



**Much Ado About Nothing:**

**Debunking the Myth of Frequent and Frivolous Elder Abuse  
Lawsuits Against California's Nursing Homes**

---

California Advocates for Nursing Home Reform (CANHR) is a statewide not-for-profit organization that provides advocacy assistance and legal support regarding long-term care issues throughout California. CANHR maintains a website with information on various topics related to long-term care at **[www.canhr.org](http://www.canhr.org)**.

For information on specific facilities in California, including detailed regulatory and services data, see our [www.nursinghomeguide.org](http://www.nursinghomeguide.org) website. For more information about this report or to order copies, call the CANHR office at (415) 474-5171 or e-mail CANHR at [info@canhr.org](mailto:info@canhr.org).

---

© November 2003  
California Advocates for Nursing Home Reform (CANHR)  
1610 Bush Street, San Francisco, California, 94109  
(415) 474-5171  
[www.canhr.org](http://www.canhr.org) • [info@canhr.org](mailto:info@canhr.org)

# TABLE OF CONTENTS

<b>INTRODUCTION .....</b>	<b>4</b>
<b>I. EXECUTIVE SUMMARY .....</b>	<b>5</b>
1. <i>There is an extraordinarily low level of elder abuse litigation being filed against California skilled nursing facilities.....</i>	5
2. <i>A disproportionate number of elder abuse lawsuits are filed against a small group of skilled nursing facilities.....</i>	5
3. <i>Facilities subject to elder abuse lawsuits tend to have significantly poorer records of care.....</i>	6
4. <i>Elder abuse lawsuits in California are hardly frivolous, but address life threatening matters. All of the cases reviewed addressed wrongful death or serious injury claims.....</i>	6
5. <i>Nonprofit nursing homes have especially low rates of elder abuse type lawsuits .....</i>	6
<b>II. BACKGROUND.....</b>	<b>7</b>
<b>III. METHODOLOGY .....</b>	<b>9</b>
<i>Margin of Error.....</i>	10
<b>IV. FINDINGS .....</b>	<b>12</b>
<b>V. FREQUENCY OF LAWSUITS.....</b>	<b>13</b>
<b>VI. WHY NURSING HOMES ARE SUED .....</b>	<b>15</b>
<i>Wrongful Death – Death Caused by Abuse or Neglect.....</i>	15
<i>Severe Bedsores, Infections and Amputations Caused by Gross Neglect.....</i>	16
<i>Serious Injuries Caused by Assaults and Avoidable Falls .....</i>	16
<b>VII. CORRELATION BETWEEN LAWSUITS AND SUBSTANDARD CARE .....</b>	<b>17</b>
<i>Barriers to Legal Remedies .....</i>	19
<b>VIII. CORRELATION BETWEEN LAWSUITS AND TYPE OF OWNERSHIP.....</b>	<b>21</b>
<b>IX. COMPARISON WITH OTHER STUDIES.....</b>	<b>22</b>
<b>X. SUMMARY .....</b>	<b>25</b>
<b>XI. RECOMMENDATIONS .....</b>	<b>26</b>
<b>BIBLIOGRAPHY.....</b>	<b>28</b>
<b>SOURCES.....</b>	<b>29</b>
<b>APPENDIX A: LAWSUITS PER THOUSAND SKILLED NURSING FACILITY BEDS, 2000 – 2002.....</b>	<b>30</b>
<b>APPENDIX B: PERFORMANCE RECORDS OF FREESTANDING SNFS WITH TWO OR MORE ELDER ABUSE TYPE LAWSUITS FILED AGAINST THEM, 2000 – 2002.....</b>	<b>31</b>

## INTRODUCTION

*“The facts do not bear out the allegations of an ‘explosion’ in litigation or in claim size, nor do they bear out the allegations of a financial disaster suffered by property/casualty insurers today. They finally do not support any correlations between the current crisis in availability and affordability of insurance and such a litigation ‘explosion.’ Instead, the available data indicate that the causes of, and therefore solutions to, the current crisis lie with the insurance industry itself.”*

(Francis X. Bellotti, Attorney General of Massachusetts, et al., *(Analysis of the Causes of the Current Crisis of Unavailability and Unaffordability of Liability Insurance, Ad Hoc Insurance Committee of the National Association of Attorneys General, May 1986.)*

Sixteen years after the last liability insurance “crisis,” consumers are once again being blamed. Only this time, it's abused elderly and disabled residents of nursing homes who are the alleged culprits in rising liability insurance rates. Like homeowners and businesses across the country, nursing home providers have been hit with sharp increases in liability insurance premiums. The problem has been particularly acute for those facilities that provide substandard care that results in the injury or death of residents. Hoping to capitalize on this crisis and convince legislators that limiting lawsuits by abused elders will solve the problem of high liability premiums, the nursing home industry has cited an explosion of “frivolous” lawsuits against them.

In a June 4, 2003 request to California's Supreme Court regarding a significant elder abuse decision, attorneys representing the California Association of Health Facilities stated: *“Since the passage of EADACPA, and particularly within the last two to three years... the filing of literally thousands of these complaints against long-term care providers has created an insurance crisis in the long term care industry with virtually all major carriers leaving California.”*<sup>1</sup> (Emphasis added.) In fact, the nursing home industry has never provided any data to support the allegation of “thousands” of elder abuse lawsuits. Unable to determine what types of claims have been filed or the number of claims filed, most of the reports cited by the industry and others have relied on loss ratios and investment reports provided by the insurance industry.

Until now, no direct study of actual elder abuse cases filed has ever been conducted. The critical need for this information is highlighted in a June 2003 report by the California's Department of Health Services to the California Legislature: *Liability Insurance for California Long-Term Care Providers, A Report to the California Legislature*. The report's primary finding was that more information is needed to properly guide public policy regarding liability insurance and elder abuse claims. The report's primary recommendation is that the California Department of Health Services obtain more information about litigation and insurance claims against nursing homes.

Between January and September 2003, the California Advocates for Nursing Home Reform (CANHR) studied elder abuse litigation against 577 skilled nursing facilities housing 50 percent of the freestanding skilled nursing facility beds in California. This report provides the first comprehensive study of actual lawsuits filed against nursing homes in California. The results of this study show that, not only are there no “frivolous” elder abuse lawsuits, but there are few elder abuse lawsuits filed in the first place.

---

<sup>1</sup> Norman v. Life Care Centers of America, Inc., 107 Cal.App. 4th 1233, 132 Cal. Rptr. 2d 765

## I. EXECUTIVE SUMMARY

This study was conducted to assess claims made by the California nursing home industry that their liability insurance costs were skyrocketing due to an explosion of frivolous elder abuse lawsuits against facilities. Allegedly to gain lower insurance costs, nursing home industry representatives are seeking changes that would weaken California's landmark elder abuse protection law, the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) of 1991.

By examining actual lawsuit patterns against all freestanding skilled nursing facilities in sixteen California counties, this study responds to the claim of excessive elder abuse litigation and the critical need for reliable information. The sixteen counties extend the length of the state, house 50 percent of the state's freestanding nursing facility beds, and represent urban and rural regions of California. Selected counties include ten Northern California counties: Butte, Del Norte, Glenn, Humboldt, Lassen, Plumas, Shasta, Siskiyou, Solano and Tehama; four Bay Area counties: Contra Costa, San Francisco, San Mateo, and Santa Clara; one Central California county: Sacramento; and one Southern California County: Los Angeles.

California Superior Court records in these counties were analyzed to identify and catalog elder abuse lawsuits filed against skilled nursing facilities between January 1, 2000 and December 31, 2002. The study identified all general jurisdictional lawsuits involving damage claims made by or on behalf of skilled nursing facility residents, not just lawsuits that specifically included an elder abuse cause of action. In addition, quality of care records for the 577 skilled nursing facilities in the selected counties were examined to study the correlation, if any, between elder abuse lawsuits and public documentation of abuse and neglect.

