

Lawsuits and Liability Insurance Experience of Florida Nursing Facilities,
January – October 5, 2001

By

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Executive Summary

- The Florida Policy Exchange Center on Aging conducted a survey of 675 nursing facilities in the State of Florida during October-November 2001. A total of 442 facilities responded (65%). The facilities were distributed between the three regions of the state with northern region facilities responding at a higher rate (70%) compared to southern region facilities (63%). Altogether, responding facilities represent 53,976 nursing facility beds.
- Three out of five nursing facilities (62%) in Florida were sued in 2001.
- There were 702 lawsuits reported by 422 nursing facilities in the first nine months of 2001. Using new record requests as a marker for the potential number of additional lawsuits (multiple record requests for one individual are counted as one potential lawsuit), facilities reported that there were 1,621 potential additional lawsuits.
- Applying the average number of lawsuits for chain and independent facilities to the full population of nursing facilities, there could be 1,723 open and 3,033 potential lawsuits in this period, for a total of 4,756 possible lawsuits.
- Resident Rights are the primary allegation against facilities. This is true more for regional chain facilities (49.5% of lawsuits) than for other facilities. The second most common allegations were Negligence or Negligence Per Se.
- On average, facilities are paying \$147,331 for liability insurance premiums. This is highest for regional chain facilities (\$180,210) and lowest for multi-facility chains (who generally are self-insured and therefore do not pay a premium). Coverage for these facilities is limited. On average, regional chains have the lowest per occurrence limit (\$797,727). Independent facilities have the lowest deductible per claim (\$56,394). National chains have a \$2,666,667 per occurrence limit and a \$1,717,797 deductible, on average.
- The minimum average cost per bed for responding facilities is \$6,434, including premium and deductible. This does not include the cost of claims above the coverage limits.
- One out of five nursing facilities is currently uninsured. Another 36% of facilities reported that they were self-insured although it is not known if their self-insurance meet Agency for Health Care Administration (AHCA) standards. If applied to all facilities throughout Florida, there may be as many as 112 uninsured and 269 self-insured facilities operating in the state. Applying these statistics to all facilities, there could be as many as 13,643 uninsured beds and 33,068 self-insured beds (46,711 total beds) in Florida.
- Overall, 28% of facilities do not expect to renew their coverage. This varies from 2% of chain facilities to 42% of independent facilities.

- The cost of insurance premiums is not related to lawsuits or bed size. Multivariate analyses showed a nearly significant ($p=.058$) relationship between structural variables such as bed size, profit status, facility type, region of the state, etc. and the cost of insurance premiums.
- On the other hand, multivariate analyses showed a significant ($p=.001$) relationship between bed size and total lawsuits, controlling for other structural variables such as profit status, facility type, region of the state, etc. This is true, even though not-for-profits are less likely to be sued (45%) than for profits (69%). On average, not-for-profits had fewer beds (113) than for-profits (125).
- Nursing facilities are seeking alternative methods of insurance coverage including strategies such as: 1) dollar for dollar coverage (\$250,000 premium for \$250,000 aggregate coverage); 2) creating captives; 3) seeking state approval of savings deposited toward bond programs (self-insurance); and 4) de-licensing unused beds.
- The Central region of the state has significantly higher numbers of recent and potential lawsuits. Facilities in this area are in the middle in terms of annual premiums but have the highest per occurrence and aggregate coverage limits. Policy deductibles for this area are the highest in the state. The central region also has the lowest percentage of facilities that are uninsured (16%) compared to the other two regions but this difference is not significant.

Background¹

The state of Florida has faced a growing nursing facility liability insurance crisis for the past four years. In part, this crisis has been due to Chapter 400 statutes that provided for 1) rights of nursing facility residents coupled with civil enforcement procedures that allowed for lawsuits to be filed for an infringement of any of the rights (most notably the “right to adequate and appropriate health care”) without proving negligence, and 2) attorneys’ fees paid in addition to any awarded damages.

In 1997, Florida’s legislature first addressed the litigious atmosphere for businesses (not just in the areas of nursing facilities and healthcare); however, no reforms were passed. In 1998, tort reform was passed in Senate Bill 874, however the bill was vetoed by Governor Lawton Chiles on the grounds that it gave unfair advantage to big business and did not adequately compensate innocent victims in its provisions. In the 1999 legislative session, House Bill 775, “Civil Action,” passed and was signed by Governor Jeb Bush. HB 775 addressed joint and several liability, punitive damages, vicarious liability of motor vehicle owners, and statutes of repose involving product liability. This legislation also included limits on punitive damages for the majority of lawsuits. However, HB 775 provided exceptions for punitive damage limits and legal action requirements for cases involving abuse of children, developmentally disadvantaged persons, the elderly, Chapter 400 cases, or cases involving intoxicated defendants. In effect, HB 775 did not impact nursing facility litigation.²

Insurance carriers began to discontinue nursing facility coverage altogether or increase their premiums by as much as 1000%, causing facilities to go without insurance and to be exposed to the risk of closing due to financial losses sustained from lawsuits. In February 2000,

¹ The authors would like to thank Stefanie Thompson, B.A. for her invaluable assistance with this study.

² Peck, R. S., R. Marshall, et al. (2000). Tort reform 1999: A building without a foundation. Florida State University Law Review 27 Fla. St. U.L. Rev. 397, 397-445.

it was estimated that nine percent of Florida nursing facilities were uninsured.³ Nursing facilities had experienced decreased insurance coverage, increased deductibles, and a shift in coverage type from occurrence to claims-made. Since February 2001, there have been no admitted insurance carriers (those regulated by the Department of Insurance) offering nursing facility liability coverage. Surplus insurance carriers have effectively stopped writing policies in the state. An insurance industry analyst found that for-profit multi-facility chains were paying \$12,700 a bed in 2000 for all legal costs and claims which was 12 times more than the average loss cost in the other 49 states.⁴

In an effort to address these and other issues related to long-term care in the state, the Florida legislature passed House Bill 1993 in May 2000, creating the Task Force on the Availability and Affordability of Long-Term Care. The Task Force undertook four major areas of study including nursing facility alternatives, financing long-term care, improving nursing facility quality, and the impact of litigation and liability insurance for the state's nursing facilities.

Staff research found that lawsuits were widespread in one representative county (Hillsborough). There were 456 lawsuits filed during a ten-year time period with 81% of all cases filed after 1995. Between 1996 and 2000 the average lawsuit settled out of court for approximately \$462,000.⁵ At the time of the study, the only correlation between facilities and numbers of lawsuits was number of beds – more beds were associated with greater lawsuit activity. Further analysis found that being a nursing facility chain member and having been sued

³ Florida Policy Exchange Center on Aging. (2001). Informational report of the Task Force on Availability and Affordability of Long-Term Care for the Florida Legislature in Response to House Bill 1993. Tampa, Florida.

