Senior Living Liability Insurance

How to navigate rising insurance costs and increased claims litigation

By Andrew Haake

Introduction: State of the senior living industry

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The total market capitalization of the senior living industry, including housing and care facilities, is estimated to be approximately $475 billion in the United States alone, according to the nonprofit National Investment Center, which connects investors and providers with data analytics to support access and choice for America's seniors. While this estimate from the close of 2019 points to a healthy industry, it is also an industry facing the headwinds of rising loss severity, social inflation, and an active plaintiffs' bar, all of which present threats to net operating income and the potential for reduced market capacity.

COVID-19 complicated an already-hardening market as the elderly proved highly susceptible to the disease and, tragically, the death toll soared. As a result, insurance carriers pulled back, sharply increasing rates and retentions, reducing limits, and adding new exclusions. Lockton Vice President and Health Care Practice leader Elizabeth Spink notes that the COVID-19 concern extends beyond pricing to the specter of increased deductibles and reduced capacity. "Carriers are looking at potential mass litigation and assessing how they can price for the exposure," Spink says. "Exclusions are changing with particular emphasis around communicable disease and punitive damages."

In this environment, it is not surprising that underwriters are asking more questions, and that risk quality has become an increasingly important factor in simply getting terms. Progress will require a steady blend of market engagement, risk mitigation, and strategic planning. This Lockton whitepaper is intended to assist those in the senior living industry in better understanding common risk factors and how the industry's risk may be effectively mitigated and transferred.

Risk profile: Senior living sector

The most significant risk in the senior living sector is the rise of aggressive litigation leading to increased claim severity. Over the past 5 years, plaintiff-friendly legal venues across the nation have been a key cause of cost increase. Some of the most challenging jurisdictions include Arizona, California, Florida, Illinois, Kentucky, New Jersey, New Mexico, New York, and West Virginia. Personal injury attorneys are generally aggressive in their pursuit of plaintiffs and have become highly sophisticated in their approach. In some cases, personal injury claims are financed by, or coordinated with, third-party litigation funds.

As a result, very large awards or settlements for allegations of negligent care and wrongful death have become common in venues that do not cap damages. Given the trauma experienced by families who have lost a loved one in ways deemed attributable to inadequate care, these awards may reach astronomical proportions among juries that follow instructions to "send a message" to a senior living provider (see Figure 1). These increased payouts have had a profound effect on carrier profitability, leading many to revamp their pricing models or exit the sector altogether.

As one senior living industry leader, Joseph Marinelli of Anthology Senior Living, notes, "Unfortunately, the layperson on a trial jury often does not understand or fully appreciate the care dynamics of our communities, the frailty of our residents, and the economic challenges of one-on-one 24/7 care."

FIGURE 1: COSTLY AWARDS IN RECENT SENIOR LIVING LAWSUITS

$23 million
in California

Awarded in 2013 to the estate of a nursing home resident who died 10 weeks after being moved to a skilled nursing facility

$200 million
in Florida

Awarded in 2012 to the estate of a nursing home resident in a wheelchair who died upon falling down a staircase

$28 million
in Kentucky

Awarded in 2017 to a resident of a skilled nursing facility for injuries and pain deemed attributable to inadequate care

Sources: Grunbaum, Rami. "$23M verdict stings Seattle-based assisted-living giant Emeritus," Seattle Times, April 6, 2013; Tampa Bay Times, "Who should pay the $200 million for nursing home death? It's complicated," February 4, 2012; Callais, Krystle, "McCracken County nursing home found guilty of negligence," WPSD, September 29, 2017.

Anthology Senior Living is the senior living platform of CA Ventures, which develops, acquires, and operates best-in-class senior living communities throughout the United States. Marinelli suggests that the plaintiff's bar litigators preys on jurors' lack of knowledge of the senior living operating environment. A Lockton client, he adds, "It is critical for operators to have sophisticated and experienced advisors who are dedicated to the senior living space."

While any of life's inherent risks may arise in a senior living setting, there are also some common causes that experience has shown underlie many senior living litigations and settlements. Two of the most common risk factors in the field are high staff turnover and resident frailty.

Staff turnover

While the senior care industry has grown rapidly as the U.S. population has aged, senior care has historically struggled to retain employees, especially registered nurses and certified nursing assistants. The COVID-19 pandemic only magnified this challenge, as the demand for skilled healthcare talent skyrocketed. A steady increase in the expenses associated with recruiting, training, and compensating staff have eroded profitability for facility operators and made it more difficult to deliver consistent quality of care. Meanwhile, medical advances have prolonged life for many seniors, creating increased demand for senior care. With a greater percentage of the population seeking senior care coupled with an ongoing shortage of skilled care providers who are loyal to a specific facility or setting, resident care can sometimes slip, making liability claims more likely.