Major findings of the study are:

**1. There is an extraordinarily low level of elder abuse litigation being filed against California skilled nursing facilities:**

- During the three-year period of January 1, 2000 through December 31, 2002, a total of 501 elder abuse lawsuits were filed against nursing homes in the counties studied. These lawsuits averaged 167 per year for 577 nursing homes with 58,134 licensed beds.
- Over 50 percent of the skilled nursing facilities studied did not have a single elder abuse type lawsuit filed against them during this three-year period.
- In every year reviewed, fewer than 25 percent of skilled nursing facilities were sued for elder abuse.

**2. A disproportionate number of elder abuse lawsuits are filed against a small group of skilled nursing facilities:**

- 23 percent of the facilities included in this study account for over 71 percent of the lawsuits filed.
- 10 percent of the 577 facilities studied were responsible for 47 percent of the lawsuits.

- Of the 275 skilled nursing facilities that were sued, 52 percent had only one elder abuse type lawsuit against them during 2000–2002.
- Over 53 percent of the 577 facilities had no lawsuits filed against them.

**3. Facilities subject to elder abuse lawsuits tend to have significantly poorer records of care:**

- Ten percent of the skilled nursing facilities, many with extreme histories of abuse and neglect violations, account for almost half (47%) of the elder abuse lawsuits. Compared to skilled nursing facilities that were not sued, these facilities averaged almost 100 percent more deficiencies, nearly 200 percent more complaints, and several times the number of “AA,” “A,” and “B” citations.

**4. Elder abuse lawsuits in California are hardly frivolous, but address life threatening matters. All of the cases reviewed addressed wrongful death or serious injury claims:**

- 50 percent of the reviewed lawsuits presented wrongful death claims.
- 27 percent of the cases addressed serious harm in the form of severe bedsores and/or infections stemming from neglect.
- 23 percent of the cases involved serious injury claims caused by avoidable falls or assaults by staff or other residents.

**5. Nonprofit nursing homes have especially low rates of elder abuse type lawsuits:**

- Only 18 of the 78 not for profit, freestanding skilled nursing facilities located in the study counties had elder abuse type lawsuits filed against them. During the three-year study period, 75 percent of the nonprofit skilled nursing facilities had no elder abuse lawsuits. Comparatively, just over half of the for-profit skilled nursing facilities had one or more elder abuse lawsuit filed against them during 2000–2002.

These findings verify what consumers and advocates have long understood. Although the EADACPA is a valuable remedy for victims of abuse and neglect, its stringent evidence code and other rigorous requirements strictly limit the number of lawsuits that are filed. Of the thousands of people who are abused and neglected every year in California skilled nursing facilities, only a very few are able to seek justice and compensation by filing a civil elder abuse lawsuit.

This study also provides direct, reliable information for California legislators and policy makers who must consider how to preserve and protect the rights of elder abuse victims. Until now, these officials have had little information other than insurance industry data and reports primarily based on events in distant states with very different legal climates than California. Whatever may be the case in other states, there has never been an explosion of elder abuse lawsuits in California, and there is no sign that one is coming.

Victims of elder abuse should not be blamed for the alleged liability insurance crisis. As this study indicates, the best way for nursing homes to avoid lawsuits and liability is to improve care.

## II. BACKGROUND

Elder abuse and neglect are very serious problems in California nursing homes. Every year California inspectors document hundreds of instances of abuse and neglect and many more incidents go undetected.<sup>2</sup> Many studies have documented harm to nursing home residents and recommended stronger enforcement of the law.<sup>3</sup> The federal government estimated that residents in one-third of California's 1,400 nursing homes are at risk of death or serious bodily injury.<sup>4</sup> The California Department of Health Services annually issues at least 25,000 deficiencies and 700 citations as a result of inspection and complaint investigation findings.<sup>5</sup> Despite the prevalence of documented cases of elder abuse, the California State Long Term Care Ombudsman Program recently reported that abuse in long-term care facilities is underreported.<sup>6</sup>

To help combat this problem, California enacted the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) in 1991.<sup>7</sup> Until that time, California protections from elder abuse were weak and difficult to enforce. Despite the prevalence of abuse and neglect, nursing homes were rarely sued and faced few consequences for their notorious misconduct. In enacting the EADACPA, the California Legislature declared its intentions to change this situation:

*(h) The Legislature further finds and declares that infirm elderly persons and dependent adults are a disadvantaged class, that cases of abuse of these persons are seldom prosecuted as criminal matters, and few civil cases are brought in connection with this abuse due to problems of proof, court delays, and the lack of incentives to prosecute these suits.*

---

<sup>2</sup> See, for example, *Nursing Home Quality: Prevalence of Serious Problems, While Declining, Reinforces Importance of Enhanced Oversight*, United States General Accounting Office, GAO-03-561, July 17, 2003. The report cites a rising volume of nursing home complaints in California, about 10,000 per year, with a 20 percent increase in complaints from January 2001 through July 2002. The report also describes a serious failure of California's survey agency to properly detect and cite deficiencies when there is evidence that nursing home residents have been harmed due to neglect or abuse.

<sup>3</sup> See, for example, *Nursing Homes: More Can Be Done to Protect Residents from Abuse*, United States General Accounting Office, GAO-02—312, March 1, 2002; *Nursing Homes: Prevalence of Serious Quality Problems Remains Unacceptably High, Despite Some Decline*, United States General Accounting Office, GAO-03-1016T, July 17, 2003; and *Abuse of Residents is a Major Problem in U.S. Nursing Homes*, Minority Staff, Special Investigations Division, Committee on Government Reform, U.S. House of Representatives, July 30, 2001.

<sup>4</sup> *California Nursing Homes: Federal and State Oversight Inadequate to Protect Residents in Homes with Serious Care Problems*, United States General Accounting Office, GAO/T-HEHS-98-219, July 28, 1998 and *California Nursing Homes: Care Problems Persist Despite Federal and State Oversight*, United States General Accounting Office, GAO/HEHS-98-202, July 27, 1998.

<sup>5</sup> California Department of Health, Licensing and Certification Program, Automated Certification and Licensing Administrative Information and Management Systems (ACLAIMS).

<sup>6</sup> Fiscal Year 2002 National Ombudsman Report System report by the California Long Term Care Ombudsman Program, issued June 5, 2003.

<sup>7</sup> SB679, Mello, Chapter 774, Statutes of 1991.

*(j) It is the further intent of the Legislature... to enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults.<sup>8</sup>*

The EADACPA gives elder and disabled Californians important but strictly limited opportunities to seek remedies for elder abuse in court. It provides a private, civil cause of action for individuals who are abused. To ensure that abusers do not benefit from the death of their victims, it allows recovery for pain and suffering even when the victim dies before final judgment.

Under EADACPA, victims of elder abuse must meet rigorous requirements. To qualify for non-economic damages, victims must prove by clear and convincing evidence that they were harmed by egregious abuse or neglect that involves recklessness, oppression, fraud or malice by the health care provider. This requirement, combined with a stringent evidence code and a heightened burden of proof, deter most elder abuse victims from seeking justice in court and prevent the majority from finding legal representation. Because elder abuse cases are extraordinarily complex and expensive to pursue, often involving thousands of dollars in out-of-pocket expenses, attorneys are unlikely to take on any case that cannot meet the high burden imposed under the Elder Abuse statute, much less one of a "frivolous" nature.

In 2002, the California nursing home industry launched an \$8 million campaign challenging the future of the EADACPA. Industry lobbyists claim that the law must be changed to protect California nursing homes from insurance and financial crises caused by an explosion of elder abuse lawsuits. However, the industry has not offered any direct information showing how often California nursing homes are sued for elder abuse, which facilities are being sued, the basis for the lawsuits, or their outcomes.