⁴ Bourdon, T. W. and S. C. Dubin (2001). Florida long term care, general liability and professional liability, Actuarial analysis, Aon Risk Consultants, Inc.

⁵ Hedgecock, D. K., C. E. Johnson, et al. (2001). Hillsborough county, Florida nursing facility litigation 1991-2000. Annual Meeting of the Gerontological Society of America, Chicago, Illinois.

previously also increased the probability of being sued. Facilities meeting the Centers for Medicare and Medicaid Services (CMS) recommended minimum licensed RN staffing level had a decreased risk of being sued. There was no relationship between quality deficiencies and number of lawsuits.⁶

Research conducted in other regions of Florida supported these findings. In February 2001, the *Sun-Sentinel* and *Orlando Sentinel* concluded a four-month investigation of eight counties in south and central Florida, reviewing five years of data. Their research revealed that 924 lawsuits had been filed in those counties with a 300% increase between 1996 and 1999.⁷ The Florida Association of Homes for the Aging (FAHA) and Florida Health Care Association (FHCA) conducted a study in February 2001 and found that 70% of responding nursing facilities had at least one open lawsuit and approximately 90% were facing potential lawsuits. They estimated that statewide the potential number of lawsuits (based upon record requests) could total 2,893 for 2001.⁸

As a result of this research, the Task Force considered legislative recommendations that were included in Senate Bill 1202: 1) decrease the four-year statute of limitations; 2) remove the add-on attorney fees provision of Chapter 400; 3) require residents' rights and all nursing facility-related lawsuits to be tried using a new negligence standard; and 4) limit punitive damages. Senate Bill 1202 passed May 4, 2001 and, among other provisions, resulted in tort reform for nursing facilities.

⁶ Johnson, C. E., D. K. Hedgecock, et al. (2001). Predictors of lawsuit activity against nursing facilities in Hillsborough county Florida. Annual Meeting of the Gerontological Society of America, Chicago, Illinois .

⁷ Groeller, G. & Lamendola, B. (2001, March 3). Skyrocketing suits spur crisis in care. [Sun-Sentinel](#).

⁸ The Florida Association of Homes for the Aging & Florida Health Care Association (2001). Nursing facility tort survey.

As of May 15, 2001, alleged nursing facility complaints that occurred on or after that date are covered under the revised Chapter 400 statutes. Complaints against facilities for incidents that occurred before May 15 had until October 5, 2001 to be eligible to file under previous Chapter 400 punitive damage provisions. Actions for damages against a nursing facility must be initiated within two years with a four-year repose from the time an incident is discovered or should have been discovered. Exceptions include fraudulent concealment or intentional misrepresentation of facts by the facility. In these circumstances, the statute of limitations can be extended up to six years.

Punitive damages are now limited to three times the amount of awarded compensatory damages or \$1 million (whichever is higher) unless it can be proven that a defendant knowingly participated in actions that had a high probability of causing injury to a resident. In such an instance, punitive damages are four times compensatory damages or \$4 million (whichever is higher). There are no punitive damage caps for gross negligence (intention to harm). Attorney fees, including for personal injury or wrongful death lawsuits, have been eliminated, except in cases seeking injunctive relief or administrative remedy. In such cases, attorney fees are limited to \$25,000. Any awarded punitive damages will be equally divided between claimants and a Quality of Long-Term Care Facility Improvement Fund.

Another key modification in SB 1202 is a new negligence standard which is now the exclusive remedy for resident's rights violations and requires claimants to prove by a preponderance of evidence that the defendant owed a duty to the resident, breached that duty and in so doing caused loss, injury, death or damage to the resident. Lawsuits involving the death of a resident can be filed as either a wrongful death or a negligent survival claim, but not both as was previously possible under the old statutes.

Finally, nursing facilities are required to have liability insurance as of January 1, 2002.

Research Questions

The Florida Health Care Association contracted with the Florida Policy Exchange Center on Aging to conduct a follow-up survey with all Florida nursing facilities in order to understand the extent of lawsuit activity and the availability and affordability of liability insurance. The survey included questions regarding litigation activity from January 1, 2001 through May 14, 2001 (prior to SB 1202) and from May 15, 2001 through October 5, 2001 (the last day for filing lawsuits under previous punitive damage provisions in Chapter 400.023 statutes). These questions included numbers of new, resolved and potential lawsuits; details of allegations and claim causes in any newly filed lawsuits; and the cost of and availability of liability insurance.

Research Methods

The research study was approved by the University of South Florida Institutional Review Board (#99.843). The Florida Nursing Facility Litigation and Liability Insurance Survey (Appendix A) and letters of support were mailed to 676 nursing home facilities on lists available from FHCA and the Agency for Health Care Administration. Of these, 63% were members of multi-facility chains. For this study, chain facilities have been coded either “National” (39%) or “Regional” (24%). A facility has been considered National if it is owned by a chain included in American Health Care Association’s (AHCA) list of top 25 multi-facility chains. A facility that is a member of an organization having financial interest and/or management control of more than ten facilities or more than 1,202 beds in one or more states or geographic areas but is not included in AHCA’s top 25 multi-facility chains list has been coded Regional. Facilities have been coded as “Independent” if the facility owner has financial interest and/or management

control of less than 11 facilities or less than 1,201 beds. Corporate offices, as identified by FHCA, for Florida chain facilities were also contacted by mail, receiving the same survey package along with a computer disk containing an Excel spreadsheet for each corporately owned facility to make it easier to respond. A follow-up reminder FAX was sent out to all facilities and corporate headquarters that had not yet returned their surveys and follow-up telephone calls were made one week later.

The numbers of lawsuits presented here are likely undercounts of actual lawsuits filed by October 5, 2001. There can be a 120-day period from an official complaint filing until a facility receives notification. The Center has conducted on-going research in the Hillsborough County Circuit Court by identifying lawsuits filed against nursing facilities. Therefore, we calculated an accuracy ratio for 15 nursing facilities that responded to the survey from that county. Overall, Hillsborough County facilities in this survey over-reported by 23% the number of lawsuits actually filed against them from January 1 through May 15, 2001 and underreported by 30% the number of lawsuits that were in fact filed against them from May 15 through October 5, 2001. Under and over reporting are likely due to the delay in notification of recently filed lawsuits. So in the first five months of 2001, facilities appeared to be reporting some lawsuits that were filed in 2000. In the second five months, some facilities had not yet been notified of all newly filed lawsuits by October 5, 2001, the survey's ending date for reporting new lawsuits. For example, one corporate legal advisor noted that three weeks after the return of their survey, the chain was notified of 20 additional lawsuits, all filed before October 5, 2001. Some of those lawsuits were filed in early September.

