facility (and/or assisted living staff member) must have breached this duty.
3. A resident of the facility must have experienced damages (injury or death) and there existed a proximate causal relationship between the damages and the assisted living facility's breach of duty.

The types of lawsuits currently affecting Assisted Living Facilities are those same lawsuits that shaped the nursing home sector into a highly-regulated industry. Adelman states that “while each lawsuit is different and is based on individualized facts and state-specific regulations, they have similar characteristics...[and] we are seeing the same prosecution models and playbooks used across the country.” (Adelman, 2013) The most common claim events forming the foundation of these lawsuits are listed in **Table 1**.

Table 1. Most Common Claims in Assisted Living

Resident Care	Staff Related
<ul style="list-style-type: none">➤ Falls➤ Wrongful death➤ Abuse (physical or sexual)➤ Wound Issues➤ Changes in condition➤ Elopement/ wandering	<ul style="list-style-type: none">➤ Failure to supervise➤ Inconsistent, Incomplete, Erroneous Documentation➤ Understaffing/Inadequate Staffing➤ Medication Administration errors➤ Corporate Negligence➤ Failure to transfer or discharge➤ Non-compliance with facility policies and procedures

(Adelman, 2013)

2.0 SURVEY OF LEGAL PRESSURE

2.1 METHODOLOGY

In February 2017, 225 anonymous questionnaires were sent by mail or filled out electronically by Assisted Living Administrators (200 by mail and 25 electronic versions). The country was broken into three regions which geographically span north to south: the East Region (New York, Pennsylvania, Florida, and Kentucky), Middle Region (South Dakota, Colorado, and Texas), and West Region (Oregon, California, and Nevada). After breaking up the country into three regions, we looked for a group of states that geographically dispersed as well as an established Assisted Living sector. In the east region, we chose Pennsylvania and Florida due to the substantial higher proportion of elderly individuals. Kentucky was chosen at the suggestion of a Chief Executive Officer of a very prominent long term care organization in the North Eastern United States. This CEO believed that legal pressure has shaped the Kentucky Assisted Living Industry and has contributed to their current non-medical model of care. Surveys were sent to both urban and rural locations of New York to encompass a state with a stark difference in urban and rural populations. The Middle region states were chosen at random and based on geographic location. In the West region, Oregon was chosen, because it is the birthplace of Assisted Living. Nevada and California were chosen due to high per population ratios of ALFs.

Assisted Living facilities and addresses were selected through online investigation, and of the identified 225 facilities, 192 (85.3%) were known (advertised on their website) to house

“memory care units”. Mailed surveys included a prepaid envelope for return mail to the University of Pittsburgh Graduate School of Public Health.

Surveys (see **Appendix**) were structured to capture opinion based and qualitative data from Assisted Living administrators regarding their perceptions of the trends of claims, lawsuits, and settlements over the past five years. They also focus types of lawsuits, the prevalence of dementia in their facility, and lastly the effect that this pressure may or may not have had on the principles of resident choice, dignity, privacy, and safety. After the original survey was written, it was reviewed by Dr. Nicholas Castle, a pioneer in Long Term care quality measures, and two different Health Policy Lawyers to ensure that the goal of the survey was accurately represented through the questions. All reviewer’s feedback was incorporated into the final survey.

2.2 RESULTS

As of March 24, 2017, we received data from 58 survey responses, corresponding to a response rate of 25.7%. Response rates varied between states, from greatest to least, the response rates were as follows: Florida, (14/24) 58%, Pennsylvania, (13/24) 54%, New York, (10/28) 36%, Nevada, (7/22) 32%, Kentucky, (6/22) 27%, Colorado, (4/23) 17%, Texas, (2/22) 9%, South Dakota, (1/20) 5%, California, (1/20) 5%, Oregon, (0/20) 0%.