Resident frailty

The physical and mental acuity levels of senior living residents have changed over time. While medical breakthroughs have led to people living longer, often, those "longer" years are defined by senior living residents becoming increasingly vulnerable and requiring more care. Societal expectations around quality of life may not always match the reality faced by senior living residents, and that disconnect may not necessarily be a factor of poor quality of care. Even residents at the best senior living care facility in the world will ultimately not be immune to difficulties that are inherent in the aging process. Facing these realities can be extremely painful for loved ones, some of whom may be motivated — perhaps even subconsciously — to blame a provider for problems rather than acknowledging the mortality or increasing fragility of their loved one.

While not the only potential risk faced by senior living practitioners, the combination of resident frailty and high staff turnover is a common and dangerous recipe for unwanted outcomes. Fortunately, there are steps the sector can take to minimize such risks and align itself for successful outcomes on behalf of seniors, their families, senior living providers, and investors.

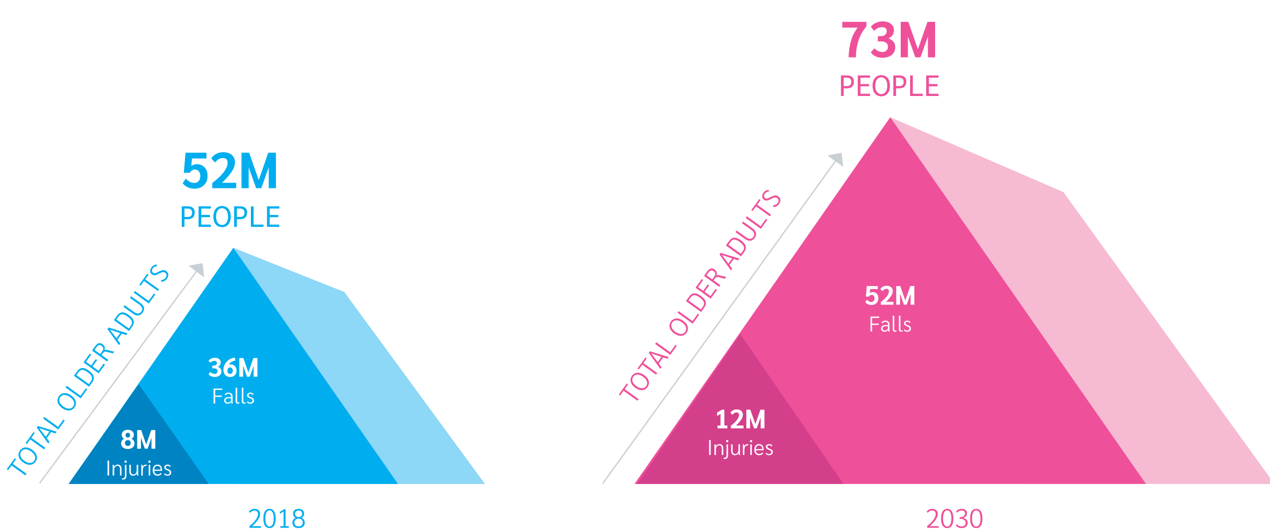
Mitigating risk and improving outcomes

Progress in the current market begins with a well-considered strategy. The first step involves retraining one's organization — and possibly oneself — to understand success as a process, rather than a destination. We are never "done" with risk management. Instead, best-in-class operators understand they must consistently attack costs through risk reduction, aggressive claim management, and efficient risk finance structures. Below, we offer some key focus areas for doing so in the senior living sector.

Reducing resident falls

Falls are the most common cause of both fatal and non-fatal injuries among older adults, **according to the U.S. Centers for Disease Control and Prevention** (CDC), and these falls have **increased 30% over the last decade.** Among the general population, the CDC projects further increases over the coming decade (see Figure 2).