This study responds to the critical need for information by examining elder abuse litigation against 577 California skilled nursing facilities in 16 counties. It answers the questions about how often and why California skilled nursing facilities are sued.

This study does not provide information on the outcomes of elder abuse lawsuits, since few elder abuse lawsuits go to trial and because the majority of lawsuits settled out of court are subject to confidential settlement agreements, which preclude the plaintiff from disclosing the terms of the settlement. It is hoped that recent passage of AB 634 will improve public information about the cause and impact of elder abuse litigation in California.<sup>9</sup> Under this law, effective January 1, 2004, courts will not recognize or enforce certain confidentiality agreements in civil actions where a plaintiff produces a factual foundation for a violation of the Elder Abuse Act.

It is important to note that the only other legal remedy for nursing home residents is Health and Safety Code §1430(b), which was enacted in 1982 to provide a private right of action for residents whose rights have been violated. Because of the \$500 limit on civil damages, virtually no lawsuits have been filed under this provision, despite thousands of documented residents' rights violations. Thus, the high legal burden of EADACPA and the limited remedies for residents' rights violations leave most nursing home residents with no legal recourse at all.

---

<sup>8</sup> California Welfare and Institutions Code section 15600(h) and (j).

<sup>9</sup> Assembly Bill 634, Steinberg, Chapter 242, Statutes of 2003, approved by Governor Davis on August 28, 2003.

### III. METHODOLOGY

This study examined civil elder abuse lawsuits against 577 freestanding skilled nursing facilities<sup>10</sup> in 16 California counties that were filed between January 1, 2000 and December 31, 2002. Skilled nursing facilities operating as a distinct part of a hospital were not included in the study.

The 16 counties include 50 percent of the freestanding skilled nursing facility beds in California, extend the length of the State and represent both urban and rural regions. Selected counties include ten Northern California counties: Butte, Del Norte, Glenn, Humboldt, Lassen, Plumas, Shasta, Siskiyou, Solano and Tehama; four Bay Area counties: Contra Costa, San Francisco, San Mateo, and Santa Clara; one Central California county: Sacramento; and one Southern California County: Los Angeles.

Los Angeles County was included in the study because it has an extremely large nursing home population and its residents have ready access to legal resources. Its 371 freestanding nursing homes exceed the number of nursing homes in 35 states. According to the California Superior Court, County of Los Angeles, it is the largest court system in the world. In the year 2000 alone, 2,645,485 legal actions were filed with the Court.<sup>11</sup> If there has been an explosion of elder abuse litigation in California, it is felt that it would manifest itself in Los Angeles County.

In each county, the California Superior Court civil indexes were reviewed to identify general jurisdiction lawsuits that include elder abuse type claims. The term “elder abuse type” is used throughout this report because general jurisdiction lawsuits that contained damage claims made by or on behalf of a nursing home resident were treated as an elder abuse case even if they did not specifically include a cause of action under the EADACPA.

The searches were conducted between January and September 2003 using current business and licensee names for each facility. If a facility’s name or ownership changed since January 1, 2000, additional searches were conducted under the former business and/or licensee names. To ensure that the research was thorough, court index searches in the four Bay Area counties plus Los Angeles County, Sacramento County and Solano County included about 100 nursing home chains that are or have been doing business in California.

Where available, computerized civil indexes were reviewed directly. In some of the Northern California counties, however, an electronic index is not available to the public. In these counties, searches were made through request to court clerks.

Lawsuits listed under any civil category that might include an elder abuse claim were examined, including the following types of action: personal injury, malpractice, wrongful death, negligence,

---

<sup>10</sup> The study excluded distinct part facilities, including one 1,200 bed facility operated by a local government.

<sup>11</sup> *Your Guide to the Superior Court of California, County of Los Angeles*, Los Angeles County Superior Court, PIO 001, revised January 2002.

elder abuse, civil rights, breach of contract and other general civil categories. With the exception of Los Angeles County, each lawsuit file was reviewed to determine if it involved a damage claim made by or on behalf of a nursing home resident and if it involved a freestanding skilled nursing facility.

In Los Angeles County, the California Superior Court, County of Los Angeles, maintains an electronic case summary of all civil lawsuits on computer. For each case identified on the Court's computerized index, the case summary was reviewed to assess whether it involved an elder abuse type claim. To verify that the identified lawsuits included an elder abuse type claim, 20 percent of the Los Angeles County cases were randomly selected for further review to identify details on the causes of action. In these cases, the initial or amended complaints filed with the Court by the plaintiff were examined. All of the reviewed complaints included damage claims made by or on behalf of a skilled nursing facility resident.

This study also examined public quality of care records of the 577 skilled nursing facilities to evaluate the possible connection between elder abuse lawsuits and public documentation of nursing home abuse and neglect.

### **Margin of Error**

The study may overstate the number of lawsuits containing elder abuse type claims because not all of the actual complaints in Los Angeles County were reviewed. It is possible that some of the identified cases do not involve damage claims concerning nursing home residents but rather involve allegations of harm by other parties. However, because all of the cases selected for in-depth review contained elder abuse type claims, this margin is likely to be small.

In addition, in a significant number of lawsuits, a skilled nursing facility was a minor or secondary defendant, while another health facility (e.g., a hospital) or a health professional (e.g., a physician) was the primary defendant. Because liability is established by comparative negligence, a skilled nursing facility faces less exposure in a lawsuit where its responsibility in causing personal injury to a person is limited.

There is also the possibility that not all relevant lawsuits were identified. Errors or omissions in the civil databases maintained by the various courts, incorrectly named nursing home defendants, or filings in a county other than where the skilled nursing facility is located could lead to some omissions.

To minimize the risk of omission, a variety of methods were used. These included duplicate searches and court index searches using several variations of a facility name, licensee name and corporate parent name. Index searches for nursing home parent corporations also helped detect many lawsuits that otherwise might not have been identified. In some counties, court index searches were conducted for facilities in nearby counties to assess whether lawsuits were filed in a county other than where a skilled nursing facility is located. Because of the comprehensive approach used to detect relevant lawsuits, the margin of error on omissions is estimated to be minimal.

As noted, the data are derived from 16 counties in California. It is possible that some counties not included in the study may have different rates of litigation (higher or lower) than those in the instant study, although no evidence exists to suggest this would be a marked or significant difference. Further, differences between counties would not alter the results of the correlational data in the instant study.

#### **IV. FINDINGS**

Very few elder abuse lawsuits have been filed in California. During the study period, January 1, 2000 to December 31, 2002, the number of lawsuits totaled 501 for 577 nursing homes with 58,134 licensed beds. Over half of the skilled nursing facilities did not have a single elder abuse type lawsuit filed during this three-year period.

There is no evidence that frivolous lawsuits have been filed. All of the lawsuits identified address serious claims of abuse and neglect. 50 percent of the claims address the alleged wrongful death of a skilled nursing facility resident.

The study found a strong correlation between lawsuits and public records of poor care. On average, nursing homes that were sued for elder abuse had substantially more complaints, more deficiencies, and more citations than nursing homes that were not sued.

Because most nursing home residents and their representatives did not take legal action even when faced with deplorable care that caused them harm, further study is needed to identify barriers that might be preventing abused nursing home residents from seeking justice through the courts.

## V. FREQUENCY OF LAWSUITS

A total of 501 elder abuse type lawsuits were identified, or an average of 167 per year. These numbers represent all cases involving general jurisdiction personal injury claims filed by or on behalf of residents against skilled nursing facilities, not just lawsuits with a specific elder abuse cause of action. A significant number of the lawsuits did not contain an elder abuse cause of action.