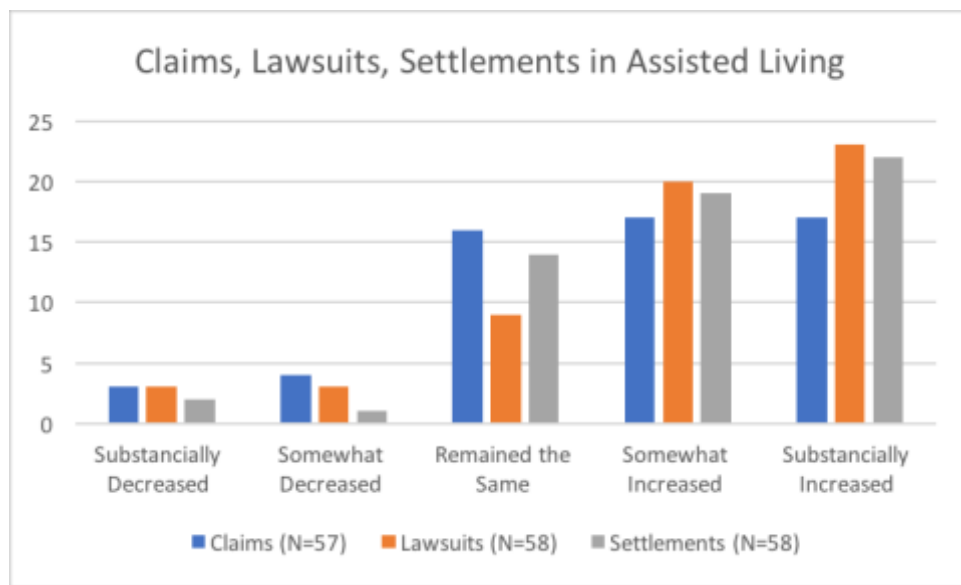


Figure 1. Respondents' Opinion of the Trend in Claims, Lawsuits, and Settlements in Assisted Living over the Past 5 Years

As shown in **Figure 1**, the majority (34/57) or 59.6% of respondents noticed either a somewhat or substantial increase in claims over the past five years. Sixteen or 28% responded that claims have remained the same, and 12.3% responded that claims have either somewhat or substantially decreased. Nearly 75% (43/58) of respondents stated that lawsuits against assisted Living Facilities have either somewhat or substantially increased over the past five years. Nine respondents or 15.5% believed they have remained the same, while only 10.3% believed they

have decreased, either somewhat or substantially. Settlements showed similar trends as claims and lawsuits in that 70.6% (41/58) either somewhat or substantially increased. 24% of respondents believed that they remained the same and a mere 5% believed that they have decreased over the past five years.

When respondents were asked to comment on the statement “Litigation is forcing Assisted Living facilities to become more like nursing homes in terms of regulation”, 36% strongly agreed, 32% somewhat agreed, 22% neither agreed nor disagreed, and 10% either somewhat or strongly disagreed.

