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Chairman Craig, Senator Breaux, distinguished Committee members, thank you for inviting me to discuss recent trends in long-term care liability. I have been asked to describe the characteristics and general impact of liability in the long-term care sector, to outline potential implications for policy, and to highlight important questions not yet answered by research studies. I will draw primarily on my own research with colleagues in this area, which has focused on nursing home litigation.

In particular, my remarks will focus on three key questions:

1. What is known about the nature and impact of nursing home litigation?
2. What factors have contributed to recent litigation trends?
3. What characteristics of this litigation are important for policymakers to consider as they seek to address concerns in this area?

### Nursing Home Litigation Trends

Lawsuits against nursing homes are a relatively new feature on the health law landscape. Until recently, conventional wisdom was that older people were not attractive clients to plaintiffs' attorneys. The lack of economic losses typically associated with their injuries made recoverable damages (and fees) relatively small.<sup>1</sup> For reasons that are not

clear, this situation began to change dramatically through the 1990s.<sup>2</sup> Nursing home litigation is now widely recognized as one of the fastest growing areas of health care litigation. In several states, most notably Florida and Texas, claims rates and nursing homes' liability insurance premiums have soared.<sup>3</sup> State residents' rights statutes appear to have provided a legal basis for many of these claims.<sup>4</sup>

Despite a growing sense of alarm among policy-makers, little is known about lawsuits against nursing homes. To address this knowledge gap, we surveyed a national sample of plaintiff and defense attorneys who practice in this area about details of the claims they steward, including litigant characteristics and the volume, type, and outcomes of claims. The empirical evidence presented below is from this study.<sup>5</sup> One caveat that is important to interpreting these data is that respondents were asked to characterize their litigation experience for calendar year 2001.

Based on responses from 278 attorneys, we found that nursing home litigation is a new and growing industry that is, at this time, heavily concentrated in a handful of states. Our data suggest that attorneys mobilized into this area in the mid-1990s and that the number of claims and the size of recoveries grew substantially over the period 1996-2001. The attorneys we surveyed were personally involved in litigating nearly 4,700 claims in the 12 months prior to the survey, and their firms handled approximately 8,300 claims. More than half of these claims were in Florida and Texas alone.

Claimants were commonly elderly Medicaid recipients, often with dementia or Alzheimer's disease. Claims often involved serious injuries and were typically initiated by parties other than the residents themselves. More than half of claims nationwide involved deaths, while allegations of pressure sores, dehydration/malnutrition, and emotional

distress featured prominently. The prime initiators of nursing home claims were residents' children (64%) and spouses (22%), a logical result given the portion of claims involving death and the prevalence of cognitive impairment among nursing home residents.

Although fewer than one in ten nursing home claims went to trial (8%), almost nine out of ten recovered some damages for the plaintiff. This is around three times the payout rate for medical malpractice claims. Plaintiff and defense attorneys alike estimated these payments to average around \$400,000 per claim. Considered as a whole, these data imply total compensation payments of \$2.3 billion to plaintiffs nationwide.<sup>a</sup> Florida and Texas again account for a very significant proportion—three-quarters of the total compensation payments identified in our survey.

### Factors Driving Nursing Home Litigation

The factors driving the recent trends in nursing home litigation are unclear. Public discussion often centers on two competing drivers: trial attorneys seeking to maximize their incomes; and consumers responding to unacceptable care in nursing homes and potential failures of regulatory oversight in this sector. Such polarized explanations must be situated in the context of the broader, ongoing debate about the relationship between litigation and quality.<sup>6</sup>

Consumer advocates and the plaintiffs' bar have long argued that lawsuits are essential to ensuring high quality care. Proponents of litigation can point to plentiful reports of substandard care as substantiating the need for the deterrent influence of tort

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<sup>a</sup> These figures should be interpreted as a type of "unfunded liability," rather than as strictly annualized estimates of litigation costs. Because of the time lag associated with resolution of claims, a portion of the reported claims would have closed in 2001; the rest will close in future years (and, of course, be joined along the way by new claims).

law.<sup>7</sup> Yet, providers and defense attorneys counter that lawsuits are haphazard and do little to improve quality. Moreover, critics argue that litigation imposes significant financial burdens on providers and diverts scarce resources away from resident care.

The bottom line, however, is that we don't know how accurate nursing home claims are. In particular, we do not know the extent to which nursing home litigation: (1) reliably tracks negligence; (2) deters poor quality care; and (3) compensates residents with meritorious claims (as opposed to non-meritorious or "nuisance" claims). One can theorize about the impact of increased litigation on nursing home quality, and one can also speculate about the responsiveness of litigation to poor quality care. To the best of my knowledge, however, no studies have addressed these questions in a convincing way.<sup>8</sup> Further research is ultimately needed to study these questions at the level of the individual nursing home and at the level of the individual claim.

Still, the overall scale of the litigation is cause for concern. The diversion of substantial resources to defend and pay nursing home lawsuits could have a negative impact on quality of care, especially in high volume litigation states. For example, total compensation payments in Florida represented around 20% of the state's total nursing home spending for 2001; in Texas, the proportion was 15%. In addition, failures in liability insurance markets can make it difficult for nursing homes to protect themselves against the risk of large settlements, leaving them—and ultimately residents—exposed to unpredictable financial losses.

