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Senate 1202: Relating to Long-term-care Facilities

S1202 GENERAL BILL/CS/CS/CS/3RD ENG by Appropriations, Judiciary; Health, Aging and Long-Term Care, Brown-Waite; (CO-SPONSORS) Holzendorf (Linked **S 1200**, Compare CS/1ST ENG/**H 0605**, **H 1353**, **H 1581**, **H 1619**, **H 1641**, 1ST ENG/**H 1753**, 3RD ENG/**H 1861**, CS/**H 1879**, 1ST ENG/**H 1881**, CS/CS/2ND ENG/**S 0792**, **S 1326**, **S 1372**, CS/CS/**S 1456**, CS/1ST ENG/**S 1848**)

Long term care Facilities; clarifies duties of local ombudsman councils re inspections of nursing homes & long-term-care facilities; requires AHCA & Office of Attorney General to study use of electronic monitoring devices in nursing homes; provides for election of survival damages, wrongful death damages, or recovery for negligence; prescribes limits on amount of punitive damages; provides for division of punitive damages, etc. Amends FS. APPROPRIATION: $16 ,[illegible] EFFECTIVE DATE: 05/15/2001 except as otherwise provided

02/28/01 SENATE Prefiled
03/01/01 SENATE Referred to Health, Aging and Long-Term Care; Judiciary; Appropriations Subcommittee on Health and Human Services; Appropriations
03/06/01 SENATE Introduced, referred to Health, Aging and Long-Term Care; Judiciary; Appropriations Subcommittee on Health and Human Services; Appropriations -SJ 00059; On Committee agenda-- Health, Aging and Long-Term Care, 03/08/01, 2:00 pm, 110-S --Temporarily postponed
03/09/01 SENATE On Committee agenda-- Health, Aging and Long-Term Care, 03/14/01, 12:15 pm, 110-S
03/14/01 SENATE CS by Health, Aging and Long-Term Care; YEAS 10 NAYS 0 -SJ 00149; CS read first time on 03/16/01 -SJ 00161
03/16/01 SENATE Now in Judiciary -SJ 00149
03/22/01 SENATE On Committee agenda-- Judiciary, 03/27/01, 2:00 pm, 412-K --Temporarily postponed
03/30/01 SENATE On Committee agenda-- Judiciary, 04/03/01, 1:30 pm, 412-K --Temporarily postponed
04/05/01 SENATE On Committee agenda-- Judiciary, 04/10/01, 9:00 am, 412-K
04/10/01 SENATE CS/CS by Judiciary; YEAS 10 NAYS 1 -SJ 00396; CS read first time on 04/18/01 -SJ 00399
04/11/01 SENATE Withdrawn from- Appropriations Subcommittee on Health and Human Services -SJ 00323
04/13/01 SENATE Now in Appropriations -SJ 00396; On Committee agenda-- Appropriations, 04/18/01, 9:00 am, 412-K
04/18/01 SENATE CS/CS/CS by- Appropriations; YEAS 20 NAYS 1 -SJ 00447; CS read first time on 04/20/01 -SJ 00448
04/20/01 SENATE Placed on Calendar, on second reading -SJ 00447
04/26/01 SENATE Placed on Special Order Calendar -SJ 00485; Read second time -SJ 00533; Amendment(s) adopted -SJ 00534, -SJ 00539; Ordered engrossed -SJ 00543
04/27/01 SENATE Read third time -SJ 00554; Amendment(s) adopted -SJ 00555; CS passed as amended; YEAS 33 NAYS 5 -SJ 00555; Immediately certified -SJ 00555
04/27/01 HOUSE In Messages
04/30/01 HOUSE Received, placed on Calendar, on second reading -HJ 01396; Read second time -HJ 01396; Temporarily postponed, on second reading, On Unfinished Business -HJ 01397
05/01/01 HOUSE Was taken up -HJ 01448; Amendment(s) adopted -HJ 01450
05/02/01 HOUSE Read third time -HJ 01529; Motion to reconsider failed -HJ 01530; CS passed as amended; YEAS 1[illegible] NAYS 8 -HJ 0153[illegible]
05/02/01 SENATE In returning messages
05/04/01 SENATE Was taken up -SJ 01[illegible]; Amendment(s) to House amendment(s) adopted -SJ 01617; Concurred in House amendment(s) as amended -SJ 01641; Requested House to concur -SJ 01644; CS passed as amended; YEAS 38 NAYS 0 -SJ 01644
05/04/01 HOUSE In returning messages; Was taken up -HJ 02266; Concurred -HJ 02267; CS passed as amended; YEAS 10[illegible] NAYS 8 -HJ 0[illegible]95

596-606
SJ 0926,1...
...-613
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...-47
...-9
1...-17...
533-541

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05/04/01 SENATE Ordered engrossed, then enrolled -SJ 02118
05/14/01   Signed by Officers and presented to Governor
05/15/01   Approved by Governor; Chapter No. 2001-15; See also SB 1200
                (Ch. 2001-44), HB 1861
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Bill Text: (Top)

Bill Name	Date Posted	Available Formats
S 1202	03/01/2001	Web Page PDF
S 1202C1	03/17/2001	Web Page PDF
S 1202C2	04/14/2001	Web Page PDF
S 1202C3	04/21/2001	Web Page PDF
S 1202E1	04/27/2001	Web Page PDF
S 1202E2	04/28/2001	Web Page PDF
S 1202E3	05/08/2001	Web Page PDF
S 1202ER	05/07/2001	Web Page PDF

Committee Amendments and Filed Floor Amendments: (Top)

S 1202

Amendment ID	Date Posted	Available Formats

S 1202C1

Amendment ID	Date Posted	Available Formats

S 1202C2

Amendment ID	Date Posted	Available Formats

S 1202C3

Amendment ID	Date Posted	Available Formats
045942	04/24/2001	Web Page PDF
063568	04/25/2001	Web Page PDF
111486	04/25/2001	Web Page PDF
113470	04/23/2001	Web Page PDF
113614	04/26/2001	Web Page PDF
113930	04/25/2001	Web Page PDF
115682	04/25/2001	Web Page PDF
130808	04/25/2001	Web Page PDF
135980	04/26/2001	Web Page PDF
163292	04/25/2001	Web Page PDF
163828	04/25/2001	Web Page PDF
183142	04/25/2001	Web Page PDF
192074	04/26/2001	Web Page PDF
201012	04/26/2001	Web Page PDF
222646	04/26/2001	Web Page PDF
261814	04/25/2001	Web Page PDF
274038	04/25/2001	Web Page PDF
324128	04/26/2001	Web Page PDF
324740 (762432)	04/26/2001	Web Page PDF
340598	04/25/2001	Web Page PDF
352358	04/26/2001	Web Page PDF
364104	04/25/2001	Web Page PDF
420752	04/26/2001	Web Page PDF
420982	04/23/2001	Web Page PDF
422664	04/23/2001	Web Page PDF

422736	04/26/2001	Web Page PDF
451258	04/23/2001	Web Page PDF
460248	04/25/2001	Web Page PDF
463060	04/25/2001	Web Page PDF
472148	04/23/2001	Web Page PDF
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501228	04/26/2001	Web Page PDF
532194	04/26/2001	Web Page PDF
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894608	04/23/2001	Web Page PDF
904424	04/26/2001	Web Page PDF
935776	04/26/2001	Web Page PDF
945166	04/26/2001	Web Page PDF
985764	04/25/2001	Web Page PDF

S 1202E1

Amendment ID	Date Posted	Available Formats
183218	04/27/2001	Web Page PDF

S 1202E2

Amendment ID	Date Posted	Available Formats
074769	04/30/2001	Web Page PDF
105751	05/01/2001	Web Page PDF
114741	04/30/2001	Web Page PDF
163451	05/01/2001	Web Page PDF
191785	05/01/2001	Web Page PDF
194553	04/30/2001	Web Page PDF
215552	05/04/2001	Web Page PDF
260568	05/04/2001	Web Page PDF
323135	04/30/2001	Web Page PDF
341895	04/30/2001	Web Page PDF
424095	05/01/2001	Web Page PDF
441093	05/01/2001	Web Page PDF
472345	05/01/2001	Web Page PDF
531051	04/30/2001	Web Page PDF
540936	05/02/2001	Web Page PDF
563254	05/02/2001	Web Page PDF
582752	05/04/2001	Web Page PDF
620363	05/01/2001	Web Page PDF
633037	05/01/2001	Web Page PDF
635375	05/01/2001	Web Page PDF
642555	05/01/2001	Web Page PDF
711949	05/01/2001	Web Page PDF
712698	05/04/2001	Web Page PDF
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794880	05/02/2001	Web Page PDF
803155	05/01/2001	Web Page PDF
870386	05/02/2001	Web Page PDF
925107	04/30/2001	Web Page PDF
925473	05/01/2001	Web Page PDF
931505	04/30/2001	Web Page PDF
941027	05/01/2001	Web Page PDF
944809	05/01/2001	Web Page PDF
953807	05/01/2001	Web Page PDF
962565	05/01/2001	Web Page PDF
983088	05/03/2001	Web Page PDF

S 1202E3

Amendment ID	Date Posted	Available Formats

S 1202ER

Amendment ID	Date Posted	Available Formats

Staff Analysis: (Top)

Analysis ID	Sponsor	Available Formats
s 1202	Health, Aging and Long-Term Care	PDF
s 1202	Judiciary	PDF
s 1202	Appropriations	PDF
s 1202	HMS	PDF

Vote History: (Top)

House 1879: Relating to Long-Term Care

H1879 GENERAL BILL/CS by Fiscal Responsibility Council; Elder & Long-Term Care (HCC), Green; (CO-SPONSORS) Murman; Fiorentino (Linked 1ST ENG/**H 1881**, Compare CS/2ND ENG/**H 0475**, **H 1353**, **H 1581**, **H 1619**, **H 1641**, **S 0242**, CS/**S 0688**, **S 1200**, CS/CS/CS/3RD ENG/**S 1202**, CS/CS/1ST ENG/**S 1312**, **S 1372**, CS/2ND ENG/**S 1558**, CS/**S 1726**)

Long-Term Care; requires ombudsman verification & reporting of nursing home staff on duty & posting thereof; provides for election of survival damages, wrongful death damages, or recovery for negligence; limits actions against nursing homes & assisted living facilities; requires facility posting of Fla. Nursing Home Guide Watch List; provides performance review & inservice training requirements for certified nursing assistants, etc. Amends FS. EFFECTIVE DATE: Upon becoming law except as otherwise provided

Date	Chamber	Action
04/05/01	HOUSE	Filed
04/10/01	HOUSE	Introduced -HJ 00492
04/12/01	HOUSE	Referred to Council for Ready Infrastructure; Council for Healthy Communities -HJ 00512
04/16/01	HOUSE	Also referred to Fiscal Responsibility Council -HJ 0052[illegible]
04/17/01	HOUSE	On Council agenda -- Council for Ready Infrastructure, 04/18/01, 10:30 am, 404-H --Temporarily deferred
04/19/01	HOUSE	On Council agenda-- Council for Ready Infrastructure, 04/20/01, 10:45 am, 404-H
04/20/01	HOUSE	Favorable with 3 amendment(s) by Council for Ready Infrastructure; YEAS 19 NAYS 0 -HJ 00549
04/23/01	HOUSE	Now in Council for Healthy Communities -HJ 00549; On Council agenda-- Council for Healthy Communities, 04/23/01, 3:45 pm, Reed Hall; Favorable with 21 amendment(s) by- Council for Healthy Communities; YEAS 15 NAYS 0 -HJ 00659
04/24/01	HOUSE	Now in Fiscal Responsibility Council -HJ 00659; On Council agenda -- Fiscal Responsibility Council, 04/24/01, 10:15 am, 21-H --CS by- Fiscal Responsibility Council; YEAS 19 NAYS [illegible] -HJ 00966
04/26/01	HOUSE	CS read first time on 04/26/01 -HJ 00955; Pending review of CS under Rule 6 -HJ 00966; Placed on Calendar, on second reading -HJ 00966
05/04/01	HOUSE	Died on Calendar, Link/Iden/Sim/Compare passed, refer to CS/HB 475, CS/SB 688

Bill Text: (Top)

Bill Name	Date Posted	Available Formats
H 1879	04/06/2001	Web Page PDF
H 1879C1	04/27/2001	Web Page PDF

Amendments: (Top)

H 1879

Amendment ID	Date Posted	Available Formats
022015	04/23/2001	Web Page PDF
075949	04/23/2001	Web Page PDF
083749	04/23/2001	Web Page PDF
091741	04/23/2001	Web Page PDF
105961	04/23/2001	Web Page PDF
132133	04/23/2001	Web Page PDF
165741	04/23/2001	Web Page PDF
352153	04/23/2001	Web Page PDF
364195	04/23/2001	Web Page PDF
412707	04/23/2001	Web Page PDF
414211	04/23/2001	Web Page PDF
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474199	04/23/2001	Web Page PDF
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643061	04/23/2001	Web Page PDF
650653	04/23/2001	Web Page PDF
680153	04/23/2001	Web Page PDF
701161	04/23/2001	Web Page PDF
723433	04/23/2001	Web Page PDF
724613	04/23/2001	Web Page PDF
955321	04/23/2001	Web Page PDF
984527	04/23/2001	Web Page PDF

H 1879C1

Amendment ID	Date Posted	Available Formats
113479	04/25/2001	Web Page PDF
143853	04/25/2001	Web Page PDF
503109	04/25/2001	Web Page PDF
841473	04/25/2001	Web Page PDF

Bill Analysis. (Top)

Analysis ID	Sponsor	Available Formats
h 1879	Elder & Long-Term Care	PDF
h 1879	RIC	PDF
h 1879	HCC	PDF
h 1879s1	FRC	PDF

Vote History: (Top)

No Vote History Available

Citations: (Top)

STATUTE CITATIONS (Top)

0101.655
0397.405
0400.0069
0400.0073
0400.021
0400.0[illegible]3
0400.0225

[illegible]

1, [illegible] [illegible]

1, [illegible] CS/SB [illegible]

1, [illegible], 14[illegible]-149 CS/[illegible]/SB 12 12/4 much [illegible] [illegible]

1, 17-23, 135-36 CS/[illegible] [illegible] [illegible])

1, 16-23 " 12[illegible]/4 [illegible]

S, Ju[illegible] [illegible] CS/[illegible] [illegible] ([illegible] - [illegible])

SJ[illegible] [illegible] ([illegible]3[illegible])

1, [illegible]-19 [illegible]

1, 16-22 CS/HB 13[illegible] - [illegible] CS/[illegible] 53 1202

Senate 1202: Relating to Long-term-care Facilities

S1202 GENERAL BILL/CS/CS/CS/3RD ENG by Appropriations, Judiciary; Health, Aging and Long-Term Care; Brown-Waite; (CO-SPONSORS) Holzendorf (Linked S 1200, Compare CS/1ST ENG/H 0605, H 1353, H 1581, H 1619, H 1641, 1ST ENG/H 1753, 3RD ENG/H 1861, CS/H 1879, 1ST ENG/H 1881, CS/CS/2ND ENG/S 0792, S 1326, S 1372, CS/CS/S 1456, CS/1ST ENG/S 1848)

Long-term-care Facilities, clarifies duties of local ombudsman councils re inspections of nursing homes & long-term-care facilities, requires AHCA & Office of Attorney General to study use of electronic monitoring devices in nursing homes, provides for election of survival damages, wrongful death damages, or recovery for negligence, prescribes limits on amount of punitive damages, provides for division of punitive damages, etc Amends FS APPROPRIATION $16,223,557 EFFECTIVE DATE 05/15/2001 except as otherwise provided

02/28/01 SENATE Prefiled
03/01/01 SENATE Referred to Health, Aging and Long-Term Care, Judiciary, Appropriations Subcommittee on Health and Human Services, Appropriations
03/06/01 SENATE Introduced, referred to Health, Aging and Long-Term Care, Judiciary, Appropriations Subcommittee on Health and Human Services, Appropriations -SJ 00058, On Committee agenda-- Health, Aging and Long-Term Care, 03/08/01, 2 00 pm, 110-S --Temporarily postponed
03/09/01 SENATE On Committee agenda-- Health, Aging and Long-Term Care, 03/14/01, 12.15 pm, 110-S
03/14/01 SENATE CS by Health, Aging and Long-Term Care, YEAS 10 NAYS 0 -SJ 00149, CS read first time on 03/16/01 -SJ 00181
03/16/01 SENATE Now in Judiciary -SJ 00149
03/22/01 SENATE On Committee agenda-- Judiciary, 03/27/01, 2 00 pm, 412-K --Temporarily postponed
03/30/01 SENATE On Committee agenda-- Judiciary, 04/04/01, 1 30 pm, 412-K --Temporarily postponed
04/05/01 SENATE On Committee agenda-- Judiciary, 04/10/01, 8 00 am, 412-K
04/10/01 SENATE CS/CS by Judiciary, YEAS 10 NAYS 1 -SJ 00396, CS read first time on 04/18/01 -SJ 00399
04/11/01 SENATE Withdrawn from- Appropriations Subcommittee on Health and Human Services -SJ 00313
04/13/01 SENATE Now in Appropriations -SJ 00396, On Committee agenda-- Appropriations, 04/18/01, 9 00 am, 412-K
04/18/01 SENATE CS/CS/CS by- Appropriations, YEAS 20 NAYS 1 -SJ 00447, CS read first time on 04/20/01 -SJ 00448
04/20/01 SENATE Placed on Calendar, on second reading -SJ 00447
04/26/01 SENATE Placed on Special Order Calendar -SJ 00465, Read second time -SJ 00533, Amendment(s) adopted -SJ 00534, -SJ 00539, Ordered engrossed -SJ 00543
04/27/01 SENATE Read third time -SJ 00554, Amendment(s) adopted -SJ 00555, CS passed as amended, YEAS 33 NAYS 5 -SJ 00555, Immediately certified -SJ 00555
04/27/01 HOUSE In Messages
04/30/01 HOUSE Received, placed on Calendar, on second reading -HJ 01396, Read second time -HJ 01397, Temporarily postponed on second reading, On Unfinished Business -HJ 01397
05/01/01 HOUSE Was taken up -HJ 01448, Amendment(s) adopted -HJ 01450
05/02/01 HOUSE Read third time -HJ 01529, Motion to reconsider failed -HJ 01530, CS passed as amended, YEAS 112 NAYS 8 -HJ 01531
05/02/01 SENATE In returning messages
05/04/01 SENATE Was taken up -SJ 01589, Amendment(s) to House amendment(s) adopted -SJ 01617, Concurred in House amendment(s) as amended -SJ 01644, Requested House to concur -SJ 01644, CS passed as amended, YEAS 38 NAYS 0 -SJ 01644
05/04/01 HOUSE In returning messages, Was taken up -HJ 02266, Concurred -HJ 02267, CS passed as amended, YEAS 109 NAYS 8 -HJ 02295
05/04/01 SENATE Ordered engrossed, then enrolled -SJ 02118
05/14/01 Signed by Officers and presented to Governor
05/15/01 Approved by Governor; Chapter No. **2001-45**, See also SB 1200 (Ch 2001-44), HB 1861

House 1879. Relating to Long-Term Care

H1879 GENERAL BILL/CS by Fiscal Responsibility Council; Elder & Long-Term Care (HCC); Green; (CO-SPONSORS) Murman; Fiorentino (Linked 1ST ENG/H 1881, Compare CS/2ND ENG/H 0475, H 1353, H 1581, H 1619, H 1641, S 0242, CS/S 0688, S 1200, CS/CS/CS/3RD ENG/S 1202, CS/CS/1ST ENG/S 1312, S 1372, CS/2ND ENG/S 1558, CS/S 1726)

Long-Term Care, requires ombudsman verification & reporting of nursing home staff on duty & posting thereof, provides for election of survival damages, wrongful death damages, or recovery for negligence, limits actions against nursing homes & assisted living facilities, requires facility posting of Fla Nursing Home Guide Watch List, provides performance review & inservice training requirements for certified nursing assistants, etc Amends FS EFFECTIVE DATE Upon becoming law except as otherwise provided

04/05/01 HOUSE Filed
04/10/01 HOUSE Introduced -HJ 00492
04/12/01 HOUSE Referred to Council for Ready Infrastructure, Council for Healthy Communities -HJ 00512
04/16/01 HOUSE Also referred to Fiscal Responsibility Council -HJ 00527
04/17/01 HOUSE On Council agenda-- Council for Ready Infrastructure, 04/18/01, 10 30 am, 404-H --Temporarily deferred
04/19/01 HOUSE On Council agenda-- Council for Ready Infrastructure, 04/20/01, 10 45 am, 404-H
04/20/01 HOUSE Favorable with 3 amendment(s) by Council for Ready Infrastructure, YEAS 19 NAYS 0 -HJ 00549
04/23/01 HOUSE Now in Council for Healthy Communities -HJ 00549, On Council agenda-- Council for Healthy Communities, 04/23/01, 3 45 pm, Reed Hall, Favorable with 21 amendment(s) by- Council for Healthy Communities, YEAS 15 NAYS 0 -HJ 00659
04/24/01 HOUSE Now in Fiscal Responsibility Council -HJ 00659, On Council agenda-- Fiscal Responsibility Council, 04/24/01, 10 15 am, 212-K, CS by- Fiscal Responsibility Council, YEAS 19 NAYS 2 -HJ 00966
04/26/01 HOUSE CS read first time on 04/26/01 -HJ 00965, Pending review of CS under Rule 6 -HJ 00966, Placed on Calendar, on second reading -HJ 00966
05/04/01 HOUSE Died on Calendar, Link/Iden/Sim/Compare passed, refer to CS/HB 475 (Ch 2001-53), CS/SB 688 (Ch 2001-67), SB 1200 (Ch 2001-44), CS/CS/CS/SB 1202 (Ch 2001-45), CS/SB 1558 (Ch 2001-277), CS/SB 1726 (Ch 2001-194)

living facilities, amending s 400 426, F S, requiring that certain residents be examined by a licensed physician, amending s 400 4275, F S, specifying minimum amounts of liability insurance required to be carried by an assisted living facility, amending s 400 428, F S, revising requirements for the survey conducted of licensed facilities by the agency, amending s 400 429, F S, providing for election of survival damages, wrongful death damages, or recovery for negligence, providing for attorney's fees for injunctive relief or administrative remedy, providing that ch 766, F S, does not apply to actions under this section, prescribing the burden of proof, providing that a violation of a right is not negligence per se, prescribing the duty of care, prescribing a nurse's duty of care, eliminating presuit provisions, eliminating the requirement for presuit mediation, creating s 400 4293, F S, providing for presuit notice, prohibiting the filing of suit for a specified time, requiring a response to the notice, tolling the statute of limitations, limiting the discovery of presuit investigation documents, limiting liability of presuit investigation participants, authorizing the obtaining of opinions from a nurse or doctor, authorizing the obtaining of unsworn statements, authorizing discovery of relevant documents, prescribing a time for acceptance of settlement offers, requiring mediation, prescribing the time to file suit, creating s 400 4294, F S, requiring the availability of facility records for presuit investigation, specifying the records to be made available, specifying what constitutes evidence of failure to make records available in good faith, specifying the consequences of such failure, creating s 400 4295, F S, providing that the provisions of s 768 21(8), F S, do not apply to actions under part III of ch 400, F S, creating s 400 4296, F S, providing a statute of limitations, providing a statute of limitations when there is fraudulent concealment or intentional misrepresentation of fact, providing for application of the statute of limitation to accrued actions, creating s 400 4297, F S, requiring evidence of the basis for punitive damages, prohibiting discovery relating to financial worth, providing for proof of punitive damages, defining the terms "intentional misconduct" and "gross negligence", prescribing criteria governing employers' liability for punitive damages, providing for the remedial nature of provisions, creating s 400 4298, F S, providing limits on the amount of punitive damages, providing for the calculation of attorney's fees, creating s 400 4303, F S, requiring that copies of certain documents be forwarded to the state attorney if punitive damages are awarded, amending s 400 434, F S, authorizing the Agency for Health Care Administration to use information obtained by certain councils, amending s 400 435, F S, relating to maintenance of records, conforming provisions to changes made by the act, amending s 400 441, F S, clarifying facility inspection requirements, amending s 400 442, F S, relating to pharmacy and dietary services, conforming provisions to changes made by the act, creating s 400 449, F S, prohibiting the alteration or falsification of medical or other records of an assisted living facility, providing penalties, amending s 464 203, F S, revising certification requirements for nursing assistants, authorizing employment of certain nursing assistants pending certification, requiring continuing education, amending s 397 405, F S, relating to service providers, conforming provisions to changes made by the act, prohibiting the issuance of a certificate of need for additional nursing home beds, providing intent for such prohibition, reenacting s 400 0255(3), (8), F S, relating to discharge or transfer of residents, reenacting s 400 23(5), F S, relating to rules for standards of care for persons under a specified age residing in nursing home facilities, reenacting s 400 191(2), (6), F S, relating to requirements for providing information to consumers, reenacting s 400 0225, F S, relating to consumer satisfaction surveys for nursing homes, reenacting s 400 141(4), (5), F S, relating to the repackaging of residents' medication and access to other health-related services, reenacting s 400 235(3)(a), (4), (9), F S, relating to designation under the nursing home Gold Seal Program, reenacting s 400 962(1), F S, relating to the requirement for licensure under pt IX of ch 400, F S, reenacting s 10 of ch 2000-350, Laws of Florida, relating to requirements for a study of the use of automated medication-dispensing machines in nursing facilities and for demonstration projects and a report, amending s 627 351, F S, creating the Senior Care Facility Joint Underwriting Association, defining the term "senior care facility", requiring that the association operate under a plan approved by the Department of Insurance, requiring that certain insurers participate in the association, providing for a board of governors appointed by the Insurance Commissioner to administer the association, providing for terms of office, providing requirements for the plan of operation of the association, requiring that insureds of the association have a risk-management program, providing procedures for offsetting an underwriting deficit, providing for assessments to offset a deficit, providing that a participating insurer has a cause of action against a nonpaying insurer to collect an assessment, requiring the department to review and approve rate filings of the association, providing appropriations, providing for severability, providing effective dates

—which was previously considered and amended this day Pending **Amendment 24 (364104)** by Senator Brown-Waite was adopted

Senator Brown-Waite moved the following amendments which were adopted

Amendment 25 (163292)—On page 17, line 12, On page 23, line 11, On page 28, lines 1, 17 and 25, On page 95, line 8, On page 99, line 23, On page 104, line 12, and On page 105, line 4, delete "July 1" and insert May 15

Amendment 26 (063568)—On page 29, line 25, On page 31, line 17, On page 32, line 28, On page 106, line 4, and On page 107, line 26, after the period ( ) insert

Effective May 15, 2001, and applying to causes of action filed on or after that date,

RECONSIDERATION OF AMENDMENT

On motion by Senator Brown-Waite, the Senate reconsidered the vote by which **Amendment 26** was adopted **Amendment 26** was withdrawn

Senator Brown-Waite moved the following amendments which were adopted

Amendment 27 (163828)—On page 34, line 21 and On page 109, line 7, delete "October 1" and insert May 15

Amendment 28 (564344)—On page 104, delete line 28 and insert

Section 44 Effective May 15, 2001, and applying to causes of action accruing on or after that date, section 400 4295,

Amendment 29 (720662)(with title amendment)—On page 99, between lines 22 and 23, insert

(7) The resident or the resident's legal representative shall serve a copy of any complaint alleging in whole or in part a violation of any rights specified in this part to the Agency for Health Care Administration at the time of filing the initial complaint with the clerk of the court for the county in which the action is pursued The requirement of providing a copy of the complaint to the agency does not impair the resident's legal rights or ability to seek relief for his or her claim

And the title is amended as follows

On page 7, line 23, after the semicolon (;) insert requiring copies of complaints filed in court to be provided to the agency,

Amendment 30 (585886)—On page 18, lines 15-25, delete those lines and insert *Civil Procedure Sections 400 023-400 0238 provide the exclusive remedy for a cause of action for recovery of damages for the personal injury or death of a nursing home resident arising out of negligence or a violation of rights specified in s 400 022 This section does not preclude theories of recovery not arising out of negligence or s 400 022 which are available to a resident or to the agency The provisions of chapter 766 do not apply to any cause of action brought under ss 400 023-400 0238* ~~Any plaintiff who prevails in any such action may be entitled to recover reasonable attorney's fees, costs of the action, and damages, unless the court finds that the plaintiff has acted in bad faith, with malicious purpose, and that there was a complete absence of a justiciable issue of either law or fact A prevailing defendant may be entitled to recover reasonable attorney's fees pursuant to s 57 105 The remedies provided in this section are in addition to and cumulative with other legal and administrative remedies available to a resident and to the agency~~

Amendment 31 (665066)—On page 20, between lines 24 and 25, insert

(6) An action under this part for a violation of rights or negligence recognized herein is not a claim for medical malpractice, and the provision of s 768 21(8) do not apply to a claim alleging death of the resident

Informational Report of the Task Force on Availability and Affordability of Long-Term Care for the Florida Legislature in Response to House Bill 1993

Volume 1:

Synopsis, Executive Summary, Options, Task Force Members' Responses

The Task Force voted 12-4 (3 absent) on February 5, 2001 to accept this report, with areas of disagreement and agreement thoroughly documented. Conclusions and options were not voted on by the Task Force.

