# CRC State of the Market Report:
## Long-Term Care

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## The Takeaway

Retail agents and brokers serving long-term care facilities should prepare their insureds for changing insurance market conditions. In general, insurers are looking to stabilize rates and are seeking steep increases in particularly difficult legal venues. A variety of factors are having an impact on the insurance market for this healthcare segment. In particular, more than half a dozen venues around the United States known to be plaintiff-friendly are attracting more lawsuits against long-term care (LTC) facilities.

## The Overview

Long-term care facilities, ranging from assisted living to skilled nursing, serve critical needs for an aging population. While the outlook for growth in LTC is strong, the number of facilities and caregivers is struggling to keep pace with demand. The Department of Health and Human Services (HHS) forecasts that the long-term care population will double by 2020 and may even quadruple by 2040.[1] HHS estimates that the number of people age 65 or over who may require care for a long-term disability will range from 14.8 million to 22.6 million by 2040.[2]

According to the National Center for Health Statistics at the Centers for Disease Control and Prevention, as of 2014, there were 15,600 nursing homes, with 1.7 million licensed beds. Ownership of LTC facilities varies by state, but it is consolidating into larger, for-profit organizations. Data compiled by the Kaiser Family Foundation show that a large majority of U.S. certified nursing facilities in 2014, 69%, were owned by for-profit entities. Of this number, nearly half were owned by multi-facility or chain operators.[3]

Finding and retaining adequate staff is a challenge for many facilities, even though there are no federal minimum staffing requirements and relatively few states have such rules. Employee turnover also is high. A Kaiser Family Foundation study found that the average number of nursing hours of care provided in LTC facilities in 2014 was 4.0 per resident per day, compared with 3.9 in 2009. Much of that care is provided by non-licensed staff, such as nursing assistants or healthcare aides. The average amount of care provided by registered nurses in 2014, according to the Kaiser study, was 0.8 hours per resident per day, up from 0.7 in 2009.[4]

From a liability perspective, among the most common allegations by plaintiffs bringing nursing home malpractice claims are falls and pressure ulcers suffered by residents, and errors or omissions in patient charts. Modest increases in long-term care loss frequency and severity nationally are compounded by sharp increases in certain venues, including California, Florida, Illinois, Kentucky, Tennessee and West Virginia. Insurers writing long-term care risks in these areas are feeling greater financial pressure.

# Review & Outlook

Retail agents and brokers should be aware that, despite a general trend in the long-term care marketplace toward rate increases, capacity remains plentiful. The number of insurance companies competing in difficult venues may be limited to three or four, but as of now there are no indications that insurers are looking to withdraw from the long-term care market. Rather, claim frequency and severity are leading underwriters to tighten terms and conditions and seek higher retentions and rates at renewal, especially for accounts with adverse loss experience.

## CMS Mandatory Arbitration Ban Lifted

In 2015 under the Obama administration, the Centers for Medicare and Medicaid Services (CMS) promulgated a rule that would have prohibited long-term care facilities that accept Medicaid and Medicare payments from requiring residents to sign pre-dispute binding arbitration agreements. Arbitration is widely used throughout the industry as a contractual tool to reduce the time and expense of defending litigation in court.

Long-term care industry leaders and insurers believed that if the CMS rule stood it would have exposed LTC operators to more lawsuits and increased liability insurance claims at a time when the LTC sector has been struggling. Because Medicaid and Medicare are the largest payers of long-term care costs, and more than 90% of facilities nationally have Medicaid and Medicare beds, the arbitration rule would have applied to virtually all of the nation's more than 15,000 long-term care facilities. The American Health Care Association filed a lawsuit to stop CMS from implementing the rule, and the Northern District Court of Mississippi granted a preliminary injunction on November 7, 2016 against enforcement of the rule, leaving the LTC industry in limbo.

