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THE INCREASING NUMBER OF CLAIMS FOR VIOLATION OF RESIDENT'S RIGHTS AND ITS IMPACT ON LIABILITY COSTS

by: Regina A. Casey, Esq.

A recent study by Aon Risk Solutions, in partnership with the American Health Care Association, found that long term care liability costs are rising as a result of the average claim size increasing—despite the fact that claim frequency is decreasing. In its study, Aon found that the average claim size has increased four percent, and nationwide, liability claims have risen from an average of \$125,000 in 2005 to \$153,000 in 2010. This increase in claim size is important to long term care providers, especially when coupled with the uncertainty of Medicare and Medicaid funding and reimbursement.

In California, the liability cost for long term care facilities is higher than the national average. California has a projected loss rate per occupied long term care bed of \$2,020 in 2011, which is the fourth highest loss rate in the study. The projected average liability cost for 2011 is \$192,000.

Why are liability costs in California among the highest in the country when California caps non-economic damage awards at \$250,000? One reason is California's elder adult protection law. Enacted in 1991, The Elder Abuse and Dependent Adult Civil Protection Act (EADACPA, Cal. Welfare & Institutions Code Sections 15657-15657.7) provides a tool for the plaintiffs' bar to circumvent the limitation on the recovery of non-economic damages in individual cases of elder abuse by placing an emphasis on the "custodial" rather than the "professional" nature of long term care, thereby enabling plaintiffs to get around the protections normally afforded healthcare providers.

Now comes proposed legislation SB 558 (Simitian), which will fundamentally change the way juries decide elder abuse cases by establishing a lesser standard of proof from "clear and convincing" to a "preponderance of the evidence" by amending EADACPA. Not only has tort reform in California been ineffectual in protecting the long term care industry, but recent legislation is increasing the burden for providers to defend themselves.

Another reason claim severity may be increasing in California is the recent rise in claims for alleged violations of resident rights, as Health and Safety Code Section 1430(b) creates a civil cause of action for these violations. In addition to claims for elder abuse and negligence, now plaintiffs are including separate causes of action for violating resident rights under 22 C.C.R. Section 72527. In addition to alleging that defendants failed to keep plaintiff free from mental and physical abuse; failed to provide good personal hygiene; and failed to treat plaintiff with dignity, thus violating his or her rights, plaintiffs are routinely claiming defendants failed to employ, train and/or supervise an adequate number of staff violating 22 C.C.R. Section 72527(a)(24) and Health and Safety Code Section 1599.1(a).

With the lesser burden of preponderance of the evidence, plaintiffs will simply need to present testimony of a family member that the resident was allowed to lay in soiled sheets for long periods of time to persuade a jury to conclude the resident's rights were violated.

If staffing is below 3.2 PPD at any time during the plaintiffs residency, plaintiffs counsel will be confident they will be able to recover attorney fees and costs under Health and Safety Code Section 1430(b), even if elder abuse is not established, thus reducing counsel's risk of taking a case to trial. Therefore, if a long term care facility finds itself in the unfortunate circumstance of having elder abuse litigation levied against it, reaching a reasonable settlement will be more challenging when violations of residents rights are raised.

How do you prevent plaintiffs counsel from inflating the settlement value of a case by arguing insufficient staffing? If staffing appears to be below minimum statutory requirements, then shift the focus of the case from statistical staffing ratios to the actual care that was provided. Emphasize the care documented in the chart that clearly shows the resident's needs were met. If documentation is poor, then rely on the testimony of the various care providers to establish that appropriate care was in fact given.

The best approach to preventing the upward spiral of liability costs is to maintain good documentation of the care provided in the facility record as well as maintain documentation of sufficient staffing and training of personnel to counter claims of violations of resident rights and substandard care.

About the Author:

A shareholder at Wroten & Associates, Regina Ann Casey has been defending physicians, hospitals and various other healthcare providers for over 20 years. Previously serving as a litigation partner at an East Coast firm with offices in Maryland and Washington D.C., she then worked with a West Coast medical malpractice defense firm. She has been with Wroten & Associates since it was founded.

Ms. Casey has successfully defended medical malpractice cases in federal and circuit courts in Maryland. She has also tried cases in the U.S. District Court and Superior Court for the District of Columbia, and in California's Superior Court. She has participated in a number of arbitrations and is a mediation specialist. She has represented physicians in administrative hearings before the Medical Board in Maryland and at hearings to defend physicians' hospital privileges.

She graduated magna cum laude from Duke University earning a Bachelor of Science in Nursing in 1975. After working as a nurse at the University of Virginia and Georgetown University Hospitals, she earned her Master of Science in Nursing at Catholic University America, where she was a member of the Nursing Honor Society, Sigma Theta Tau. She graduated with honors from the University of Maryland Law School and was admitted to the Maryland Bar in 1986; the District of Columbia Bar in 1987, and the California Bar and U.S. District Court for the Central District of California in 2001.