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February 16, 2001

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And the 40 experts who provided testimony at Task Force meetings
Along with the approximately 100-200 individuals who participated in Public Testimony in Tampa, Pensacola, Tallahassee, Miami and Jacksonville
or via teleconference from Boca Raton, Cocoa, Gainesville, Panama City, and Winter Haven

Task Force on Availability and Affordability of Long-Term Care

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Secretary Gema Hernandez, Dr. P.A., Department of Elder Affairs

Bob Sharpe, Agency for Health Care Administration

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I. Synopsis of Task Force Activities

In May 2000, the Florida Legislature passed House Bill 1993 (Appendix 1) to create a Task Force on the Availability and Affordability of Long-Term Care to study issues related to the provision of long-term care to the elderly in nursing homes and alternatives to nursing homes such as private homes, senior residences, and assisted living facilities The Task Force was composed of 18 members and the chairman, Lt Governor Frank T Brogan (Appendix 2 has a list of members) The legislation stipulated that the Task Force study and take recommendations on a minimum of sixteen topics It also stipulated that the Task Force submit a report containing its recommendations to the Governor and the Legislature The Florida Policy Exchange Center on Aging at the University of South Florida was named in the legislation to provide staff support to the Task Force This synopsis provides a brief description of Task Force activities and processes

A Website

Staff created a website (www fpeca.usf.edu) for all Task Force materials and notices Many of the background reading materials provided to Task Force members are available through the website as well

B Organization

The sixteen tasks in HB 1993 were organized into four major task areas alternatives to nursing homes, financing long-term care, improving nursing home quality, litigation and insurance Each of these areas was nearing a crisis level in recent years

Alternatives

In the 1990's, over 88% of all public spending for long-term care was spent on nursing home care, leaving 12% for home and community-based services (HCBS). In 1983, only 77% of public spending on long-term care went to nursing homes. At that time, Florida was considered a model state in providing home-based care Governor Jeb Bush's first two budgets significantly improved spending for HCBS Even so, Florida has a long way to go to balance its long-term care system The legislature asked the Task Force to study and make options on areas such as alternative housing and care settings, including the use of rent-subsidized facilities, assisted living facilities, and adult family care homes, the availability of HCBS to allow elders to age in place, the role of family members in caring for elders, and the role of the certificate of need process in the development of long-term care systems They also asked for how other states have promoted the development of alternatives These issues are addressed in Chapter V

Financing Long-Term Care

The cost of long-term care to the State, private sector, and families is an important aspect of creating a better long-term care system The legislature asked the Task Force to study and make options on areas such as: adequacy of reimbursements to nursing homes and alternative care settings, the causes for recent nursing home bankruptcies, the availability of long-term care insurance, and the additional costs to Medicaid, Medicare, and the family when a patient suffering from a preventable condition is admitted to the hospital These topics are addressed in Chapter VI

Nursing Home Quality

The State has a responsibility for ensuring that nursing home care is provided in a safe and secure settings and meeting a standard of care The legislature asked the Task Force to study and make options on how quality of care is compromised because of market factors that affect nursing home financial stability, the differences between quality of care in for profit and not for profit skilled nursing facilities, and how the quality of care in Florida compares to other states These topics are addressed in Chapter VII

Litigation and Insurance

Nursing home and assisted living facility providers had asked the legislature to address the issue of increased liability insurance costs Admitted insurance and reinsurance companies were threatening to or had stopped insuring both nursing homes and assisted living facilities, leaving the E&S insurance market to provide liability insurance at higher rates The providers perceived that this was due to an increased level of litigation against facilities The legislature asked the Task Force to study and make options on the kinds of incidents that lead to filing lawsuits and to the extent to which they are frivolous, the effect of lawsuits on the costs of nursing home care and the stability of the industry, and the cost and availability of general and professional liability insurance, including the impact on the cost of care These topics are addressed in Chapter VIII

C Public Testimony

The Task Force held five meetings which included 2-4 hour public testimony hearings in Tampa, Pensacola, Tallahassee, Miami, and Jacksonville (Appendix 3) Interpreters for the hearing impaired were available at each meeting and Spanish and Creole interpreters were available for the Miami meeting Public testimony was transcribed and made available on the website In addition, many individuals sent letters, emails, and faxes to Task Force members and the staff These materials are also on the website After the first public testimony hearing, the Task Force asked that the testimony be organized to offer a balance of time spent on the topics being addressed As a result, subsequent public testimony was taken equally among the four major task areas described above Approximately 100-200 persons provided testimony at the hearings, hundreds more attended the meetings. The major concerns addressed in public testimony included (but were not limited to)

- the need for better access to and more services in the community,
- the increased cost of liability insurance for nursing homes, assisted living facilities, and continuing care retirement communities without regard to the number of lawsuits at a particular facility, and in the case of CCRC and assisted living facilities, the increased cost to consumers,
- the experience of family members and staff with either very poor or very good care in nursing homes,
- the desire of family members to keep the current private cause of action in Chapter 400 or the desire of facilities to be held to the same negligence standard that hospitals and other health care providers are under; and
- the concern from financial investors about the viability of nursing homes given both the changes in Medicare reimbursement before and after the Balanced Budget Act of 1997, the level of Medicaid reimbursements, and the increased cost of litigation due to higher insurance rates, settlements, or awards

D Business Meetings

Business meetings were held before or after the five public testimony hearings in addition to two other meetings held in Tallahassee. A final conference call business meeting was held February 5, 2001 to review this Report.

Five of the business meetings included expert testimony on the sixteen tasks. Agendas and minutes from these meetings are available on the website.

In Tampa, on August 25, Task Force members were provided information on how the Agency for Health Care Administration addresses financial fraud and abuse; the demographics of the aging population in Florida, the past and future of long-term care in Florida including the history of how Florida's home and community based services, how the State currently evaluates quality in nursing homes, and how the staff will research the litigation and liability insurance issues in House Bill 1993.

In Pensacola, on October 15-16, Task Force members heard from the aging network beginning with the Secretary of the Department of Elder Affairs (a task force member) and including Area Agencies on Aging, service providers, lead agencies, and special programs available in some counties: Health and Home Connection in Orlando, Channeling Project in Dade and Broward counties, and the United Healthcare managed care project in Dade County. They heard from the providers about alternative settings, affordable housing for elders and assisted living facilities. And they heard from consumer representatives about long-term care insurance and the need for in-home services, especially for elders suffering from Alzheimer's Disease.

In Tallahassee, on October 30-31, Task Force members heard from staff at the Agency for Health Care Administration regarding Medicaid reimbursements to nursing homes and the quality of care in for-profits and not-for-profit nursing homes. They also heard from a financial investor and private business representative on the impact of litigation and reimbursement rates on viability of nursing homes. Staff from the Department of Insurance described a recent survey of facilities regarding liability insurance rates. They heard from a trial attorney and elder law attorney about the importance of Florida's Chapter 400 statute to ensure that resident rights are enforced and how eligibility rules for Medicaid affect low income elders who are just above the cut-off. They heard from a nursing home medical director regarding quality of care, and the nursing home and assisted living facility industries in regard to the impact of lawsuits and increased liability insurance rates on their viability. This meeting and public testimony hearing was available to five other sites via interactive teleconference: Boca Raton, Cocoa, Gainesville, Panama City, and Winter Haven.

In Tallahassee, on November 20-21, Task Force members heard from the Department of Insurance regarding the survey of facilities, Aon Actuarial Services in regard to the for-profit chains' experience with litigation costs, assisted living facility industry in regard to insurance rates and alternatives such as a JUA, and a consumer from a continuing care retirement community that had raised its rates due to insurance costs.

In North Miami, on December 4-5, Task Force members heard from staff in regard to research conducted on quality of care and litigation. They also heard from an insurance representative who described the flight of both admitted carriers and reinsurance companies from the Florida long-term care market. Attorneys representing plaintiffs and defendants debated the merits of two tort packages that were submitted by the Academy of Florida Trial Lawyers and the Florida Association of Homes for the Aging.

There was no expert testimony at the business meeting in Jacksonville on December 18th.

E Principles[1,2]

1. Persons in need of long-term care and their families (consumers) should receive such services in the least-restrictive environment that is practical and consistent with their needs and wishes and one that maximizes their physical, mental, and functional capacity

2. The consumer is entitled to a safe and secure living environment that includes public advocacy (e g , public guardian, ombudsman) to ensure protection through all available means

3. The consumer should have reasonable access to coordinated services from a continuum of care that emphasizes consumer directed choice. Private and public services should be coordinated and access to services streamlined

4. The public long-term care system should include an appropriate balance between nursing home and community care expenditures Private planning, insuring, and saving for long-term care should be promoted Public funding a long-term care should be a supplement Providers are entitled to an appropriate rate of compensation and taxpayers are entitled to a full and fair accounting

5. In order to ensure the long-term care delivery system truly serves the public interest, all participants in the system must have adequate protection under the law and all participants must act responsibly or face the consequences for failing to do so.

F Options[3,4]

Task Force members and the general public were invited to submit options for the Task Force members to review in November Staff synthesized options and categorized them under the four major task areas The process of synthesizing options was for staff to group like concepts together under one of the 16 tasks in House Bill 1993 The wording of the original option was maintained as much as possible, but the authors were not noted. The full options received from 65 persons or organizations are available on the website. Options from individual Task Force members are included in Chapter III.

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[1] Add two principles

6 State and federal funding for long term care services should cover a reasonable cost of care and should be adjusted annually to cover increases in salaries, insurance and other costs of doing business

7 All regulatory mandates intended to improve long-term care should be funded

Although these two options are not included as principles, they were raised many times as major considerations by several task force members (Grofic – 24)

[2] These should be more correctly identified as "guiding" principle s These items were discussed with the Task Force but were not ratified by the Task Force (Fierro & Freidin – 25) Staff Response The Task Force brainstormed principles at its October 17 business meeting Staff was directed to draft a set of principles based on the discussion At the November 20 business meeting, Task Force members made changes to the principles which were adapted and approved on November 21st

[3] The process by which options were "synthesized" was determined by staff and not by the task force. Some options were excluded from the staff options and some were edited based upon staff opinion Some options were staff generated and were not discussed at task force meetings (Boyer -4)

[4] The options set forth were generally regarded as favorable by Task Force members All members expressed the need for balanced improvements in choice, quality and reducing litigation costs However, it was recognized that many of the options will involve significant State of Florida budget considerations Therefore, legislative proposals, if presented, should include the scoring of the options in terms of financial requirements or implications and a balanced legislative proposal should reflect a reasonable and achievable financial effect on the State's budget (Liptak 43)

The process for reaching consensus on options began at the November 20-21 meeting in Tallahassee. Staff was asked to present the options that they felt had the most merit in terms of addressing the issues that experts, the public, and researchers had outlined for the Task Force in background reading material or oral testimony At this meeting, staff reviewed a table of options in regard to alternatives and, to some degree, nursing home quality and litigation and insurance They also addressed the financing issues that were applicable Staff was asked to revise the organizing tables to indicate which options had been addressed by staff and which had been left out. Staff was asked to identify the type of action needed for each option (i e statutory or administrative) It was not possible within the time allotted to complete this step for all of the options considered by the Task Force. [1] In addition, the fiscal impact was not addressed Clearly, funding will be necessary for many of the options to be implemented

The revised tables, plus a "side by side" table that compared the major aspects of the two distinctive tort packages (from the Academy of Florida Trial Lawyers and Florida Association of Homes for the Aging) were the focus of the business meeting in Miami on December 4-5. Because of time constraints, only the quality and litigation tasks were addressed during the meeting The staff was directed to include all of the options that had been discussed plus any remaining options proposed by any Task Force member in the final set of options that were to be voted up or down at the December 18th meeting

As short hand, Task Force members adopted the term "staff recommendations" which included many Task Force member options in addition to options from the public The full list (approximately 120 options) was prepared for the December 18th meeting This version of the options was titled "recommendations" because they included more that the original "staff recommendations" At the December 18th meeting, a motion to not vote on the recommendations passed (see below) and the staff was directed to develop a staff report that would provide an information base to the legislature In that edition of the full research report with recommendations, the staff used the shorter list of recommendations that had been presented in earlier meetings and was revised based on the Task Force members' discussion The report also included the individual Task Force member recommendations (see chapter III)

On December 18, the Task Force members passed the following motion (15-2, 1 abstention, 1 absent)

> That in the absence of specific proposed legislation to consider today, and given the shortness of time that remains, that staff will circulate a proposed report among the Task Force members which will provide an information base to the legislature and which members of the Task Force will have the opportunity to critique and review with the view that as much consensus as possible will be generated as to the final form of the report, but where that consensus is not achieved, members would be permitted to express their points of view in the report. [2]

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[1] Throughout the report there are suggestions that do not identify the action needed (i e change of statute, rule change or promulgation, interagency agreement, executive order of the governor, federal changes, etc.) nor do they identify the appropriate organization who should be responsible for the action (Fierro & Freidin – 13)

[2] The Task Force specifically voted not to provide options or suggested legislative language to the Legislature The suggestions presented below were prepared by the staff and were not supported by the Task Force In fact, many of these suggestions may be contrary to good public policy and there has been

Staff prepared and circulated a "Staff Report" December 22, 2000 to Task Force members Task Force members returned 420 comments that addressed areas of agreement, disagreement, and additions. These comments were handled in a variety of ways

- Many comments that were supported by evidence (either in the Staff Report or from additional reliable evidence provided by the Task Force member) were incorporated into the text with a footnote that acknowledges the Task Force member's contribution (Please note, that much of the original Report incorporates many comments and ideas from Task Force members There wasn't time to add footnotes to acknowledge these earlier contributions but staff is grateful to Task Force members for their assistance)

- Many comments were opinions or interpretations and were entered as a footnote at the point where it is addressed in the report

- Many comments reflected a clear difference of opinion between Task Force members about conclusions or options. These comments were entered in a "side by side" table within the report

- In nearly all cases, the complete comment was used with the minimum of editing (for readability) A complete copy of the original Task Force members' responses is included in Chapter IV

- A unique number was assigned to each comment and is noted after each name

Most of the comments were focused on the Executive Summary and Options For this reason, and because of printing limitations, the Informational Report has been divided into two volumes 1 Synopsis, Executive Summary, Options and Task Force Members' Responses and 2) Research Staff circulated a "Draft Final Staff Informational Report" January 28, 2001 to Task Force members.

On February 5, 1001, the Task Force met by telephone conference call (with public participation through telephone link or in person at the Capitol) to review this draft The Task Force voted 12-4 (3 absent) to forward the existing Informational Report as a Task Force Report to the Legislature with the following changes that were discussed at the meeting 1) use the same font size for the text and footnotes to give Task Force member comments parity, 2) include the full comments of Task Force members, 3) replace recommendations with options; 4) rewrite the first page of the executive summary, 5) include tort reform options forwarded by the Academy of Florida Trial Lawyers and the Florida Association of Homes for the Aging along with staff proposed reforms, and 6) remove the tort reform questions and answers section (or move to an appendix) In keeping with this vote, the word "recommendation" was replaced with "option" in the text and footnotes This change was made to Task Force member comments to be consistent.

This Informational Report and the Task Force Website represent a tremendous amount of work on the part of 19 very dedicated volunteers who served on this Task Force They were given a slate of 16 complex tasks to study and make recommendations within six months They voted to extend the deadline in order to better document the areas of disagreement among Task Force members on both the interpretation of facts and the options to be considered Within these pages and in the public testimony,

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insufficient information or research to support many of these options (Fierro – Freidin –28) Staff Response The task force did not "specifically vote not to provide options" see motion above.

minutes, and other documentation on the Website, the Governor and Legislature of the State of Florida, have been provided a very thorough documentation of these complex issues

II. Executive Summary and Options

In order to affect serious changes in our long-term care system that will benefit frail elders and other long-term care consumers in Florida, the task force members examined information and options on alternatives, nursing home quality, litigation and liability insurance This executive summary provides the major findings (with areas of agreement and disagreement noted through the text) and options that should be considered in solving these problems The Task Force members decided not to vote on individual options but to present them all to the legislature as options [1]

Options that would provide for more alternatives to nursing homes included making a commitment to a more balanced long-term care system that promotes consumer choices and autonomy, increasing funding and availability of assisted living facilities, adult family care homes, home and community based waiver programs, and service coordinators and programs for HUD-financed housing, developing an integrated health and long-term care system demonstration project, and promoting assistive technology and private long-term care insurance.

Options to improve nursing home quality included creating sanctions to discourage poor care, incentives to improve quality of care in nursing homes, ensure a culture of care in nursing homes that values residents, family, workers, and volunteers, and change the community standard of care by providing family and residents better access to information about quality of care in nursing homes.

Options to address the litigation and liability insurance issues included tort proposals from the Academy of Florida Trial Lawyers, the Florida Association of Homes for the Aging, and the staff, and short-term solutions to high insurance rates removing the requirement for assisted living facilities to have liability insurance, establishing a Joint Underwriters Association, and risk retention groups

[1] "Executive Summary" should not represent a set of conclusions coming from the staff but a synopsis of what occurred I find it unsettling that the staff would take it upon themselves to draw clearly based conclusions – in many cases in direct conflict with their own data – that were never agreed to or even voted upon by the task force members (Connor –44)

Task #4
Litigation and Insurance

HB 1993 Questions

#h The effect of lawsuits against nursing homes and long-term care facilities on the cost of nursing home care and on the financial stability of nursing home industry in the state

#i The kinds of incidents that lead to the filing of lawsuits and the extent to which frivolous lawsuits are filed

#j The cost of liability insurance coverage for long-term care providers and the extent to which such costs affect the affordability of care.

#k The availability of liability insurance coverage for long-term care providers through Florida's insurance companies

What is Known About Litigation and Liability Insurance[1]

- The frequency and severity of claims is increasing [2] [3]
- Florida has four times as many claims as the rest of the nation. (Aon, 2001) [4]
- The average loss cost per annual occupied bed in Florida was $12,700 in 2001 which is 12 times more than the average loss cost in the other 49 states ($1,050) (Aon, 2001)
- 33 out of 35 nursing homes in the Hillsborough County study—94%--had one or more resident care related (Chapter 400) lawsuits, including 75% of the non-profit facilities The size of the settlements (for those that were not sealed) went from an average of $311,393 in the early 1990s to $410,294 in the late 1990s (Hillsborough Circuit Court study) [5]

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[1] As I review the findings and staff recommendations in this section, I cannot help but feel that the stated agreed upon task force principles have all but been ignored, specifically· Principle #2 - The consumer is entitled to a safe and secure living environment that includes public advocacy to ensure protection through all available means, and, Principle #5 - All participants in the system must have adequate protection under the law and all participants must act responsibly or face the consequences for failing to do so (Freidin -185)

[2] the report relied too heavily on the experience of for-profit corporations and was therefore skewed toward a higher frequency and severity of claims (Freidin -187)

[3] There is no basis for this statement. The staff's own data indicates that the number of lawsuits has declined every year since 1998. Connor (198 & 206) Staff Response The decline in lawsuits in 1999 and in the first part of 2000 was observed in Hillsborough County The number and distribution of lawsuits in Hillsborough County should not be assumed without verification to be representative of the litigation experience of nursing homes in all regions of Florida. Although those who were critical of the regional sample now wish to generalize from it, this caveat still stands.

[4] This information [is from] a study submitted by the industry lobbying group and has been widely discredited (Connor -199) Staff Response Staff have one submitted statement (provided by Trial Bar representative of Wilkes and McHugh) that criticized the Aon report referred to in this comment In response to this statement, Aon investigators submitted a written rebuttal that addressed the criticisms of and questions about their report

[5] Information on the size of claims does not come from the task force's own research but by a study submitted by the industry lobbying group, the Florida Health Care Association (FHCA).. (Connor – 201) Staff Response The average claims of the 35 unsealed cases in the Hillsborough District Court study are the source of these data, not Aon (Averages from the Hillsborough study are consistent with averages reported by Aon actuaries, however)

- 44% of lawsuits in Hillsborough County were for resident rights only, 37% were for wrongful death with or without negligent survival, and 20% were for negligent survival without wrongful death All lawsuits included allegations of resident rights infringements; specifically the right to receive "adequate and appropriate healthcare " (Hillsborough Circuit Court study) [1 2]
- 60% of all lawsuits in Hillsborough County included allegations that involve pressure sores, 57% alleged falls, 25% alleged abuse or neglect, 43% of all lawsuits include allegations of dehydration and/or weight loss These allegations are not frivolous according to the legal definition of the term, yet there is not sufficient information available to determine if the incidents are due to poor care or inevitable health decline (i e , 98-99% of cases are settled out of court) (Hillsborough Circuit Court study) [3 4]
- In multivariate analyses, the number of beds in a nursing home was the only significant variable of a number of structural, case-mix, and quality measures that significantly predicted lawsuit activity There is no clear relationship between quality and lawsuits (Hillsborough Circuit Court study) [5 6 7 8]
- Currently, in Florida, 88 8% of Chapter 400 lawsuits are filed within two years from resident discharge, 68% of cases are closed within 18 months (Hillsborough Circuit Court study)

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[1] It is particularly important to highlight this finding since the thrust of the proposed litigation reforms is to place long term care providers under the same standards now applied to other health care providers (Calkin –191)

[2] I strongly agree that since all lawsuits contain allegations of violations of the patient's bill of rights, its use, or misuse, must be addressed in any successful litigation reform package (Sherberg –192)

[3] . a finding of negligence, either by settlement or verdict would be the clearest indication that the decline was due to poor care (Connor – 202) Staff Response A Finding of negligence is not required in order to settle

[4] The data gathered by the task force staff showed almost no suits considered to be "frivolous" in nature (Connor – 209) Staff Response· The allegations are not frivolous. It is not possible to verify the merit of cases that are settled

[5] FAHA compared survey data available from AHCA on its own members to that of non-members FAHA members out performed non-members in quality of care, quality of life and administration, had higher staffing ratios, and spent on average $18 more per patient day than non-members Nonetheless, 67 percent had one or more resident rights' claims brought within the past three years compared to 83 percent for non-members The high quality of care and enriched staffing did not insulate FAHA members from resident rights' lawsuits. They are just as vulnerable to lawsuits as other nursing homes in Florida (Grofic –194)

[6] I strongly agree that there is no clear relationship between quality of care and lawsuits (Sherberg –195)

[7] This data was not provided to task force members .this statement about the relationship between quality and lawsuits is in conflict with the staff's own findings of care deficiencies occurring in Florida as compared to the rest of the nation (Connor – 203 & Fierro – Freidin 416) Staff Response Data were presented at the December 5 meeting Although there is a relationship between staffing and quality outcomes, there isn't a relationship between quality outcomes and lawsuits.