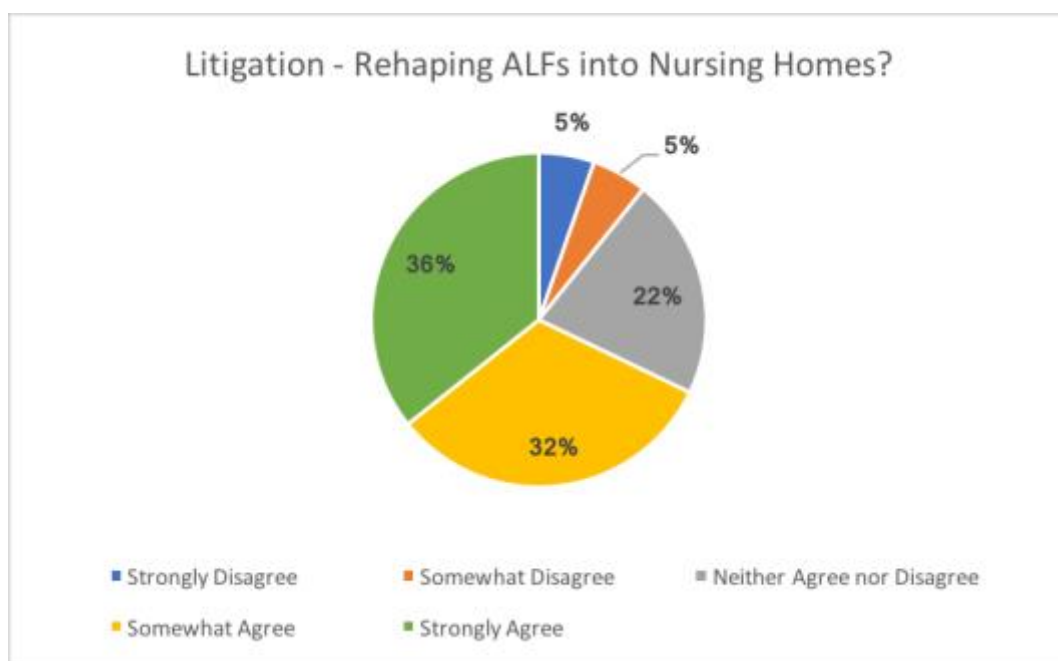


Figure 2. Response to the Statement: "Litigation is forcing Assisted Living facilities to become more like nursing homes in terms of regulation"

Regarding Dementia in Assisted Living Facilities, respondents were asked to estimate the number of residents living with dementia in their facility as well an estimated percent of lawsuits that involve residents with dementia. Thirty seven of the 55 administrators who responded, stated

that 50% or more of their residents live with some form of dementia. When asked to estimate what percent of lawsuits involve residents living with dementia, the average response was 41.6% (standard deviation: 29.6) of the claims lawsuits, and settlements involve residents with dementia. We graphed the two measures together (**Figure 3.**) to see whether estimated percent of residents with dementia corresponded to the estimated percent of lawsuits claims and settlements involving residents with dementia. We found that administrators who estimated that between 0-25% of their population had dementia or those who estimated that over 75% of their residents had dementia, they also estimated that these groups had the largest dementia related claims, lawsuits and settlements.

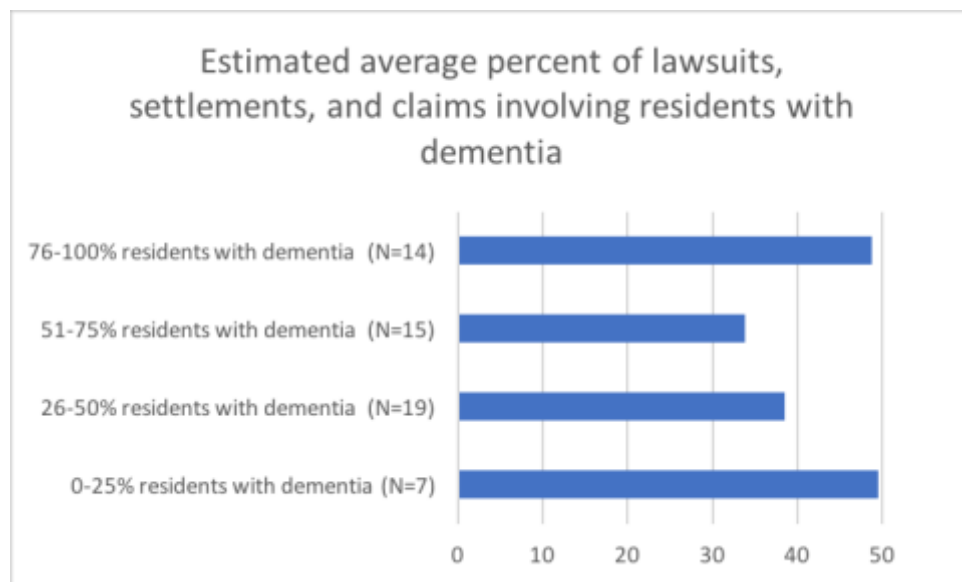


Figure 3. Estimate Average Percent of Lawsuits, Settlements, and Claims Involving Residents with Dementia Among 4 Categories of Estimated Dementia Prevalence

Figure 4. shows the extent to which legal pressure has affected resident values such as choice, dignity, privacy, and safety; most administrators felt that legal pressure had a moderate to substantial effect on each of the values. Administrators answered on a 5-point scale, however due to a survey error, there was no zero listed on the scale. Many respondents wrote in a '0' and

circled it. To accommodate for this error, 0-1 was grouped to represent little to no effect, 2-3 to represent moderate effect, and 4-5 to represent substantial effect. Forty-one administrators or 73.2% of administrators felt that legal pressure has had a moderate to substantial effect on resident choice. Thirty-three or 58.9% of respondents recognized that legal pressure has had a moderate to substantial effect on resident dignity. Thirty-one administrators or 55% of administrators felt that legal pressure has had a moderate effect on resident privacy. Lastly, the most significant proportion, 48 administrators (85.7%) felt that legal pressure has had a moderate to substantial effect on safety.