FIGURE 2: PROJECTED NUMBER OF FALLS AMONG U.S. CITIZENS AGE 65+



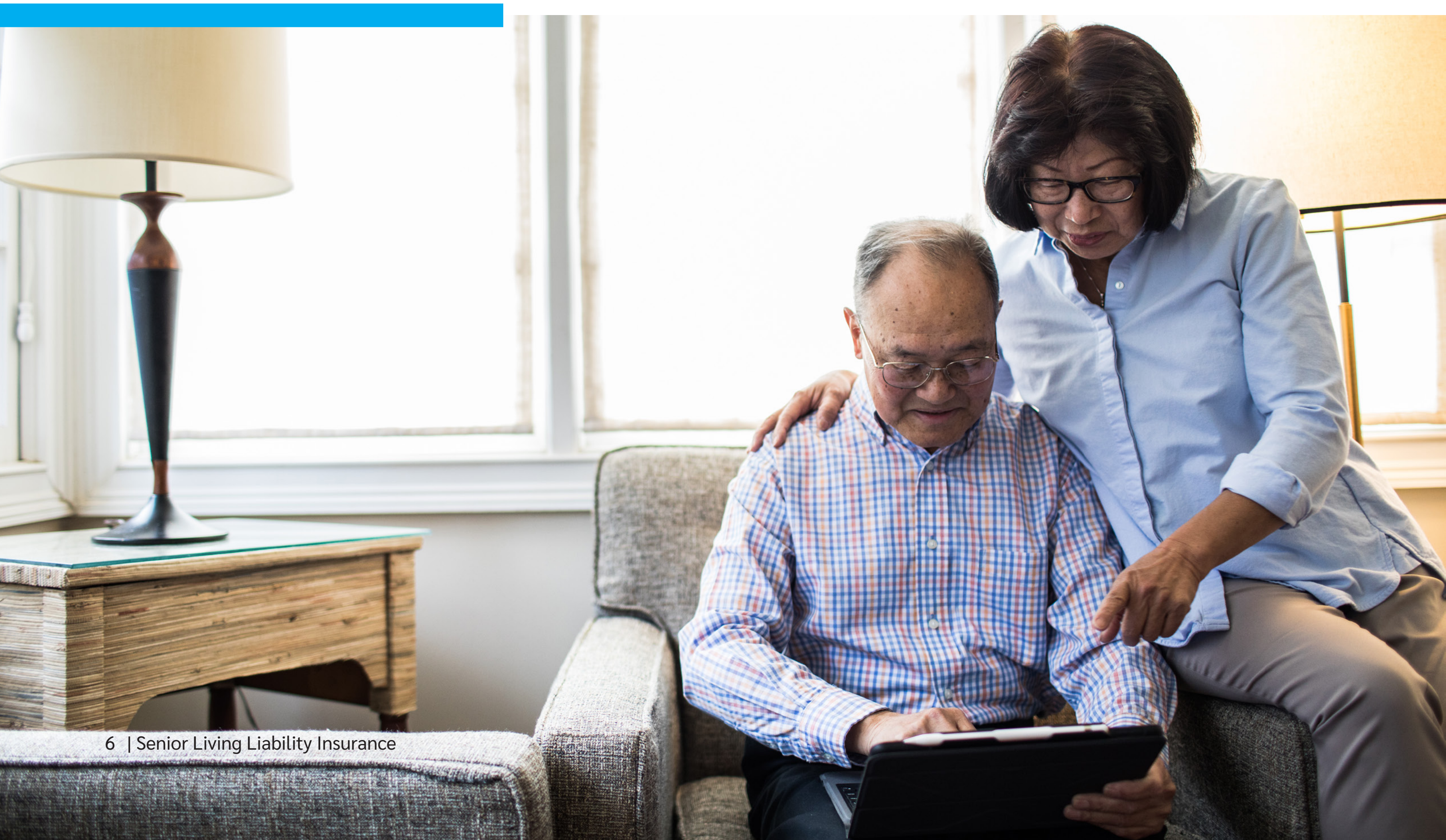
Source: U.S. Centers for Disease Control and Prevention, "Fact Sheet: Older Adult Falls," 2020.

Given these statistics in the population overall, it is not surprising that resident falls account for a plurality of claims in the senior housing industry. Failure to monitor residents is the most frequent and expensive fall-related allegation that providers face.

To reduce resident falls, senior living providers should implement a well-executed fall management program, which should include ongoing training for staff and frequent assessments for residents. Preventative interventions to reduce resident falls could include:

- Encouraging residents to review medications with physician or pharmacist to determine if any medicines may increase one's risk of falling;
- Encouraging residents to consult their doctor on health conditions that may increase one's risk of falling;
- Ensuring residents' vision is checked at least once per year, and updating lenses if necessary;
- Encouraging residents to participate in activities that strengthen legs and foster greater balance, such as yoga or Tai chi;
- Keeping facility floors clear of clutter or trip hazards;
- Installing and maintaining grab bars in bathrooms; and
- Installing and maintaining handrails and lights on staircases.

If a fall does occur, whether big or small, having in place a thorough investigation and quality control program is essential. Plan to perform a root cause analysis to understand what is going on with the resident, and any facility gaps, and put in place a personalized intervention that makes sense for that individual. Proper documentation is critical when communicating with caregivers and family members alike, as are reasonable expectations.



Creating realistic expectations

Failure to understand and manage resident and family expectations is a common source of conflict and potential litigation in the senior living sector. Continuing with our example of resident falls, for instance, let us consider a resident with vertigo; while a senior living facility may make every reasonable accommodation to try to prevent a fall, an expectation of zero falls among this inherently fall-prone resident may not be realistic. Fortunately for providers, most residents and families are willing to discuss and agree upon reasonable expectations.