[8] The data gathered by the task force staff shows a direct correlation between short staffing and lawsuits For example, in 1998 Florida lead the nation in short staffing deficiencies. During that same year we saw the number of lawsuits reach a peak As the number of deficiencies for short staffing declined in 1999, the number of suits also declined (Connor – 208) Staff Response The short staffing variable was tested in this statistical model (survey deficiency for insufficient staff F-tag 353) and was not significantly related to the number of lawsuits It was also observed in the regional study of litigation that one-fourth of the Hillsborough County complaints, not the majority, included an allegation of insufficient staff in the facility

- In Hillsborough County, 67 7% of cases paid attorney fees from the settlement and did not make use of the add on attorney fees provision in 400 023, although the existence of the provision is used in negotiating settlements (Hillsborough Circuit Court study)
- Other states have some features of Florida's Chapter 400.022 and 400 023. The 15 states with both residents rights and a private cause of action are Arkansas, California, Florida, Georgia, Illinois, Kentucky, Louisiana, Massachusetts, Minnesota, Missouri, New Jersey, North Dakota, Oklahoma, Texas, and Wisconsin. Nine of these states cover reasonable attorney fees for residents' rights violations but only Florida specifies 12 ways to set reasonable attorney's fees, including contingency fees In summary, seven states, including Florida, have civil resident rights with a private right of action and provisions for attorney fees and punitive damages Of those, only two states also have health-related resident rights Arkansas and Florida
- Nine percent of nursing homes in Florida are either entirely without liability insurance now, or will be "going bare" by February 1, 2001. This is up from 1% in June The majority of the 40 homes lost or dropped coverage since July 2000 (AHCA unpublished survey data).[1]
- Most facilities experienced a reduction in the amount of insurance coverage· deductibles increased for 69% of the facilities and decreased for 6% Policy limits decreased for 44% Liability coverage changed from occurrence to claims-made (a considerable reduction in the scope of coverage) for 13% of the facilities (AHCA unpublished survey data)
- Assisted Living Facilities (ALF), who are required by statute to hold liability insurance, are being told by insurers to give up their Extended Congregate Care or Limited Nursing Service licenses in order to receive liability insurance (Public Testimony)
- ALFs are also required to hold an ECC or LNS license to accept residents who are on the Medicaid Waiver Without an ECC or LNS license, these ALFs will have to discharge their residents and nursing homes will be their only alternative
- Continuing Care Retirement Communities (CCRC) experienced a 74% increases in their premiums in 2000 (the average increase in 1998 and 1999 was 15%), 12% had increases in excess of 1000% (DOI published report) Florida CCRCs are required by state law to have 15% of their operating costs (including expected liability insurance costs) set aside in a reserve fund
- The last admitted insurance carrier (one that is regulated by the Department of Insurance) in the Florida nursing home insurance market has announced that it is ending its liability coverage for long-term care facilities in February 2001 [2]

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[1] The staff has repeatedly cited "unpublished data" or have cited unnamed "key informants" to back up their findings Any such "conclusions" should be discarded. (Connor – 205) Staff Response With less than six months to gather and analyze data, staff relied on state agencies (AHCA, DOEA, DOI) for data that was already planned to be collected. The fact that it is unpublished does not mean that it was not collected or analyzed properly In face, the AHCA data were handed out to Task Force members at the December 4-5 meeting. Key informants are assured of their anonymity per normal research practice A list of the perspectives they provide is provided in the Litigation chapter.

[2] The Florida Department of Insurance was unable to find a single insurer that was leaving Florida that was not doing so as part of a broader national strategy (Connor –206)

Options Addressing Litigation and Insurance

Task Force members directed staff at the February 5, 2001 telephone conference call meeting to change the format of the options for addressing litigation and insurance to include three tort reform options prepared by the Academy of Florida Trial Lawyers (AFTL), the Florida Association of Homes for the Aging (FAHA), and the Staff In addition, two new proposals that address the insurance issue have been added (they were addressed in the Chapter on Liability in Volume 2) The new options were not commented on by Task Force members as they were added at Task Force member request for this edition For commentary on the AFTL and FAHA tort options, please see the minutes from the February 5, 2000 meeting when attorneys representing plaintiffs and defendants critiqued both proposals.

1 Remove the requirement in Florida Statutes 400.4275 that assisted living facilities must have liability insurance to maintain their license [1,2]

2 Set up a Joint Underwriters Association. This option requires insurance company participation and actuarial soundness, which means rates charged must cover losses If deficits occur, policyholders would be assessed to cover the deficit Policy coverage would be of a reduced nature than is offered in the private market The American Insurance Association identified 10 states, including Florida, with medical malpractice JUAs (Kansas, Massachusetts, Minnesota, New Hampshire, New York--NY's JUA is now in the process of dissolving, Pennsylvania, Rhode Island, South Carolina, and Wisconsin) Only Pennsylvania and Wisconsin's JUAs cover nursing homes, but very few "four or five" in PA and "several" in Wisconsin. Texas has launched a JUA for nursing homes, beginning with coverage for non-profit facilites only. Variable rates are charged based on an exemplary set of standardized criteria for individualized risk assessment [3] [4]

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[1] Removing the insurance criteria for ALFs will not help facilities financed with bonds Liability insurance is required as part of the bond covenant. Without insurance, an ALF that is funded with bonds will be in default and as a result could suffer serious consequences, including a higher interest rate (Grofic –214)

[2] I believe we should not remove this requirement and should impose insurance requirements for nursing homes If insurance is not available, the statutes should provide for alternative forms of financial responsibility such as bonds or letters of credit If the legislature were to remove the liability insurance requirement, or not require insurance, the facility should be required to post notice of this choice to the residents and the public (Freidin –216)

[3] The coverage will be for medical (professional) liability only and for claims made policies, not occurrence, and coverage for attorney's fees awarded to or incurred by the plaintiff is excluded The policies are subject to assessment to recoup any deficits sustained by the JUA and premiums are structured to increase each year The first year per bed rates start at $538 for zero deductible, $1 million/$3 million limits for providers with the lowest risk score and range to $5,631 per bed for providers with the highest risk scores Coverage may not be affordable for facilities with a claims history (Staff)

[4] It is highly questionable how a JUA would have the participation of private insurers when so few companies are currently writing coverage for Florida nursing homes, and only one of the insurers is regulated by DOI (Staff).

3 Set up a Risk Retention Group. The Product Liability Risk Retention Act of 1981 allowed those seeking protection from product liability claims to form either "risk retention groups" for group self-insurance or "purchasing groups" to obtain group insurance from an insurance company The major impact of the Act was to preempt many state laws that prohibited or hindered the formation of interstate retention groups or purchasing groups States still have some regulatory control Businesses or persons with similar types of risk may form an RRG to insure against their liability exposure. It is limited to members who have similar exposure because of their trade, product, service, premise, or operation [1,2]

4. Academy of Florida Trial Lawyers tort options apply to nursing homes and assisted living facilities

Notice to Long-Term Care Facilities Residents or their representatives would provide notice to a potential defendant of an intent to pursue a civil remedy for violation of a resident's rights 60 days prior to filing a lawsuit Notification must include the rights a defendant has violated that are reasonably identifiable prior to the filing of a lawsuit and commencement of formal discovery.

Expert Affidavits In cases where the alleged violation of a resident's rights causes physical injury or death, an affidavit is required from an expert. In 1993, the Legislature imposed a requirement that expert witness affidavits be submitted whenever a lawsuit was filed against a nursing home alleging a violation of the right to adequate and appropriate medication and health care AFTL's proposal extends the expert witness affidavit requirement.

Informal Exchange of Information. Records in the possession of the defendant must be produced within 10 days of the receipt of a certified notification of intent, including internal and state required incident reports If records are not produced within 10 days, the expert affidavit requirement is waived Parties may submit questions and requests for production within the 60 day presuit notification period and may take the unsworn statements of parties. Statute of limitations (and repose) is tolled for the 60 day case evaluation period and any extension Case evaluation materials are not discoverable or admissible in civil litigation

Fast Track Cases Cases shall be placed on the docket pursuant to chapter 415 upon request of the plaintiff (Amend chapter 415 to make mandatory that the judge advance the trial on the docket) The proposal would include a clear statement that the provisions of chapter 766 do not apply to cases brought under chapter 400

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[1] Some purchasing groups are providing coverage for nursing homes but as of April 2000, no RRGs have been formed for nursing homes (Risk Retention Reporter, April 2000). Purchasing Groups are easier to form but they are no stronger than the insurance company from which they purchase coverage. RRGs are more complex and expensive. In fact of the eight RRGs that have recently gone out of business, six of them were in the healthcare sector (Risk Retention Reporter, October, 2000)

[2] Since these alternative insurance plans would need to be self-supporting and not operated at a deficit, it is unlikely that premiums established for adequate insurance coverage would differ substantially from the extremely high rates charged at present in the private market. The insurance premiums are high because insurance losses are high. Unless losses can be effectively reined in, rates are likely to remain high and increasingly out of reach for many providers (Staff).

Streamline Litigation Clarify the law to resolve the issues raised in *Knowles* and *Hamilton* cases, i e., that the cause of action under chapter 400 does not die with the resident and that deceased residents are not limited to damages under the wrongful death statute (e g , funeral bills) Conform and amend the language relating to the entities that can be held accountable under section 400 023, F.S to those found in the Assisted Living Facility statute, i e., any facility owner, administrator, or staff (s. 400 429, F S.), and include management companies.

Mandatory Mediation Presuit mediation is required if requested Within 30 days of the completion of the case evaluation period and upon the request of a defendant, the parties shall complete mediation within 30 days (Parties can agree to an extension.) The current mandatory mediation piece added to chapter 400 in 1999 is repealed

No Caps on Damages The Academy of Florida Trial Lawyers opposes caps on damages The Legislature addressed the issue of caps on punitive damages in cases arising under chapter 400 in 1999, imposing a three times compensatory damages presumptive limitation The Academy has taken the position that this restriction is unconstitutional Punitive damages are the best deterrent possible to prevent abuse and neglect of Florida's vulnerable citizens. There is no justification for protecting nursing homes from the full force of the law when they have engaged in conduct that is willful, wanton, gross or flagrant, reckless or consciously indifferent to the rights of residents Punitive damages provide the long-term care industry incentive to ensure that this conduct does not occur and that nursing home profits are not put before quality care

Criminal Prosecution In cases where a court permits the pleading of punitive damages, the court shall refer the individuals involved to the state attorney for criminal prosecution. Abuse and neglect of seniors and vulnerable adults in this state is a crime Criminal laws to punish this behavior should be enforced Reform in this area will bring the egregious conduct of individuals to the attention of the proper authorities [1]

Mitigation of the Amount of Attorneys Fees in Nursing Home Cases Nursing home defendants can mitigate the amount of fees Nursing homes that have complied with minimum staffing requirements and have had good track records can introduce these factors to the court in a determination of the amount of an award of attorneys' fees. Factors to be considered in mitigation include content of a nursing home's state surveys, staffing levels, and record of reports of abuse or neglect during the time of the stay of the resident and one year prior The court can also consider the timing and amount of settlement offers and whether a defendant demanded presuit mediation. In Florida, if a nursing home resident prevails in a case where death or injury was caused by a violation of his or her rights, the courts will award an attorneys fee in addition to the damages as determined by the jury This law has been on the books since 1980 and other states have this provision as well The purpose of this law is to ensure that the rights of the resident are enforceable by the resident or his or her representative Laws allowing for an award of attorneys fees are found in many consumer protection statutes around the country and are often referred to as "mini attorney general" laws, i.e., people are allowed to enforce the rights provided them by law The award of attorneys fees in Florida needs to stay on the books so that all of the rights guaranteed to Florida nursing home residents can be enforced, such as the rights to privacy, uncensored communications, safekeeping of funds, etc A right without a remedy is meaningless The award of attorneys fees in cases where a residents' rights have been

[1] Supported by Connor –164, Fierro & Freidin –127 Staff response In 1999, there were 164,046 deaths in Florida, 106,909 referred to a medical examiner, 19,649 accepted by medical examiner (gap between 19K and 106K is that many of the 106K are routine requests for permission to cremate) 5,280 autopsies (Dale Heideman of FDLE, personal conversation)

violated allow residents to enforce their rights and improve their quality of life. Allowing nursing homes to introduce compliance with staffing requirements and state surveys provides additional incentives for nursing homes to comply with the law and provide quality care to residents Nursing homes with good records will be treated differently by the court than nursing homes with bad records

Strengthening of Residents' Bill of Rights Amend the Residents' Bill of Rights to: 1) allow voluntary camera surveillance of residents, 2) state that a long-term care facility may not require nor permit a resident to waive their rights to trial by jury, including arbitration requirements in resident contracts, 3) require that residents have the right to know whether a nursing home has liability insurance (would require posting of a notice)

Statute of Limitations State specifically that the applicable statute of limitations is s. 95.11(3)(f) (4 years)

5. Florida Association of Homes for the Aging tort proposal:

Standard of Proof When Filing Lawsuit Claimant must prove by a greater weight of evidence that each defendant has an established duty to the resident, that each defendant failed to comply with the prevailing standard of care, that each defendant's deviation from the prevailing standard of care was the direct and proximate cause of damages to the resident, and that each defendant's deviation from the prevailing standard of care resulted in either injury or the death of the resident, abuse, neglect or the deprivation of the resident's rights

Limits on Who Can Sue. The resident or his/her guardian, or by a surviving child (regardless of age) or spouse or the personal representative of the estate of a deceased resident

Attorneys' Fees Above & Beyond Contingency Fees (Add-on fees) s 766 207(7)(f) -- When a case is arbitrated add-on attorneys' fees are capped at no more than 15% of the award s 766 209(3)(a) -- If a settlement at arbitration is rejected and the case goes to trial, add-on attorneys' fees are capped at 25% of the award.

Cap on Contingency Fees for Attorneys No caps Contingency fees are governed by Florida Bar rules.

Economic damages No Caps

Non-economic / compensatory damages For cases settled through arbitration Maximum of $250,000 per defendant, but no more than an aggregate amount of $350,000 against all defendants Capacity shall be calculated on a percentage basis with respect to capacity to enjoy life so that a finding that the claimant's injury resulted in a 50% reduction in his or her capacity to enjoy life would warrant an award of no more than $125,000 (same as in s 766 207 (7)(b) If a claimant rejects offer to arbitrate, award at trial may not exceed an aggregate amount of $350,000 for all defendants

Punitive damages. s 766 207 (7)(d) -- For cases that are settled through arbitration -- no punitive damages. s 768 73(1) -- For cases that go to trial Three times the amount of compensatory damages or the sum of $500,000, Where wrongful conduct is motivated solely by unreasonable financial gain and the dangerous nature of the conduct, together with the high likelihood of injury from the conduct, was known by the managing agent, director, officer or other person responsible for policy decisions,

punitive damage award may not exceed four times compensatory damages or $2 million, When defendant acted with specific intent to harm and harm occurred, no cap on punitive damages

Pre-suit notification requirement s 766 106 -- Mandatory pre-suit notification to defendant, opportunity for defendant to respond

Protection of quality assurance and risk management records from discovery Amends s 400.118 to require quality assurance (QA) meetings every other month in a nursing home, and to protect QA and risk management records from discovery. Amends s 400.4275 to protect QA and risk management programs in ALFs from discovery.

Arbitration. s 766 207 -- Voluntary Arbitration

Statute of Limitation 2 years

Civil Remedies (Restriction on number of lawsuits that can be filed simultaneously by plaintiff). Long Term Care Facility Negligence Act is created as the exclusive civil remedy for lawsuits filed on behalf of a long-term care facility resident

6 Staff tort reform proposal The staff tort reform options were developed in consultation with Hayden Dempsey, Deputy General Counsel to the Governor They are the result of input from persons who testified at Task Force meetings, residents groups, trial attorneys, and representatives from the insurance industry, assisted living facilities, and nursing homes These staff recommendations replace the civil cause of action in 400 023 with a new Long-Term Facility Negligence statute while assuring residents are still offered adequate legal protections [1 2 3 4 5 6]

Attorney's Fees. Eliminate automatic entitlement to recovery of attorney's fees under Ch 400 In cases based on violation of rights involving no personal injury or death, the prevailing party shall recover a maximum of $10,000 in attorney's fees [7] When a defendant refuses an offer by a claimant to arbitrate, the claimant shall recover up to 25% of the award, reduced to present value, for attorney's fees In cases submitted to arbitration, the defendant shall pay the claimant's attorney's fees up to 15% of the award, reduced to present value [8]

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[1] Clearly provide that the patient's bill of rights is enforceable only by injunction (Sherberg –215)

[2] The litigation reforms presented in the package below are designed to limit the civil redress for individuals who have been harmed by long-term care providers (Fierro & Freidin –226)

[3] I continue to be hesitant with the legal terminology, but my recommendation is to use the same criteria as hospitals and medical facilities with nursing homes (Hernandez)

[4] these suggestions were not discussed with the task force and were never voted on by task force members (Connor – 227) Staff Response The December 5 meeting included a debate between a plaintiff's attorney and defense attorney regarding the two extreme positions on tort (AFTL and FAHA). Staff crafted a middle ground approach that increased access to the courts for frail elders who die before their lawsuits are resolved (not currently available) and included their own pain and suffering (without regard to capacity to enjoy life) even after death Staff agreed with the trial bar's criticism of mediation and used an arbitration approach. And staff set caps at what appeared to be fair levels given the current average size of claims data available

[5] The options regarding Task #4 "Liability and Long Term Care Viability" should be deleted entirely. These options are not supported or justified by the research presented to the task force or by any information provided to the task force Further, these options severely limit residents access to the courts and fail to ensure their protection against improper and inadequate care. Any option for successful litigation reform must include the following inseparable elements.
1) Assuring the safety of residents and protecting their right to pursue remedies in court,
2) Improving care through increased staffing and aggressive regulatory enforcement Addressing the insurance availability and rate issues by rate incentive and loss predictability measures (Boyer –276)

[6] Staff presented data showing that the number of lawsuits were declining significantly and no evidence was presented suggesting that damages were "ever-increasing " Connor (40) Staff Response In Hillsborough County there was a significant increase in lawsuit activity from the early 90s to the late 90s

[7] There currently is no automatic entitlement of attorney's fees under chapter 400 In order for a plaintiff to collect attorney's fees, the plaintiff must prevail. This provision provides an incentive for a defendant to run up the costs on the plaintiff and offer frivolous defenses as a way to make the case unviable to a plaintiff attorney (Connor 219)

[8] The restrictions on attorney's fees only appear to apply to plaintiff attorneys If there is going to be substantive reduction in the costs of litigation, then there should be a mechanism to limit or reduce the amount of defense attorneys fees as well (Fierro & Freidin –222)

Table 4
Response by Task Force Members to Attorney Fees

Limiting attorney fees will limit enforcement of resident rights; linking attorney fees to arbitration render them meaningless	Limits on attorney fees are needed; clarification needed about add on vs. contingency fees
• Oppose the recommendations on attorney's fees These recommendations would ensure that many cases involving violations of important resident rights would never be enforced The inclusion of a maximum add on fee of $10,000 is inadequate to ensure the enforcement of rights under s 400 022 and was recommended by staff without consulting with Elder Law Section attorneys to determine their position, or to determine the appropriateness of the proposed fee cap. The staff should alternatively adopt the recommendation of the Academy of Florida Trial Lawyers (AFTL), which allows for a mitigation of fees for facilities who meet certain criteria regarding quality. (Freidin - 223)	• Strongly agree that it is important to sharply limit or eliminate a plaintiff's entitlement to attorney's fees, except when a plaintiff is only seeking injunctive relief for violations of the patient's bill of rights There are neither rationale nor resources to support the present state of the law There is no evidence that attorneys avoid or refuse to take cases in which statutory fees are not awarded. Litigation rates in the United States already far outpace those in other industrialized countries To argue that the award of attorney's fees is necessary ignores the fact that doing so encourages litigation and increases liability insurance costs (Sherberg - 218)
• This provision [to provide 25% of an award for attorney fees when a defendant refuses to arbitrate] becomes meaningless in the most egregious cases as the arbitration provisions of this set of proposals offer a huge windfall for any defendant (regardless of conduct) to merely offer to arbitrate There is essentially no incentive for a plaintiff to arbitrate thereby making this suggestion a meaningless one This provision also provides an incentive for a defendant to run up the costs on the plaintiff and offer frivolous defenses as a way to make the case unviable to a plaintiff attorney) (Connor - 220) • This provision [to provide 15% of an award for attorney fees when both parties agree to arbitrate] also provides an incentive for a defendant to run up the costs on the plaintiff and offer frivolous defenses as a way to make the case unviable to a plaintiff attorney. This provision runs directly counter to the set of principles voted on and agreed to by the task force in that it directly violates the 5th principle (Connor - 221)	• According to trial lawyers with whom I spoke, the 25 percent and 15 percent are for add-on attorney fees, above and beyond a percentage of the award that is agreed upon as a contingency fee. The percentages for contingency fees are set by rules of the Florida Bar. Assuming this is correct, the plaintiff's attorney could receive a percent of the award as a contingency fee plus up to 25 or 15 percent as an add-on fee You may want to verify if this is correct (Grofic - 290) • There should be no adding on attorney's fees in the event the plaintiff's lawyer has a separate contingency fee contract with their client (Sherberg - 231)

Punitive Damages Adopt the limitations on the amount and standard for recovery of punitive damages contained in the Civil Justice Reform Act enacted by the Legislature in 1999. Cap punitive damages to three times compensatory damages or $500,000, whichever is greater. Where the misconduct was motivated by unreasonable financial gain and the high likelihood of personal injury was known by the person responsible for making decisions on behalf of the defendant, such as the director or managing agent, punitive damages may not exceed the greater of four times compensatory damages or $2 million Where the defendant had specific intent to cause the personal injury, there shall be no cap on punitive damages Punitive damages may be imposed against an employer only when the employer actively participated in the misconduct, condoned or ratified the misconduct, or engaged in misconduct that contributed to the personal injury [1] Punitive damages may not be awarded where the parties agree to arbitrate the claim A claimant who refuses a defendant's offer to arbitrate may not recover punitive damages Requires the clerk of court to forward to the state attorney's office for investigation any action for long term care facility negligence in which punitive damages are awarded at jury trial

Table 5
Response by Task Force Members to Punitive Damages

Restrictions on punitive damages are unfair, illegal, protects providers, will not decrease insurance costs, and will not result in referrals to state attorney's office as stated.	**High limits on punitive damages will not decrease tort costs but are essential to reviving long-term care insurance.**	**Staff Response: Punitive damages reforms are appropriate and will decrease tort costs.**
• Unlike Medical Malpractice claims, there is an absolute bar to the recovery of punitive damages if the defendant merely offers to arbitrate When this provision is combined with the staff language which also had a cap on all non-economic damages, (and in consideration of the fact that the vast majority of resident's rights claim involve only small compensatory damages) these provisions make an action against a nursing home much more restrictive than those brought against a hospital Additionally, many actions brought	• At least 95% of all long term care liability cases allege conduct subject to punitive damages I would refer you to the answer to the second question on page 41 It is important for the public to know that the proposed higher caps for punitive damages are not the exception, but the norm, based on the allegations made by plaintiffs attorneys in these cases (Calkin-193)	• The recommendations for arbitration are nearly identical to what is currently contained in the medical malpractice statute One exception is that where the parties agree to arbitrate and the arbitrator finds that the defendant's conduct amounted to intentional misconduct or gross negligence, which is the standard for punitive damages, an additional $500,000, for a total of $750,000, may be awarded to the claimant This is three times more than is recoverable under the medical malpractice statute

[1] Allocate a portion of punitive damages from nursing home lawsuits into a newly created Quality of Care Trust Fund administered by the state to provide funds for increased staffing (or for other purposes that improve access to high quality long term care services) (Grofic –244)

against a hospital could be brought under a common law negligence claim, a nursing home could never be sued under common law negligence This would make suing a nursing home significantly harder than suing a hospital That is unacceptable and was not even requested by the industry to the task force (Connor-34) • A defendant can eliminate any possible award of punitive damages by offering to arbitrate, regardless of the behavior (Connor-246, Freidin-239)		
• A plaintiff could never show "specific intent" and therefore the cap would never be lifted (Connor-247) • Obliterates any chance of a plaintiff ever receiving a large verdict regardless of the behavior of the home and. the injuries suffered as a result of their actions (Connor-250) • Punitive damages serve an important public purpose of expressing jurors' extreme disapproval of tortuous conduct For frail nursing home residents who generally have limited economic damages and, would be restricted in non-economic damages, punitive damages would be especially important.. An award of meaningful punitive damages would be highly unlikely (Fierro citing Center for Medicare Advocacy-251) • Oppose the imposition of the 1999 tort restrictions on		• Punitive damages would not be recoverable by a claimant where the claimant and defendant agree to arbitration or the claimant refuses an offer to arbitrate However, where the parties agree to arbitrate and the arbitrator finds that the defendant's conduct amounted to intentional misconduct or gross negligence, which is the standard for punitive damages, an additional $500,000, for a total of $750,000, may be awarded to the claimant.