Table 1 provides an overview of elder abuse litigation patterns. It presents, by county, the number of freestanding skilled nursing facilities, the number of facility beds, the number of facilities subject to an elder abuse type lawsuit filed during 2000 – 2002 and the number of elder abuse type lawsuits filed against these facilities during the years 2000 – 2002.

**Table 1: Lawsuit Trends by County 2000 - 2002**

County	# of Freestanding SNFs	# of Freestanding SNF Beds	# of Freestanding SNFs with Lawsuits	Total # of Elder Abuse Type Lawsuits
Butte	11	1,130	5	7
Contra Costa	34	3,187	18	34
Del Norte	1	99	1	1
Glenn	1	76	0	0
Humboldt	6	534	2	4
Lassen	1	96	1	3
Los Angeles	371	37,986	181	319
Plumas	1	57	1	2
Sacramento	36	3,841	23	49
San Francisco	18	1,396	5	7
San Mateo	20	1,940	8	20
Santa Clara	54	5,429	17	24
Shasta	7	864	3	7
Siskiyou	2	158	1	1
Solano	12	1,228	8	22
Tehama	2	113	1	1
<b>TOTALS</b>	<b>577</b>	<b>58,134</b>	<b>275</b>	<b>501</b>

The number of lawsuits is extraordinarily low when measured against the large number of nursing homes and the tens of thousands of elder and dependent adults who resided in the 577 skilled nursing facilities during the study period. Most California nursing home residents are discharged within three months of admission,<sup>12</sup> so it is very likely that the 577 skilled nursing facilities generally served at least twice as many people as they have licensed beds, or more than 100,000 people per year. 302 (52 percent) of the 577 skilled nursing facilities did not have even one elder abuse type lawsuit during the three-year study period. 275 facilities (48 percent) had one or more elder abuse type lawsuits filed against them.

<sup>12</sup> *California Long Term Care Services, Statewide Trends, 1990-1999*, California Office of Statewide Health Planning and Development.

Table 2 shows the total number of elder abuse type lawsuits filed each year against the freestanding skilled nursing homes in the counties studied. It also gives the total number and percentage of facilities sued each year, showing that in each year less than 25 percent of freestanding skilled nursing facilities were subject to an elder abuse type lawsuit.

**Table 2: Lawsuit Trends by Year**

	<b>2000</b>	<b>2001</b>	<b>2002</b>
<b>Total # of lawsuits</b>	157	180	164
<b>Total # of facilities sued</b>	119	134	134
<b>Percentage of 577 facilities that were sued</b>	21%	23%	23%

In every year reviewed, fewer than 25 percent of skilled nursing facilities were sued for elder abuse. The 275 skilled nursing facilities subject to an elder abuse type lawsuit averaged 1.8 lawsuits over the three-year period, or an average of 0.6 lawsuit per facility per year. More than half (52 percent) of the 275 skilled nursing facilities that were sued had only one elder abuse type lawsuit detected against them during 2000–2002. 57 facilities (10 percent) averaged one or more elder abuse lawsuits per year.

For liability insurance purposes, the annual average of 167 lawsuits against skilled nursing facilities with a licensed bed capacity of 58,134 translates to an insurance claims rate of about 2.9 per 1000 beds.<sup>13</sup> The largest number of lawsuits in any year, 180 in 2001, generates a claims rate of just 3.1 per 1000 skilled nursing facility beds.

---

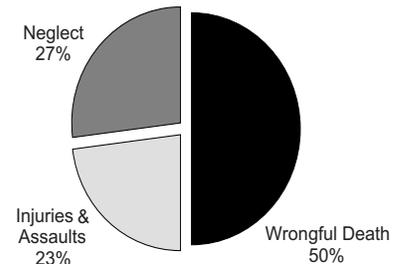
<sup>13</sup> See Appendix A, "Lawsuits Per Thousand Skilled Nursing Facility Beds, 2000–2002."

## VI. WHY NURSING HOMES ARE SUED

This study examined the nursing home industry's frequent claim that elder abuse lawsuits are often frivolous, and sought to determine why nursing homes are sued by reviewing the initial or amended complaints filed in the lawsuits.

All of the complaints reviewed contained wrongful death or serious injury claims such as untreated bedsores, amputations, dehydration, malnutrition, infections, falls and physical abuse. Although it is not possible to determine the merits of a case through a review of complaints, the study was unable to identify a single claim that could be considered frivolous by any reasonable standard.

**Abuse Lawsuits by Type of Action  
2000-2002**



Fifty percent of the reviewed cases contained wrongful death claims. In these cases, it was alleged that specific actions of the defendants contributed to the death of a skilled nursing facility resident. The remaining cases addressed serious harm in the form of severe bedsores and infections stemming from neglect (27 percent), and fractures or other serious injuries caused by avoidable falls or assaults by staff or other residents (23 percent). The following allegations are examples from lawsuits reviewed during the study:

### **Wrongful Death – Death Caused by Abuse or Neglect**

- An 80-year old woman from Sacramento County died of asphyxiation from the illegal use of a physical restraint.
- A man from Santa Clara County died following severe neglect that led to infected bedsores, dehydration, malnutrition and other injuries.
- A 90-year old woman from San Mateo County died because the defendants neglected her medical needs during a heat wave that resulted in 108 degree temperatures within the nursing home.
- A woman from Solano County died following neglect that had caused dehydration, weight loss, urinary tract infection and sepsis.
- A woman from Shasta County suffered from four severe bedsores and significant weight loss, resulting in her death.
- A woman from Los Angeles County died of kidney failure after the defendants ignored her repeated requests to be transported to a dialysis center for treatment.
- A woman from Sacramento County died after being physically and sexually assaulted twice within one month after admission to the nursing home.
- A Humboldt County resident fell down 12 concrete steps outside the facility, causing a fracture of the cervical spine, a severe closed head injury, multiple deep abrasions, paralysis for 6 days, and death. Despite the presence of a wander guard alarm, the understaffed nursing home (3 aides for 83 residents) failed to respond when the decedent wandered away from the facility.
- A man from San Francisco County was trapped and died when his bed collapsed.

### **Severe Bedsores, Infections and Amputations Caused by Gross Neglect**

- A woman from Los Angeles County developed gangrene and suffered amputation of her leg and foot due to neglect.
- A man from San Mateo County suffered from a cantaloupe-sized bed sore on his back and from a near fatal bladder infection.
- A woman from Sacramento County suffered bedsores and amputation of both legs due to neglect.
- A woman from Los Angeles County suffered amputation of both legs caused by the defendants' failure to treat her pressure sore and to detect symptoms of gangrene.
- A resident of Contra Costa County had her leg amputated above the knee after an untreated sore on her foot became infected.
- A married couple from Los Angeles County, ages 95 and 97, died due to severe neglect. Both were hospitalized in critical condition within weeks after nursing home admission, suffering from dehydration, malnutrition, infection and pneumonia.

### **Serious Injuries Caused by Assaults and Avoidable Falls**

- A San Francisco County resident suffered a fracture and permanent paralysis from the waist down after being neglected and dropped on the floor.
- A 91-year old woman from Los Angeles County died following hip surgery needed to repair a fracture caused when she was dropped in the shower.
- A man from San Mateo County suffered a fractured hip and emotional distress caused by illegal confinement, restraint and assault.
- A woman from Contra Costa County broke her neck when she fell after wandering from the facility, undetected, in her wheelchair.
- A woman from Sacramento County was burned alive after being left smoking unsupervised in her wheelchair on a patio outside the facility.

## VII. CORRELATION BETWEEN LAWSUITS AND SUBSTANDARD CARE

The study found a very strong association between a skilled nursing facility’s history of neglect and the likelihood of being sued. Compared to skilled nursing facilities that had not been sued, facilities that were sued for elder abuse had substantially higher percentages of deficiencies,<sup>14</sup> complaints to the Department of Health Services,<sup>15</sup> and “A,”<sup>16</sup> “AA”<sup>17</sup> and “B”<sup>18</sup> citations.