To achieve shared and realistic expectations, providers must build trust via consistent, transparent communication. At the outset of care, delineate facility capabilities and realistic service goals for residents and families. Highlight progress and expectations through your communication. Allow families to ask questions and thoroughly address concerns. This will be helpful in minimizing potential sources of dissatisfaction or mistrust.

Reducing staff turnover

While clear and consistent communication will help build trust and satisfaction, frequent staff turnover may trigger the opposite effect: resident and/or family distrust. An unstable workforce may also yield diminished safety, as staffing levels that are stretched thin may impact resident monitoring. Even if exiting staff are quickly replaced, it may take a period of time for new hires to attain the appropriate level of familiarity with a facility's standard protocol and practices.

Because of the risks inherent in staff disruption, senior living providers must commit to cultivating a stable work environment. To facilitate a healthy, positive, and productive work environment, senior living operators should:

- Hire and staff facilities at appropriate levels;
- Recognize and reward the hard work of dedicated employees;
- Create a trusting and open workplace culture; and
- Encourage positive workplace friendships and connections.

Senior living providers should recognize today's market realities: skilled caregivers are in demand. As in most fields, retaining top talent has its cost, and so does losing one's top talent.

Considering arbitration agreements

In many cases involving senior living, disputes may best be settled via a mediation process outside of a courtroom. While the viability of arbitration agreements varies by jurisdiction, there is growing evidence that they can be a useful tool for settling cases. If considering an agreement, senior living providers should first understand what arbitration is and how it works. Arbitration agreements may be attractive in the senior living sector for several reasons:

- Arbitration may reduce trial uncertainty with a faster process, yielding reduced expenses for all involved.
- Arbitrators generally understand the standards of care that apply to senior living providers better than juries.
- Arbitration eliminates the risk of "runaway jury" verdicts, as arbitrated case awards very rarely reach seven figures.

Senior living providers should also understand that residents and/or families may be counseled to avoid arbitration; when the possibility of a large award such as those that make headlines is taken away, the claim may become less attractive to some plaintiffs' attorneys. Most importantly, when considering arbitration, be sure to carefully review with your attorney to ensure compliance with all requirements and applicable state laws. In addition, be sure to train your staff to ensure effective communication throughout the arbitration process.

Communicating risk prevention measures

For any policy to be successful, one's team must know it exists. In implementing any or all the risk mitigation procedures referenced herein, senior living providers should be prepared to offer a detailed update to all relevant staff as well as to underwriters. This is an opportunity to build relationships. By communicating risk prevention measures to staff, senior living providers can signal their dedication to best practices, perhaps providing an impetus to change to any employees who were previously not reaching acceptable service levels on a consistent basis. Presenting measures in an open forum may also afford an opportunity to build or enhance a positive company culture.

Communicating risk management policies to underwriters is also important. In a very real sense, underwriters are investing in senior living providers. The better an underwriter understands the risks, management philosophy, and controls, the more likely they are to provide support in difficult circumstances. In showcasing proactive steps being taken to avoid or mitigate losses, senior living providers should be prepared to itemize:

- Fall prevention protocols;
- Infectious disease actions (e.g., protocol during COVID-19);
- Inspection and risk identification techniques;
- Staff training and staffing levels;
- Family communications plans; and
- Claim explanations and future mitigation steps.

Conclusion: Efficient risk transfer in senior living

When facing the realities of the insurance marketplace, senior living organizations should proactively consult with their insurance broker to (re) assess the organization's risk-bearing capacity and risk management strategy across all lines of coverage. Begin by developing a clear-eyed view of program goals. Senior living providers should carefully review exposure alongside their insurance broker to develop a detailed analysis of retentions and limits that can help guide management decisions and focus available capacity.

Using sophisticated analytics models, senior living organizations, and brokers can identify the probability of loss at various levels and evaluate carrier offerings. Weighing proposed premiums against the true economic cost of risk can highlight both inefficiencies and opportunities. In today's senior living insurance environment, understanding coverage terms, sublimits, and deductibles that could be under pressure is key.

Senior living providers should plan for "must have" and "nice to have" risk management solutions. Additionally, senior living organizations should conduct a review of lender, partner, and management agreements to understand if certain insurance requirements will need to be negotiated. Senior living providers and insurers should also evaluate whether there is an opportunity to combine various lines with a single carrier to capitalize on pricing efficiencies.

While specific solutions will vary depending on the needs of individual providers, the senior living sector stands to benefit from greater understanding of the industry's most significant risk factors and its agency to recognize, reduce, and ride out those risks.

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