punitive damages from which seniors and the disabled were specifically excluded (Freidin-239).		
• A cap on compensatory damages which is unlike the 1999 Civil Justice Reform Act and unlike the provisions governing medical negligence thereby giving nursing homes more protections (not equal protections as they have repeatedly asked for) than either hospitals or other businesses . This provision violates the 5th principle which states that residents "must have adequate protection under the law and all participants must act responsibly or face the consequences for failing to do so." (Connor-245,246)	• The $750,000 limit for intentional misconduct or gross negligence, that is included in the non-economic damages section, has the same effect as damages based on conduct subject to punitive damages Since almost all nursing home complaints allege gross negligence (such as conscious disregard for the care of a patient due to a fall), damages awarded in arbitration may surely be considered punitive. It is inaccurate to state that punitive damages would not be awarded under arbitration within the proposed litigation reforms (Calkin-240)	• The limitations on punitive damages contained in the 1999 Civil Justice Reform Act apply to medical malpractice actions just as they would to long term care facilities under the staff proposals Just like in medical malpractice actions, caps be placed on non-economic damages when either a claimant rejects a defendant's offer to arbitrate or both parties agree to arbitrate Where the parties agree to arbitrate, the staff is recommending a caps up to three times higher than available in medical malpractice claims Where neither party offers to arbitrate or where the defendant refuses an offer to arbitrate, there would be no cap on non-economic damages
• Agree that defendants against whom punitive damages have been awarded should be referred to the state attorney for prosecution (Freidin-239) • All cases where punitive damages are awarded in a jury trial referred to local state attorney's office] sadly, .. will never happen even for the worst crimes committed against a resident (Connor-37).	• Eliminate [the] recommendation which directs the Clerk of the Court to forward cases, where there is a punitive damage award, to the state attorney's office for criminal investigation. As the task force report states, in at lease 95% of the claims, trial attorneys allege punitive damages I am concerned about the threat that a possible criminal referral will have on the decision to litigate or arbitrate claims (Calkin-241). • Rather than forwarding judgments containing an	

	award of punitive damages to the state attorney's, office provide an appropriation to the Statewide Prosecutor to investigate suspected criminal activity against residents at long-term care facilities This latter approach would be much more comprehensive than relying upon the happenstance that a particular plaintiff was awarded punitive damages under a civil rather than criminal burden of proof (Sherberg-243)	
• The provision to impose punitives against an employer only when they actively participated in, condoned or ratified, or engaged in misconduct that contributed to personal injury] would encourage employers to turn a blind eye to the most outrageous of conduct and violates the 5th principle by rewarding irresponsibility of corporate owners (Connor-248, Fierro & Freidin-252) • The California Supreme Court rejected a similar argument that facilities should not be responsible for the acts of their employees under the "reasonable licensee" defense authorized by the state's civil money penalty law (Fierro citing Center for Medicare Advocacy-252)		
• Punitive damages are not currently covered by insurance and have not been a part of the losses and damages paid by the	• The punitive damage provisions shall apply to all cases which have not gone to trial on the date of enactment of the act The	

insurers that have resulted in insurance premium increases and policy cancellations (Fierro-251 408) • It still isn't clear if insurance companies will cover the higher aggregate compensatory cap of $750,000 If they won't, this could hurt non-profit providers If the higher aggregate compensatory cap may be awarded through arbitration, but is treated as if it were a punitive damage award by insurance companies, nursing homes would be forced to pay the damages out of pocket Punitive damages are not covered by insurance Many more nursing homes than the one percent that now go to court could potentially be hit with the higher compensatory cap than are now subject to punitive damages as a result of a trial If this is the case, perhaps the second tier cap should be eliminated and some other way of addressing punitive damages for the most egregious cases, i e , criminal acts, should be considered (Grofic -292)	purpose of the liability reform proposal is to bring liability insurance back to Florida. However, this proposal does not address the "tail" where lawsuits under Chapter 400 can continue for four years after enactment of the bill Any provision that can be made to apply to claims that have not gone to trial is imperative to help bring liability insurance back to Florida Punitive damages are not a personal right, but a fine As such, restrictions and limitations may be changed by the legislature The proposal to apply new limits on the amounts and new standards for recovery of punitive damages should be made to apply to all causes of action which have not gone to trial as of enactment of the new law (Calkin –242)	

Non-Economic Damages In cases voluntarily submitted to binding arbitration of damages, caps non-economic damages to $250,000 aggregate for all defendants or $750,000 aggregate for all defendants if the claimant proves intentional misconduct or gross negligence; Provide that where a defendant refuses a claimant's offer to voluntarily arbitrate, the case shall proceed to trial without limitation on non-economic damages, Provides that where a claimant refuses a defendant's offer to voluntarily arbitrate, non-economic damages not to exceed $350,000 aggregate for all defendants, No cap on non-economic damages where neither the claimant nor defendant request arbitration

Table 6
Response by Task Force Members to Compensatory Damages

Caps on non-economic damages are unconstitutional, insufficient, and benefits defendants.	Two-tiered non-economic damages will increase liability costs and make it harder to defend against a claim of gross negligence; claimants will receive higher awards through double dipping.
• Not only is capping non-economic damages when cases are voluntarily submitted to binding arbitration of questionable constitutionality, but also it goes far beyond anything in current law The nursing home industry representatives have continuously stated they want to be treated just like hospitals and be brought under similar provisions of chapter 766 This concept combined with others in this document offer nursing homes a better deal than they even asked for Again, this provision is in direct violation of the 5th principle voted on and agreed to by the task force members that states that residents "must have adequate protection under the law and all participants must act responsibly or face the consequences for failing to do so " (Connor - 236)	• This multi-tiered damage cap is extremely problematic It encourages "litigation" in a different forum This litigation in arbitration to determine intent or degree of culpability may be as involved, time consuming and expensive as litigation in the court system and would destroy much of the benefit which insures claimants choosing arbitration will expedite their recovery. As a practical matter, because of the benefit built into the assertion of intentional conduct or gross negligence, the focus of the arbitration panels' deliberations would be misdirected from a determination of what is fair compensation for non-economic damages incurred by the patient and/or family to an exhaustive examination of the possible motivation for the errors acknowledged by the defendant The evidence presented in an arbitration forum is not designed, nor well suited for judicial type determinations For example, the testimony of retained experts on the extent of any deviations from the standard of care, motives, practices and extensive employee or former employee and other caregiver testimony will now mire us down in time and costs, just as much as going to court This offsets any reason why the task force offers arbitration as a recommendation (Calkin - 232) • Legitimate concerns have also been raised that any award based on gross negligence or intentional conduct would likely make the entire award uninsured This type of conduct is generally excluded from coverage under the insurance contract. If insurance is not available to pay an award, most claims would be uncollectible given the financial condition of providers Even for the more solvent providers, the payment of a few of these claims without the assistance of insurance would only accelerate their closure (Calkin - 232) • Eliminate the bifurcated non-economic damage caps, $250,000 and $750,000, because proving intentional misconduct or gross negligence in arbitration may create a conflict between the insurer and insured because insurers do not cover

	intentional misconduct (Sherberg - 234)
• Recognizing that non-economic damages are the only damages that a resident can recover in most cases against long term care facilities Language was added in the 2nd draft to allow recovery of up to $750,000 of non-economic damages aggregate against all defendants, if the resident can prove "intentional misconduct" or "gross negligence" In cases against a nursing home facility for horrible neglect, it will be impossible to show that the management intentionally injured a resident Consequently, the additional $500,000 in non-economic damages will never be obtainable Note also that the additional $500,000 in non-economic damages is not available to a resident who chooses not to arbitrate (Freidin - 235) • Combined with other provisions, this unconstitutional provision would set a limit of $350,000 for all damages for a defendant regardless of the conduct and regardless of the suffering caused by a resident Again, this provision is in direct violation of the 5th principle (Connor - 238)	• This issue is further compounded by the lack of a definition of "gross negligence." Defendants may be understandably reluctant to agree not to contest liability where their exposure in every case triples under arbitration Having already acknowledged liability, defendants will likely find it difficult to defend against allegations that their conduct was grossly negligent, as is alleged in 95% of current claims This disincentive to arbitrate may cause a large number of cases to remain in the tort system (Calkin - 232)
• The total amount awardable against all defendants, aggregate. benefits nursing home operators, owners, and management companies Often there are several defendants in nursing home litigation, where, for example, there has been more than one owner of a home during the period of abuse, or there is a management company, licensee and owner who may all have responsibility for the neglect of a resident The fact that there may be several bad actors should not inure to the benefit of the same bad actors (Freidin - 235)	
• I fail to see a circumstance where a defendant guilty of egregious crimes would ever refuse to arbitrate given the lavish benefits an offending operator would receive for doing so Again, this provision is in direct violation of the 5th principle (Connor - 237) • This language also inappropriately mixes the concepts of non-economic damages and punitive damages Non-economic damages are to compensate victims for suffering, to be distinguished from punitive damages, which are to punish wrongdoers and to act as a deterrent against similar conduct in the future It makes no sense to apply punitive damages thresholds to	• If a defendant offers to arbitrate, the claimant's attorney has no choice, for all practical purposes, but to agree to arbitrate and allege intentional misconduct or gross negligence to more than double the potential recovery (from $350,000 in litigation to $750,000 in arbitration). There is no risk to the claimant in making such assertions, only the potential for much larger damages It is poor policy to encourage claimants through their attorneys to allege, without regard to whether they have a good faith basis, that the defendants intended to cause harm or were grossly negligent (Calkin - 232) • I strongly agree that caps on non-economic and

an award of compensatory damages for non-economic injuries The language hopelessly confuses the issues and is unprecedented in law (Freidin 235 & Connor - 230)	punitive damages are essential to reviving the long-term care liability insurance market These caps should mirror those for medical malpractice and punitive damages present in current law (Sherberg - 233)

Arbitration[1 2] Allow either party to request voluntary binding arbitration of damages Agreement to enter binding arbitration will require defendant to admit liability (but not intentional misconduct or gross negligence which must be proved by claimant);[3] Permit the court, upon motion by either party, to order that the claim be submitted to non-binding arbitration, In cases voluntarily submitted to binding arbitration of damages, caps non-economic damages to $250,000 aggregate for all defendants or $750,000 aggregate for all defendants if the claimant proves intentional misconduct or gross negligence, Where a defendant refuses a claimant's offer to voluntarily arbitrate, the case shall proceed to trial without limitation on non-economic damages and the claimant shall be entitled to recover prejudgment interest and reasonable attorney's fees up to 25% award reduced to present value [4] Where a claimant refuses a defendant's offer to voluntarily arbitrate, the damages awardable at trial shall be capped to net economic damages and non-economic damages shall not exceed $350,000 [5] Punitive damages may not be awarded where the parties agree to arbitrate the claim. In cases submitted to arbitration, the defendant shall pay the claimant's attorney's fees up to 15% of the award, reduced to present value [6]

Statute of Limitations:[7] Reduce statute of limitations from 4 years to 2 years [8 9] For claims that have already accrued, the claim must be filed within 2 years of the effective date of the act

Standards of Recovery[1] Repeal strict liability and replaces it with a negligence standard. Defines "long-term care facility negligence" as a deviation by a long term care facility of the prevailing

[1] I strongly agree that the use of arbitration, styled after the medical malpractice statute, will greatly assist in the fair and prompt resolution of long-term care lawsuits (Sherberg –229)

[2] A defendant can eliminate any possible award of punitive damages by offering to arbitrate (Freidin – 239) Staff Response In order to arbitrate requirement the defendant has to admit liability, in return, punitives are not awarded but aggregate non-economic damage are $750,000

[3] It should be clarified that the parties can voluntarily agree to mediate at any time, as currently exists under the medical malpractice law The proposal should also permit the court, upon motion from either party, to order that a claim be mediated (Calkin –228)

[4] There would be virtually no instance where a defendant would ever refuse such an offer, especially in cases of outrageous conduct (Connor –256)

[5] It is clear from these provisions that it was the intent of the task force staff to punish plaintiffs whenever the defendant offers to arbitrate and to provide lavish incentives for an operator to arbitrate – especially in cases involving egregious conduct (Connor –257)

[6] In case a reader missed this statement in the above section, it is listed here again to make it clear the staff wants to offer a huge windfall for a defendant that merely offers to arbitrate a claim (Connor -258)

[7] The statute of limitations should not be shortened absent some additional time frame to allow a reasonable person the opportunity to discover the potential cause of action, if such information is not apparent (Freidin –274)

[8] I strongly agree that reducing the statute of limitations from four to two years is necessary to help predict losses and to ensure that evidence is preserved (Sherberg –273)

[9] A 4-year statute of limitations should apply in cases where a home concealed facts from the family or legal guardian (Connor – 275)

professional standard of care for a similar long-term care provider (with a standard license from AHCA) which proximately causes personal injury or death to a resident and makes long-term care facility negligence the exclusive remedy [2] Provide that a violation of a resident's rights is a cause of action for long term care facility negligence Define a managed risk agreement as an agreement between a resident and a long-term care facility, approved by a medical doctor, which sets forth the resident care plan and service plan and consequences and inherent risks likely to result from changes to the care or service plan. Allows a long-term care facility to introduce evidence that a managed risk agreement was entered into by a resident and the facility and that it was properly implemented and maintained by the facility [3] Protect a long-term care facility from liability for the consequences of a decision by a resident to refuse or modify care or services, so long as the resident is informed of the consequences, as required under s 400 022(k) [4] Adopt current law that a long-term care facility shall not be liable for the negligence of a physician rendering medical care Expressly provide that limitation of liability does not limit the right of a patient to bring an action for medical negligence against a physician under the medical malpractice statute. In actions involving the death of a resident, allow a personal representative to recover for the decedent's estate the decedent's pain and suffering before death Allow minor children and a surviving spouse of a deceased resident, and if there is no surviving spouse, all children, regardless of age, to recover for mental pain and suffering Protect quality assurance and risk management records that comply with AHCA approved risk management program (see option #5 under Quality earlier in this report) from discovery [5] Protect surveillance records (without regard to who pays for the surveillance) from discovery [6] Require that claims for abuse or neglect of the elderly against a long-term health care facility be brought under Chapter 400 and not under Chapter 415 [7]

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[1] I continue to be hesitant with the legal terminology but my recommendation is to use the same criteria we have for hospitals and medical facilities with nursing homes (Suggested by Hernandez)

[2] Negligence is already defined in the Medicare and Medicaid statutes it is the deviation from the standards that nursing facilities are required to meet to receive federal funds (Fierro & Freidin –266).

[3] According to the Center for Medicare Advocacy this proposed managed risk agreement inappropriately incorporates a concept of managed risk agreements from the assisted living industry into the nursing home industry (Fierro & Freidin -267)

[4] This suggestion immunizes facilities from liability if residents refuse care or services. Unfortunately, a common practice in some nursing homes is to write a notation in a resident's medical chart that they refused services when in fact the services were simply not delivered. This kind of legal protection protects them from any liability for potential bad outcomes from not feeding, hydrating, medication, cleaning, ambulating, toileting or providing other services Particularly for ..cognitively impaired individuals and or individuals who have no family support, this could be disastrous (Fierro & Freidin – 268)

[5] I do not agree that the current protections for hospital peer review and risk management be applied in the long-term care facility context (Freidin -136)

[6] A recent news account showed an incident where staff was dragging a disabled woman through the halls, mocking her and treating her cruelly Given the fact that without the videotaped recording, this incident would have never become public (Connor –286)

[7] Chapter 415 was just recently passed and signed into law by Governor Jeb Bush This law states that an elderly person who is, for example, physically assaulted is given access to the civil justice system and has a cause if a physical assault occurs in a hospital, the hospital can be held to the standards found in chapter 415 This provision would give nursing homes more legal protections than a hospital (Connor & Fierro –287)

Table 7
Responses by Task Force Members to Standards of Recovery

Standards of recovery go beyond what is available to hospitals: protecting providers.	Standards of recovery go beyond what is available to hospitals: providing more opportunities for claimants to sue. Negligence needs to be proved; allow defendants to not contest liability in order to arbitrate; protect facilities from the negligence of other parties.
• The proposals would give the nursing home industry more protection than any other entity, including physicians and hospitals, for example Burden of proof for violation of rights is higher than a negligence claim The nursing home industry will have more protection from liability than any other person or entity Creates a lower standard for nursing homes. The proposal states that the standard of care for the nursing home is the prevailing standard for similar nursing homes in the community If most nursing homes in the community are under-staffed and poorly run, under this proposal this low standard will become the acceptable standard for Florida's senior and disabled citizens Nursing home no longer have any exposure for the criminal abuse, neglect or exploitation of seniors and vulnerable adults under chapter 415 The ...proposal specifically precludes nursing homes from being held accountable under this statute for what happens inside their facility Nursing homes and assisted living facilities can short-circuit litigation and set another barrier to a recovery by a resident by arguing to a court that they had no "duty" to the resident for care and treatment Assisted living facilities stand to benefit most from this provision, since they often maintain that they merely are there to provide basic assistance with activities of daily living. When a resident begins to deteriorate and needs additional services, the ALF will argue it had no duty to the resident and not be responsible when they all too often keep a resident in the ALF longer than they should in order to continue to collect revenue from the resident. Under this proposal, there will be no incentive for an ALF to move a resident to a more appropriate setting where his or her growing needs can be met Nursing home residents will be subjected to "managed risk" agreements, which will be used to justify the failure to provide care and services to residents For example, if a resident refuses to eat a meal, the nursing home will document that refusal and will have an absolute defense to a	• Allow defendants to agree to arbitration without admitting liability but agreeing to not contest liability This will encourage defendants to agree to arbitration (Sherberg - 253) • A claimant should have to prove that an alleged "violation of a resident's right" was due to negligence The allegation of a violation of a resident's right by itself should not be proof of negligence For example, a family member may enter a bedroom and find a resident exposed. A number of reasons beyond the control of facility staff could have contributed to the exposure to an alleged violation of the resident's right to dignity A facility should not be legally responsible for the exposure that occurred if it was not due to negligence (Grofic - 262) • Eliminating strict liability and replacing it with ordinary negligence (which almost all other plaintiffs must plead and prove) is an essential ingredient to tort reform. (Sherberg - 260)

claim that the nursing home failed to provide hydration and nutrition to a resident, which resulted in death. In this event the nursing home would have no incentive or duty to take further action to see that the resident's basic needs are met through alternative means (Freidin - 263)	
• I [support] the *Knowles* and *Hamilton* decisions in items f and g [allowing for the recovery of pain and suffering after the death of the resident and allow all children, regardless of age to recover for mental pain and suffering] (Freidin - 263)	• Remove the provision that allows recovery both for the decedent's pain and suffering <u>and</u> the pain and suffering of survivors.(Sherberg - 254) • The recommendation allows a claimant to collect compensatory damages based on the pain and suffering of a nursing home or assisted living facility (ALF) resident <u>and</u> the claimant's pain and suffering -- in effect a double dip Under medical malpractice, pain and suffering is based on the patient's pain and suffering. To prevent double dipping, the claimant should be required to choose one or the other, but not both (Grofic - 38) • In actions for injuries causing the death of a patient, the proposal allows the personal representative to recover for the estate, pain and suffering damages for the decedent's pain and suffering An action for the patient's pain and suffering experienced prior to the patient's death for unrelated causes is preserved This allows for double damages which is unavailable in any other type of action. (Calkin - 271) • Allows minor children and a surviving spouse of a deceased patient, and if there is no surviving spouse, all children, regardless of age, to recover pain and suffering damages under the Wrongful Death Act where the long term care provider negligence caused the death This is not allowed under physical/hospital medical malpractice (Calkin - 272)
• Many physicians are employed by facilities as medical directors at the same time as they serve as residents' attending physicians and under this proposal these common practices reflecting the lack of independence of physicians from the nursing facilities would nevertheless lead to facility immunity (Fierro & Freidin 269) • Some of the statutory restrictions on discovery and admissibility extended to doctors and hospitals already go too far in keeping relevant and important information from a person seeking redress for injuries. Court interpretation of these statutes has been inconsistent, and in some cases has kept original documents, such as the qualifications and disciplinary records of caregivers from litigants Language protecting peer review and risk management must be	• Provide that long-term care facilities are not liable for the negligence of third party health care providers.(Sherberg - 255) • Prohibiting the admission of Agency for Health Care Administration (AHCA) surveys into evidence because they are not relevant, are also an essential ingredient to successful tort reform (Sherberg - 261)

carefully crafted to ensure that only information generated during the peer review process would be protected Documents from original sources and state and federal survey and inspection records should not be kept from discovery or held inadmissible In addition to the extent residents are able to make use of video or electronic monitoring, these items should not be statutorily restricted in terms of discoverability and admissibility (Freidin 277)	

Pre-Suit Requirements [1] Adopt relevant litigation reforms contained in the medical malpractice statute [2] Require that a notice of claim be provided to a potential defendant 90 days before suit is filed [3] Require that before sending a notice of claim, a claimant must conduct a pre-suit investigation to ascertain whether there are reasonable grounds to assert a claim In claims involving personal injury or death, the pre-suit investigation shall include obtaining a verified medical opinion corroborating the existence of reasonable grounds to bring the claim Require that during the 90 days after the notice of claim is mailed, the insurer or the defendant must complete a pre-suit investigation At the end of the 90 day period, the insurer must reject the claim, make a settlement offer, or admit liability (but not intentional misconduct or gross negligence which must be proved by claimant) and request arbitration [4] Require that during the pre-suit investigation period, the claimant and defendant provide relevant medical records upon request by the other party [5] Exclude from discovery and admission into evidence any statements, reports or other documents generated by the pre-suit investigation process [6] Allow both the claimant and defendant to file a motion in circuit court asking the court to determine whether there exists a reasonable basis for the opposing party's claim or denial [7] Within 90 days of receiving a notice of claim, allows a defendant who has a good faith basis to believe that it had no legal duty to the claimant to file an action in circuit court to contest the lack of duty.

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[1] The medical malpractice pre-suit procedures which are not appropriate or adequate for cases involving elders and long term care facilities. AFTL has proposed pre-suit procedures that are more appropriate for these cases. Substitute the option of AFTL on pre-suit procedures (Freidin –282)

[2] Supported by Hernandez

[3] Supported by Hernandez.

[4] I am not sure if 90 days is a workable period of time I would suggest that 120 days may be a more appropriate time frame (Calkin –283)

[5] This item should require that medical records, including those of prior and subsequent health care providers, be provided (Calkin 284).

[6] These provisions would dramatically increase the cost of bringing a claim against a nursing home (Connor –285).

[7] Supported by Hernandez.

Table 8
Impact on Awards of Staff Tort Reform Options

Offers voluntary arbitration▼	**Attorney Fees**	**Economic**	**Non-Economic (Pain & Suffering)**	**Punitive**
Claimant only (defendant refuses)	Reasonable attorneys fees up to 25% of award reduced to present value (in cases involving personal injury or death) OR Maximum of $10,000 (for violations of resident rights involving no personal injury or death)	Net economic damages (health care and funeral bills)	No Caps	3 times compensatory damages to $500,000 OR if motivated by unreasonable financial gain 4 times compensatory damages to $2 million OR for specific intent to cause personal injury, no cap
Defendant only (claimant refuses)	Not awarded	Net economic damages (health care and funeral bills)	$350,000 aggregate	Not Awarded
Claimant and defendant	Defendant pays claimant's attorney fees up to 15% of award reduced to present value (in cases involving personal injury or death) OR Maximum of $10,000 (for violations of resident rights involving no personal injury or death)	Net economic damages (health care and funeral bills)	$250,000 aggregate $750,000 aggregate if claimant proves intentional misconduct or gross negligence	Not awarded (but see additional recovery under non-economic damages)
Neither claimant nor defendant	Not awarded	Net economic damages (health care and funeral bills)	No cap	3 times compensatory damages to $500,000 OR if motivated by unreasonable financial gain 4 times compensatory damages to $2 million OR for specific intent to cause personal injury, no cap

8 Guiding Principles for Litigation Reform submitted by The Honorable Nancy Argenziano

Preamble It is the desire of this Task Force to strike an important balance in crafting these guiding principles We must work to assure the safety of residents while trying to stabilize insurance rates It is therefore our intention to provide the Florida Legislature with a set of guiding principles that will seek to encourage insurers back into Florida wile maintaining adequate legal remedies for residents who have been harmed Additionally, we believe the reduction in lawsuits must also come from an improvement in care through increased staffing in homes as well as an increase in the availability of alternative care mechanisms, including, but not limited to the home and community-based care systems as outlined in the other chapters of this report It is important to also note that these two concepts must be indivisible To enact litigation reform without substantial improvements and changes to the long-term care delivery system will do little to help us achieve our primary goal of providing the best long-term care delivery system in America.