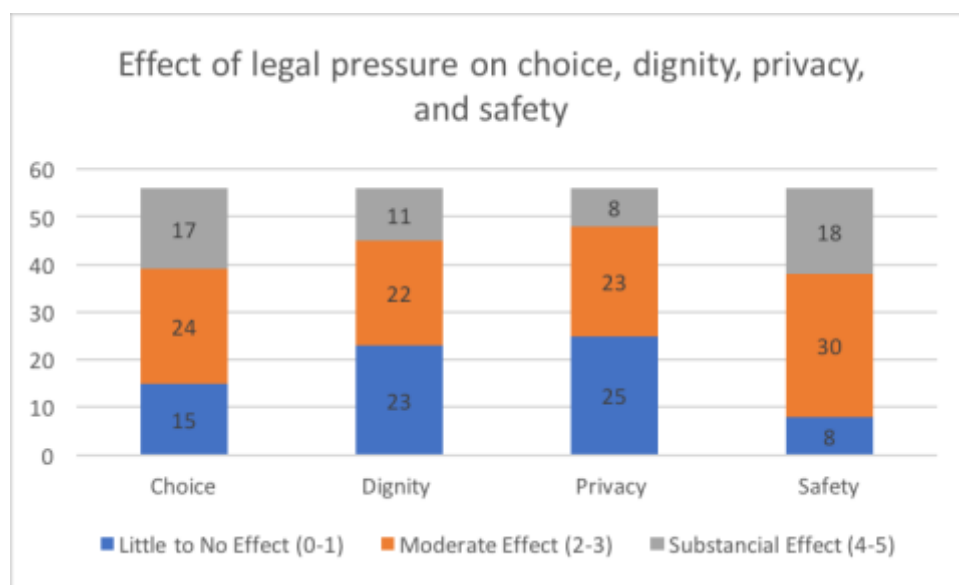


Figure 4. The Effect of Legal Pressure on Resident Choice, Dignity, Privacy, and Safety. The numbers displayed in Each Bar are the Number of Administrators who Responded in Each Effect Category

Questions pertaining to the frequency of claims lawsuits, and settlements in both patient care and staff related categories are listed in **Table 2** below. The frequency was measured on a '0-5'scale, '0' representing not frequent at all and '5' representing very frequent. The total of each category was calculated then ranked. Patient care related claims, lawsuits, and settlements

accounted for the highest frequency. Falls were the overwhelming leader in terms of frequency followed by wound issues, abuse, changes in condition, wrongful death, and elopement. In staff related issues, medication administration errors led the way, followed by understaffing, failure to supervise, failure to transfer/discharge, corporate negligence, inconsistent documentation, and non-compliance with facility policies.

Table 2. Frequency of Claims, Lawsuits, and Settlements

Patient Care Related			Staff Related		
Rank	Type	Point Value	Rank	Type	Point Value
1	Falls	131	1	Medication Administration Errors	82
2	Wound Issues	83	2	Understaffing/ Inadequate Staffing	64
3	Abuse (Physical or Sexual)	72	3	Failure to supervise	57
4	Changes in Condition	71	4	Failure to Transfer/ Discharge	56
5	Wrongful Death	54	5	Corporate Negligence	50
6	Elopement/ Wandering	48	6	Inconsistent, Incomplete, Erroneous Documentation	50
			7	Non-compliance with facility policies and procedures	44

Also, included in the survey were questions regarding the total number of lawsuits and settlements from the year 2016. Due to inconsistent responses and the clear majority of the respondents leaving this question blank, this question was omitted the data from this question. Furthermore, with no question regarding bed size, raw numbers of lawsuits would be misrepresentative, and have little meaning outside the context of facility size. Lastly, each survey included a space for additional thoughts, these are listed in the **Table 3**.