Response Rate

Of Florida's total 675 facilities that were in operation at the time of the survey, 442 (65%) responded (Table 1). The response rate for national chains (70%) was better than the rate for independents (58%). All of the government-sponsored facilities responded. As displayed in Table 2, the facilities were mostly for profit (77%) including 42% national multi-facility chains, 25% regional multi-facility chains, and 33% independents.

Table 1
Response Rate

	Chain		Independent	Government	Total	Total Beds
	National	Regional				
Number Mailed	260	164	245	7	676	82,694
Out of Business			1	0	1	120
Final Sample	260	164	244	7	675	82,574
Responded	183	110	142	7	442	53,976
Response Rate	70%	67%	58%	100%	65%	65%

Table 2
Distribution of Sample by Profit and Chain Status

	National Chain	Regional Chain	Independent	Total
Not-For-Profit	1%	6%	15%	23%
For Profit	41%	19%	18%	77%
Total	42%	25%	33%	100%

The responding facilities were distributed equally between the three regions of the state (Table 3) as designated by the Agency for Health Care Administration (Appendix B). The geographic representation of responding facilities is similar to that in FAHA's earlier Nursing Facility Tort Survey.⁹ There was better representation of northern facilities (70%) than of southern facilities (63%).

⁹ Florida Association of Homes for the Aging et al. (2001).

Table 3
Geographic Representation

	Total Facilities	Facilities Responding	Pct of Total Facilities	Beds Represented
Northern Region	199	139	70%	16,339
Central Region	242	156	64%	19,266
Southern Region	234	147	63%	18,371
Total	675	442	65%	53,976

The initial mailing was followed-up with a FAX to non-responders and then personal phone calls. Those who responded after the phone calls were coded “late responders.” There were no significant differences between these facilities on most indicators (bed size, average number of lawsuits, annual liability premium) but late responders were more likely to be a member of a national chain or an independent facility and less likely to be a regional chain and to have purchased liability insurance (Table 4). These characteristics are likely to describe the 35% of facilities that did not respond to the survey as well.

Table 4
Response Rate Bias

	Facilities Responding to Question	Early Responders	Late Responders	Sig.
	<i>N=442</i>	<i>N= 256</i>	<i>N= 186</i>	
For Profit	435	77%	77%	
National Chain	435	38%	47%	***
Regional Chain	435	37%	9%	
Independent	435	25%	44%	
CCRC-Affiliated	207	18%	33%	
Faith-Based	301	14%	20%	
Currently Purchase Liability Insurance	359	75%	47%	***
Average N Beds	442	122	122	
Average N Lawsuits January 1-May 14	356	.72	.94	
Average N Lawsuits May 15-October 5	359	.93	1.03	
Average Annual Liability Premium	224	\$145,903	\$145,590	

***p<.001

Findings

The survey addressed: the extent of litigation activity, the nature of lawsuits in terms of the allegations and causes for claims, and the availability and costs of liability insurance. These findings are compared between for-profit vs. not-for-profit facilities and national, regional multi-facility chains and independent facilities. Table 5 is a display of the numbers of lawsuits reported by facilities. For this table only, statistics include summary data supplied by two national multi-facility chains which did not provide responses per facility. The remaining tables include data at the facility level only.

Table 5
Total Number of Lawsuits January - October 5, 2001

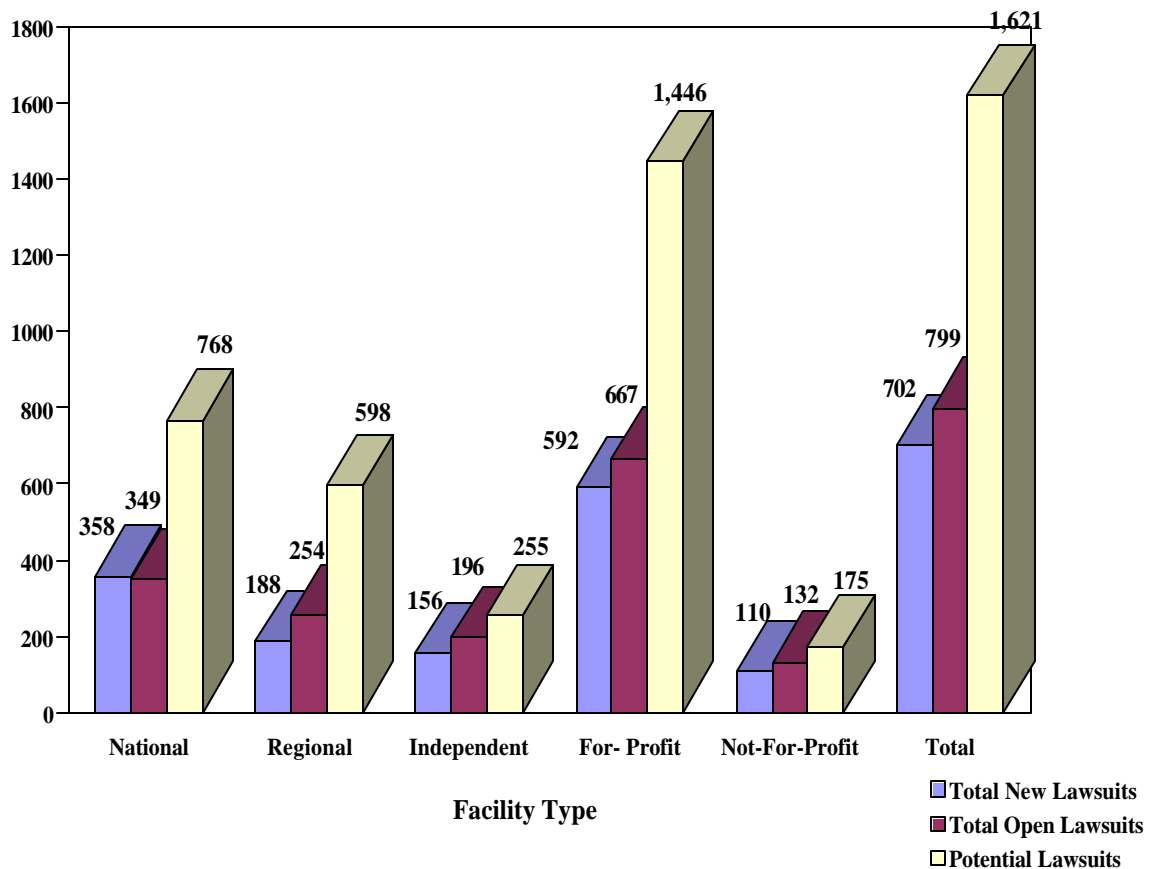
	Natl Chain ¹	Reg Chain	Independent	For-Profit ¹	Not-For-Profit	Total
<i>Facilities Reporting:</i>	<i>N=176</i>	<i>N=110</i>	<i>N=136</i>	<i>N=324</i>	<i>N=98</i>	<i>N=422</i>
New Lawsuits January 1 - May 14, 2001	187	71	70	282	46	328
New Lawsuits May 14 - October 5, 2001	171	117	86	310	64	374
Total New Lawsuits	358	188	156	592	110	702
Total Resolved Lawsuits	166	60	52	248	30	278
Total Resolved Before Jury Trial	106	54	48	178	30	208
Total Resolved at Jury Trial	1	2	1	2	2	4
Potential Lawsuits	768	598	255	1,446	175	1,621
Total Open Lawsuits as of October 5, 2001	349	254	196	667	132	799