1 Promote the early resolution of claims through the use of an informal exchange of information that benefits both parties prior to filing a suit
2 Promote the use of alternative dispute resolutions (ADR) in order to avoid costly litigation We support the concept of voluntary binding arbitration to allow a defendant to admit liability and, in return, the defendant would be able to limit exposure as well as unpredictability through the ADR process This concept would avoid the costly process of proving or defending fault yet would allow both parties to focus solely on the amount of damages
3 Eliminate add-on attorney fees in cases involving the personal injury of a resident and allow only limited fees in cases not involving personal injury.
4 Create a mechanism that will increase the predictability of awards for nursing home negligence suits
5 Limit punitive damages per defendant to a multiplier of compensatory damages with no limits for egregious or intentional conduct

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2 Promote the use of alternative dispute resolutions (ADR) in order to avoid costly litigation We support the concept of voluntary binding arbitration to allow a defendant to admit liability and, in return, the defendant would be able to limit exposure as well as unpredictability through the ADR process This concept would avoid the costly process of proving or defending fault yet would allow both parties to focus solely on the amount of damages.
3 Eliminate add-on attorney fees in cases involving the personal injury of a resident and allow only limited fees in cases not involving personal injury
4. Create a mechanism that will increase the predictability of awards for nursing home negligence suits
5 Limit punitive damages per defendant to a multiplier of compensatory damages with no limits for egregious or intentional conduct

Appendix 1
Commonly Asked Questions About Staff Options for Tort Reform[1]

The staff tort reform options were developed in consultation with Hayden Dempsey, Deputy General Counsel to the Governor They are the result of input from persons who testified at Task Force meetings, residents groups, trial attorneys, and representatives from the insurance industry, assisted living facilities, and nursing homes These questions and answers were developed with Mr Dempsey in response to questions received after these proposals were first suggested

Q	How do these provisions affect access to the courts (i.e , will attorneys still take cases without add on attorney fees)? What about the clients who have non-personal injury resident right complaints?
A	Chapter 400 023 (Civil Enforcement) would be repealed which allowed for add-on attorney fees What is proposed here is that attorney fees are linked to willingness to arbitrate which amounts to • In cases in which neither party offers to arbitrate or the claimant refuses to arbitrate, the claimant's attorneys are paid a percentage of the total award, consistent with nearly all tort cases • 25% of unlimited non-economic damages if claimant agrees to arbitrate (but defendant refuses) for personal injury or death cases • Maximum of $10,000 in add on attorney fees for violation of rights involving no personal injury or death (e g , complaints handled by Elder Law attorneys) • In cases in which both parties agree to arbitrate, the claimant is entitled to an additional 15% of the total award for attorney's fees These potential awards would still be profitable for attorneys and should not reduce interest by attorneys in representing these citizens (or their estates) for both personal injury/death or for violation of custodial resident rights
Q	What is the basis for the proposed caps on punitive damages? Do they apply to other causes of action, such as medical malpractice cases? Can a defendant avoid punitive damages merely by offering to arbitrate the case?
A	• The proposed punitive damages reforms are from the 1999 Civil Justice Reform Act enacted by the Legislature in 1999 The punitive damages caps contained in the Act currently apply to almost all actions, including medical malpractice cases • Removing the threat of punitive damages is intended to provide the defendant incentive to go to arbitration, a resolution process much quicker and less expensive than the court system In long-term health care cases in particular, it benefits the injured resident to resolve the claim as quickly as possible • A defendant who wishes to go to arbitration must admit liability (but not intentional misconduct or gross negligence which must be proved by claimant) At arbitration, if a claimant can prove intentional misconduct or gross negligence on the part of the defendant, the current standard for punitive damages, the plaintiff can recover up to $750,000, plus 15% for attorney fees The amount recoverable in the arbitration process proposed is several times greater than what is recoverable in medical malpractice cases • Although a defendant can escape imposition of "punitive damages" by offering to go to arbitration, if a claimant proves at arbitration that the defendant's conduct was grossly negligent or intentional, the arbitrator can award up to $750,000 (aggregate) to the claimant, an amount intended to be punitive • If neither the claimant nor defendant offer arbitration or the defendant refuses arbitration, the amount of punitive damages recoverable is the same as almost all other tort cases If the jury finds the defendant actually intended to harm the claimant, no caps on punitive damages apply • In cases in which a jury awards punitive damages, the case will be automatically filed with the local state attorney's office for investigation

[1] The responses to these "Commonly Asked Questions" are grossly and repeatedly inaccurate, they are editorial in nature and are not based on sound legal analysis It would be pointless to comment on them except to say they have no place whatsoever in this report (Connor –291 & Freidin-289) Staff Response: Need examples of erroneous information

	The caps contain the potential size of punitive damages, except where there has been specific intent to cause personal injury Less than 1% of all nursing home litigation goes to jury trial The threat of punitive damages (which are claimed in 95% of these lawsuits currently) is generally used in negotiating settlements for the 99% that do not go to jury trial These caps should have the effect of containing the multi-million dollar awards because defendants would admit liability (but not intentional misconduct or gross negligence) and pay up to $750,000 if intentional misconduct or gross negligence is proved
Q	What would be recoverable if the resident dies from the abuse or neglect, or even a cause unrelated to a resident's rights violation? What is currently recoverable in other wrongful death cases? Would surviving children be entitled to recover for their pain and suffering? Can surviving children recover in wrongful death cases resulting from medical malpractice?
A	• Under this proposal, when a resident dies, his or her estate can recover for any pain and suffering of the resident before death. The recovery of damages for pain and before death is not possible in most cases, including medical malpractice cases This proposal recognizes the frailty of long term care facility residents and removes any potential argument that it would otherwise be less expensive for a defendant if the resident were to die • Currently in medical malpractice cases resulting in death, children over 25 are not permitted to recover for their pain and suffering Under this proposal, when there is no surviving spouse, all surviving children, regardless of age, may recover for their pain and suffering
Q	What is the basis for the amount of caps on non-economic damages? Do they apply to other cases?
A	• In cases in which a claimant refuses a defendant's offer to arbitrate, the cap on non-economic damages is $350,000 This is the same amount as in medical malpractice cases • In cases in which both parties agree to arbitrate, the caps are $250,000, or $750,000 if the plaintiff proves intentional misconduct or gross negligence This amount is several times higher than in medical malpractice cases • In cases in which either the defendant refuses an offer to arbitrate or neither party offers to arbitrate, there is no cap on non-economic damages. This is the same as medical malpractice cases • The caps on non-economic damages are intended to provide both parties an incentive to arbitrate rather than litigate cases • Currently, 83% of all claims (including plaintiff attorney fees) in Florida are under $250,000 (Aon, 2000) • Caps of $250,000 (up to $750,000 plus 15% for attorney's fees) or $350,000 (and no attorney fees) are well within the current claims. In addition, fees should be less when lawsuits are settled early before attorney fees mount
Q	Will the $750,000 aggregate cap for intentional misconduct or gross negligence be covered by insurance?
A	Insurance companies generally don't cover misconduct or gross negligence (this is why they don't cover punitive awards in their policies) The cap is higher than the average claim in order to allow room to negotiate a settlement
Q	Reducing the statute of limitations does not provide families sufficient time to grieve and seek redress for their family members
A	• The statute of limitations in Medical Malpractice and Wrongful death is currently 2 years • 88 8% of lawsuits currently are filed within 2 years (Hillsborough County study)
Q	How would a jury determine whether the long-term health facility defendant, such as a nursing home or ALF, provided care below what is required?
A	The definition of "long term care facility negligence" is similar to the definition of "medical malpractice " The level of care required of the facility is the prevailing professional standard of care for a similarly licensed facility In addition, negligence related to poor health outcomes would be judged using recognized clinical practice guidelines such as published by the Agency for Health Care Policy and Research
Q	Would a violation of a resident's statutory rights still be actionable?
A	A violation of resident rights is actionable under the proposed long-term care facility negligence statute. In actions for violation of rights involving no personal injury or death, attorney's fees up to $10,000 may be awarded Attorney's fees are also available if the parties agree to arbitration or the defendant refuses arbitration

Q	Allowing the facility to enter into evidence the fact that there is a managed risk agreement would not benefit the resident
A	The managed risk agreement is a document that provides evidence that the resident or her representative understood the consequences and risks of deciding to refuse certain treatments (which is a resident right) The managed risk agreement is signed by a doctor and would only be valid if entered into voluntarily
Q	Limiting risk management, quality assurance, and surveillance records from discovery serves no purpose and would prevent either arbitrators or a jury from learning all the facts available to the facility The argument that it allows the facility to conduct "self-critical analysis" is a cover-up All nursing home records are maintained by the facility on behalf of the resident who cannot record the information herself Special quality assurance records are already protected under law from discovery and admissibility at trial
A	This stipulation is only valid if the clearly defined risk management programs are an option (see option #5 under quality) adopted by this Task Force Surveillance systems could be a violation of a resident's right to privacy (400 022(m)), especially since most residents share a room In addition, insurance carriers have stated that they will not provide liability coverage to facilities that permit video surveillance in resident rooms Photographs and videography are subject to interpretation
Q	Why impose the pre-suit requirements currently required in medical malpractice cases to long-term care facility cases? Does it impose an undue burden on elderly claimants? Will it unnecessarily delay the resolution process?
A	The purpose of the pre-suit requirements currently imposed in medical malpractice cases is to encourage early resolutions and discourage frivolous claims The trial bar is already complying with these pre-suit requirements in nursing home cases involving personal injury or death Prior to sending a notice of claim, the claimant must conduct an investigation to determine if there are reasonable grounds for a claim, for a claim of personal injury or death, there has to be a corroborating medical opinion The notice of claim is required 90 days prior to filing suit Upon receipt of the notice of claim, the defendant must conduct its own investigation and must decide to reject the claim, make a settlement offer, or admit liability (but not intentional misconduct or gross negligence which must be proved by claimant) and request arbitration During this same 90-day period the defendant may file an action to contest the lack of legal duty

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Raymond Johnson
Chair

Karen Torgesen
President/CEO

November 15, 2000

The Honorable Frank Brogan
Lieutenant Governor
PL 05 Capitol
Tallahassee, FL 32399-0001

Dear Lt Governor Brogan

Attached is FAHA's proposed legislation to address the long-term care facility litigation and liability insurance crisis The recommended statutory changes were summarized, but not included, in the proposal we submitted to the Task Force on Availability and Affordability of Long Term Care on November 7th

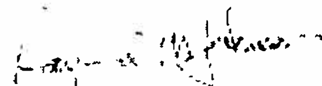
Also included in this transmittal is a chart comparing current law (Chapters 400, 766, and 768, F S) with our recommendations As the chart indicates, we are proposing replacing the civil enforcement provisions in Chapter 400, F S , with a "Long Term Care Facility Negligence Act" that includes negligence standards, presuit notification requirements, arbitration, caps on damages and attorney's fees, and other provisions that are similar to those now if effect for other health care providers. We believe that the only meaningful way to address the huge increases in liability insurance premiums for long-term care facilities is to create a civil enforcement provision that allows residents and their families the recourse to sue when they are wronged, but at the same time, gives high-quality providers the ability to defend themselves when they follow acceptable standards of care

The amount of money spent on insurance premiums and deductibles is robbing long-term care providers of resources that could and should be spent on care and services If the situation continues, some of the best nursing homes and assisted living facilities in the state will be forced to rethink their missions and either down-size their operations or close

The task force is dealing with the most basic public policy question. Does the state of Florida wish, as a matter of public policy, to allow nursing homes and ALFs to operate? If the answer is yes, then the Task Force and the Legislature must deal with the overwhelming problems created as a result of a law that makes it very easy to sue long-term care providers for unlimited damages

Many thanks for providing FAHA staff with the opportunity to testify before the Task Force on October 30th If we can be of further assistance, please do not hesitate to contact Senior Vice President of Public Policy, Mary Ellen Early, or me.

Sincerely,



Raymond Johnson
Chair

RMJ/bms
Attachments

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FINDING A SOLUTION TO THE LONG TERM CARE LIABILITY INSURANCE CRISIS
LITIGATION RELIEF PROPOSAL

Statement of the Problem Nursing homes and assisted living facility providers are embroiled in a crisis that is affecting their ability to provide care to elder Floridians The cause of the crisis is exorbitant increases in liability insurance premiums resulting from a deluge of residents' rights lawsuits and claims against long-term care providers Because the standards for bringing a lawsuit against a nursing home or ALF are more lenient than those in effect for other health care providers and businesses, long-term care providers have become an easy and lucrative target for trial lawyers

Proposed Solution: Enact legislation that treats lawsuits and claims against nursing homes and ALFs similarly to those filed against other health care providers

Topic	Chapter 400, F.S. (current law)	Chapter 766, F.S., Medical Malpractice/Chapter 768, F.S., Negligence	FAHA Proposal
1. Standard of Proof When Filing Lawsuit	**s. 400.023(1), s. 400.429(1)** -- Deprivation or infringement of a resident's rights, no standard of proof established in law NOTE This amounts to strict liability without regard to fault or negligence	**s. 766.102** -- Claimant must prove by a greater weight of evidence that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care for that health care provider	Claimant must prove by a greater weight of evidence that each defendant has an established duty to the resident, that each defendant failed to comply with the prevailing standard of care, that each defendant's deviation from the prevailing standard of care was the direct and proximate cause of damages to the resident; and that each defendant's deviation from the prevailing standard of care resulted in either injury or the death of the resident, abuse, neglect or the deprivation of the resident's rights
2. Limits on Who Can Sue	**s. 400.023(1), s. 400.429(1)** -- The resident or his/her guardian, a person or organization acting on behalf of a resident with resident/guardian's consent, or a personal representative of the estate of a deceased resident when the cause of death resulted from the deprivation or infringement of the	**Ch. 766** (med mal) -- the patient. **s. 768.20 - 21**(wrongful death) -- the decedent's personal representative if there is a surviving spouse or minor child	The resident or his/her guardian, or by a surviving child (regardless of age) or spouse or the personal representative of the estate of a deceased resident

	decedent's rights		
3. Attorneys' Fees Above & Beyond Contingency Fees (Add-on fees)	**s. 400.023(1), s. 400.429(1)** -- Plaintiff who prevails may be entitled to recover reasonable attorneys' fees, costs of the actions and damages These attorneys' fees are in addition to contingency fees that are a percentage of a settlement or award	**s. 766.207(7)(f)** -- When a case is arbitrated. • Add-on attorneys' fees are capped at no more than 15% of the award **s. 766.209(3)(a)** -- If a settlement at arbitration is rejected and the case goes to trial, add-on attorneys' fees are capped at 25% of the award	The same as requirements in s **766.207(7)(f) and s. 766.209(3)(a)**
4. Cap on Contingency Fees for Attorneys	No Caps	**Ch. 766 or 768** -- No caps Contingency fees are governed by Florida Bar rules	No caps Contingency fees are governed by Florida Bar rules
5. Caps on Damages:			
a. economic	No Caps	**s. 766.207(7)(a)** -- For cases that are arbitrated • coverage for cost of past and future medical expenses, and 80% of wage loss and loss of earning capacity, offset by any collateral source payments	No Caps
b. non-economic / compensatory	No Caps	**s. 766.207(7)(b)** -- For cases that are arbitrated: • Maximum of $250,000 per incident, and shall be calculated on a percentage basis with respect to capacity to enjoy life so that a finding that the claimant's injury resulted in a 50% reduction in his or her capacity to enjoy life would warrant an award of no more than $125,000 **s. 766.209(4)(a)** -- If a claimant rejects offer to arbitrate, award at trial for non-economic damages may not exceed $350,000 per incident	For cases settled through arbitration • Maximum of $250,000 per defendant, but no more than an aggregate amount of $350,000 against all defendants • Capacity criteria same as in s **766.207 (7)(b).** If a claimant rejects offer to arbitrate, award at trial may not exceed an aggregate amount of $350,000 for all defendants

c. **punitive**	**s. 768.735 (2)** -- Three times the amount of compensatory damages (which are not capped) unless claimant demonstrates to the court by clear and convincing evidence that the award is not excessive	**s. 766.207 (7)(d)** -- For cases that are settled through arbitration -- no punitive damages **s. 768.73(1)** -- For cases that go to trial • Three times the amount of compensatory damages or the sum of $500,000 • Where wrongful conduct is motivated solely by unreasonable financial gain and the dangerous nature of the conduct, together with the high likelihood of injury from the conduct, was known by the managing agent, director, officer or other person responsible for policy decisions, punitive damage award may not exceed four times compensatory damages or $2 million • When defendant acted with specific intent to harm and harm occurred, no cap on punitive damages	Same as **s. 766.207 (7)(d)** Same as **s. 768.73 (1)**
6. Pre-suit notification requirement	No notification requirements, may file lawsuit immediately without notification to facility	**s. 766.106** -- Mandatory pre-suit notification to defendant, opportunity for defendant to respond.	Same as **s. 766.106**
7. Protection of quality assurance and risk management records from discovery	None	**s. 766.101(5)** -- Protects investigation, proceedings and records of peer review and other quality assurance activities from discovery and introduction as evidence Also protects participants from testifying in a lawsuit	• Amends **s. 400.118** to require quality assurance (QA) meetings every other month in a nursing home, and to protect QA and risk management records from discovery • Amends **s. 400.4275** to protect QA and risk management programs in ALFs from discovery ***NOTE:*** These changes are in FAHA's

			quality of care proposal
8. Arbitration	None	**s. 766.207** -- Voluntary Arbitration	Same as **766.207**
9. Statute of Limitation	4 years	2 years	2 years
10. Civil Remedies (Restriction on number of lawsuits that can be filed simultaneously by plaintiff)	Can sue simultaneously under Chapter 400, Chapter 766 (medical malpractice) and Chapter 768 (negligence)	**Ch. 766** is exclusive civil remedy for medical malpractice	Long Term Care Facility Negligence Act is created as the exclusive civil remedy for lawsuits filed on behalf of a long-term care facility resident

Contact persons: Mary Ellen Early, Senior Vice President - Public Policy (904/738-0503), Email mecarly@totcon.com
Karen Torgesen, President/CEO (850/671-3700), Email ktorgesen@faha org

The Florida Association of Homes for the Aging (FAHA) is a 37-year old statewide organization that represents nursing homes, assisted living facilities, and HUD housing for the elderly Over 95% of the membership consists of non-profit community or faith-based providers

RESPONSE TO THE STAFF REPORT
TO THE TASK FORCE ON AVAILABILITY AND AFFORDABILITY
OF LONG TERM CARE
by
Edwin M. Boyer
Long-term Care Ombudsman District 6

GENERAL CONSIDERATIONS

1. CLEARLY IDENTIFY ON THE FACE OF THE REPORT THAT THE REPORT IS AN INFORMATIONAL REPORT AND DOES NOT REPRESENT THE RECOMMENDATIONS NOR THE CONSENSUS OF THE TASK FORCE

At the December 18th meeting of the Task Force it was agreed that the Task Force would submit an informational report to the legislature and that any recommendations included in the report whether staff recommendations or otherwise, were not approved by the task force This should be made very clear on the face of the report

2 DELETE THE INTRODUCTION AND EXECUTIVE SUMMARY AND REPLACE IT WITH A SYNOPSIS OF THE WORK OF THE TASK FORCE

The introduction and executive summary represent the opinions and views of the staff which were not authorized by statute, or approved by the task force, nor was much of it discussed by the task force. Left as it is, the introduction and executive summary gives the appearance that it is the product of the task force when it is clearly not.

3 REVISE THE TITLE OF THE REPORT TO REFLECT THAT IT IS AN INFORMATIONAL REPORT

4 IF STAFF RECOMMENDATIONS ARE INCLUDED IN THEIR EXISTING FORM, THEY SHOULD BE CLEARLY IDENTIFIED AS STAFF RECOMMENDATIONS AND NOT APPROVED BY OR RECOMMENDED BY THE TASK FORCE

As stated at page two of the staff report "The recommendations contained within this report represent a synthesis of recommendations that can be supported by available data and were submitted by over 50 interested persons including Task Force Members, providers, consumer advocates, financial and insurance interests, consumers, and project staff."

The process by which recommendations were "synthesized" was determined by staff and not by the task force Some recommendations were excluded from the staff recommendations and some were edited based upon staff opinion Some recommendations were staff generated and were not discussed at task force meetings.

RESPONSE
TO THE STAFF REPORT
TO THE TASK FORCE ON AVAILABILITY AND AFFORDABILITY OF LONG TERM CARE

by

Edwin M. Boyer
Long Term Care Ombudsman District VI

EXECUTIVE SUMMARY AND STAFF RECOMMENDATIONS

Task #1 and #2
Choices in Long-term Care

Choice Recommendations

Recommendation 2 - expand OSS and Medicaid Waiver Funded In-Home and Community-residential Programs

- this is not a task force recommendation and the statement that it is should be removed

- Enhancement of community mental health services is a worthwhile goal. However, inclusion of community mental health services in all Home And Community Based Services waiver-funded programs may require amendment of the Medicaid waiver and may have cost and entitlement considerations which should be clarified before this recommendation is approved

Recommendation 3 - Expand Affordable Housing.

-This is not a task force recommendation and the statement that it is should be removed.

- What is the justification for providing incentives for conversions and new construction? Has it been determined that there is a shortage of existing ALF facilities?

- Exemption of ALF conversions from existing regulations raises equal protection and resident protection issues Facilities are regulated to insure protection of residents. What is the justification for exempting some facilities from certain regulations and not others. If some facilities should be exempt from certain regulations then why not all facilities?

- Assigning assisted living waiver slots to facilities agreeing to set aside 50% of their beds as "affordable" shifts the focus of funding. Funding typically follows the individual, not the facility. This may have important policy implications. Also, a determination of what is considered "affordable" should be clarified before this is considered.

Recommendation 4 - Expanding the Adult Family Care Home Program.

- Expansion of the Adult Family Care Home Program should be encouraged However to bring it

over the next three-to-five years" All other portions of recommendation 11 can be areas for consideration in the study

- Adoption of recommendation 11 in its entirety, would eliminate an existing successful locally controlled system for the identification of needs and for and the delivery of services for the elderly. Creating an Independent case management system" within the Department of Elder Affairs establishes a substate structure for the delivery of services and represents a major policy shift from a privatized case management system to a government run system

- Recommendation 11 was never discussed by the task force nor was it presented to the task force for consideration

- Recommendation 11 incorporates major changes to the existing system and then calls for a third party study of the current administrative/organizational structures and practices of the departments The study should be done first Why recommend a redesign of the system and then study it?

Task #3 and #2
Quality in Nursing Homes

Recommendation 13 - Increase Funding by $1,500,000 for Public Guardians

- The Office of the Statewide Public guardian can play a vital role in protecting the interests of all indigent incapacitated individuals, whether in the community or in long term care facilities Adequate funding for the program can provide early intervention for individuals who, but for the program, might ultimately need more expensive services

- This recommendation should be modified to reflect this expanded role of the program It should be moved to Task #1, Home and Community-Based Alternatives to Nursing Home Care It should be revised as follows, "Increase funding for the Office of the Statewide Public Guardian by $1,500,000 in order to begin building an infrastructure for public guardianship in Florida to protect the interests of cognitively impaired indigent individuals in need of community based and long term care services"

New Recommendation - repeal the Medicaid Income Cap

- The following new recommendation should be added "The legislature should repeal the Medicaid income cap which unfairly reduces the availability of long term care beds to applicants who have met both medical and financial criteria for eligibility"

- The rationale for repeal of the Medicaid income cap is found in my same recommendation included under the section of task force member recommendations.

Task #4

Limiting Costly Litigation

The recommendations regarding Task #4 "Liability and Long term Care Viability" should be deleted entirely. These recommendations are not supported or justified by the research presented to the task force or by any information provided to the task force. Further, These recommendations severely limit residents access to the courts and fail to ensure their protection against improper and inadequate care Analysis of the recommendations by both The AARP, and the National Citizens Coalition for Nursing Home Reform (NCCNHR) reached the same conclusion as shown by the attached letters submitted to the task force at the December 18th meeting and the attached memorandum dated January 8th, 2001, all of which I include in my response as recommendations.

Any recommendation for Successful litigation reform must include the following inseparable elements

1. assuring the safety of residents and protecting their right to pursue remedies in court

2.. improving care through increased staffing and aggressive regulatory enforcement.

3. addressing the insurance availability and rate issues by rate incentives and loss predictability measures

The "Guiding Principals For Litigation Reform" distributed by Representative Nancy Argenziano at the December 18th meeting is the type of recommendation which should be made regarding Task#4.

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MEMORANDUM

TO: Ed Boyer
FROM: Toby S. Edelman
RE: Florida Task Force on Availability and Affordability of Long-Term Care, Task #4, Liability and Long-Term Care Viability
DATE: January 8, 2001

I have reviewed Chapter VI, Task #4, Liability and Long-Term Care Viability, from the Florida Task Force's Second Draft report (Dec. 16, 2000) as well as the Task Force staff's recommendations on litigation, which I understand the Task Force did not officially adopt I submit dress comments on behalf al the National Academy for Elder Law Attorneys, the National Citizens Coalition for Nursing Home Reform and the Center for Medicare Advocacy

Executive Summary

I submit the following summary of my analysis and comments;

A. The Report's Findings and Recommendations

1. The Task Force found that tort litigation in Florida is not frivolous The lawsuits involve pressure sores. falls, dehydration. and malnutrition, all of which it correctly identified as serious failure-of-care issues.

2. Tie Task Force found that problems in the nursing home industry (extremely poor care outcomes for residents and absence of risk management programs) and financial incentives in the insurance industry have contributed to the increased liability insurance premiums that rhe nursing home industry has experienced. The existence of valid and justifiable tort litigation is not the sole cause of increased costs of

liability insurance

2 These findings do not support the Report's harsh recommendations about tort litigation, which would virtually eliminate this type of litigation in Florida in the future The Report's recommendations about litigation fail to address problems in either the nursing home industry that give rise to the justifiable tort litigation or the insurance industry

B. Analysis and Comments

1 Tort litigation serves as an important adjunct to the public enforcement system It serves as a mechanism that helps remove extremely poor providers from the provider pool, protecting future residents

2 Tort litigation also provides justice and a remedy to residents who are harmed by the care they receive The public regulatory system does not provide direct relief or any compensation to individuals who are harmed

3. The litigation recommendations of the Task Force staff should be rejected

4 Further research is needed to identify constructive actions that the state could take

  1 To assure that the results of tort litigation are referred to and considered by regulatory authorities

  2 To prohibit courts or the parties from placing tort settlements under seal so that their results are kept secret from the public

  3. To require nursing homes to develop comprehensive and effective risk management programs

  4. To enact legislation creating regulatory authority to review insurance companies' pricing practices for long-term care liability insurance

Analysis and Comments

My longer analysis and comments follow

If enacted, the recommendations about litigation would severely limit the ability of residents to seek justice from the courts when they are seriously harmed by nursing homes. By severely restricting, and, under many circumstances, totally eliminating, non-economic damages, punitive damages, and attorney's fees, the proposed revisions to Florida law would allow only minimal recoveries for residents and their families, even

for egregious failures of care causing serious harm and death.
Moreover, the staff's recommendations are not supported by the Report's actual findings on liability issues. The Task Force found that the tort litigation filed in Hillsborough County (the county whose tort litigation it reviewed) reflected serious care problems, not frivolous matters In addition, it found that financial incentives for insurance companies and problems in the nursing home industry (absence of risk management programs that are common for other health care providers) contributed to the increased insurance premiums for Florida providers These findings are not addressed in the recommendations on litigation

- The Task Force found and reported that the nursing home tort litigation filed in Florida is not frivolous To the contrary, the report concluded

> All of the complaints list one or more serious allegations pertaining to the resident's physical condition and cite the violation of the statutory right to adequate and appropriate health care as the cause of action. These lawsuits are fundamentally about pressure sores, falls, dehydration, and malnutrition or weight loss among nursing home residents, and none of these conditions or incidents is a minor matter in this population, or any other.
>
> * * *
>
> If a Chapter 400 case has been filed in circuit court, . . ., it is most unlikely to be a frivolous lawsuit

Report, page 357. Appendix 5, Jury Cases in Florida, at pages 388 through 401, amply supports this finding. For example, the Report describes a May 20, 1999 settlement for $1.5 in Leon County as follows.