Table 3. Comments from Assisted Living Administrators

Comments from Administrators on the topic of Legal Pressure in Assisted Living
<i>"We are a small community with few actual lawsuits, but many threats of." – Nevada</i>
<i>"Legal issues haven't directly impacted us, however, I suspect it has an impact on state regulations" – South Dakota</i>
<i>"Claims and lawsuits are just too much for a 6-bed facility. The insurance is mostly a waste because with only six residents you can monitor closely. Lawsuits and claims or insurance should only be required for big facilities." – California</i>
<i>"Only lawsuit we had involved [a] resident who eloped over a year ago, and the family waited until he passed away (still in our care at the family's insistence!) to then sue us. VERY flimsy case, but our insurance company chose to settle because litigation would be too costly. Sad..." – Kentucky</i>
<i>"[Assisted Living] in Kentucky is a bit different than other states – we are completely non-medical. Very little documentation on our part – home health agencies provide all medical services." – Kentucky</i>
<i>"The state of Kentucky is a "model" state where the communities as a whole cannot be medically involved with residents. Family is responsible for setting up all [medication] for the residents (how do we know what they are putting in planners). As an executive director and responsible for resident's care...we should have some way to identify [medication] given to residents!" – Kentucky</i>
<i>"Assisted living in Kentucky is a non-clinical (social) model. Assisted Living facilities have no clinical staff and provide no clinical care to residents." – Kentucky</i>
<i>"[Personal Care/Assisted Living] has increased activity levels which does not seem to be noticed by outside legal" – Pennsylvania</i>

3.0 DISCUSSION

Given the sensitive nature of the survey, and lack of incentive for completion, a 25.7% response rate was amenable. The high response rate from Florida was somewhat unprecedented, however given that the University of Pittsburgh's Graduate School of Public Health's presence in Pennsylvania, Pennsylvania was less surprising. Furthermore, other than Oregon, each state surveyed was represented in the data. Although, the large majority of responses came from the east region, the middle region was fairly represented by Colorado and Texas. Likewise, the west region was bolstered by responses from Nevada. In conclusion, given the geographic distribution of responses, preliminary generalizations regarding the US Assisted Living sector can be drawn.

It was quite clear in the data that most administrators believe that claims, lawsuits, and settlements have been rising over the past five years. Furthermore, considering that 68% of respondents either somewhat or strongly agreed that assisted living facilities are becoming more like nursing homes in terms of regulation, this legal pressure is having a measurable effect. Insight from Nevada administrator written feedback showed that even in cases of low lawsuit frequency, there "threat" of lawsuits is ever prevalent. Prior to the survey, it was hypothesized that dementia may be a confounding factor in this regard. In other words, as the number of residents with some form of cognitive impairment increased, so to would lawsuits, claims, and settlements increase. There was no conclusive evidence to this effect. The lack of evidence can primarily be attributed to the ineffectiveness of survey to accurately measure dementia prevalence in each facility.

Given that all responses were administrator estimates, these data are quite qualitative, opinion-based, and general. Regarding dementia prevalence, a majority 67% of administrators estimated that at least half (50%) of their residents have some form of dementia. Zimmerman, Sloane, and Reed, 2014, found that staff often underestimate the prevalence of dementia in their facilities, for instance, “almost 40 percent of residents with moderate impairment and 10 percent of those with severe impairment did not have dementia that staff recognized.” (Zimmerman, Sloane, Reed, 2014) With these results in mind, the number of residents with some form of dementia is likely higher than estimated in these facilities. By graphing administrators’ estimated percent of residents with dementia against the estimated percent of lawsuits that involve residents with dementia in **Figure 3**, we found an association between estimated prevalence and estimated lawsuits. To accomplish this, the facilities were placed into four groups, those who estimated between 0-25% of their organizations had dementia, and followed the same process for 26-50%, 51-75%, and 76-100%. Through analyzing the average estimated number of lawsuits that administrators attributed to residents with dementia in each of these categories, an interesting pattern emerged. We found that those facilities who were at each end of the spectrum estimated higher percent of dementia related lawsuits. For example, a facility who has 25% of residents with dementia and one who had 90% of residents with dementia, estimate higher percent of dementia related lawsuits. A possible explanation for this is phenomenon is that facilities with low levels of dementia residents have less staff and are less familiar with handling dementia residents. Furthermore, those with a high percent of residents with may be overburdened, understaffed, or unable to handle the demand of this complex population. This is an assumption, and should be further verified by more intensive research to verify. It is hard to narrow down a specific cause for this variation as dementia “training [varies] greatly, ranging