Table 3 presents the public performance records of the 275 freestanding skilled nursing facilities that had at least one elder abuse type lawsuit filed against them during 2000 – 2002. By county, it summarizes data for key performance indicators including the number of deficiencies, complaints and citations. It also shows the average performance of facilities by category. This table can be compared with Table 4, which provides the same type of data for the 302 freestanding SNFs that had no elder abuse type lawsuits during 2000-2002.

**Table 3: Performance Records of SNFs with Elder Abuse Type Lawsuits**

County	Number of freestanding SNFs with elder abuse lawsuits 2000 – 2002	Deficiencies 2000-2002	Complaints to DHS 2000-2002	AA Citations 2000-2002	A Citations 2000-2002	B Citations 2000-2002
Butte	5	336	163	3	7	10
Contra Costa	18	1552	813	0	27	23
Del Norte	1	60	16	0	0	1
Glenn	0	0	0	0	0	0
Humboldt	2	175	54	1	1	6
Lassen	1	45	27	1	0	2
Los Angeles	181	8552	3014	0	19	265
Plumas	1	39	14	0	0	0
Sacramento	23	1650	1084	2	31	38
San Francisco	5	442	132	0	8	6
San Mateo	8	723	312	4	16	19
Santa Clara	17	1034	588	0	12	33
Shasta	3	207	100	0	5	4
Siskiyou	1	48	37	0	0	1
Solano	8	721	337	1	18	49
Tehama	1	25	8	0	0	1
<b>TOTALS</b>	<b>275</b>	<b>15609</b>	<b>6699</b>	<b>12</b>	<b>144</b>	<b>458</b>
<b>AVERAGE PER FACILITY</b>	<b>275 SNFs</b>	<b>56.8</b>	<b>24.4</b>	<b>0.04</b>	<b>0.5</b>	<b>1.7</b>

<sup>14</sup> A deficiency is a failure of the facility to meet a legal requirement that has been detected and cited by the Department of Health Services.

<sup>15</sup> A complaint is a consumer allegation against the facility or is a self-report by the facility of an unusual occurrence that must be reported as a matter of law.

<sup>16</sup> An “A” citation is given for a detected violation of California standards that has caused an imminent danger of death or serious harm to a resident or substantial probability of death or serious physical harm.

<sup>17</sup> The most severe violation, an “AA” citation is given when a violation meets the criteria for a class “A” violation and the DHS determines the violation was the direct proximate cause of death of a resident, resulting from an occurrence the nature of which the regulation violated was designed to prevent.

<sup>18</sup> A “B” citation is given for a detected violation of California standards that has a direct or immediate relationship to the resident’s health, safety or security.

On average, skilled nursing facilities with at least one lawsuit during the study period had about 85 percent more complaints and several times the rate of “A” and “AA” citations as did skilled nursing facilities that had no identified lawsuits during the study period. They also had, on average, about 45 percent more deficiencies cited by state inspectors.

Table 4 presents the public performance records of the 302 freestanding skilled nursing facilities that had no elder abuse type lawsuits filed against them during 2000-2002. When compared with the performance records of skilled nursing facilities that were sued in Table 3, it demonstrates that facilities subject to elder abuse lawsuits had significantly poorer performance records than those that were not sued.

**Table 4: Performance Records of SNFs without Elder Abuse Type Lawsuits Filed**

County	Number of freestanding SNFs with no elder abuse lawsuits 2000 - 2002	Deficiencies 2000-2002	Complaints to DHS 2000-2002	AA Citations 2000-2002	A Citations 2000-2002	B Citations 2000-2002
Butte	6	390	149	0	1	8
Contra Costa	16	743	257	1	3	7
Del Norte	0	0	0	0	0	0
Glenn	1	55	22	0	0	0
Humboldt	4	347	104	0	0	7
Lassen	0	0	0	0	0	0
Los Angeles	190	6780	1902	0	7	122
Plumas	0	0	0	0	0	0
Sacramento	13	596	350	0	14	14
San Francisco	13	263	45	0	2	2
San Mateo	12	406	126	0	4	5
Santa Clara	37	1735	648	0	1	45
Shasta	4	219	90	0	0	4
Siskiyou	1	64	22	0	0	2
Solano	4	198	252	1	0	8
Tehama	1	74	12	0	1	5
<b>TOTALS</b>	<b>302</b>	<b>11870</b>	<b>3979</b>	<b>2</b>	<b>33</b>	<b>229</b>
<b>AVERAGE PER FACILITY</b>	<b>302 SNFs</b>	<b>39.3</b>	<b>13.2</b>	<b>0.01</b>	<b>0.1</b>	<b>0.8</b>

Not surprisingly, a high number of formal complaints is an especially strong indicator that a skilled nursing facility may be sued. Even so, the total of 10,678 complaints for the 577 skilled nursing facilities is more than 21 times greater than the number of elder abuse type lawsuits (501). The vast majority of people concerned about poor quality nursing home care do not file elder abuse lawsuits.

These findings help explain why skilled nursing facilities being sued want the EADACPA amended to keep public records of neglect out of evidence. It is evident that skilled nursing facilities with histories of abuse and neglect stand a much higher chance of being sued for elder abuse.

One of the most important findings of the study is that a disproportionately small percentage of skilled nursing facilities (23 percent) account for over 71 percent of the lawsuits filed. An even smaller number (10 percent) account for almost half (47 percent) of the lawsuits. Only 57 of the 577 skilled nursing facilities included in the study had three or more lawsuits filed against them during 2000–2002, totaling 233 of the 501 lawsuits. These high-risk facilities stand in strong contrast to the vast majority of skilled nursing facilities that are at very low risk of being sued for elder abuse.

Table 5 presents information on the number and percentage of elder abuse lawsuits for four groups of facilities -- those with none, at least one, two or more, and three or more elder abuse type lawsuits filed during 2000 – 2002. The table shows that 23 percent of facilities with at least two lawsuits account for 71 percent of the lawsuits. The last column shows that 10 percent of facilities with three or more lawsuits account for 47 percent of all lawsuits;

**Table 5: Prevalence of Elder Abuse Lawsuits**

	<b>Facilities with no detected lawsuits 2000 - 2002</b>	<b>Facilities with just one lawsuit 2000 - 2002</b>	<b>Facilities with two or more lawsuits 2000 - 2002</b>	<b>Facilities with three or more lawsuits 2000 - 2002</b>
<b>No. of SNFs by lawsuits filed</b>	302	143	132	57
<b>Percent of 577 SNFs in Study</b>	52%	25%	23%	10%
<b>No. Elder Abuse Lawsuits</b>	0	143	358	233
<b>Percentage of 501 total lawsuits</b>	0	29%	71%	47%

Table 6 compares the average public performance record of four groups of facilities -- those with none, one or more, two or more, and three or more elder abuse type lawsuits filed during 2000 – 2002. It shows that skilled nursing facilities with histories of poor care and high volumes of complaints are more likely to be sued for elder abuse.

**Table 6: Comparison of Performance Records with Prevalence of Elder Abuse Lawsuits**

	<b>Skilled nursing facilities with no lawsuits</b>	<b>Skilled nursing facilities with at least one lawsuit</b>	<b>Skilled nursing facilities with two+ lawsuits</b>	<b>Skilled nursing facilities with three+ lawsuits</b>
<b>Average # of deficiencies per facility</b>	39.3	56.8	63.8	77.9
<b>Average # of complaints per facility</b>	13.2	24.4	29.4	36.1
<b>Average # of “AA” citations per facility</b>	0.01	0.04	0.06	0.1
<b>Average # of “A” citations per facility</b>	0.1	0.5	0.6	1
<b>Average # of “B” citations per facility</b>	0.8	1.7	2.1	2.6

Many of the 57 skilled nursing facilities with three or more lawsuits had extreme histories of abuse and neglect. Compared to skilled nursing facilities without elder abuse lawsuits, these facilities averaged nearly 200 percent more complaints, 100 percent more deficiencies, and many times the average rate of “A” and “AA” citations.