> Admitted 3/95, good condition. By spring 1995, contractures resulting in fetal position; falls, traumas, multiple bedsores (1/96), 3/96 gross mismanagement of feeding tube; weight loss of 43 pounds over the next 67 days. Died 10/11/96 Fraudulent and inconsistent charting entries included entries showing care during hospitalizations and day after death.

Report, page 396. The egregious care Mr Lark received over a 19-month period led to considerable pain and suffering and numerous bad care outcomes that would have been avoided had he received proper care. Nevertheless, under the recommendations of the Task Force staff, if Mr Lark's case had been sent to arbitration, non-economic damages would have been limited to $250,000 (or to $750,000, if the arbitrator found gross negligence) and punitive damages could not have been awarded at all If Mr. Lark's family refused arbitration and the nursing home agreed to arbitration, non-economic damages would have been limited to $350,000 and punitive damages and attorneys' fees could not have been awarded at all. If neither Mr Lark's family nor the facility offered to arbitrate, there would have been no cap on non-economic damages, but no attorneys' fees could have been awarded and punitive damages would have been limited (generally to three

times compensatory damages or $500,000, whichever is greater).

- The Task Force found and reported a variety of reasons for increased liability insurance premiums in Florida.

  - "First and foremost, insurance companies are in business to make money" (Report, page 369)

  - "The long-term care industry is poorly understood by most insurers, and relatively few have been active in this market at any point in time Developing sophistication in individualized risk assessment is hampered by a lack of sufficient interest, as the total long-term care market is very small relative to other markets (homeowners or car insurance, for example), lack of data and limited experience overall. Many insurers have entered this market and quickly exited, after sustaining losses Very few companies have a long track record writing policies for the long-term care industry to contribute to an information base for underwriting" (Report, page 369)

  - "Further, insurers familiar with the broader health care market find it vexing that few long-term care providers have facility-based risk management programs that are standard in the acute care setting There is consensus of opinion that the implementation of comprehensive risk management programs would be an extremely important component of an effort to resuscitate the long-term care insurance market in Florida Risk management programs are successful in loss prevention and serve to improve quality of care, as issues are continually identified and addressed Aggressive risk management programs are expensive to implement, but it's difficult to imagine how the long-term care industry can afford to be without them any longer" (Report, pages 369-70)

  - "Finally, premiums are likely to remain prohibitively high as long as insurers are operating in a non-competitive market. With only a handful of E & S companies writing policies, there is no incentive to lower rates and no regulatory authority to review pricing practices" (Report, page 370)

In summary, the Task Force found that the profit-motivated insurance industry has minimal experience with nursing homes and little competition for its business The insurance industry is unregulated with respect to pricing nursing home liability policies When it looks at the nursing home industry, it does not find the risk management programs that are standard in other health care settings These factors, in addition to increases in tort litigation, have led the liability insurance industry to raise its premiums for Florida's long-term care providers.

These findings of the Task Force support a conclusion that problems in the nursing home industry (poor care outcomes for residents and absence of risk management programs) and financial incentives in the

insurance industry have contributed to the increased liability insurance premiums that the nursing home industry in Florida has experienced

Two other findings of the Task Force are worthy of mention

- The three facilities in Hillsborough County that had been sued the most (more than 20 times each) "have subsequently undergone transformation two properties have changed ownership and the third has permanently closed" (Report, page 350) This finding indicates that the tort litigation may have helped play an important public role in bringing about critical changes in nursing facilities that provided exceptionally poor care to a large number of individuals. Tort litigation may have served as an effective adjunct to the public regulatory system

- The Task Force found and reported that the costs of legal defense to a tort case range from $100,000 to $200,000 (Report, page 360) The Task Force cited these numbers to support an inference that facilities may settle a case, even if it has little merit, as a rational economic decision However, these numbers also demonstrate that defense attorneys benefit financially from the tort litigation This fact is not addressed at all in the recommendations Only plaintiffs' attorneys' compensation would be affected (i e , reduced) by the recommendations.

With respect to the specific recommendations, my analysis is that the proposed litigation recommendations would severely restrict the value and effectiveness of tort litigation in Florida

Standards of Recovery

The proposals under Standards of Recovery would drastically reduce potential tort liability by establishing a minimal standard of care as acceptable

Negligence would be defined as "a deviation by a long term care facility of [sic] the prevailing professional standard of care for a similar long-term care provider . which proximately causes injury or death to a resident" (point a) This definition would not hold facilities responsible for meeting the standards of care that are set out in state and federal law, which facilities are paid to meet.

The federal nursing home reform law requires that facilities provide care and services to each resident to enable him/her to "attain and maintain" his/her "highest practicable physical, mental, and psychosocial well-being" 42 U S C §§1395i-3(b)(2), 1396r(b)(2), Medicare and Medicaid, respectively. Skilled nursing facilities (under Medicare) and nursing facilities (under Medicaid) voluntarily agree to comply with these federal standards as a condition of receiving Medicare and/or Medicaid reimbursement

The definition of negligence proposed here, in contrast, would hold facilities responsible only for meeting the "prevailing" standard of care. This standard means that if a facility provided care that was generally the same quality as the care provided by similar facilities, it would not be found negligent and no liability would

attach, even if the facility was negligent and failed to comply with the federal standards of care and the resident was harmed as a direct result

The proposal (point j) would require all claims for abuse and neglect to be brought under Chapter 400 and would expressly prohibit litigation under chapter 415, Florida's Adult Protective Services Act. It is inappropriate to shield nursing home residents from the protections of the protective services act, whose purpose the Florida Legislature described as follows:

> (2) The Legislature recognizes that there are many persons in this state who, because of age or disability, are in need of protective services. Such services should allow such an individual the same rights as other citizens and, at the same time, protect the individual from abuse, neglect, and exploitation It is the intent of the Legislature to provide for the detection and correction of abuse, neglect, and exploitation through social services and criminal investigations and to establish a program of protective services for all disabled adults or elderly persons in need of them It is intended that the mandatory reporting of such cases will cause the protective services of the state to be brought to bear in an effort to prevent further abuse, neglect, and exploitation of disabled adults or elderly persons

401 101(2) The Florida Adult Protective Services Act creates a cause of action for older people who are abused, neglected, or exploited, and authorizes recovery of compensatory and punitive damages (415 1111) Nursing home residents should not be excluded from this law's reach and protection

Three points under Standards for Recovery attempt to immunize facilities from responsibility for poor outcomes for residents Point c inappropriately incorporates a concept of managed risk agreements from the assisted living industry into the nursing home industry (Approval by a medical doctor is inadequate oversight of these agreements.) Point d immunizes facilities from liability if residents refuse care or services Point e immunizes facilities from liability for physician negligence Many nursing home physicians have little involvement in directing or overseeing resident's care and simply rubber-stamp decisions made by facility staff Many physicians are employed by facilities as medical directors at the same time as they serve as resident's attending physicians Under the proposal, these common practices reflecting the lack of independence of physicians from facilities would nevertheless lead to facility immunity.

Non-Economic Damages

Resident's economic damages from poor care may be limited Residents such as Mr. Lark may have no or limited additional health care bills as a result of the poor care they receive As a result, non-economic damages for pain and suffering are especially significant for residents and their families. However, the proposed revisions would severely limit non-economic damages

> If the parties agreed to binding arbitration, non-economic damages would be capped at $250,000 per incident or at $750,000 if there was intentional misconduct or gross negligence (point a).
> If a claimant refused a defendant's offer to arbitrate, non-economic damages would be limited to $350,000 (point c).
> Only when defendants refused a claimant's offer to arbitrate or when neither party requested arbitration would there be no limitation on non-economic damages (points b and d , respectively)

Since facilities would benefit financially from agreeing to arbitration (as discussed below), they would be

likely to want arbitration Non-economic damages for residents would be severely curtailed, as a result

Punitive damages

Punitive damages serve an important public purpose of expressing jurors' extreme disapproval of tortuous conduct. For frail nursing home residents who generally have limited economic damages and, as discussed above, would be restricted in non-economic damages, punitive damages would be especially important However, an award of meaningful punitive damages would be highly unlikely under the proposal.

Punitive damages would not be available ***at all*** if the parties agreed to arbitrate or if a claimant refused a facility's offer to arbitrate (points f. and g , respectively) Punitive damages would be available only if no party requested arbitration or if the defendant facility refused arbitration However, as discussed below, arbitration is so financially beneficial to providers that facilities would be unlikely to reject it.

Moreover, even in the limited instances when punitive damages would be awarded, they would be capped at three times compensatory damages or $500,000, whichever is greater (point b.). For nursing home residents, whose economic damages are likely to be small and whose non-economic damages would be capped, there would be, at most, extremely limited punitive damages The escape clause – the defendant had the "specific intent to cause the injury" (point d.) – would be successfully invoked only in extremely rare circumstances

Point e. would limit employers' liability for punitive damages to situations where the employer "actively participated in the misconduct, condoned or ratified the misconduct, or engaged in misconduct that contributed to the injury " Defendants would not be liable for acts of his/her employees under the doctrine of *respondeat superior*. In *California Association of Health Facilities v Department of Health Services*, 16 Cal.4th 284, 940 P.2d 323, 65 Cal.Rptr 2d 872, 885 (1997), the California Supreme Court rejected a similar argument that facilities should not be responsible for the acts of their employees under the "reasonable licensee" defense authorized by the state's civil money penalty law

Arbitration

These provisions are onerous, especially combined with the provisions for **Non-economic damages.** The provisions encourage arbitration Providers, but not claimants, benefit from the arbitration clauses completely because.

> If a claimant refused a defendant's offer to arbitrate, non-economic damages would be limited to $350,000 (non-economic damages, point c ; arbitration, point e (both net economic and non-economic damages are limited to $350,000)
>
> If the parties agreed to binding arbitration, non-economic damages would be capped at $250,000 per incident or at $750,000 if there was intentional misconduct or gross negligence (arbitration, point c).
>
> If the parties agreed to arbitration, punitive damages would not be awardable (arbitration, point f)
>
> Defendants who refused a claimant's offer to arbitrate would be subject to no limitation on non-economic damages, prejudgment interest, and higher attorney's fees (arbitration, point d)
>
> The chart (p 40) indicates that if a claimant refused "voluntary" arbitration (but the defendant agreed to arbitration), attorney's fees would not be awardable Attorney's fees would also not be awardable if neither party wanted arbitration Higher attorney's fees would be awardable if the claimant wanted arbitration and the defendant did not. If both parties wanted arbitration, the fees

would be awardable, but lower

According to the chart, defendants will offer voluntary arbitration to limit their potential liability in fees, non-economic damages, and punitive damages Their exposure would be most limited if the claimant refused voluntary arbitration (no attorney's fees or punitive damages are awardable) Their potential attorney's fee exposure would be highest if the claimant wanted arbitration and they did not

Pre-suit requirements

These requirements are also onerous for claimants.

Before sending a notice of claim, the claimant would be required to conduct an investigation and to get a "verified medical opinion corroborating the existence of reasonable grounds to bring the claim" (point c) This requirement seems to require claimants to prove their case before filing it.

The fourth point (d.) would give the insurance company 90 days after receiving the claim to investigate the claim If the company admitted liability, the only purpose of arbitration would be to decide the amount that would be paid

Attorney's fees

These provisions would reduce the automatic award of attorney's fees under chapter 400.

Attorney's fees would generally be awarded as a percentage of the resident's recovery Since, as discussed above, the recoveries for non-economic and punitive damages would be severely restricted, attorney's fees would be similarly restricted Attorneys would not be eligible for any fees if the facility offered arbitration and the resident rejected arbitration Fees would otherwise be limited to

> 25% of the award, reduced to present value, when defendants refused resident's offer to arbitrate (point b.),
>
> 15% of the award, reduced to present value, for cases submitted to arbitration (point c.); and
>
> $10,000 for violations of rights not involving personal injury or death (point a.)

Attorneys would be unlikely to file tort litigation for residents and their families when their potential compensation would be so low

Conclusion

In conclusion, the recommendations of the Task Force staff concerning litigation should be rejected

The proposed revisions to Florida's liability standards would effectively insulate providers from the consequences of their negligence Residents who were harmed by the poor care they received would no longer be able to seek justice in the courts Tort litigation provides a remedy for residents who are harmed by the care they receive The public regulatory system does not provide direct relief or any compensation to individuals who are harmed.

The loss of effective tort litigation would also remove an important mechanism for sanctioning facilities that consistently provide poor care As the Task Force implicitly found, tort litigation supplements the public enforcement system by serving as a mechanism that helps remove extremely poor providers from the

provider pool Such a result protects future residents from harm

The Task Force found that insurance companies have raised premiums for liability insurance because of their own financial incentives and because of problems in the nursing home industry These problems would not be addressed or corrected by the proposals of the Task Force

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January 5, 2001

Via Facsimile

Honorable Frank Brogan, Chair
Task Force on Availability and Affordability
of Long-term Care
Executive Office of the Governor
PL-01 The Capitol
Tallahassee, Florida 32399-0001

Dear Frank:

I am in receipt of the draft report from the Task Force staff and must admit I was a bit surpri[illegible] by what I saw and felt it important to bring my concerns to your attention.

First, and despite the unanimous consent of the panel, this document appears to be presented as the final work product of the task force members. While I recognize that there is a disclaimer on the cover, I strongly recommend changing it to better reflect the will of the task force and to make it exceedingly clear **that this is the staff product and not the work, nor the consensus of the task force itself.** The report seems to ignore an important and basic fact that the task force never agreed to a set of conclusions nor made any formal recommendations to the legislature On this matter I would seek guidance from Mr. Polivka's memorandum of August 10, 2000 asking us to "clearly state on the cover and title page" that the document in question is not the formal work product of the task force He specifically mentions that only items that resulted from a "consensus or vote of Task Force members" could be considered "official task force materials." Clearly, the staff report does not meet this standard As this operated well as a policy during our tenure, I see no reason to deviate from it now

Second, we must change the misleading title, "Choices, Quality & Limiting Litigation: Three Keys to Improving Long-Term Care in Florida," which is an editorial conclusion of the staff and one that certainly was never discussed, voted on, or even debated by the task force

Which leads me to my third point The "Executive Summary" should not represent a set of conclusions coming from the staff but a synopsis of what occurred I find it unsettling that the staff would take it upon themselves to draw clearly biased conclusions – in many cases in direct conflict with their own data – that were never agreed to or even voted upon by the task force members It is important that the executive summary clearly reflect the reality that after months of study and testimony, the members did not reach a consensus. For that section of the report to offer conclusions and interpretation would be misleading and against the directives given by the panel members.

Additionally I want to make sure that my motion which was approved by unanimous consent be included in both the executive summary and the body of the report And I would like to remind the staff that it was widely agreed upon that member comments would be included within the **report and not as**

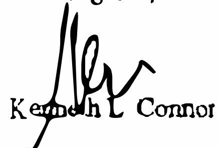
Honorable Frank Brogan
January 5, 2001
Page Two

addenda at the back of it This concept was discussed at length and it was exceedingly clear to me that the Will of the membership was to include our comments within the relevant sections

finally I want to join the request of Victoria Fierro that members, all members, be furnished with the data compiled by the staff. The notion that these materials would he withheld from the members and from the public is not only outrageous but violates both the spirit and the intent of the open records laws of this state. My own belief is that, in many instances, the data simply does not support the conclusions drawn by the staff

I appreciate your attention to this matter and trust these suggestions will be honored.

Kind regards,



Kenneth L Connor

KLC/aj
cc: Dr Larry Polivka
Members, Task Force on the Availability and Affordability of Long-term Care

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January 13, 2001

Via Facsimile

Honorable Frank Brogan, Chair
Task Force on Availability and Affordability
of Long-term Care
Governor's Office
PL-01 The Capitol
Tallahassee, Florida 32399-0001

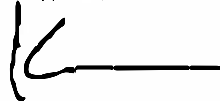
Dear Frank,

Staff brought to my attention that my comments bad been drafted to an earlier draft of the "Executive Summary" Attached are my comments to the appropriate draft Again, for convenience my additions to the *report* are underlined, deletions have been struck through and comments appear in italics

I would also like to reiterate my request from yesterday's letter that staff include these additions, deletions and comments in the text of the report as well.

Thank you for your attention to these matters

Kind regards,



Kenneth L. Connor

aj/KLC
Enclosure
cc: Dr Larry Polivka

II. Executive Summary and Final Recommendations

These items were never voted on nor approved by task force members.

In order to affect serious changes in our long-term care system that will benefit frail elders in Florida, a three-prong approach is proposed but was not voted on nor approved by the members of the task force Choice, Quality, and Limiting ~~Costly~~ Unnecessary Litigation

Choices will be achieved in Florida with the 13 recommendations that are outlined below They include making a commitment to a more balanced long-term care system that promotes consumer choices and autonomy, increased funding and availability of assisted living facilities, adult family care homes, home and community based waiver programs, and service coordinators and programs for HUD-financed housing They also recommend an integrated health and long-term care system demonstration project, promotion of assistive technology, and private long-term care insurance

Quality will be achieved in Florida with the 51 recommendations that are outlined below They include recommendations that will: create sanctions to discourage poor care in long-term care, create incentives to improve quality of care in long-term care, ensure a culture of care in nursing homes that values residents, family, workers, and volunteers; and change the community standard of care by providing family and residents better access to information about quality of care in nursing homes

Limiting ~~Costly~~ Unnecessary Litigation will be achieved through a set of changes that will both ensure access to the court system for frail elders and their families and limit the ever-increasing amount of damages, while assuring residents are still offered adequate legal protections and that homes that violate residents' rights are appropriately punished. *(Comment Staff presented data showing that the number of lawsuits were declining significantly and no evidence was presented suggesting that damages were "ever-increasing")* These recommendations, which were not voted on nor approved by the task force members, replace the civil cause of action in 400 023 with a new Long-Term Facility Negligence statute ~~Key provisions are~~ The following provisions were offered by the staff but were not approved by the task force. *(Comment: Many of these provisions run directly counter to the set of principles voted on and agreed to by the task force in that they directly violate the stated principle that residents "must have adequate protection under the law and all participants must act responsibly or face the consequences for failing to do so" These provisions all but eliminate many of the causes of action that a resident might bring and severely restrict recovery in these same actions but particularly benefit facilities which cause the most harm to residents)*

- The resident and his/her representative have a cause of action (based on negligence) that remains after death and does not require there to be a survivor
- ~~Add-on attorney fees for injury or death are repealed in Chapter 400, but in claims involving injury or death, a percentage of the award is recoverable for attorney fees For non-personal injury resident rights cases, a cap of $10,000 in attorney fees has been added.~~ *(Comment. Attorney's fees were put into law as a means of protecting the most vulnerable among us as a way to allow for recovery in cases that had little or no "economic value" but represent the intrinsic value in the dignity of human life)*
- Significant incentives for arbitration for both claimants and defendants *(Comment This statement is grossly inaccurate and inconsistent with the language submitted by the staff Under the language given to the staff members, a defendant would become immune from any and all punitive damages by merely offering to arbitrate regardless of the conduct of the home and regardless of the damages suffered by a resident At no level is that ever an incentive for the plaintiff to arbitrate)*
- Caps on claims (damages + attorney fees) are higher than the current average claims reported by Aon and by staff research *(Comment. The staff submitted no such research to the task force members)* and are not capped if the claimant refuses arbitration *(Comment Again, this runs directly counter to the guiding principles voted on and approved by the task force members and is blatantly false in light of the language submitted to the task force in that if a plaintiff refuses arbitration, the defendant shall never pay any punitive damages Additionally, the study submitted by Aon was, by its own admission based on data provided by the industry lobbying group (Florida Health Care Association) and was, again in their*

own words, never "audited" nor "verified" for accuracy The report itself says this data comes only from for-profit chains and is not representative For the staff to refer to and rely on this flawed product is an insult to the work of the task force members)

- Unlike in Medical Malpractice claims, in cases where both parties agree to arbitrate, there is no provision to reduce the award based on capacity to enjoy life *(Comment However, unlike Medical Malpractice claims, there is an absolute bar to the recovery of punitive damages if the defendant merely offers to arbitrate When this provision is combined with the staff language which also had a cap on all non-economic damages, (and in consideration of the fact that the vast majority of resident's rights claim involve only small compensatory damages) these provisions make an action against a nursing home much more restrictive than those brought against a hospital Additionally, many actions brought against a hospital could be brought under a common law negligence claim, according to the language given to the task force by the staff, a nursing home could never be sued under common law negligence Again this would make suing a nursing home significantly harder than suing a hospital That is unacceptable and was not even requested by the industry to the task force)*
- ~~Provides for a managed risk agreement between provider and resident and approved by a medical doctor and properly maintained that protects the facility from liability from the consequences of a decision to refuse or modify care~~.
- ~~Provides for the protection of appropriate risk management or quality assurance programs and records and surveillance records (without regard to who pays for the surveillance) from discovery~~ *(Comment. As these concepts were never even discussed at the meetings they should be stricken without further comment Additionally, the categorization of any internal documents as "quality assurance programs" would unfairly and illogically bar them from discovery)*
- Refers all cases where punitive damages are awarded in a jury trial to the local state attorney's office *(Comment: Sadly, given the provisions submitted to the task force, this will never happen even for the worst crimes committed against a resident)*
- In actions involving death of resident, allows for pain and suffering of the decedent – plus for adult pain and suffering

TASK #4
LIMITING ~~COSTLY~~ UNNECESSARY LITIGATION

HB 1993 Tasks

#h. The effect of lawsuits against nursing homes and long-term care facilities on the cost of nursing home care and on the financial stability of nursing home industry in the state

#i The kinds of incidents that lead to the filing of lawsuits and the extent to which frivolous lawsuits are filed.