However, on June 5, 2017 under the Trump administration, CMS issued proposed revisions to its arbitration agreement requirements for LTC facilities removing the Obama administration's arbitration ban and resolving the uncertainty facing the LTC industry.[5]

# Claims Considerations

In long-term care claims, tail liability is growing as claims take longer to close. For example, it is not uncommon to see open claims in 2017 in certain jurisdictions that were initiated in 2007 or 2008. The tail on many long-term care claims is 36 months or longer. Part of the reason for this is a lag in reporting. As a result, the amount of time between the loss occurrence and the reported date may be 18 months or longer. An actuarial study of long-term care claim trends, found that, on average, 71.2% of claims were reported within 12 months, 92.2% within 12 to 24 months, and 98.2% were reported within 24 to 36 months of occurrence.[6]

Other trends are influencing LTC claim activity. These include:

- A reduction in aggressive litigation of LTC claims. Few lawsuits proceed to trial; as in other types of liability claims, the vast majority are settled before reaching court.
- Low deterrence of plaintiffs. The fact that almost all LTC lawsuits settle does not deter plaintiffs from filing suits.
- High employee turnover. A high rate of employee turnover in the LTC sector tends to provide plaintiffs' attorneys with a ready supply of witnesses whose testimony in depositions or court can be unfavorable to defendants. A 2014 American Health Care Association study found that the median turnover rate for all employees in U.S. skilled nursing facilities was 43.9% and greater than 50% for direct care providers such as registered nurses and certified nursing assistants.[7]

# Difficult Venues

States with plaintiff-friendly legal venues are continuing to see large awards and settlements for long-term care lawsuits. For example:

- A Florida jury in 2013 awarded $1.1 billion to the family of a 69-year-old woman who fell at an Auburndale, Fla., nursing home and received poor supervision prior to her death in 2007. The award comprised $110 million in compensatory damages and $1 billion in punitive damages.
- A Madison County, Ky., court in 2015 awarded $18 million in a wrongful death and neglect case to the family of an elderly woman who died after developing bed sores and infections.
- A judge in Kanawha County, W.Va., in 2013 upheld a $90.5 million medical malpractice verdict against the corporate owner of a nursing home after one of its residents was alleged to have fallen, developed sores and suffered severe dehydration prior to her death.

Other venues that have seen increases in claim severity above the national average include California; Cook County, Ill.; New Jersey; and Tennessee.[8]

# Placement Considerations

As the marketplace shifts toward a more stable rate environment, with some increases, retail agents and brokers should prepare their clients accordingly to manage expectations. A question that retailers should consider carefully is whether their insureds have adequate coverage limits for the venues in which they operate. In locations where underwriters prefer larger retentions, an insured may unintentionally assume more risk by not adjusting coverage to the current exposure. Underwriters will usually give more favorable consideration to accounts that demonstrate efforts to manage their risks. As in most lines of business, agents and brokers that invest time to collect and present compelling submission data will achieve the best results for their insureds.

Local knowledge and fact-specific information, especially in the more challenging venues, will be important to obtain the best rates, terms and conditions. Accounts with average to better-than-average loss experience have generally achieved favorable renewals.

Underwriters have become stricter on risks with adverse loss experience. For accounts with prior claims, the ability to demonstrate risk mitigation will be paramount for successful renewals. Retailers should encourage insureds to take a more active role in managing their facilities' perception by the public. Heightened awareness of long-term care facilities can lead to unfavorable media coverage and potentially attract the attention of state regulatory authorities.

Working with an expert wholesale partner to navigate the insurance market and obtain appropriate coverage, particularly in those more challenging venues, is a sure way for retail agents and broker to achieve the right solution for their insureds. For more information and insights about long-term care and other sectors, please contact your CRC Group representative.

## NURSING HOME USE, HIGH AND LOW

Use rate per 1,000 residents aged 85 and over*

U.S. average: 87

| FIVE HIGHEST USE RATES: | |
|---|---|
| North Dakota | 166 |
| Iowa | 159 |
| South Dakota | 156 |
| Rhode Island | 151 |
| Nebraska | 134 |

| FIVE LOWEST USE RATES: | |
|---|---|
| Arizona | 26 |
| Alaska | 27 |
| Oregon | 27 |
| Nevada | 33 |
| Utah | 43 |

*A "use rate" is the statistical number of people in a given segment (e.g. elderly people) who are enrolled in nursing homes. In this graphic, 166 of every 1,000 people age 85+ are in nursing homes in North Dakota.

*Source: National Center for Healthcare Statistics, 2013-2014 National Study of Long-Term Care Providers; https://www.cdc.gov/nchs/data/nsltcp/2014_nsltcp_state_tables.pdf*

## For-Profit Ownership

The vast majority of U.S. certified nursing facilities in 2014 were owned by for-profit entities.