¹Includes summary data from facilities from two for-profit national chains that did not provide facility level data.

The 422 facilities that answered these questions reported 702 new lawsuits in the first nine months of 2001 (Table 5; Figure 1). Of these, 62% had been sued at least one time in 2001, including 22% with one lawsuit, 17% with two lawsuits, and 23% with three or more lawsuits in the first nine months of 2001 (not displayed). Overall, by October there were 799 open lawsuits.

In addition to a probable under-reporting, there are likely to be more lawsuits in the pipeline as reported later.

**Figure 1
Lawsuits**



Comparing facilities only by mission, not-for-profits are less likely to be sued (45%) than for profits (69%; not displayed) and have fewer lawsuits on average. For-profit facilities had significantly higher average numbers of lawsuits prior to May 15, 2001 (Table 6) when Senate Bill 1202 and the first tort reform provisions became law (.95) compared to not-for-profit or independent facilities (.47). There was a slight average increase in lawsuits from May 15 to October 5 after the final set of tort reforms became law (average of 1.11 lawsuits per for-profit facility). The “delay factor” described earlier is likely to be influencing these averages. The

significant differences between not-for-profits and for profit facilities become non-significant when other variables, such as bed size, are included in the analyses (see page 20 below). For profit facilities in this study, on average, had more beds (125) than not-for-profits (113).

Table 6
Average Number of Lawsuits (January - October 5, 2001)

	Natl Chain	Reg Chain	Independ- ent	Sig.	For- Profit	Not- For- Profit	Sig.
	<i>N=114</i>	<i>N=110</i>	<i>N=136</i>		<i>N=262</i>	<i>N=98</i>	
New Lawsuits January 1- May 14, 2001	1.36	.65	.51	***	.95	.47	**
New Lawsuits May 14 - October 5, 2001	1.33	1.06	.63	***	1.11	.65	**
Total Lawsuits	2.69	1.71	1.15	***	2.06	1.12	***
Potential Lawsuits	6.16	5.75	2.00	***	5.28	1.94	***
Total Open Lawsuits as of October 5, 2001	3.67	2.40	1.54	***	2.71	1.43	***

*** $p < .001$, ** $p < .01$

Based on record requests, reporting facilities face 1,621 potential new lawsuits. For-profit facilities reported an average of 5.3 residents for whom there have been one or more record requests which may lead to further lawsuits while not-for-profits reported 1.9 (Table 6).

National chains reported an average of 6.2 potential lawsuits; regional chains reported 5.8; and independents reported 2. If the averages of reporting nursing facilities are applied to all facilities in the state (Appendix C), there are at least 1,723 open lawsuits and there could be as many as 3,033 potential lawsuits based on the number of individual facilities by number of separate record requests that have been made.

Table 7
Resolved Lawsuits (January - October 5, 2001)

	Natl Chain	Reg Chain	Independ-ent	Sig.	For Profit	Not-For-Profit	Sig.
	<i>N=114</i>	<i>N=110</i>	<i>N=136</i>		<i>N=262</i>	<i>N=98</i>	
Settled before jury trial	.19	.51	.39		.43	.34	*
Settled by jury trial	.00	.02	.01		.01	.03	
Total Resolved Lawsuits	.99	.57	.41	*	.71	.34	*

* $p < .05$

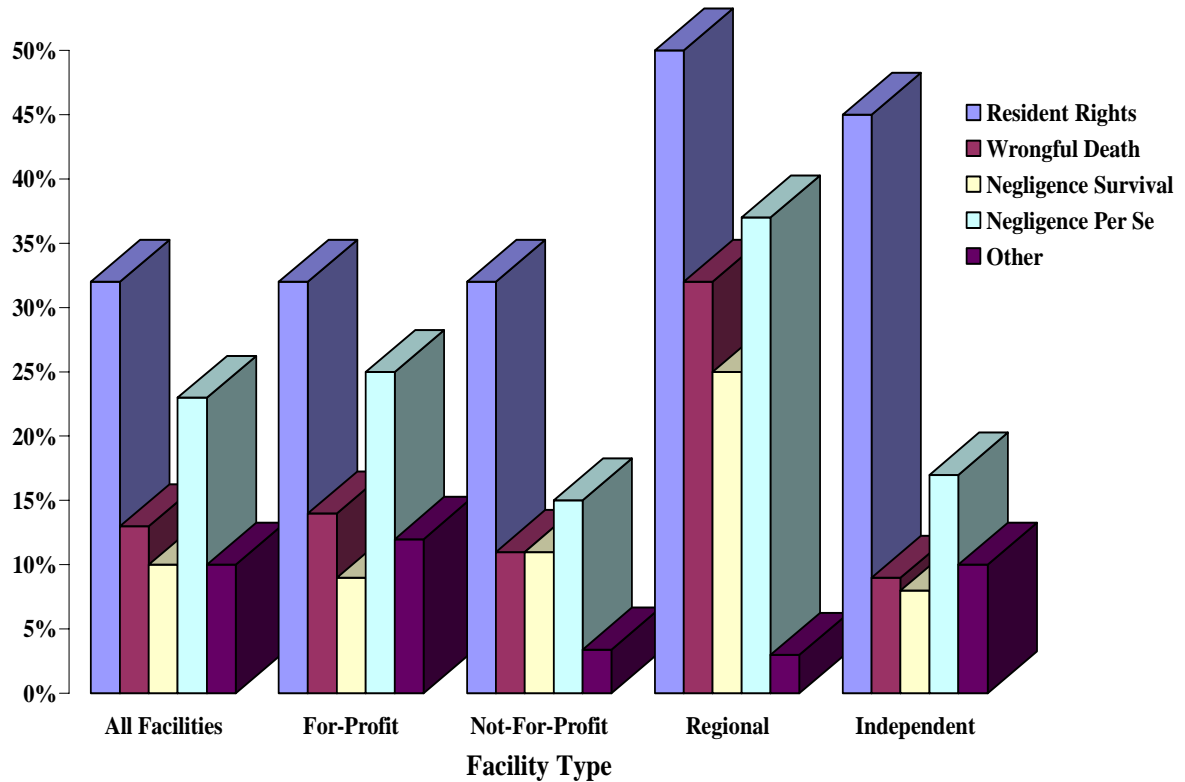
Facilities also reported that some lawsuits (that were filed at any date) were resolved during the first nine months of 2001 (Table 7). For-profits had an average of .71 lawsuits resolved. Not-for-profits resolved, on average, .34 lawsuits. Nearly all lawsuits were resolved prior to jury trial. Jury trials are rarely a part of nursing facility litigation.