from simply giving an overview to covering specific topics and providing certain (albeit limited) amounts of training.” (Zimmerman, Sloane, Reed, 2014)

As hypothesized legal pressure is influencing the values of choice, dignity, privacy, and safety. Administrators viewed choice (73.2%), dignity (58.9%), privacy (55%) and safety (85.7%); all as being moderately to substantially affected by legal pressure. It is unsurprising that safety has been most affected in that most regulations lawsuits or proposed regulation would be toward increasing the safety standards of the industry. The extent to which administrators viewed legal pressure affecting dignity, privacy, and choice, was surprising.

From **Chart 2**, Patient Care Related lawsuits and settlements were the most common form of legal pressure noticed among administrators, with falls being the frontrunner. From a staff related perspective, medication errors were the biggest concern. It is our assumption that these were ranked in many cases in terms of the “risk” of each category rather than based on a number amount. One administrator wrote in “I will rate according to risk, but no lawsuits except one, ten years ago.” (Colorado Administrator) Regarding medication administration errors, responses from Kentucky administrators state that Kentucky is a non-medical state. This is an interesting theory for Assisted Living, however it still poses legal problems in that although Assisted Living facilities are not responsible for medication administration, they are unaware of the medication that their residents are taking. An administrator echoed this saying, “how do we know what they are putting in planners”. As an executive director and responsible for resident’s care...we should have some way to identify [medication] given to residents!” (Kentucky Administrator) Although Kentucky is a non-medical model, 66% of administrators responded that claims were either somewhat or substantially increasing. Likewise, this trend was observed

for lawsuits and settlements as well with 83% of administrators responding similarly for both categories.

4.0 CONCLUSION

Per the results of the opinion-based and qualitative data from assisted living administrators across the country, claims, lawsuits, and settlements are increasing. Most administrators believe that this increased legal pressure is reshaping the regulatory framework of the assisted living facilities and driving them to be more like nursing homes. Although this study doesn't provide conclusive evidence to state that higher proportions of residents with dementia in Assisted Living is driving this trend, preliminary results suggest that an organization that view itself as having a low prevalence of dementia residents or a high prevalence, estimate that a higher number of claims, lawsuits, and settlements. We suggest further investigation into this phenomenon. Lastly, we measured that most respondents believed that increased legal pressure is influencing resident choice, privacy, dignity, and safety.

Although preliminary, these results give insight to an important trend in long term care – the Assisted Living environment is adapting in a similar fashion that nursing homes had. Hypothetically, given that Assisted Living regulation reaches a comparable standard regulation as nursing homes, two important issues will emerge. First, the values mentioned throughout this paper – dignity, choice, and independence – survive in Assisted Living due to relaxed regulation surrounding safety requirements. If one grants that legal pressure is driving an increase in safety requirements, a likely corresponding assumption would be that the emphasis on the remaining values will fall. These values are meaningful for elderly individuals contemplating long term care options, which is why the CMS has attributed a large percent of the decrease in utilization

rates of nursing home beds over the past twenty years to the increase in assisted living facilities. Elderly individuals are making the choice for Assisted Living because they value “quality of life” over safety. The increase in lawsuits, claims, and settlement and the effect that this will have, threaten that tenant.