For-Profit .................................. 69%
Non-Profit .................................. 24%
Government-Owned ................. 6%

## Facility Revenue Sources

In 2014, the majority of residents in certified nursing facilities used Medicaid as the primary payer.

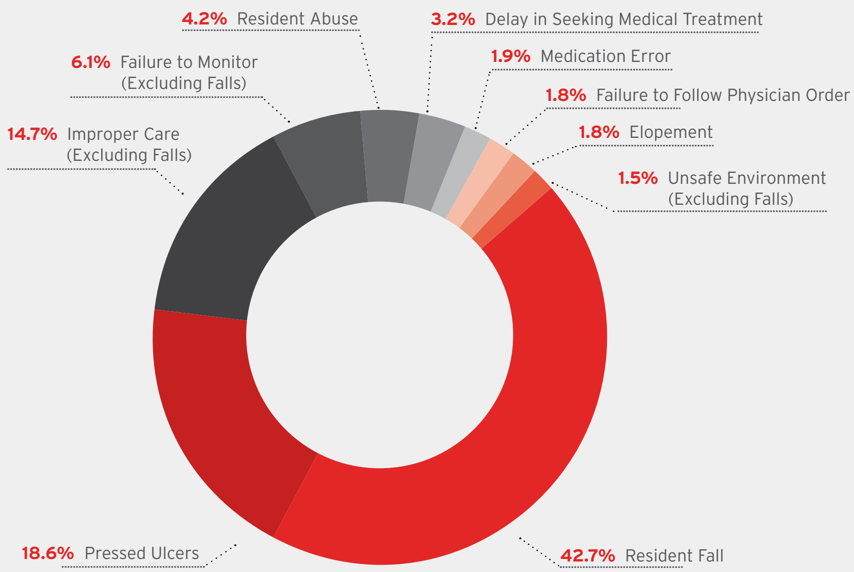
Medicaid ..................................... 62.5%
Medicare ..................................... 14.2%
Private Payer/Other .................. 23.3%

*Source: Kaiser Family Foundation*

### FREQUENCY OF CLAIMS BY ALLEGATION

Percentage of closed claims in 2015 against aging services centers (including skilled nursing, assisted living, independent living and other facilities)

*Source: CNA Aging Services 2016 Claim Report*




For more information, contact your CRC, CRC Swett or SCU broker.
To find a conveniently located broker visit us on the web at:
**crcins.com, crcswett.com or scui.com.**

# Endnotes


1. United States Department of Health and Human Services, "Long-Term Care for the Boomers: a Public Policy Challenge for the 21st Century." See: http://aspe.hhs.gov/basic-report/long-term-care-boomers-public-policy-challenge-twenty-first-century

2. United States Department of Health and Human Services, "Long-Term Care for the Boomers: a Public Policy Challenge for the 21st Century." See: http://aspe.hhs.gov/basic-report/long-term-care-boomers-public-policy-challenge-twenty-first-century

3. Kaiser Family Foundation, "Nursing Facilities, Staffing, Residents and Facility Deficiencies, 2009 through 2014"; https://kaiserfamilyfoundation.files.wordpress.com/2015/08/8761-nursing-facilities-staffing-residents-and-facility-deficiencies.pdf

4. Kaiser Family Foundation, "Nursing Facilities, Staffing, Residents and Facility Deficiencies, 2009 through 2014"

5. CMS.gov Centers for Medicare & Medicaid Services, "CMS Issues Proposed Revision Requirements for Long-Term Care Facilities' Arbitration Agreements"; https://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2017-Fact-Sheet-items/2017-06-05.html?DLPage=1&DLEntries=10&DLSort=0&DLSortDir=descending

6. Aon Global Risk Consulting, "2016 Long Term Care General Liability and Professional Liability Actuarial Analysis," November 2016; http://www.aon.com/forms/2016/2016-long-term-care-form.jsp

7. American Health Care Association, "AHCA 2012 Staffing Report"; https://www.ahcancal.org/research_data/staffing/Documents/2012_Staffing_Report.pdf

8. Aon Global Risk Consulting, "2016 Long Term Care General Liability and Professional Liability Actuarial Analysis"