#j The cost of liability insurance coverage for long-term care providers and the extent to which such costs affect the affordability of care

#k. The availability of liability insurance coverage for long-term care providers through Florida's insurance companies

What is Known about Litigation

- The frequency and severity of claims is increasing rapidly· *(Comment There is no basis for this statement The staff's own data indicates that the number of lawsuits has declined every year since 1998)*
- Florida has three times as many claims as the rest of the nation. *(Comment This information does not come from the task force's own research but by a study submitted by the industry lobbying group, the Florida Health Care Association (FHCA), and has been widely discredited. In fact and by its own admission is based on data provided solely by FHCA and, in their own words, was never "audited" nor "verified for accuracy" The report itself says this data comes only from for-profit chains and is therefore skewed to the types of homes that, according to HCFA are most commonly short of staff)*
- The average size of a nursing home litigation claim in Florida was $278,637 in 1999 which is 250% more than the average claim in the other 49 states ($112,351) The average loss cost per annual occupied bed in Florida was $6,283 in 1999 which is 776% (8 times) more than the average loss cost in the other 49 states ($809) *(Comment This information does not come from the task force's own research but by a study submitted by the industry lobbying group, the Florida Health Care Association (FHCA), and has been widely discredited In fact and by its own admission is based on data provided solely by FHCA and, in their own words, was never "audited" nor "verified for accuracy" The report itself says this data comes only from for-profit chains and is therefore skewed to the types of homes that, according to HCFA are most commonly short of staff.)*
- Every year from 1995-1999, on average, 54% of nursing homes in Hillsborough County have had at least one lawsuit. The size of the claims (for those that were not sealed) went from an average of $311,393 in the early 1990s to $410,294 in the late 1990s. *(Comment Information on the size of claims does not come from the task force's own research but by a study submitted by the industry lobbying group, the Florida Health Care Association (FHCA), and has been widely discredited In fact and by its own admission is based on data provided solely by FHCA and, in their own words, was never "audited" nor "verified for accuracy". The report itself says this data comes only from for-profit chains and is therefore skewed to the types of homes that, according to HCFA are most commonly short of staff.)*
- 44% of lawsuits are for resident rights only, 37% are for wrongful death with or without negligent survival; and 20% are for negligent survival without wrongful death. All lawsuits include allegations of resident rights infringements, the most common cause of action is the right to receive "adequate and appropriate healthcare."
- 60% of all lawsuits include allegations that involve pressure sores; 57% allege falls; 25% allege abuse and/or neglect; 43% of all lawsuits include allegations of dehydration and/or weight loss. These allegations are not frivolous yet there isn't data available to determine if the incidents are due to poor care or inevitable health decline (i.e., 95% of cases are settled out of court) <u>It can be assumed, however, that a finding of negligence, either by</u> settlement or verdict would be the clearest indication <u>that the decline was due to poor care</u>
- In multivariate analyses, bed size was the only significant variable of a number of structural, case-mix, and quality measures that significantly predicted lawsuit activity There is no clear relationship between

quality and lawsuits *(Comment This data was not provided to task force members Moreover, this statement about the relationship between quality and lawsuits is in conflict with the staff's own findings of care deficiencies occurring in Florida as compared to the rest of the nation Florida has ranked above the national average every year since 1993 in the percentage of facilities cited for short staffing Staff's analysis indicates that staffing "positively impacts resident outcomes ")*

- The courts are acting expeditiously.
- Currently, in Florida, 88.8% of Chapter 400 lawsuits are filed within two years from resident discharge, 68% of cases are closed within 18 months.
- In Hillsborough County, 67 7% of cases paid attorney fees from the settlement and did not make use of the add on attorney fees provision in 400 023, although the existence of the provision is used in negotiating
- Other states have some features of Florida's Chapter 400.022 and 400 023
- ~~29~~ 34 states have a tort liability associated with the patient bill of rights although about half have a cause of action for negligence resulting in injury and the others for strict liability. Some provide injunctive relief or for remedies under common law Punitive damages are recoverable in most states but generally under common law or a separate statute, not under the patient bill of rights Attorney fees are recoverable under patient bill of rights or the elder abuse statute in 14 states Half the states have caps on tort damages
- Nine percent of nursing homes in Florida are either entirely without liability insurance now, or will be "going bare" by February 1, 2001 This is up from 1% in June The majority of the 40 homes lost or dropped coverage since July 2000 29% are reportedly self-insured (new AHCA unpublished data, December 2000) *(Comment The staff has repeatedly cited "unpublished data" or have cited unnamed "key informants" to back up their findings Any such "conclusions" should be discarded)*
- Most facilities experienced a reduction in the amount of insurance coverage, deductibles increased for 69% of the facilities and decreased for 6% Policy limits decreased for 44% Liability coverage changed from occurrence to claims-made (a considerable reduction in the scope of coverage) for 13% of the facilities
- Assisted Living Facilities (ALF), who are required by statute to hold liability insurance, are being told by insurers to give up their Extended Congregate Care or Limited Nursing Service licenses in order to receive liability insurance
- ALFs are also required to hold an ECC or LNS license to accept residents who are on the Medicaid Waiver. Without an ECC or LNS license, these ALFs will have to discharge their residents and nursing homes will be their only alternative
- Continuing Care Retirement Communities (CCRC) experienced a 74% increases in their premiums in 2000 (the average increase in 1998 and 1999 was 15%) and are required to have 30% of their operating costs (including expected liability insurance costs) set aside in a reserve fund.
- The last admitted insurance carrier (one that is regulated by the Department of Insurance) has announced that it is ending its liability coverage for long-term care facilities in February 2001 The Florida Department of Insurance was unable to find a single insurer that was leaving Florida that was not doing so as part of a broader national strategy
- The data gathered by the task force staff showed a dramatic decline in the number of lawsuits from 1998 to 1999 It appears from the data that the decline is continuing through August 2000 (the latest data available) There has not been a single study to refute these findings or to suggest they are not applicable statewide
- The data gathered by the task force staff shows a direct correlation between short staffing and lawsuits For example, in 1998 Florida lead the nation in short staffing deficiencies. During that same year we saw the number of lawsuits reach a peak As the number of deficiencies for short staffing declined in 1999, the number of suits also declined
- The data gathered by the task force staff showed almost no suits considered to be "frivolous" in nature

Litigation Recommendations

(Comment Please note that these suggestions were not discussed with the task force and were never voted on by task force members)

1. Remove the requirement in Florida Statutes 400 4275 that assisted living facilities must have liability insurance to maintain their license.

2. Enact a set of long-term care litigation reforms that are aimed to ensure residents and their families access to a negligence cause of action while capping attorneys' fees within current limits that reflect current average total claims in order to introduce a level of predictability in insurance claims These litigation reforms are presented as a complete package

Attorney's Fees:

a Eliminates automatic entitlement to recovery of attorney's fees under Ch 400 In cases based on violation of rights involving no injury or death, the prevailing party shall recover a maximum of $10,000 in attorney's fees *(Comment There currently is no automatic entitlement of attorney's fees under chapter 400 In order for a plaintiff to collect attorney's fees, the plaintiff must prevail. This provision provides an incentive for a defendant to run up the costs on the plaintiff and offer frivolous defenses as a way to make the case unviable to a plaintiff attorney)*

b. When a defendant refuses an offer by a claimant to arbitrate, the claimant shall recover up to 25% of the award, reduced to present value, for attorney's fees. *(Comment. This provision becomes meaningless in the most egregious cases as the arbitration provisions of this set of proposals offer a huge windfall for any defendant (regardless of conduct) to merely offer to arbitrate There is essentially no incentive for a plaintiff to arbitrate thereby making this suggestion a meaningless one This provision also provides an incentive for a defendant to run up the costs on the plaintiff and offer frivolous defenses as a way to make the case unviable to a plaintiff attorney)*

c In cases submitted to arbitration, the defendant shall pay the claimant's attorney's fees up to 15% of the award, reduced to present value *(Comment This provision also provides an incentive for a defendant to run up the costs on the plaintiff and offer frivolous defenses as a way to make the case unviable to a plaintiff attorney This provision runs directly counter to the set of principles voted on and agreed to by the task force in that it directly violates the 5th principle which states that residents "must have adequate protection under the law and all participants must act responsibly or face the consequences for failing to do so ")*

Punitive Damages:

a Adopts the limitations on the amount and standard for recovery of punitive damages contained in the Civil Justice Reform Act enacted by the Legislature in 1999.

b Caps punitive damages to three times compensatory damages or $500,000, whichever is greater *(Comment. Full disclosure would require this statement to indicate that staff also recommends a cap on compensatory damages which is unlike the 1999 Civil Justice Reform Act and unlike the provisions governing medical negligence thereby giving nursing homes more protections - not equal protections as they have repeatedly asked for - than either hospitals or other businesses)*

c Where the misconduct was motivated by unreasonable financial gain and the high likelihood of injury was known by the person responsible for making decisions on behalf of the defendant, such as the director or managing agent, punitive damages may not exceed the greater of four times compensatory damages or $2 million *(Comment As a matter of law, even a 100% return on an investment could be considered reasonable. Full disclosure would require this statement to indicate that staff also recommends a cap on compensatory damages which is unlike the 1999 Civil Justice Reform Act and unlike the provisions governing medical negligence thereby giving nursing homes more protections (not equal protections as they have repeatedly asked for) than either hospitals or other businesses Combine this with the provisions that allow a defendant to merely offer to arbitrate in order to avoid any punitive damages and even the most egregious crimes would go unpunished This provision runs directly counter to the set of principles voted on and agreed to by the task force in that it directly violates the 5th*

principle which states that residents "must have adequate protection under the law and all participants must act responsibly or face the consequences for failing to do so ")

d Where the defendant had specific intent to cause the injury, there shall be no cap on punitive damages. *(Comment This is a meaningless proposal in that, as a matter of law, a plaintiff could never show "specific intent" and therefore the cap would never be lifted Combine this with the provisions that allow a defendant to merely offer to arbitrate in order to avoid any punitive damages and even the most egregious crimes would go unpunished This provision runs directly counter to the set of principles voted on and agreed to by the task force in that it directly violates the 5th principle which states that residents "must have adequate protection under the law and all participants must act responsibly or face the consequences for failing to do so ")*

e. Punitive damages may be imposed against an employer only when the employer actively participated in the misconduct, condoned or ratified the misconduct, or engaged in misconduct that contributed to the injury *(Comment. This provision would encourage employers to turn a blind eye to the most outrageous of conduct and violates the 5th principle by rewarding irresponsibility of corporate owners)*

f. Punitive damages may not be awarded where the parties agree to arbitrate the claim. *(Comment· See note below)*

g A claimant who refuses a defendant's offer to arbitrate may not recover punitive damages. *(Comment· By combining these two provisions any defendant who merely offers to arbitrate – regardless of the behavior and regardless of the suffering caused by that behavior – would be absolutely barred from ever paying punitive damages This provision is in direct violation of the 5th principle voted on and agreed to by the task force members that states that residents "must have adequate protection under the law and all participants must act responsibly or face the consequences for failing to do so ")*

h Requires the clerk of court to forward to the state attorney's office for investigation any action for long term care facility negligence in which punitive damages are awarded at jury trial *(Comment Given the above provisions, this would never happen – especially in the most egregious cases of misconduct. It is also important to note that the study floated by the nursing home industry trade group states quite clearly that the "size of verdicts" is not the problem, it is the frequency of cases. Yet the task force staff all but obliterates any chance of a plaintiff ever receiving a large verdict regardless of the behavior of the home and regardless of the injuries suffered as a result of their actions)*

Non-Economic Damages:

a. In cases voluntarily submitted to binding arbitration of damages, caps non-economic damages to $250,000 aggregate for all defendants or $750,000 aggregate for all defendants if the claimant proves intentional misconduct or gross negligence. *(Comment Not only is this of questionable constitutionality, but also it goes far beyond anything in current law The nursing home industry representatives have continuously stated they want to be treated just like hospitals and be brought under similar provisions of chapter 766 This concept combined with others in this document offer nursing homes a better deal than they even asked for Again, this provision is in direct violation of the 5th principle voted on and agreed to by the task force members that states that residents "must have adequate protection under the law and all participants must act responsibly or face the consequences for failing to do so ")*

b. Provide that where a defendant refuses a claimant's offer to voluntarily arbitrate, the case shall proceed to trial without limitation on non-economic damages *(Comment I fail to see a circumstance where a defendant guilty of egregious crimes would ever refuse to arbitrate given the lavish benefits an offending operator would receive for doing so Again, this provision is in direct violation of the 5th principle voted on and agreed to by the task force members that states that residents "must have adequate protection under the law and all participants must act responsibly or face the consequences for failing to do so ")*

c. Provides that where a claimant refuses a defendant's offer to voluntarily arbitrate, non-economic damages not to exceed $350,000 aggregate for all adamages. *(Comment: Combined with other provisions, this unconstitutional provision would set a limit of $350,000 for all damages for a defendant regardless of the conduct and regardless of the suffering caused by a resident. Again, this provision is*

in direct violation of the 5th principle voted on and agreed to by the task force members which states that residents "must have adequate protection under the law and all participants must act responsibly or face the consequences for failing to do so ")

d No cap on non-economic damages where neither the claimant nor defendant request arbitration *(Comment: As noted throughout this document, it is inconceivable as to when or why a defendant that has committed gross misconduct would ever refuse to arbitrate)*

Arbitration:

a Allows either party to request voluntary binding arbitration of damages. Agreement to enter binding arbitration requires defendant to admit liability (but not intentional misconduct or gross negligence which must be proved by claimant).

b Permits the court, upon motion by either party, to order that the claim be submitted to non-binding arbitration.

c In cases voluntarily submitted to binding arbitration of damages, caps non-economic damages to $250,000 aggregate for all defendants or $750,000 aggregate for all defendants if the claimant proves intentional misconduct or gross negligence. *(Comment. This mixing of punitive conduct tied to an increase in compensatory damages is not only constitutionally unsound but offers the plaintiff an all but impossible standard to meet Combined with the other provisions listed herein, it all but completely denies a plaintiff – especially a plaintiff who suffered serious harm as the direct result of outrageous behavior by a home – any realistic chance of a fair and equitable recovery Again, this provision is in direct violation of the 5th principle voted on and agreed to by the task force members which states that residents "must have adequate protection under the law and all participants must act responsibly or face the consequences for failing to do so ")*

d. Provides that where a defendant refuses a claimant's offer to voluntarily arbitrate, the case shall proceed to trial without limitation on non-economic damages and the claimant shall be entitled to recover prejudgment interest and reasonable attorney's fees up to 25% award reduced to present value. *(Comment There would be virtually no instance where a defendant would ever refuse such an offer, especially in cases of outrageous conduct.)*

e Provides that where a claimant refuses a defendant's offer to voluntarily arbitrate, the damages awardable at trial shall be capped to net economic damages and non-economic damages shall not exceed $350,000. *(Comment. It is clear from these provisions that it was the intent of the task force staff to punish plaintiffs whenever the defendant offers to arbitrate and to provide lavish incentives for an operator to arbitrate – especially in cases involving egregious conduct)*

f Punitive damages may not be awarded where the parties agree to arbitrate the claim *(Comment In case a reader missed this statement in the above section, it is listed here again to make it clear the staff wants to offer a huge windfall for a defendant that merely offers to arbitrate a claim.)* In cases submitted to arbitration, the defendant shall pay the claimant's attorney's fees up to 15% of the award, reduced to present value.

Statute of Limitations :

a. Reduced statute of limitations from 4 years to 2 years <u>A 4-year statute of limitations should apply in cases where a home concealed facts from the family or legal guardian.</u>

b For claims that have already accrued, the claim must be filed within 2 years of the effective date of the act. <u>A 4-year statute of limitations should apply in cases where a home concealed facts from the family or legal guardian.</u>

Standards of Recovery:

a Repeal strict liability and replaces it with a negligence standard Defines "long-term care facility negligence" as a deviation by a long term care facility of the prevailing professional standard of care for a similar long-term care provider (with a standard license from AHCA) which proximately causes injury or death to a resident and makes long-term care facility negligence the exclusive remedy *(Comment We heard repeated testimony at task force hearings that nursing home operators want to be treated like*

hospitals. This exclusive remedy provision, combined with the other provisions would give nursing homes much greater protection than currently given to hospitals – all at the residents expense)
b Provide that a violation of a resident's rights is a cause of action for long term care facility negligence
c Define a managed risk agreement as an agreement between a resident and a long-term care facility, approved by a medical doctor, which sets forth the resident care plan and service plan and consequences and inherent risks likely to result from changes to the care or service plan. Allows a long-term care facility to introduce evidence that a managed risk agreement was entered into by a resident and the facility and that it was properly implemented and maintained by the facility.
d Protect a long-term care facility from liability for the consequences of a decision by a resident to refuse or modify care or services, so long as the resident is informed of the consequences, as required under s 400 022(k) *(Comment This offensive concept makes no provision for the potential lack of competence of a resident nor does it address the very real circumstances where a resident is coerced into signing such an agreement)*
e Adopt current law that a long-term care facility shall not be liable for the negligence of a physician rendering medical care. Expressly provide that limitation of liability does not limit the right of a patient to bring an action for medical negligence against a physician under the medical malpractice statute
f In actions involving the death of a resident, allows a personal representative to recover for the decedent's estate the decedent's pain and suffering before death
g Allow minor children and a surviving spouse of a deceased resident, and if there is no surviving spouse, all children, regardless of age, to recover for mental pain and suffering
h Protect quality assurance and risk management records that comply with AHCA approved risk management program (see recommendation #18 under Quality earlier in this report) from discovery
i Protect surveillance records (without regard to who pays for the surveillance) from discovery *(Comment A recent news account showed an incident where staff was dragging a disabled woman through the halls, mocking her and treating her cruelly Given the fact that without the videotaped recording, this incident would have never become public This provision should be offensive to anyone who reads it. It is a sad commentary that financial transactions and even traffic violations can be recorded and presented in court as evidence yet staff feels that the dignity of human life does not warrant the same legal protections given to banks, jewelry stores, and even toll booth operators)*
j Require that claims for abuse of the elderly against a long-term health care facility be brought under Chapter 400 and not under Chapter 415 *(Comment Chapter 415 was just recently passed and signed into law by Governor Jeb Bush This law states that an elderly person who is, for example, physically assaulted is given access to the civil justice system and has a cause of action As stated previously, if a physical assault occurs in a hospital, the hospital can be held to the standards found in chapter 415 This provision would give nursing homes more legal protections than a hospital.)*

Pre-Suit Requirements:
a Adopt relevant litigation reforms contained in the medical malpractice statute.
b Require that a notice of claim be provided to a potential defendant 90 days before suit is filed
c Require that before sending a notice of claim, a claimant must conduct a pre-suit investigation to ascertain whether there are reasonable grounds to assert a claim In claims involving injury or death, the pre-suit investigation includes obtaining a verified medical opinion corroborating the existence of reasonable grounds to bring the claim
d Require that during the 90 days after the notice of claim is mailed, the insurer for the defendant must complete a pre-suit investigation At the end of the 90-day period, the insurer must reject the claim, make a settlement offer, or admit liability (but not intentional misconduct or gross negligence which must be proved by claimant) and request arbitration.
e Require that during the pre-suit investigation period, the claimant and defendant provide relevant medical records upon request by the other party
f Exclude from discovery and admission into evidence any statements, reports or other documents generated by the pre-suit investigation process *(Comment These provisions would dramatically increase the cost of bringing a claim against a nursing home When combined with the draconian and*

unconstitutional limits suggested herein, they all but make bringing a claim – any claim – a virtual impossibility Again, this provision is in direct violation of the 5th principle voted on and agreed to by the task force members which states that residents "must have adequate protection under the law and all participants must act responsibly or face the consequences for failing to do so ")

g Allow both the claimant and defendant to file a motion in circuit court asking the court to determine whether there exists a reasonable basis for the opposing party's claim or denial.

h Within 90 days of receiving a notice of claim, allows a defendant who has a good faith basis to believe that it had no legal duty to the claimant to file an action in circuit court to contest the lack of duty

Impact of the Litigation Reforms

a ~~Improve the predictability of insurance awards though fair attorney caps while leaving unlimited caps on cases that are particularly egregious~~. *(Comment This statement is simply untrue If a defendant merely offers to arbitrate punitive damages are waived When combined with non-economic caps, these provisions provide an absolute windfall for cases that are particularly egregious This statement must be eliminated from this report)*

b Does not impact the cause of action and add on attorneys fees in Chapter 415 (elder abuse and neglect) when abuse occurs in the community *(Comment Except that cases against a home could never be brought under 415)* Elder abuse and neglect in a facility is brought under Chapter 400 only

Task Force on the Availability and Affordability of Long-Term Care
Task #4
Limiting Costly Litigation
Commonly Asked Questions About Proposed Reforms

<u>The responses to these "Commonly Asked Questions" are grossly and repeatedly inaccurate, they are editorial in nature and are not based on sound legal analysis It would be pointless to comment on them expect to say they have no place whatsoever in this report.</u>

Q	How do these provisions affect access to the courts (i e , will attorneys still take cases without add on attorney fees)? What about the clients who have non-injury resident right complaints?
A	Chapter 400 023 (Civil Enforcement) would be repealed which allowed for add-on attorney fees. What is proposed here is that attorney fees are linked to willingness to arbitrate which amounts to • In cases in which neither party offers to arbitrate or the claimant refuses to arbitrate, the claimant's attorneys are paid a percentage of the total award, consistent with nearly all tort cases • 25% of unlimited non-economic damages if claimant agrees to arbitrate (but defendant refuses) for injury or death cases • Maximum of $10,000 in add on attorney fees for violation of rights involving no injury or death (e g , complaints handled by Elder Law attorneys) • In cases in which both parties agree to arbitrate, the claimant is entitled to an additional 15% of the total award for attorney's fees These potential awards would still be profitable for attorneys and should not reduce interest by attorneys in representing these citizens (or their estates) for both injury/death or for violation of custodial resident rights
Q	What is the basis for the proposed caps on punitive damages? Do they apply to other causes of action, such as medical malpractice cases? Can a defendant avoid punitive damages merely by offering to arbitrate the case?
A	• The proposed punitive damages reforms are from the 1999 Civil Justice Reform Act enacted by the Legislature in 1999 The punitive damages caps contained in the Act currently apply to almost all actions, including medical malpractice cases • Removing the threat of punitive damages is intended to provide the defendant incentive to go to arbitration, a resolution process much quicker and less expensive than the court system In long term health care cases in particular, it benefits the injured resident to resolve the claim as quickly as possible • A defendant who wishes to go to arbitration must admit liability At arbitration, if a claimant can prove intentional misconduct or gross negligence on the part of the defendant, the current standard for punitive damages, the plaintiff can recover up to $750,000, plus 15% for attorney fees The amount recoverable in the arbitration process proposed is several times greater than what is recoverable in medical malpractice cases • Although a defendant can escape imposition of "punitive damages" by offering to go to arbitration, if a claimant proves at arbitration that the defendant's conduct was grossly negligent or intentional, the arbitrator can award up to $750,000 to the claimant, an amount intended to "punish" the defendant • If neither the claimant nor defendant offer arbitration or the defendant refuses arbitration, the amount of punitive damages recoverable is the same as almost all other tort cases If the jury finds the defendant actually intended to harm the claimant no caps on punitive damages apply • In cases in which a jury awards punitive damages, the case will be automatically filed with the local state attorney's office for investigation • The caps contain the potential size of punitive damages, except where there has been specific intent to cause injury Less than 1% of all nursing home litigation goes to jury trial The threat of punitive damages (which are claimed in 95% of these lawsuits currently) is generally used in negotiating settlements for the 99% that do not go to jury trial These caps should have the effect of containing the multi-million dollar awards because defendants would admit liability and pay up to $750,000

Victoria K. Fierro
2855 Asbury Hill
Tallahassee, FL 32312

January 12, 2001

Honorable Frank Brogan, Chairman
Task Force on the Availability and Affordability
of Long-Term Care
Executive Office of the Governor
PL-01 The Capitol
Tallahassee, FL 32399-001

Dear Lt. Governor Brogan

At the last meeting of the Task Force a vote was taken to send an informational report to the Florida Legislature It was also decided that the Task Force members would have their comments, recommendations, and critiques included in the report at the appropriate place in order to provide the Legislature with the maximum amount of information

I have prepared a series of items I wish to have included in the final report Apart from any changes needed in spelling, punctuation or grammar I do not wish my comments to be altered by staff without my express approval

It has been a pleasure serving with you on this Task Force, and I hope the information we share with the Legislature will prove useful as they consider these important topics.

Best regards,

Victoria K. Fierro
Consumer Appointee of the
House of Representatives

Victoria K Fierro, Member
Task Force on the Affordability and Availability of Long-Term Care
Materials for Inclusion in the Final Task Force Report

Section A: General Comments/concerns of the report:

1 Each page of the report should bear a footer line that reads: "The Task Force has not officially acted or voted to support these recommendations They are presented for information purposes only."

2. Throughout the report staff or other recommendations should not be identified as "recommendations" but rather as items for consideration or suggestions. Using the term "recommendation" may provide the reader with a misconception

3. Throughout the report there are suggestions that do not identify the action needed (i e change of statute, rule change or promulgation, interagency agreement, executive order of the governor, federal changes, etc) nor do they identify the appropriate organization who should be responsible for the action. Please revise the recommendations (suggestions) to provide this information

4. The Report should be retitled to "The Information Report of the Task Force on the Availability and Affordability of Long-Term Care to the Florida Legislature".

5 The report contains many acronyms I recommend that a glossary of acronyms be included in the report

6 The Task Force received hours of public testimony from individuals and organizations across the state. This report contains no acknowledgement of their contributions and provides no appendix that lists the individuals and subject matter on which they testified I recommend that an appendix be added the lists the name of each person who testified, who they represented, the date and location of their testimony and if possible a phase or subject indicating the nature of their testimony.

7. Introduction – My recommendation is that the entire introduction needs to be eliminated. If, however, it is not eliminated then the information needs to be modified to eliminate all pronouns such as "we" since the "we" is not the Task Force Additionally, the Task Force process has not supported the statement contained in paragraph 6 on page 1 "We are also convinced that the quality of care in nursing homes has improved substantially over the past 20 years." Please delete this

sentence. If the quality had improved that much there would not be a nursing home litigation crisis

8 Page 11 Task Force Principles – These should be more correctly identified as "guiding" principles These items were discussed with the Task Force but were not ratified by the Task Force, hence calling them "Task Force Principles" is a misnomer.

Additionally, there needs to be an explanation of what these are, how they were used, and why they are included.

Section B: Executive Summary

1. The entire Introduction and Executive Summary contained in the Dec 26 Draft report should be eliminated and in its stead a new executive summary should be prepared explaining what led to the creation of the Task Force, how the Task Force conducted its work, how the various charges of the Legislature were organized into tasks, a description of the interdependence of the various tasks, and a clear and precise discussion of the Task Force's decision to send the Florida Legislature an informational report in lieu of recommendations or suggested legislation

2. Page 16 last bullet point "Despite efforts…" – Please delete the last sentence of this bullet point It is a recommendation, not an informational bullet point.

3. Should item 1 above be disregarded, then please insert the following before the opening paragraph of the Executive Summary:

   "The Task Force on the Availability and Affordability of Long-Term Care was created by the Florida Legislature by House Bill 1993 during the 2000 Legislative Session to study and report on a broad range of topics involving the entire spectrum of the long term care delivery system The Task Force, due to time constraints and lack of consensus, voted to provide an informational report to the Legislature to assist it with its work The Task Force specifically voted **not** to provide recommendations or suggested legislative language to the Legislature. The suggestions presented below were prepared by the staff and were not supported by the Task Force In fact, many of these suggestions may be contrary to good public policy and there has been insufficient information or research to support many of these recommendations

   One of the key areas of controversy which led to the creation of the Task Force was the exit of liability insurers from the marketplace for nursing homes and assisted living facilities and the dramatic rise in liability insurance premiums

   In a nutshell:

   - The staff study of lawsuit brought against Florida nursing revealed **that the suits were not frivolous.**
   - A study of Florida nursing home trials revealed there were 51 verdicts/settlements awarded against nursing homes in Florida, many with punitive damage awards It is highly unlikely that juries would be

willing to award **punitive** damages without having overwhelming evidence of substantial injury or neglect

- The Florida laws that provide protection to frail and vulnerable elders have not changed since 1980 when they were enacted as a result of the heinous conditions Florida's seniors suffered in Florida nursing homes. What has changed in recent years is that the poor quality of care in many nursing homes has resulted in increased lawsuits and verdicts, causing a rise in insurance premiums
- The federal HCFA study links the **understaffing of nursing homes with poor care outcomes** and many Florida nursing homes are understaffed.
- **The federal government has established Operation Restore Trust to deal specifically with the fraud** and over billing in the nursing home (and healthcare) industry
- Large nursing home chains are in bankruptcy principally as the result of **mismanagement, over-expansion and unacceptable levels of debt.**
- Florida has a history of care deficiencies that exceed the nation in many categories, and
- The nursing home liability insurers and reinsures that are fleeing Florida are also fleeing the **national** market. The rise in nursing home liability insurance premiums and policy cancellations is not unique

THIS IS A QUALITY OF CARE CRISIS. If we do not acknowledge this as being at least some portion of the problem any actions taken, will necessarily fall short of providing any meaningful remedy The testimony from the nursing home liability insurance representatives revealed that even if the draconian tort reform measures sought by the nursing home industry were enacted by the Legislature, the **liability insurers would not be back in the market in the near future**

The following staff suggestions, specifically those relating to litigation, were not adopted by the Task Force and there has not been sufficient research or information provided to support them. While the staff has recommended substantial changes to Florida laws on limiting civil redress for injured persons in long-term care facilities, the staff did not even have an attorney on staff to evaluate the implications of these recommendations and the staff would not provide the identities of their "key informants" nor release the raw data on the lawsuits research it conducted to the sunshine."