### **Barriers to Legal Remedies**

Substandard care, abuse or neglect does not necessarily lead to a lawsuit. It is noteworthy that a number of nursing homes with deplorable care records were not sued for elder abuse even once during 2000 – 2002. Skilled nursing facilities without detected lawsuits include:

- 23 facilities that received “A” citations during 2000 – 2002;
- 2 facilities that received “AA” citations during 2000 – 2002;
- 8 facilities that were cited for 100 or more deficiencies during 2000 – 2002;
- 9 facilities that had more than 50 complaints during 2000 – 2002; and

- 3 facilities that were cited for more than 100 deficiencies and had more than 50 complaints during 200 – 2002.

Given that California nursing home residents suffer some of the worst care in the nation, as measured by government inspection findings, it is remarkable that so few elder abuse lawsuits are filed. It is worth further study to determine why so many abused and neglected citizens cannot or do not seek legal action despite the EADACPA.

## VIII. CORRELATION BETWEEN LAWSUITS AND TYPE OF OWNERSHIP

In general, skilled nursing facilities operated by nonprofit corporations have better than average care records in California.<sup>19</sup> Given this background, it is not surprising that nonprofit nursing homes have especially low rates of elder abuse type lawsuits. Just 8 percent (39 of 501) of the detected elder abuse type lawsuits filed during 2000 – 2002 were directed against nonprofit skilled nursing facilities, although 14 percent of the facilities in the selected counties are nonprofit organizations.

On average, nonprofit operators were sued for elder abuse less than half as often as for-profit operators. Ninety-three percent (257 of 275) of the freestanding skilled nursing facilities that had at least one elder abuse type lawsuit filed against them during 2000–2002 are for-profit facilities. Only 18 of the 78 nonprofit, freestanding skilled nursing facilities located in the study counties had elder abuse type lawsuits detected against them.

Nonprofit facilities share one common trait with their for-profit counterparts: a small number of providers with generally poor care records are responsible for most of the lawsuits. Three Sacramento County skilled nursing facilities operated by Eskaton Properties, Inc., for example, account for 11 (28 percent) of the elder abuse lawsuits filed against non-profit facilities during 2000–2002.

Table 7 examines the disparity in litigation trends between for-profit and non-profit skilled nursing facilities. Fewer than one in four non-profit facilities were sued for elder abuse during 2000 – 2002, less than half the rate shown by for-profit skilled nursing facilities.

**Table 7: Comparison of Lawsuit Trends: For-profit v. Non-Profit Facilities**

	<b>Non-Profit Skilled Nursing Facilities</b>	<b>For-Profit Skilled Nursing Facilities</b>
<b>Number of Facilities in Study</b>	78	499
<b>Percentage of Facilities in Study</b>	14%	86%
<b>Number of Elder Abuse Type Lawsuits Filed Against, 2000 - 2002</b>	39	462
<b>Percentage of 501 Elder Abuse Type Lawsuits Filed Against, 2000 - 2002</b>	8%	92%
<b>Number of Facilities Without Detected Elder Abuse Type Lawsuits, 2000 – 2002</b>	60	242
<b>Percentage of Facilities Without Detected Elder Abuse Type Lawsuits, 2000- 2002</b>	77%	48%
<b>Number of Facilities Sued for Elder Abuse Once or More, 2000 - 2002</b>	18	257
<b>Percentage of Facilities Sued for Elder Abuse Once or More, 2000 - 2002</b>	23%	52%

<sup>19</sup> *California Nursing Home Search: Web Site Overview and Research Findings*, California Health Care Foundation, [www.calnhs.org](http://www.calnhs.org), October 2002.

## IX. COMPARISON WITH OTHER STUDIES

A number of organizations, researchers and government agencies have examined the affordability and availability of nursing home liability insurance in recent years. Using limited survey or insurance industry data, most of these studies and reports are directed toward supporting the industry's claim that an explosion of elder abuse litigation has caused a tremendous increase in the price of liability insurance. (See the bibliography for a listing of recent studies and reports.)

The most recent study, conducted by the United States General Accounting Office (GAO), was published in August 2003.<sup>20</sup> It examined the implications of rising liability insurance premiums on consumer access to health care with an emphasis on physician services. California was selected as one of the study states and its nursing home industry trade group was contacted to seek its views. Disputing claims of the American Medical Association, the GAO concluded that rising medical malpractice premiums do not appear to be significantly limiting access to health care.<sup>21</sup>

Aon Study: An often-cited report is a nursing home industry-commissioned study by Aon Risk Consultants, published on March 3, 2003.<sup>22</sup> The Aon study did not identify actual lawsuits or types of lawsuits. Instead, it surveyed nursing home operators on a national level about insurance claims. Aon reported that about 25 percent of nursing homes submitted information. Using the nursing home self-reported data, Aon projected that California nursing homes had a rate of about 15 insurance claims per 1,000 beds in 2002, up from about 6 claims per thousand beds in 1995.<sup>23</sup> The study does not define what constitutes a "claim" but the context of the report suggests that elder abuse litigation is causing the reported explosion of insurance claims.

Contrary to Aon's projections, the actual number of elder abuse lawsuits per year against California skilled nursing facilities is about 3 per 1,000 beds, not 15 per 1,000 as Aon projects for California. If Aon's projections on annual lawsuits were accurate, approximately 872 elder abuse lawsuits would have been filed during 2002, instead of the 164 cases that were actually filed, against the 577 skilled nursing facilities included in this study. The Aon estimates appear to exaggerate California elder abuse claims rates by over 500 percent. It is certain that if the 577 skilled nursing facilities located in the 16 study counties have average annual insurance claims rates of almost 15 per thousand beds, the great majority of claims have nothing to do with elder abuse litigation.

---

<sup>20</sup> *Medical Malpractice: Implications of Rising Premiums on Access to Health Care*, United States General Accounting Office, GAO-03-836, August 2003.

<sup>21</sup> *Ibid*, at 38.

<sup>22</sup> *Long Term Care General Liability and Professional Liability Actuarial Analysis*, AON Risk Consultants, Inc., March 3, 2003.

<sup>23</sup> *Ibid*, at 23.

Using the Aon projections and loss ratios, California's nursing home industry has claimed that the losses per bed in California from elder abuse cases currently exceed \$4,800, i.e., over \$633 million per year. While numbers like these might play well in the press or with legislators, there is no basis in fact for their numbers.

U.S. Department of Health and Human Services (DHHS): A March 2003 report by DHHS also relies on loss ratios and investment reports provided by the insurance industry to conclude:

*Nursing homes are a new target of the litigation system. From 1990 to 2001, the average size of claims tripled, and the number of claims increased from 3.6 to 11 per 1,000 beds. Premium increases paid by nursing homes are rising rapidly because of dramatic increases in both the number of lawsuits and the size of the awards.*<sup>24</sup>

Unable to determine what types of claims were filed or the number of claims, the DHHS report utilizes the aforementioned Aon Risk Consultants study as its primary information source, including inaccurate projections as fact. Interestingly, the DHHS report *does* single out California for having model tort legislation and a declining number of large jury awards.<sup>25</sup>

Harvard Researchers Report: In March 2003, two Harvard researchers published an article expressing concern that nursing home litigation costs could have a negative impact on quality of care.<sup>26</sup> Not having access to claims information, the researchers relied on the survey responses of 278 defense and plaintiff attorneys from 37 states, 39 percent of which came from Florida or Texas and only 5 percent from California. Over 50 percent of the claims cited by respondents were from Texas and Florida, neither of which is comparable to California. Unlike Florida and Texas at the time of the research, California already had stringent caps on medical malpractice awards, a strict evidence code and a burden of proof in elder abuse cases so high that only a handful of the thousands of abuse and neglect cases are ever filed.