### The Policy Response

One response to these concerns is to enact tort reform of the kind recently attempted in Florida, Texas, and other states. The goal of such reforms is to stabilize the nursing home and liability insurance markets without eliminating incentives that litigation may provide to deliver high quality care. Yet, as this Committee knows, fiercely competing political interests make these reforms difficult to advance. The main stakeholders in tort reform debates often disagree about the wisdom of caps on damages awards and on attorney fees, the two most prominent reform measures.

An alternate approach to curbing litigation is to rely on redoubled quality improvement and quality assurance efforts. In theory, quality-oriented efforts could remove the presumed basis of lawsuits—poor quality nursing home care. Yet, the impact of this approach is uncertain. Its effectiveness hinges on (1) the extent to which quality gains can be realized and (2) the extent to which litigation rates will then respond to such gains. There are considerable uncertainties—not to mention potentially large expenditures—associated with these elements.<sup>9</sup>

Some have argued that recent litigation trends bolster the case for relying on conventional tort reforms in the nursing home sector.<sup>10, 11</sup> I would caution against this conclusion. Compared to medical malpractice, nursing home claims have several distinctive features that raise questions about implementing generic reforms across the care continuum. I will focus on three areas of difference in particular—noneconomic damages, punitive damages, and the nature of injuries.

*Noneconomic damages.* Critiques of excessive medical malpractice verdicts distil largely into concerns about noneconomic damages. The inherent subjectivity of

noneconomic damages, the fact that juries are given little or no guidance in determining them, and their significant contribution to awards feed perceptions that this part of the system is out of control.<sup>12</sup> More than any other tort reform measure, caps on noneconomic damages have emerged as the favored policy strategy for “containing” the malpractice crisis.

In the context of nursing home litigation, this type of cap can be expected to have a disproportionately large impact on plaintiffs’ awards because of the distinctive nature of the plaintiffs and the losses involved. Few elderly have ongoing sources of income that would be diminished by physical injury. Consequently, the balance between economic and noneconomic damages is quite different from other types of medical malpractice litigation: economic damages tend to constitute a relatively small portion of nursing home awards, and noneconomic damages constitute a relatively large portion. Our survey results indicate that noneconomic damages account for approximately 80% of residents’ awards nationwide—roughly double the proportion in medical malpractice awards.

*Punitive Damages.* Another distinctive feature of nursing home litigation is the role of punitive damages in awards. While punitive damages play a negligible role in medical malpractice litigation (fewer than 1% of awards include them), they appear to be quite common in nursing home litigation, figuring in nearly one in five payments nationally. One plausible explanation for the difference relates to the defendants involved—typically large, for-profit corporations in the case of nursing homes compared to individuals clinicians in the medical malpractice setting. The latter tend to strike juries as more sympathetic defendants.

For policymakers interested in controlling high-end verdicts, punitive damages present a potentially attractive and effective target in the nursing home sector that does not exist for medical malpractice claims. Placing limits on this component of awards instead of noneconomic damages would ward off the charge that the cap is interfering with plaintiffs' ability to be made "whole" for their losses. At the same time, the prevalence of punitive damages in nursing home litigation means that such limits could still have a meaningful impact on the overall costs of litigation.

*Nature of Injuries.* The injury profile of nursing home claims reflects the peculiarities of the long-term care environment and the vulnerabilities of residents. The amount of *medical* care received by most residents is quite low; support of personal needs and the maintenance of functioning are the core services. In this relatively "low-tech" environment, the usual stimuli for malpractice lawsuits, such as missed diagnoses and surgical errors, give way to allegations of neglected bedsores, malnutrition, and emotional abuse. More than half of claims against nursing homes involve deaths, compared to less than one fifth of malpractice claims.<sup>13</sup>

Lawmakers and the courts might be reluctant to enforce conventional tort reforms when confronted with the types of harms that befall nursing home residents. For instance, during the recent U.S. Congressional debate over HR 5, even some of the bill's chief proponents joined legislators who declared the importance of establishing exceptions for egregious cases.<sup>14</sup> The nature of alleged injuries in the nursing home setting may produce a ready supply of such exceptions.

### Conclusions

In sum, nursing home litigation has quickly assumed an important place in the medical liability debate. Lawsuits against nursing homes have increased substantially over the past decade and now absorb a significant portion of total nursing home expenditures in some states. Visible consequences of these trends include rising liability premiums, provider difficulties in obtaining liability coverage, and concerns among policymakers about threats to quality and access for consumers. Although various factors—such as state residents’ rights statutes—have contributed to the ability of residents and their families to seek legal recourse for poor nursing home care, it is unclear whether the rise in nursing home litigation has reliably tracked negligent care, deterred substandard care, and compensated residents with worthy claims. Further information on each of these points is necessary before it is possible to conclude that litigation has been “good” or “bad” for quality of services in nursing homes.

Nonetheless, pushed in part by providers seeking legislative relief, policymakers have sought ways to address the recent liability crisis, focusing primarily on tort reforms. As these reforms are pursued, the distinct features of nursing home litigation should be recognized, and their implications treated seriously. The distinct composition of nursing home residents’ damages awards and the distinctive nature of injuries in the long-term care setting deserve attention in the design of a policy response. Insufficient sensitivity to these distinctions is likely to stress *both* of the major stakeholders in nursing home litigation—the negligently-injured residents and their families, whose ability to obtain reasonable compensation for worthy claims would be inappropriately blocked, and nursing homes themselves, for whom ineffective reforms would fail to alleviate the burden of litigation.

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