Violation of Resident Rights was most frequent allegation against nursing facilities (Figure 2). Regional chains reported that 49.5% of cases alleged resident rights violations; independent facilities reported 45% of cases. The second most frequent allegation was negligence per se: 37% of lawsuits against regional chains and 17% against independent facilities. An insufficient number of national chains reported this information. For the period after May 15, we provided an opportunity for facilities to report if they were being sued under the new negligence standard as stipulated in F.S.400.023(2).¹⁰ This category was checked infrequently, so these responses have been included in the Negligence Per Se category. Wrongful Death, Negligent Survival and Other allegations were also cited in lawsuits against nursing facilities. In comparison, circuit court records in Hillsborough County showed that the

¹⁰ (2001). Civil enforcement. Florida Statutes. 400.023.

most frequent allegations (41%) were a combination of Wrongful Death and Negligence, with 33% of lawsuits alleging resident rights violations, and 18% Negligence alone.¹¹

**Figure 2
Lawsuit Allegations**



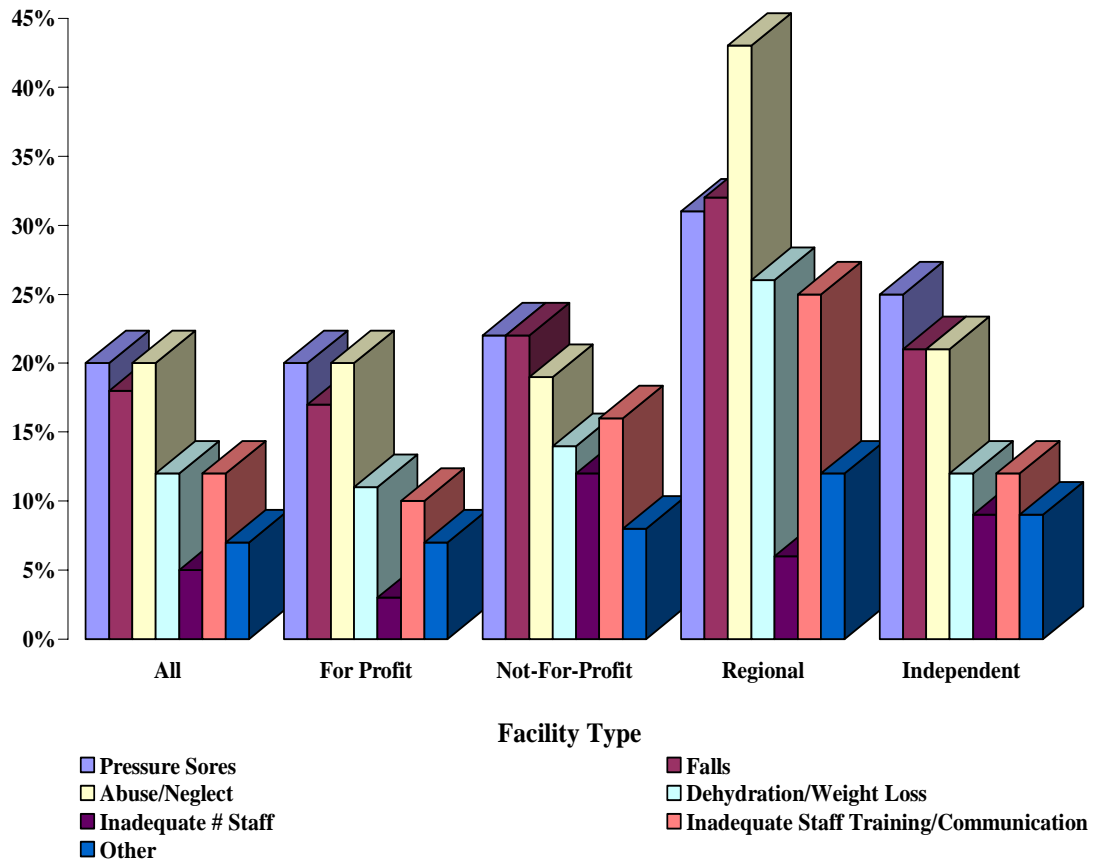
Note. Data on allegations against national multi-facility chains were insufficient to be included in this analysis.

Abuse and Neglect was the number one cause for a claim to be filed against a nursing facility (Figure 3). Regional chain facilities were most likely to have this claim against them (43%). This was followed by pressure sores (32%). Dehydration or Weight Loss and Inadequate Staff Training/Communication were also common claims. Lawsuits against for-profit facilities were least likely to allege inadequate number of staff. In comparison, data from

¹¹ Johnson et al.

the Hillsborough County sample found the most frequently cited claim was Inadequate Staff Training/Communication (78%), and 60% of claims were related to Pressure Sores, 49% cited Inadequate Number of Staff. The Hillsborough County study is based on a record review and careful recording of actual causes for claims. The current statewide survey of nursing facilities is based on self-report of lawsuit causes. It is likely that responders did not provide a thorough listing of all causes listed in each claim.

Figure 3
Causes for Claims



Note. Data on claims against national multi-facility chains were insufficient to be included in this analysis.

Regional chain facilities were paying the highest average liability insurance premium as of July, 2001 (Table 8). They reported, on average, paying \$180,210 a year for liability insurance and received, on average, the lowest per occurrence coverage (\$797,727). Not-for-profit facilities paid, on average, \$150,013 a year and received \$994,355 coverage per occurrence. National and regional chain facilities had significantly higher deductibles compared to independent facilities (\$261,930-\$1,717,797 compared to \$56,394). Not-for-profits had the lowest average deductible (\$53,117). Independent facilities were least likely to report that they expected to renew their policy (58%).