Department of Health Services Report: In June 2003, the State of California released an overdue report to the California Legislature on liability insurance for California long-term care providers.<sup>27</sup> The report was prepared by the Department of Health Services in response to a mandate by the California Legislature, AB 430 (Chapter 171, Statutes of 2001). Unfortunately, it does not include any new information on litigation trends against California skilled nursing facilities and contains only limited information on other factors affecting the cost and availability of liability insurance. In its own words, the Department of Health Service found “*the data available regarding nursing home liability insurance are limited, and generate more questions than they provide answers.*” The

---

<sup>24</sup> *Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Health Care*, Department of Health and Human Services, March 2003 at page 20.

<sup>25</sup> *Ibid.*

<sup>26</sup> Stevenson, David G and Studdert, David M, *The Rise of Nursing Home Litigation: Findings from a National Survey of Attorneys*, Health Affairs, Volume 22, No. 2, March 2003.

<sup>27</sup> *Liability Insurance for California Long-Term Care Providers, A Report to the California Legislature*, Prepared by the California Department of Health Services in response to a mandate by the California Legislature, Section 53.5 of AB 430 (Ch. 171, Statutes of 2001), released on June 12, 2003.

report's top recommendation is to increase DHS data regarding litigation and insurance claims against nursing homes.

CANHR's study takes a major step in the direction recommended by DHS, providing elder abuse litigation data for half of California's freestanding skilled nursing facilities. It provides a solid foundation of information for California legislators and policymakers. Given the declining willingness and ability of the government to devote resources to protect the health and safety of nursing home residents, California laws protecting the elderly from neglect and abuse should not be sabotaged by distorted information arising from distant states with very different legal climates.

## X. SUMMARY

Very few elder abuse lawsuits were filed against California skilled nursing facilities over the past three years. Nor is there any evidence that the public is using the elder abuse laws against skilled nursing facilities to profit on frivolous disputes. There has been no "explosion" of elder abuse lawsuits in California and there is no evidence one is on its way.

It is also true that skilled nursing facilities that chronically neglect their residents are most likely to get sued for elder abuse. Ten percent of the skilled nursing facilities, many with notorious histories of neglect and abuse, account for almost half of the elder abuse lawsuits. Skilled nursing facilities with high levels of deficiencies, complaints and citations are much more likely to be sued for elder abuse than those offering better care.

There is no question that liability insurance premiums for the nursing home industry have increased substantially over the last two years. However, the insurance and the nursing home industry's allegation that a flood of elder abuse litigation is the cause of these increases cannot be reconciled against the reality that only a trickle of lawsuits are being filed in any given year.

Even long time insurance industry analysts are aware that the insurance industry's pricing and accounting practices and declining investment returns are the primary cause of the current liability premium "crisis." As Donald J. Zuk, chief executive of Scpie Holdings Inc., a leading malpractice carrier in California, noted: "*I don't like to hear insurance company executives say it's the tort system - it's self-inflicted.*"<sup>28</sup>

In the face of declining profits, insurance carriers are doing what they always do: raising premiums. Premiums for homeowners, auto, professional liability (including attorneys), truckers and others have also quadrupled over the past few years. Carriers for nursing home liability are also being more selective and looking at claims history, enforcement records and patterns and practices from a risk management perspective. Given the high-risk behavior of some facilities, it is little wonder that their premiums have increased.

When compared with the virtual immunity from civil legal action nursing home operators enjoyed prior to enactment of the EADACPA, perhaps the occasional elder abuse lawsuit seems like a new threat to providers. But in an absolute sense, the number of lawsuits is miniscule.

The EADACPA was enacted to give older and dependent adults in California an opportunity to challenge abusive or neglectful care providers in court. Although very few people are taking advantage of this opportunity, the law appears to be working in that it is providing a measure of accountability and an incentive to improve care. It should be preserved and strengthened.

---

<sup>28</sup> *Insurers' Price Wars Contributed to Doctors Facing Soaring Costs*, The Wall Street Journal, June 24, 2002.

## XI. RECOMMENDATIONS

Elderly and disabled victims of abuse and neglect in nursing homes deserve to be fully compensated for their injuries. Curbing the right to sue, limiting damages or suppressing evidence of abuse and neglect won't solve the problem of a mismanaged and manipulated insurance market, nor will it decrease liability premiums or improve quality of care. We support reforms that will address the systemic problems of price gouging by the insurance industry and that will improve the quality of care for all of California's nursing home residents.

**1. Risk Reduction Programs:** Changing practices and reducing accidents that lead to insurance claims will ultimately reduce insurance premiums. According to several insurance industry analysts, over 80% of claims against nursing homes are related to falls, pressure ulcers, nutrition/hydration or resident abuse. It should follow that smart facilities will institute risk management and loss-control programs with aggressive assessment and intervention training and practices. California should consider adopting a "best practices" program, such as the one recently implemented in Texas, that encourages facilities to implement risk management and loss control programs that, by extension, improve the quality of care for residents.

**2. Industry Intervention:** A disproportionate number of elder abuse claims are brought against a relatively small number of facilities that have a pattern and practice of substandard care. Since insurance companies always spread the risk, a handful of high risk, frequently sued facilities can increase premiums for all. In lieu of spending millions of dollars to curtail the rights of abuse victims, the nursing home and insurance industries should work together to identify high-risk facilities, intervene and provide technical assistance to improve facility practices.

**3. Insurance Rate Increase Oversight:** For the first 12 years after California placed severe restrictions on medical malpractice awards, medical malpractice liability premiums increased 190 percent. Clearly what is needed is a cap on insurance industry profits, not a cap on damages for elder abuse. While California's insurance industry must submit proposed rate hikes to the Department of Insurance, more oversight is needed to deter unwarranted rate increases. Like public utilities, insurance companies should be required to demonstrate the need for any rate increase, and California's Insurance Commissioner needs to be given greater authority to approve or reject rate requests and to rollback insurance rates.

**4. Prohibit Arbitration Clauses in Admission Agreements:** California's policy makers should prohibit pre-dispute arbitration clauses in residential care and nursing home admission agreements. If the parties choose to enter into arbitration after a dispute arises, that should be their choice. However, the process should be voluntary, without the coercion that accompanies the "take it or leave it" setting of the admission process. Nor should frail elders or the disabled be forced to relinquish their constitutional right to a judicial hearing as a condition of admission into a facility.

**5. Greater Public Disclosure:** AB 634 (Steinberg), effective January 1, 2004, prohibits the practice of "secret" settlements in elder abuse lawsuits, except under certain circumstances. However, non-disclosure of the amount of the settlement is still permitted. SB 686 (Ortiz), also

effective January 1, 2004, requires, among other provisions, the reporting by insurance companies of certain information related to policies written for long term care providers, including the number and types of lawsuits filed, the number and amount of claims settled or closed, amount of premiums paid, and other cost and claims data. None of this information will be made available to the public except in the form of aggregate reports. While both of these bills are positive steps in opening the process and in formulating future policy decisions, more public disclosure is needed. The public, the insurance industry and the providers should be made aware of what types of claims are being filed and who the defendants are in these lawsuits.

**6. Lower the Evidentiary Burden for EADACPA:** The Elder Abuse laws have worked well to provide some elderly and disabled nursing home residents with legal remedies not previously available. It has not worked so well, however, in carrying out the intent of the law: “...to enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults.” The burden of proof in elder abuse cases, i.e., clear and convincing evidence of oppression, fraud, malice or recklessness, is so high that few of the thousands of abuse and neglect cases are ever filed, much less litigated. Indeed, the very small number of lawsuits and the ability of so many chronically substandard nursing homes to escape any legal action indicate that the evidentiary standard set by the EADACPA is so high that few elders and disabled adults can avail themselves of this remedy. We strongly recommend that the burden of proof in elder abuse cases be lowered to a “preponderance of the evidence.”