The second concern if Assisted Living continues along this trajectory, the policy implications would be devastating. There is a societal and economic benefit to individuals choosing Assisted Living. As mentioned, nursing home utilization rates have declined significantly over the past 20 years which is in large part to the choice to live in Assisted Living environments. There was a 20% drop in residents utilizing nursing homes per 1000 people aged 75 and older from 1997 through 2007 (CMS). Although this utilization decrease will likely be offset by an increasing population of elderly, the savings to the government has been crucial. Private pay Assisted Living facilities cost roughly half that of nursing home care (Genworth Financial, 2008). This decreased the burden on CMS as well as provides suitable care for a demographic of the elderly that don’t need the intensive 24-hour nursing care. If for instance legal pressure pushes the staffing standards and safety requirements of Assisted living to follow that of nursing homes, the cost to provide care would also be closer to nursing homes. In this case, Assisted Living Facilities would either leave the market or charge prices that will be unbearable for private pay resident. Under this scenario, demand for nursing home beds would presumably increase (requiring capital infusion to open new facilities or bring others up to par) or for government subsidy for Assisted Living care would need to be established. Either way, the effect on the US’s already high health expenditure as percent of GDP, would be damaging.

APPENDIX: SURVEY OF ASSISTED LIVING



University of Pittsburgh

Dear Sir or Madam,

I hope this letter finds you doing well. My name is Michael Fetterolf and I am a graduate student at the University of Pittsburgh School of Public Health. I am conducting my master's essay on the effect that legal pressure has had on assisted living/ residential care facilities (AL/RC) across the United States. The bottom of this page (and reverse side) contains a very short survey that will give me some understanding of how legal pressure may be shaping the assisted living environment. Please keep in mind that your facility's responses will remain completely anonymous and you will not be identified in anyway.

Thank you for your time, if you have any questions at all, please don't hesitate to contact me at mgfl4@pitt.edu.

Michael Fetterolf, MHA candidate

1. In your opinion, the number of claims over the past 5 years in assisted living facilities has:

- ☐ Substantially Decreased ☐ Somewhat Decreased ☐ Remained the Same ☐ Somewhat Increased ☐ Substantially Increased

2. In your opinion, the number of lawsuits over the past 5 years in assisted living facilities has:

- ☐ Substantially Decreased ☐ Somewhat Decreased ☐ Remained the Same ☐ Somewhat Increased ☐ Substantially Increased

3. In your opinion, the number of settlements over the past 5 years in assisted living facilities has:

- ☐ Substantially Decreased ☐ Somewhat Decreased ☐ Remained the Same ☐ Somewhat Increased ☐ Substantially Increased

4. Roughly, how many total lawsuits and settlements has your facility had in 2016?

#: _____

5. Please individually rank each of the following categories in terms of frequency of claims, lawsuits, settlements (0 being not at all, 5 being very frequent):

Patient Care

- ____ Falls
____ Wrongful death
____ Abuse (physical or sexual)
____ Wound Issues
____ Changes in condition
____ Elopement/ wandering

Staff Related

- ____ Failure to supervise
____ Inconsistent, Incomplete, Erroneous Documentation
____ Understaffing/ Inadequate Staffing
____ Medication Administration errors
____ Corporate Negligence
____ Failure to transfer or discharge
____ Non-compliance with facility policies and procedures



Please continue onto the reverse side.

6. Roughly what percent of your residents are living with dementia?

0-100%: _____

7. Of your organization's claims, lawsuits, and settlements, roughly what percent involve residents living with dementia?

0-100%: _____

8. How would you respond to the following statement: "Litigation is forcing Assisted living facilities to become more like nursing homes in terms of regulation"?

☐ Strongly
Disagree

☐ Somewhat
Disagree

☐ Neither agree
nor disagree

☐ Somewhat
agree

☐ Strongly
Agree

9. In your opinion, how has legal pressure affected resident care: (Please circle 0-5, 0 being no effect and 5 being substantial effect)

With respect to resident choice: 1 2 3 4 5

With respect to resident dignity: 1 2 3 4 5

With respect to resident privacy: 1 2 3 4 5

With respect to resident safety: 1 2 3 4 5

10. In the space provided below, please provide any additional thoughts:

Included is a prepaid envelope to return your responses.

***Thank you so much for your time! If you'd like a summary of my results,
please include your email address.***

This is an anonymous survey of an AL/RC facility in Pennsylvania.

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