Table 8
Liability Insurance Availability

	<i>N</i>	Natl Chain	Reg Chain	Indepen- dent	Sig.	For Profit <i>N</i> =260	Not-For- Profit <i>N</i> =95	Sig.	All Facilities <i>N</i> =355
Premium as of July	221	\$91,108	\$180,210	\$164,816 *		\$146,214	\$150,013		\$147,331
Premium per bed	221	\$1,146	\$1,486	\$1,562		\$1,373	\$1,517		\$1,415
Currently Purchasing Insurance	354	57%	61%	72% *		59%	78% ***		64%
Expect to Renew Coverage	241	98%	68%	58% ***		69%	81% *		72%
Currently Self-Insured	351	88%	11%	9% ***		40%	25% **		36%
Currently Uninsured	355	0%	37%	21% ***		20%	16%		19%
Number of Months with Insurer	221	24	8	30 ***		16	35 ***		22
Coverage Limits: Occurrence	159	\$2,666,667	\$797,727	\$873,148 ***		\$966,237	\$994,355		\$977,201
Coverage Limits: Aggregate	176	\$23,105,263	\$2,866,667	\$3,991,071 ***		\$12,788,333	\$3,330,357 ***		\$9,778,977
Deductible: Per Claim	201	\$1,717,797	\$261,930	\$56,394 ***		\$836,074	\$53,117 ***		\$602,356

****p*<.001, ***p*<.01, **p*<.05

National chains were more likely to be self-insured (88%). Regional chains were more likely to be uninsured (37%). Over all, two-thirds of facilities are purchasing insurance (64%) but of these, 19% consider themselves self-insured (not displayed). Another 16% are not purchasing insurance and consider themselves self-insured as well. It was not determined if self-insurance will meet AHCA's standards. One out of five facilities (19%) reported being uninsured. If these percentages hold for the state, there would be 112 facilities that are not insured with another 269 who are self-insured. Applying these statistics to all facilities, there

could be as many as 13,643 uninsured beds and 33,068 self-insured beds (46,711 total beds) in Florida (Appendix C).

Many facilities voiced high levels of frustration with either being unable to find liability insurance coverage at all, or when they were able to find it, at the high premiums and deductibles policies would require. For example:

- Lloyds of London \$1,000,000 policy – \$980,000 premium with \$250,000 deductible.
- \$14,000 insurance premium in 2000 cost \$410,000 in 2001 for the same amount of coverage – 2800% increase – facility must now “go bare.”
- \$15,800 premium in 2000 cost \$371,000 in 2001 – 2200% increase in one year; will cost \$560,000 in 2002 – a 50% increase from the year before and a 3400% increase in two years.
- 2002 premium will be a 370% increase from the previous year.
- 2001 premium increased 133% to \$41,300; however, deductible was \$5,000 in 2000, increased to \$750,000 (14900%) in 2001, will be \$3,000,000 in 2002 – a 300% increase in one year and a 59900% increase in two years.

Facilities are seeking to acquire insurance in various ways. Many are paying dollar per dollar for coverage, i.e., the premium for a \$250,000 policy is \$250,000, with some policies requiring additional “service fees” that can range from \$50,000 to \$100,000. Furthermore, this coverage may be valid for only a single occurrence and additional claims are not covered. Some facilities are putting money aside each month in a savings account (one facility reported depositing \$33,000 each month) in hopes that the state will approve a bond program that would allow these facilities to be considered “self-insured.” Other nursing facilities have “de-licensed” some of their beds in order to decrease their premiums. Groups of facilities are joining “captives” that operate as insurance pools to cover lawsuit claims of its members.

Some facilities that were going bare spoke of the initial fears of having no insurance, yet now felt there were some positive outcomes because of their lack of insurance. They stated that they were more directly involved in lawsuits that were being litigated and were able to choose to proceed to court or refuse to settle for what they thought were unrealistic monetary damages.

When insured, many of these facilities were left out of the litigation process, with their insurance carriers settling the majority of lawsuits without any input from them at all – even when the facility felt that the plaintiff attorney’s demands were unreasonable. They also noted there was a decrease in lawsuits filed against them – having no insurance meant there were no funds with which to pay potential settlements. Some also reported a feeling of “individual ownership” by employees of bare facilities. They know that without insurance, lawsuits could force a facility to close. Administrators state that these employees are exceptionally watchful for any issues or problems within the facility that could lead to a possible lawsuit.

There are regional differences in access to insurance as well (Table 9). Northern facilities have the lowest average premiums (\$112,609) compared to southern facilities which have the highest average premiums (\$190,407). The Central region had the highest rates of lawsuits (2.26 per facility in the first nine months of 2001). They have the lowest percentage of facilities that are uninsured (16%) but this difference is not significant. Appendix B provides a listing of the counties included in each region.

Table 9
Regional Comparison

	Northern <i>N=118</i>	Central <i>N=124</i>	Southern <i>N=108</i>	Sig.
Average N Lawsuits	1.53	2.26	1.56	*
Average N Open Lawsuits	1.76	3.24	1.95	***
Total Potential	3.2	6.1	3.5	**
Average Annual Liability Premium	112,609	130,351	190,407	*
Average Coverage Limits: Occurrence	721,721	1,243,627	981,771	*
Average Coverage Limits: Aggregate	6,395,161	12,437,500	10,333,333	**
Average Deductible Per Claim	372,197	836,793	571,932	**
Percentage uninsured	19%	16%	23%	

*** $p < .001$, ** $p < .01$, * $p < .05$

We examined the relationship between structural variables such as profit/not-for-profit, national or regional chain, independent, CCRC-affiliated, faith-based, number of beds, region of the state, total lawsuits, uninsured, and amount of the insurance premium. With all variables in the model, there was only a slight ($p=.058$) multivariate relationship between the structural variables and the amount of the insurance premium (not displayed). Of all the variables listed, including the number of lawsuits filed in 2001, only chain membership had any bearing on the amount of the premium being charged to facilities in July 2001. This model explained only 5% of variance in premium amounts. On the other hand, there was a multivariate relationship between these variables and total lawsuits. The model in Table 10 explains 12% ($p=.001$) of variance in the number of lawsuits a facility had in 2001 and the variance is explained by one variable – the number of beds in a facility.