**7. Increase Residents’ Rights Remedies:** The only remedy available for violation of residents’ rights in California is a private cause of action authorized under Health and Safety Code §1430(b). Unfortunately, fewer than five such actions have been filed since this law was enacted in 1982. Although the remedies available under this law include injunctive relief - an important remedy for violation of residents’ rights - the \$500 limit on damages so reduces the likelihood of legal representation, any opportunity for relief is moot. Thus, residents who are illegally evicted, denied phone calls or visitors or subjected to humiliation by being paraded naked through the facility, are denied any relief. We strongly recommend that the damages available under the residents’ rights provisions of Health and Safety Code Section 1430(b) be increased to \$5,000.

## BIBLIOGRAPHY

*Addressing the New Health Care Crisis, Reforming the Medical Litigation System to Improve the Quality of Health Care*, U.S. Department of Health and Human Services, March 2003.

*Institutional Elder Abuse in California: The Consequences of EADACPA*, Institute for Health and Aging, University of California, San Francisco and Hastings College of the Law, Public Law Research Institute.

*Liability Crisis: Only an Excuse for Tort Reform*, Special Report, California Advocates for Nursing Home Reform, June 2001.

*Liability Insurance for California Long-Term Care Providers, A Report to the California Legislature*, California Health and Human Services Agency, June 12, 2003.

*Long Term Care General Liability and Professional Liability Actuarial Analysis*, AON Risk Consultants, Inc., March 3, 2003.

*Medical Malpractice Insurance: Stable Losses/Unstable Rates*, Americans for Insurance Reform, October 10, 2002.

*Medical Malpractice: Implications of Rising Premiums on Access to Health Care*, United States General Accounting Office, GAO-03-836, August 2003.

*Medical Malpractice Insurance, Multiple Factors Have Contributed to Increased Rates*, United States General Accounting Office, GAO-03-702, June 2003.

*Nursing Homes: The Escalating Liability Crisis*, National Conference of State Legislatures, February 2002.

Stevenson, David G. and Studdert, David M. *The Rise of Nursing Home Litigation: Findings from a National Survey of Attorneys*, Health Affairs, Volume 22, No. 2, March 2003.

## SOURCES

California Department of Health Services, Licensing and Certification Program, Automated Certification and Licensing Administrative Information and Management Systems (ACLAIMS).

Superior Court of California, County of Butte, One Court Street, Oroville, CA 95965-3303

Superior Court of California, County of Contra Costa, 725 Court Street, Martinez, CA 94553

Superior Court of California, County of Del Norte, 450 "H" Street, Crescent City, CA 95531

Superior Court of California, County of Glenn, 526 West Sycamore Street, Willows, CA 95988

Superior Court of California, County of Humboldt, 825 5th Street, Eureka, CA 95501

Superior Court of California, County of Lassen, 220 South Lassen Street, Susanville, CA 96130

Superior Court of California, County of Los Angeles, 111 North Hill Street, Los Angeles, California 90012

Superior Court of California, County of Plumas, 520 Main Street, Quincy, CA, 95971

Superior Court of California, County of Sacramento, 720 Ninth Street Sacramento, CA, 95814

Superior Court of California, County of San Francisco, Civic Center Courthouse, 400 McAllister Street, San Francisco, CA 94102-4514

Superior Court of California, County of San Mateo, 400 County Center, Redwood City, CA 94063

Superior Court of California, County of Santa Clara, Downtown Superior Court, 191 North First Street, San Jose, CA 95113

Superior Court of California, County of Shasta, 1500 Court St., Redding, CA 96001

Superior Court of California, County of Siskiyou, 311 Fourth Street, Yreka, CA 96097

Superior Court of California, County of Solano, Hall of Justice, 600 Union Avenue, Fairfield, CA 94533

Superior Court of California, County of Tehama, 633 Washington Street, Red Bluff, CA 96080

**APPENDIX A: LAWSUITS PER THOUSAND  
SKILLED NURSING FACILITY BEDS, 2000 – 2002**

County	Number of Lawsuits in 2000	Number of Lawsuits per 1,000 SNF beds	Number of Lawsuits in 2001	Number of Lawsuits per 1,000 SNF beds	Number of Lawsuits in 2002	Number of Lawsuits per 1,000 SNF beds
<b>Butte</b>	2	1.8	2	1.8	3	2.6
<b>Contra Costa</b>	16	5	9	2.8	9	2.8
<b>Del Norte</b>	0	0	1	10	0	0
<b>Glenn</b>	0	0	0	0	0	0
<b>Humboldt</b>	1	1.9	3	5.6	0	0
<b>Lassen</b>	0	0	1	10.4	2	21
<b>Los Angeles</b>	78	2.1	120	3.2	121	3.2
<b>Plumas</b>	2	35	0	0	0	0
<b>Sacramento</b>	20	5.2	16	4.2	13	3.4
<b>San Francisco</b>	2	1.5	3	2.1	2	1.5
<b>San Mateo</b>	7	3.6	10	5.2	3	1.6
<b>Santa Clara</b>	14	2.6	7	1.3	3	0.6
<b>Shasta</b>	4	4.6	0	0	3	3.5
<b>Siskiyou</b>	1	6.3	0	0	0	0
<b>Solano</b>	10	8.2	8	6.5	4	3.3
<b>Tehama</b>	0	0	0	0	1	8.9
<b>TOTALS</b>	<b>157</b>	<b>2.7</b>	<b>180</b>	<b>3.1</b>	<b>164</b>	<b>2.9</b>

**APPENDIX B: PERFORMANCE RECORDS OF FREESTANDING SNFS  
WITH TWO OR MORE ELDER ABUSE TYPE LAWSUITS  
FILED AGAINST THEM, 2000 – 2002**

This table looks at the performance of the 132 freestanding skilled nursing facilities that had two or more elder abuse lawsuits filed against them during 2000-2002. Although these skilled nursing facilities are less than 23 percent of the study group, they account for over 71 percent of the elder abuse type lawsuits. Their performance records compare poorly with skilled nursing facilities that were not sued for elder abuse during 2000 – 2002.

County	Number of freestanding SNFs with 2 or more elder abuse lawsuits 2000 – 2002	# of lawsuits 2000-2002	Deficiencies 2000-2002	Complaints to DHS 2000-2002	AA Citations 2000-2002	A Citations 2000-2002	B Citations 2000-2002
Butte	2	4	129	84	0	4	2
Contra Costa	9	25	905	516	0	18	14
Del Norte	0	0	0	0	0	0	0
Glenn	0	0	0	0	0	0	0
Humboldt	2	4	175	54	1	1	6
Lassen	1	3	45	27	1	0	2
Los Angeles	89	227	4,598	1,747	0	9	156
Plumas	1	2	39	14	0	0	0
Sacramento	12	38	1,026	634	2	19	30
San Francisco	1	3	129	72	0	4	4
San Mateo	4	16	472	210	3	12	8
Santa Clara	5	12	291	198	0	4	14
Shasta	2	6	179	80	0	5	3
Siskiyou	0	0	0	0	0	0	0
Solano	4	18	428	243	1	9	39
Tehama	0	0	0	0	0	0	0
<b>TOTALS</b>	<b>132</b>	<b>358</b>	<b>8,416</b>	<b>3,879</b>	<b>8</b>	<b>85</b>	<b>278</b>
<b>AVERAGE PER FACILITY (132 SNFs)</b>		<b>2.7</b>	<b>63.8</b>	<b>29.4</b>	<b>0.06</b>	<b>0.6</b>	<b>2.1</b>