Table 10
Predictors of Lawsuits

	Std. Beta	Sig.
For Profit	-.09	
Facility Type	-.16	
CCRC-Affiliated	-.04	
Faith-Based	-.18	
Region of State	.07	
Number of Beds	.28	***
Uninsured	.05	
Premium	.10	

Dependent Variable: Number of Lawsuits (January - October 5, 2001)

*** $p<.001$; Adj. $R^2=.12$, $F=3.146^{**}$

In other analyses¹², we found that bed size along with chain membership and meeting a high standard for licensed RN staffing per resident day explained the number of lawsuits but quality deficiencies (e.g., pressure sore ratio) did not explain lawsuits. These quality indicators are not available for the current analyses, but the predictability of bed size for explaining number

¹² Johnson et al.

of lawsuits is maintained here. This analysis is limited since it covers a much shorter time period than was used in the Johnson et al. (2001) analysis. Since bed size is more predictive than quality indicators, we have understood this relationship to be about exposure – having more beds means more potential for lawsuits. In addition, it has been hypothesized that being a not-for-profit protects a facility from lawsuits, but this consistently has not been the case when other factors are included in either the longitudinal study conducted in Hillsborough County or in the cross-sectional study reported here.

Limitations

This study is limited in a few ways. Non-responders were less likely to be members of regional chains and to have purchased liability insurance. The study is also limited in that all responders did not reply to all questions, perhaps having omitted some answers because a question might have been unclear, a correct response may have been difficult to obtain, or answers may have been considered too revealing (e.g., “Are you currently uninsured?”). There is a great deal of anxiety on the part of facilities as to the confidentiality of their responses, perhaps fearing that an admission of lack of insurance or large numbers of filed lawsuits may have future regulatory or legal ramifications for them. Earlier research in Hillsborough County found that being sued before increases the likelihood of future suits, so this concern is valid, although confidentiality of these data is protected.

Discussion

This report provides data on the extent and nature of lawsuits and availability and affordability of liability insurance during the transition from the old Chapter 400.023 to the new one with the tort reforms instituted with SB 1202. The Task Force was told by insurers in

October 2000 that a “tail” effect of up to four years could influence the return of liability insurers to Florida, and that a “woodwork effect” of the filing of last-minute lawsuits under the previous Chapter 400 civil enforcement statutes would probably be seen before the new statutes were in full effect. These increases were expected, but remain a concern. Respondents reported a total of 2,420 potential or open lawsuits. This could mean as many as 4,756 statewide (Appendix C) and constitutes a long tail of lawsuits to be handled under the old Chapter 400 statutes.

Insurance companies appear to be responding to this tail along with other events such as the September 11th suicide bombings of the World Trade Center and Pentagon which seriously impacted the re-insurance industry. Many markets are encountering liability insurance with higher premiums, higher deductibles, and lower per occurrence and aggregate coverage.¹³ This is particularly an issue for nursing facilities that, for the first time, will be required by the State to have liability insurance as of January 1, 2002.

Nursing facilities are using an array of strategies to meet this requirement given the lack of accessibility and affordability of insurance premiums, such as entering into “captives,” paying for dollar for dollar coverage, and self-funded savings accounts. Other facilities have been completely priced out of liability insurance coverage and face the possibility of bankruptcy or closure should lawsuits go against them. The State will need to address the potential 112 facilities with their 13,643 beds that may be bare now. If self-insurance plans are determined to be inadequate, the State may also have to face an additional 269 facilities having 33,068 beds. This potential emergency is worse than the bankruptcy crisis which affected five out of eight of the largest multi-facility chains in Florida.

Government-sponsored facilities represent an example of how insurance payout limitations, due to the facilities’ sovereign immunity, influence on the number of lawsuits filed.

¹³ Harrington, J. (2001, December 2). Going up, up, up. St. Petersburg Times, p. 1H,2H.

One administrator commented that they weren't sued because people knew right up front that no matter what the details of a lawsuit might be, a plaintiff could never collect more than a set amount, which in that particular facility was \$250,000 maximum.

If the State delays implementation of the liability insurance requirement, it would assist facilities that cannot afford or find available liability insurance. It would also be perceived as unfair to those facilities that are paying high premiums for low coverage. The State could also accept the many ways that facilities are meeting the liability insurance requirement. These options could be made available to assisted living facilities as well. Until the full effects of SB 1202 are experienced, the Department of Insurance could look at ways to leverage access to the entire insurance market by admitted carriers (those regulated by DOI) by requiring the carriers to also insure a minimum number of nursing facility beds in the state.

The State will need to closely monitor the cost of and access to insurance as well as the changing nature and extent of lawsuit activity that directly affect insurance costs. The quality measures in SB 1202, including increased RN staffing, may have an effect as well. The full set of changes made in SB 1202 – including the new negligence standard, limits on punitive damages, and the removal of add-on attorney's fees – are expected to have an impact on new lawsuits after October 5th. Until this impact is felt, nursing facilities are facing a long tail of lawsuits filed under the old Chapter 400.023 statute and an insurance industry that is increasing its rates rapidly while reducing coverage.

Appendix A

Survey
Florida Nursing Facility Litigation and Liability Insurance Survey
Florida Policy Exchange Center on Aging, University of South Florida
in Cooperation with
Florida Health Care Association and Florida Association of Homes for the Aging

The purpose of this study is to understand the extent of lawsuit activity in 2001 and the availability and affordability of General and Professional Liability insurance for Florida nursing facilities. The data collected in this survey are confidential and are protected by the University of South Florida's Division of Research Compliance (IRB#99.843). The data will be entered into a computerized database for analysis. Results will be presented in aggregate form and no identifying information (e.g., facility name or location) will be included in any reports of these data. Moreover, the original questionnaire forms will be destroyed. Access to the computerized database will be restricted to University of South Florida researchers who have signed an oath to protect the confidentiality of the respondents. Proprietary data, such as we are requesting from you, are protected from Freedom of Information Requests when collected as part of university research (F.S. 240.241). Thank you very much for your participation.

FACILITY INFORMATION

	<i>Yes</i>	<i>No</i>		<i>Yes</i>	<i>No</i>		<i>Yes</i>	<i>No</i>
<i>For-profit</i>	<input type="checkbox"/>	<input type="checkbox"/>	<i>Independent</i>	<input type="checkbox"/>	<input type="checkbox"/>	<i>Faith Based</i>	<input type="checkbox"/>	<input type="checkbox"/>
<i>Not-for profit</i>	<input type="checkbox"/>	<input type="checkbox"/>	<i>Multi-facility Chain</i>	<input type="checkbox"/>	<input type="checkbox"/>	<i>County</i>		
<i>Government Sponsored</i> <i>(Federal, state or county)</i>	<input type="checkbox"/>	<input type="checkbox"/>	<i>CCRC Affiliated</i>	<input type="checkbox"/>	<input type="checkbox"/>	<i>Number of beds:</i>	<i>120 (Please correct if necessary)</i>	

LITIGATION ACTIVITY

Please provide the following information relating to your facility's litigation experience for each noted time period:

	<i>Lawsuits Filed</i>	
	<i>Between January 1 - May 14, 2001</i>	<i>Between May 15 - October 5, 2001</i>
<i>Total number of NEW lawsuits (Please complete Pages 2 and 3)</i>		
<i>Total number of RESOLVED lawsuits (Regardless of initial filing date)</i>		
<i>Total RESOLVED lawsuits settled before going to trial</i>		
<i>Total RESOLVED lawsuits settled by jury trial</i>		
<i>Other POTENTIAL lawsuits as determined by record requests (Count multiple inquiries by an attorney regarding a specific resident as <u>one</u> potential lawsuit)</i>		
<i>Number of lawsuits OPEN as of October 5, 2001</i>		

LAWSUITS FILED BETWEEN JANUARY 1 - MAY 14, 2001
For each NEW lawsuit check (Ö) all that apply
(Copy form for additional lawsuits)

	<i>Suit 1</i>	<i>Suit 2</i>	<i>Suit 3</i>	<i>Suit 4</i>	<i>Suit 5</i>	<i>Suit 6</i>	<i>Suit 7</i>
<i>Allegations:</i>							
<i>Resident Rights</i>							
<i>Wrongful Death</i>							
<i>Negligent Survival</i>							
<i>Negligence/Negligence per se</i>							
<i>Other</i>							
<i>Cause for Claim:</i>							
<i>Pressure Sores</i>							
<i>Falls</i>							
<i>Abuse or Neglect</i>							
<i>Dehydration or Weight Loss</i>							
<i>Inadequate number of staff</i>							
<i>Inadequate staff training/communication</i>							
<i>Other</i>							
<i>\$ Damages Claimed</i>							

LAWSUITS FILED BETWEEN MAY 15 - OCTOBER 5, 2001
For each NEW lawsuit check (Ö) all that apply
(Copy form for additional lawsuits)

	<i>Suit 1</i>	<i>Suit 2</i>	<i>Suit 3</i>	<i>Suit 4</i>	<i>Suit 5</i>	<i>Suit 6</i>	<i>Suit 7</i>
<i>Allegations:</i>							
<i>Resident Rights</i>							
<i>Wrongful Death</i>							
<i>Negligent Survival</i>							
<i>Negligence— Per New F.S. 400.429</i>							
<i>Other</i>							
<i>Cause for Claim:</i>							
<i>Pressure Sores</i>							
<i>Falls</i>							
<i>Abuse or Neglect</i>							
<i>Dehydration or Weight Loss</i>							
<i>Inadequate number of staff</i>							
<i>Inadequate staff training/communication</i>							
<i>Other</i>							
<i>\$ Damages Claimed</i>							

LIABILITY INSURANCE COST DATA

Please provide the following data from your facility's July 1, 2001 Medicaid Rate Computation Letter

<i>Cost Report Period Used</i>	
<i>Total Patient Days</i>	
<i>Medicaid Patient Days</i>	
<i>Operating Cost Per Diem (Line 2)</i>	
<i>Operating Cost Per Diem Inflated (Line 3)</i>	
<i>Operating Prospective Per Diem (Line 14)</i>	
<i>What is your total liability insurance premium included in the cost report period used to establish your July 1, 2001 Medicaid rate?</i>	

INSURANCE COVERAGE

<i>Are you currently purchasing insurance coverage?</i>	Yes <input type="checkbox"/>	No <input type="checkbox"/>
<i>If yes, please answer the following questions:</i>		
<i>What is the name of your insurer?</i>		
<i>How long have you had coverage with this insurer?</i>		
<i>When does your coverage period end?</i>		
<i>Do you expect to renew your coverage with this insurer?</i>	Yes <input type="checkbox"/>	No <input type="checkbox"/>
<i>What are your coverage limits?</i>		
<i>What is your deductible?</i>		
<i>Are you currently self-insured?</i>	Yes <input type="checkbox"/>	No <input type="checkbox"/>
<i>Are you currently uninsured?</i>	Yes <input type="checkbox"/>	No <input type="checkbox"/>

To complete this survey using Excel, please send an e-mail request to Debbie Hedgecock at dhedgeco@admin.usf.edu . Please return your completed survey no later than October 15, 2001, using the enclosed self-addressed, stamped envelope or mail to: Jennifer R. Salmon, Assistant Director, Florida Policy Exchange Center on Aging, University of South Florida, USF #30435, Tampa, Florida 33620 or fax to (813) 974-5788 (secure fax). For more information, contact Debbie Hedgecock at (813) 974-1337

Appendix B

Florida Counties by Region

Northern	Central	Southern
Alachua	Holmes	Brevard
Baker	Jackson	Hardee
Bay	Lake	Highlands
Bradford	Leon	Hillsborough
Calhoun	Madison	Manatee
Citrus	Marion	Orange
Clay	Nassau	Osceola
Columbia	Okaloosa	Pasco
Dixie	Putnam	Pinellas
Duval	Santa Rosa	Polk
Escambia	St. Johns	Seminole
Flagler	Sumter	
Franklin	Suwannee	
Gadsden	Taylor	
Gilchrist	Volusia	
Gulf	Wakulla	
Hamilton	Walton	
Hernando	Washington	

Appendix C

Study Statistics Applied to Total Facilities and Beds ¹

	National Chain			Regional Chain			Independent			All Facilities	
	Statistic	State	Beds	Statistic	State	Beds	Statistic	State	Beds	Total	Beds
Total		260.00	32,059.00		164.00	20,396.00		244.00	29,033.00	668.00	81,488.00
Avg Total Lawsuits	2.69	699.40		1.71	280.44		1.15	280.60		1,260.44	
Avg Potential Lawsuits	6.16	1,601.60		5.75	943.00		2.00	488.00		3,032.60	
Avg Open Lawsuits	3.67	954.20		2.40	393.60		1.54	375.76		1,723.56	
Purchasing Insurance	57%	148.20	18,273.63	61%	100.04	12,441.56	72%	175.68	20,903.76	423.92	51,618.95
Do Not Expect to Renew Insurance	2%	5.20	641.18	32%	52.48	6,526.72	42%	102.48	12,193.86	160.76	19,361.76
Self-Insured	88%	228.80	28,211.92	11%	18.04	2,243.56	9%	21.96	2,612.97	268.80	33,068.45
Uninsured	0%	0.00	0.00	37%	60.68	7,546.52	21%	51.24	6,096.93	111.92	13,643.45
Self-Insured and Uninsured	0.88	228.80	28,211.92	0.48	78.72	9,790.08	0.30	73.20	8,709.90	380.72	46,711.90

¹Excluding government sponsored facilities