The remaining comments are to be inserted in the Executive Summary if recommendation 1 above is disregarded.

Please also include my comments in the body of the report wherever the applicable subject is discussed.

3.Page 13 paragraphs 2 and 3 – Instead of identifying the number of recommendations in each category of Quality and Choice substitute the word "series". Additionally, substitute either "suggestions" or "considerations" wherever the word "recommendation" is used

4 Page 13 paragraphs 1 and 4 – Eliminate the modifying phrase "limiting costly" before litigation. I further recommend that the third category title be "Litigation/Insurance" for a more descriptive title.

5. Choice, Page 17 item 2 : Expand OSS and Medicaid Waivers - Please insert the following after the third bullet point (3-5 tiered system) – "The state has previously had a tiered payment system for nursing home care which was abandoned for a variety of reasons including the inefficiency of the system, the costs of administration, and the proclivity of the provider community to manipulate the assessment criteria to maximize reimbursement "

   Remove the words "The Task Force recommends".

6. Choice, Page 17 item 2: Expand OSS and Medicaid Waivers – Please insert the following after the final bullet point – "The Task Force was not provided adequate data to accurately identify the amount of slots, or the amount per slot for the expansions recommended above "

7 Choice, Page 19 item 7 – Please insert the following comments at the end of this suggestion –"These suggestions have major implications for the structure and financing of the delivery system. The Task Force did not receive adequate discussion or testimony on these reforms "

8. Choice, Page 21 item 11: Organizational Structure - Please insert the following after the final bullet point – "The Task Force did not receive substantive testimony on these organizational structure change suggestions. Changes of this magnitude will have significant impacts on other governmental agencies and the provider community, who were not represented on the Task Force and who were not provided a formal method of commenting on these suggestions. Many of the suggestions included have significant fiscal implications for the state and those elements have not been explored during the course of the Task Force's work."

funds should have been sufficient to bring all nursing facilities in Florida to the federally recommended minimum of 2.0 CNA hours per resident day.

The Legislature should carefully study how the industry applied the already appropriated funds and tie any future funding increases to specific outcomes or items."

35 Reimbursement, Page 34, Suggestion 3 - Please insert the following paragraphs – "The state Medicaid program should reimburse for the cost of liability insurance for normal and ordinary business risks The state should not bear the costs of verdicts, punitive damage awards, legal costs, or increased liability insurance premium costs when the costs have been incurred as a result of the neglectful or abusive behavior of a provider, or for faculties which are not in compliance with federal and state regulations and that have resulted in resident harm

At a minimum, if the state is to grant any fiscal relief for increasing costs of liability insurance or legal costs, then there should be a prohibition of any secret legal settlements. If the public is bearing costs for these items, it has the right to know how these dollars are being spent."

36. Reimbursement, Page 34, Suggestion 5 – Please insert the following paragraph – "Florida nursing homes are not "uniquely" threatened with bankruptcies, it is a **national** situation The staff analysis performed for the Task Force concluded the Florida Medicaid reimbursement rates did not cause the nursing home bankruptcies These conclusions mirror the findings at the Congressional level on this subject."

37 Reimbursement, Page 34 New suggestions – Please insert the following suggestion – "7. Uniform chart of accounts – the Florida Medicaid program for nursing home cost reporting should adopt a uniform chart of accounts. Attempts by AHCA to implement a uniform chart of accounts have been successfully resisted by the nursing home industry. A uniform chart of accounts will permit the state to do "apples to apples" comparisons of nursing home costs and provide a better basis for measuring directed reimbursement increases made by the state. Nursing homes are currently required to file their costs reports in the format prescribed by the state plan that generally differs from the regular financial statements Perhaps the State's Auditor General staff could be assigned to develop the uniform chart of accounts."

38. Litigation, Page 35, What is known about litigation – Please include the source for each of these bullet points. The statements can only fully inform the reader if the source is known For instance the size of

claim and loss cost per bed was information obtained from the Aon study that had selective participation and was paid for by the nursing home industry

39 Litigation, Page 36, prior to the section on Litigation suggestions – Please insert the following new section –

"*Tort reform and its impact on liability insurance*

The Center for Justice and Democracy has completed a major study on the impact of tort reform Their report entitled Premium Deceit' The failure of 'Tort Reform' to Cut Insurance Prices concludes "From the mid-1980's until today, the nation's largest businesses have been advancing a legislative agenda to limit their liability for causing injuries. One of the principal arguments on which they rely is that laws that make it more difficult for injured people to go to court (i.e. tort reform) will reduce insurance rates. This report analyzes these claims and concludes they are invalid." (see http:www.ccair.org/premiumdeceit premiumdeceit.html)

The Task Force received testimony from Mr. Shuttleworth of the insurance industry who announced that as of February 2001, reinsurers were no longer going to write long-term care reinsurance in Florida He further testified that even if all the tort reform proposals submitted by the nursing home industry were approved by the Florida Legislature, the insurers would not be coming back until after the insurance "tail" was past and there was sufficient court testing of the reforms. He would not estimate the length of the insurance "tail" but it will probably be in the range of 2 to 5 years or more. As summarized by Task Force member Phil Freidin, the reinsurers weren't going to come back in the near term even if we went and got them with guns.

Consequently, it is misleading, at a minimum, to represent to the Florida Legislature and the public that the passage of long-term care industry and Task Force staff's suggested litigation reforms will solve the immediate problem

In 1976, the Dade County grand jury found deplorable conditions in Florida nursing homes and the Florida Legislature subsequently passed the Chapter 400 F.S reforms. These laws have not substantively changed since that time. What has changed is that the Florida nursing home regulations were gutted in 1994, there has been significant financial and billing fraud committed by some for profit nursing home chains, and the victims of abuse and neglect in long-term care facilities have increasingly sought redress for their injuries via the court system because the current regulatory system has failed

to adequately protect them The fundamental issue is not the increasing nursing home litigation, but rather, the **quality of care crisis** that has stimulated the increase in litigation. To provide tort reform which grants fundamental immunity to long-term care facilities for harming frail and vulnerable citizens, merely punishes the victims and provides no incentive for the nursing home providers to solve their quality of care problems.

According to a December 15, 2000 letter to the Task Force from the National Citizens' Coalition for Nursing Home Reform (NCCNHR) the staff suggestions on litigation reform "are punitive towards the victims of negligence and would protect nursing home operators who profit from providing substandard care in chronically understaffed facilities "

The AARP in their letter to the Task Force dated December 15, 2000 stated "AARP does not underestimate the sense of urgency to reduce the cost of liability insurance premiums for the nursing homes that are taking good care of our most helpless citizens. The fact remains that in Texas, tort reform of the type proposed (by the Task Force staff) has not reduced the cost of liability insurance, nor has it induced insurance companies to return to the market It is difficult for us to imagine why Florida would want to repeat this failed strategy . To AARP, the important fact is that each year there are more nursing home residents in Florida that are injured and die as a direct result of negligent actions of the nursing homes in which they live As long as the state agencies charged with the responsibility of preventing such occurrences, through assurance of quality care, continue to fail in discharging this responsibility; these residents, and their families, must continue to have appropriate access to, and be assured of, redress through our courts "

40. Litigation, Page 36, Litigation Suggestions – Please insert the following paragraph as the opening paragraph to this section –
"The litigation reforms presented in the package below are designed to limit the civil redress for individuals who have been harmed by long-term care providers They are supported by the nursing home industry but do **not** have the endorsement of the Task Force."

41 Page 36, after Attorney's fees, item c. - Please insert the following:
"The restrictions on attorneys fees only appear to apply to plaintiff attorneys. If there is going to be substantive reduction in the costs of litigation, then there should be a mechanism to limit or reduce the amount of defense attorneys fees as well "

42 Page 37, Punitive Damages – Please insert this paragraph after the topic heading and before the items a through h:
"Mr. Shuttleworth, and insurance Chief Executive Officer testified before the Task Force that **punitive damages** are not currently covered by insurance and have not been a part of the losses and damages paid by the insurers that have resulted in insurance premium increases and policy cancellations. The following comments were contained in a Jan 8 2001 memo to the Task Force from the Center for Medicare Advocacy " Punitive damages serve an important public purpose of expressing jurors' extreme disapproval of tortuous conduct For frail nursing home residents who generally have limited economic damages and, . would be restricted in non-economic damages, punitive damages would be especially important However, an award of meaningful punitive damages would be highly unlikely under the (staff's) proposal

... even in the limited instances when punitive damages would be awarded, the would be capped ..For nursing home residents, whose economic damages are likely to be small and whose non-economic damages would be capped, there would be, at most, extremely limited punitive damages "

43. Page 37, Punitive Damages, item e – Please insert the following comments under item e – "This suggestion would limit employers' liability for punitive damages. According to the Center for Medicare Advocacy, "defendants would not be liable for acts of his/her employees under the doctrine of *respondeat superior*. In *California Association of Health Facilities v Department of Health Services, Cal 4th 284, 940 P 2d 323, 65 Cal Rptr 2d 872, 885 (1997)*, the California Supreme Court rejected a similar argument that facilities should not be responsible for the acts of their employees under the "reasonable licensee" defense authorized by the state's civil money penalty law.

44. Page 38, Standards of Recovery, item a – Please insert the following after item a – "The National Citizens' Coalition for Nursing Home Reform reviewed the staff's suggestion on substituting the negligence standard and responded "We find it particularly disturbing that negligence is defined as a deviation from the prevailing standard of care Negligence is already defined in the Medicare and Medicaid statutes: it is the deviation from the standards that nursing facilities are required to meet to receive federal funds".

45. Page 38, Standards of Recovery, item c – Please insert the following comments after item c and before item d – "According to the Center for Medicare Advocacy this proposed managed risk agreement inappropriately incorporates a concept of managed risk agreements

from the assisted living industry into the nursing home industry."

46 Page38, Standards of Recovery, item d – Please insert the following comments after item d and before item e – "This suggestion immunizes facilities from liability if residents refuse care or services. Unfortunately, a common practice in some nursing homes is to write a notation in a resident's medical chart that they refused services when in fact the services were simply not delivered This kind of legal protection provides the nursing home with an incentive to avoid service delivery by charting the patients refusal of services and then protects them from any liability for potential bad outcomes from not feeding, hydrating, medication, cleaning, ambulating, toileting or providing other services Particularly for particularly cognitively impaired individuals and or individuals who have no family support, this could be disastrous."

47 Page 38, Standards of Recovery, item e – Please insert the following comments after item e and before item f – "According to the Center for Medicare Advocacy this reform suggestion has the effect of immunizing facilities from liability for physician negligence since many nursing home physicians have little or no involvement in directing or overseeing residents' care and simply rubber-stamp decisions made by facility staff. The Center's concern is that many physicians are employed by facilities as medical directors at the same time as they serve as residents' attending physicians and under this proposal these common practices reflecting the lack of independence of physicians from the nursing facilities would nevertheless lead to facility immunity."

48. Page 39, Standards of Recovery, item j – after this last item please insert the following new paragraph – "The Center for Medicare Advocacy, Inc. sent a memorandum dated January 8, 2001. Their points on item j above are important. The Center recognized that the proposal requiring all claims for abuse and neglect to be brought under Chapter 400 would expressly prohibit litigation under Chapter 415 F.S Florida's Adult Protective Services Act and deny nursing home residents the protections of the that act. It was their opinion that nursing home residents should not be excluded from this law's reach and protection.

49 Page 39, Impact of the Litigation Reforms, item b - Please insert the following after item b in a separate paragraph – "According to the National Coalition on Nursing Home Reform, these proposed litigation reforms "fail to address problems in either the nursing home industry that give rise to the justifiable tort litigation or the insurance industry.

The Center for Medicare Advocacy concluded in their memo of 1/82001 to the Task Force that " .insurance companies have raised premiums for liability insurance because of their own financial incentives and because of problems in the nursing home industry. These problems would not be addressed or corrected by the (Task Force staff's suggested litigation reforms.)"

The AARP stated in their December 15, 2000 letter to the Task Force "The fact remains that in Texas, tort reform of the type proposed in these recommendations has not reduced the cost of liability insurance, nor has it induced insurance companies to return to the market. It is difficult for us to imagine why Florida would want to repeat this failed strategy."

"**Punishing the victums** of nursing home poor quality of care by removing their rights to adequate civil redress for injuries neither solves the nursing home crisis in Florida, nor improves the quality of care in nursing home and assisted living facilities. These reforms will have the effect of immunizing the nursing home industry from the consequences of their own behavior and our seniors will pay the price."

Section C: Alternatives

1. Page 67, item #2 "Expand OSS and Medicaid Waivers" --after 3rd paragraph insert: "The Task Force was not provided adequate data to accurately identify the amount of slots, or the amount per slot for the expansions suggested above."

2. Page 68, between 1st and 2nd paragraphs—insert: "The state has previously had a tiered payment system for nursing home care which was abandoned for a variety of reasons including the inefficiency of the system, the costs of administration, and the proclivity of the provider community to manipulate the assessment criteria to maximize reimbursement."

3. Page 73, item #8, "Organizational Structure" --after 1st paragraph insert: "The Task Force did not receive substantive testimony on these organizational structure change suggestions. Changes of this magnitude will have significant impacts on other governmental agencies and the provider community who were not represented on the Task Force and who were not provided a formal method of commenting on these suggestions Many of the suggestions included have significant fiscal implications for the state and those elements have not been explored during the course of the Task Force's work."

4. Page 75, item #11, "Resident Choice,"--after this suggestion insert: "The Task Force did not receive testimony on a "shared risk concept" nor were the principal groups who would be directly effected by this concept offered the opportunity to provide information or reaction."

Section F: Litigation/Insurance

1 Page 343 after 1st paragraph --insert new 2nd paragraph to read: "In 1976, the Dade County grand jury found deplorable conditions in Florida nursing homes and the Florida Legislature subsequently passed the Chapter 400 F.S reforms. These laws have not substantively changed since that time. What has changed is that the Florida nursing home regulations were gutted in 1994, there has been significant financial and billing fraud committed by some for profit nursing home chains, and the victims of abuse and neglect in long-term care facilities have increasingly sought redress for their injuries via the court system because the current regulatory system has failed to adequately protect them The fundamental issue is not the increasing nursing home litigation, but rather, the **quality of care crisis** that has stimulated the increase in litigation. To provide tort reform which grants fundamental immunity to long-term care facilities for harming frail and vulnerable citizens, merely punishes the victims and provides no incentive for the nursing home providers to solve their quality of care problems."

2 Page 364, prior to section titled "Statewide Perspective " --insert the following new section:
Tort Reform Impact Study
The Center for Justice and Democracy has completed a major study on the impact of tort reform. Their report entitled Premium Deceit: The failure of 'Tort Reform' to Cut Insurance Prices concludes "From the mid-1980's until today, the nation's largest businesses have been advancing a legislative agenda to limit their liability for causing injuries. One of the principal arguments on which they rely is that laws that make it more difficult for injured people to go to court (i e tort reform) will reduce insurance rates. This report analyzes these claims and concludes they are invalid." (see http:www ccair.org/premiumdeceit. premiumdeceit.html)

3. Page 364 prior to section titled "Statewide Perspective"--add another new section:
Punitive Damages
During his testimony, Mr. Shuttleworth also informed the Task Force that **punitive damages** are not currently covered by insurance and have not been a part of the losses and damages paid by the insurers that have resulted in insurance premium increases and policy cancellations

4 Page 367, before the section titled "Insurance Premiums"--add the following new paragraph: "The Task Force received testimony from Mr. Shuttleworth of the insurance industry who announced that as of February 2001, reinsurers were no longer going to write long-term care reinsurance in Florida. He further testified that even if all the tort reform proposals submitted by the nursing home industry were approved by the Florida

Legislature, the insurers would not be coming back until after the insurance "tail" was past and there was sufficient court testing of the reforms He would not estimate the length of the insurance "tail" but it will probably be in the range of 2 to 5 years or more. As summarized by Task Force member Phil Freiden, the reinsurers weren't going to come back in the near term even if we went and got them with guns

Consequently, it is misleading, at a minimum, to represent to the Florida Legislature and the public that the passage of long-term care industry and Task Force staff's recommended litigation reforms will solve the immediate problem."

5 Page 373, Summary of Key Findings from the Litigation Studies – Please insert the following comment after the title to this section - "The most significant finding of the Hillsborough Civil Court Litigation Study is that the Chapter 400 lawsuits filed in Hillsborough County from 1990 to 2000 was that the lawsuits were **not frivolous** and that the number of lawsuits in Hillsborough County have been **declining** since 1998"

6 Page 374, last bullet – Please insert the following comment after the last bullet "The definition of quality used by the Task Force staff in the Hillsborough County Civil Court Litigation study was too narrow in scope. Requests for the public record information containing the summary of the Hillsborough cases was not made available to Task Force members in order to allow for appropriate scrutiny of the data. Failure of the Task Force staff to provide the data prevented the Task Force members from analyzing the data using different definitions of quality."

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January 11, 2001

Dr Larry Polivka, Director
Florida Policy Exchange Center on Aging
USF #30437
Tampa, FL 33620

Dear Dr. Polivka

In accordance with the directive of the Task Force on the Availability and Affordability of Long-Term Care, I am submitting my comments to the draft staff report dated December 22, 2000. I apologize for sending my comments a day after the January 8th requested time for submission, but I did not receive my copy of the draft report until several days after December 22

General Observations:

Clarify and make clear this is ***an informational report*** to the legislature, and that no vote was taken on the staff recommendations contained herein.

Members of the task force's objections and comments to each section must be **placed in** the body of the work, in context, and not at the end of the report

All reference to "Limiting Costly Litigation" as a header to a section or a part of the report should be eliminated As an alternative, the similar reference to "quality" as a heading should be amended to include the phrase, "Improving the Quality of Care"

An appendix should be included on the study of other states tort law. (General Cologne Re Publication, "50 State Long Term Care and Tort Liability Survey Information") This survey is informative, since throughout the hearings we were informed that Florida law was unique This has turned out not to be the case, and legislators should have the benefit of this important information

If a summary of the letters and testimony of individuals regarding liability insurance is to be included, a similar summary of letters and testimony of individuals regarding quality of care and quality of life complaints should be included in the section under Quality. If the task force staff cannot accomplish this, the summary of comments on liability insurance should be removed

It is unfair to highlight only one portion of the extensive public testimony and input we have heard and received over the last several months.

I have received several letters from my colleague on the task force, Ms. Vicki Fierro, as have each of you She has detailed many problems with some of the conclusions made in various parts of the report as well as, in some instances, the underlying studies and data As Ms. Fierro is uniquely qualified to analyze these issues, I would like to register my agreement with all of Ms Fierro's observations and critique in this regard and join in her assessment of the report

Liability:

As I review the findings and staff recommendations in this section, I cannot help but feel that the stated agreed upon task force principles have all but been ignored, specifically.

Principle #2 - *The consumer is entitled to a safe and secure living environment that includes public advocacy to ensure protection through all available means, and,*

Principle #5 - *All participants in the system must have adequate protection under the law and all participants must act responsibly or face the consequences for failing to do so*

The staff acceptance with very few exceptions of the FAHA/FHC/AIF proposal on litigation reform evinced no regard for either of these principles

As a threshold matter, with regard to the "findings"(pg 35) in the litigation section, I believe it is important to indicate the source of each item of data noted. For example, if the underlying information came from the Department of Insurance, it should be noted by footnote or otherwise If the information came from the AON report, it should be noted as well. This must be done so that policymakers are able to consider the source as they proceed through this volume of material. Several task force members took exception to many of the statements made by AON and there were several concerns raised as to the reliability of the data presented (For example, it was noted that the report relied too heavily on the experience of for-profit corporations and was therefore skewed toward a higher frequency and severity of claims than would be the case if more information had been obtained by not-for-profit long term care facilities)

The "Key Informants" that have been referred to throughout this report should be identified

My comments as to the Litigation Recommendations (pgs. 36-39) are as follows.

1 Recommendation by staff to remove liability insurance requirement for ALF's. I believe we **should not** remove this requirement and **should** impose insurance requirements for nursing homes. If insurance is not available, the statutes should provide for alternative forms of

financial responsibility such as bonds or letters of credit. If the legislature were to remove the liability insurance requirement, or not require insurance, the facility should be required to post notice of this choice to the residents and the public.

2 The statement that "the litigation reforms should ensure residents and their families access to a negligence cause of action while capping attorney fees for predictability" makes no sense in the context of what follows in the way of recommendations

3 Attorneys' Fees

I oppose the recommendations **on attorney's** fees These recommendations would ensure that many cases involving violations of important resident rights would never be enforced The inclusion of a maximum add on fee of $10,000 is inadequate to ensure the enforcement of rights under s 400 022 and was recommended by staff without consulting with Elder Law Section attorneys to determine their position, or to determine the appropriateness of the proposed fee cap.

The staff should alternatively adopt the recommendation of the Academy of Florida Trial Lawyers (AFTL), which allows for a mitigation of fees for facilities who meet certain criteria regarding quality. (Please include the attached proposal by AFTL.)

4. Punitive Damages

I oppose the staff recommendation allowing a facility to immunize themselves against a potential punitive damages award when such an award may be warranted It should be stated very clearly in the text of this report that the effect of the staff recommendation is that **"a defendant can eliminate any possible award of punitive damages by offering to arbitrate".** This language should be substituted for the statement on page 37, item (g), that is, "a claimant that refuses a defendant's offer to arbitrate may not recover punitive damages". This mechanism is the defendant's method to avoid responsibility for the harm they have caused, and does not benefit the claimant in any way.

I oppose the imposition of the 1999 tort restrictions on punitive damages from which seniors and the disabled where specifically excluded

I agree that defendants against whom punitive damages have been awarded should be referred to the state attorney for prosecution

5 Non-Economic Damages/Arbitration

I oppose caps on non-economic damages intended to compensate a plaintiff for pain and suffering. The original staff recommendation and the FAHA/FHC/AIF bill would apply the medical malpractice caps on non-economic damages, i e $250,000 total for pain and suffering, mental anguish, and disfigurement, to actions against long term care facilities These caps were enacted in 1988. Recognizing that non-economic damages are the only damages that a resident can recover in most cases against long term care facilities, the Governor's office created an illusory "enhanced cap" in the 2nd draft Language was added in the 2nd draft to allow recovery of up to $750,000 of non-economic damages aggregate against all defendants, if the resident can prove "intentional misconduct" or "gross negligence" defined as a "conscious disregard" in section 786.72(2)(b) (relating to punitive damages) In cases against a nursing home facility for horrible neglect, it will be impossible to show that the management intentionally injured a resident Consequently, the additional $500,000 in non-economic damages will never be obtainable Note also that the additional $500,000 in non-economic damages is not available to a resident who chooses not to arbitrate

To add insult to injury, the 2nd draft states the cap is the **total amount awardable against all defendants, aggregate.** Obviously, this benefits nursing home operators, owners, and management companies Often there are several defendants in nursing home litigation, where, for example, there has been more than one owner of a home during the period of abuse, or there is a management company, licensee and owner who may all have responsibility for the neglect of a resident The fact that there may be several bad actors should not inure to the benefit of the same bad actors. This language accomplishes this result

This language also inappropriately mixes the concepts of non-economic damages and punitive damages. Non-economic damages are to compensate victims for suffering, to be distinguished from punitive damages, which are to punish wrongdoers and to act as a deterrent against similar conduct in the future It makes no sense to apply punitive damages thresholds to an award of compensatory damages for non-economic injuries. The language hopelessly confuses the issues and is unprecedented in law
This melding of punitive damages concepts with non-economic damages gives the appearance that punitive damages are still available to punish nursing homes where outrageous neglect and abuse has occurred But, under the FAHA/FHC/AIF bill and staff recommendations, a long term care facility can completely immunize itself from any exposure for punitive damages simply by offering to arbitrate the case

6 Statute of Limitations

The statute of limitations should not be shortened absent some additional time frame to allow a reasonable person the opportunity to discover the potential cause of action, if such information is not apparent

7 Standards of Recovery

I am opposed to all staff recommendations in this section with the exception of the recommendations regarding the *Knowles* and *Hamilton* decisions in items f and g

The remaining proposals would give the nursing home industry more protection than any other entity, including physicians and hospitals, for example·

- ♦ Burden of proof for violation of rights is higher than a negligence claim. The nursing home industry will have more protection from liability than any other person or entity

- ♦ Creates a lower standard for nursing homes The proposal states that the standard of care for the nursing home is the prevailing standard for similar nursing homes in the community If most nursing homes in the community are under-staffed and poorly run, under this proposal this low standard will become the acceptable standard for Florida's senior and disabled citizens

- ♦ Nursing home no longer have any exposure for the criminal abuse, neglect or exploitation of seniors and vulnerable adults under chapter 415. The **FAHA/FHC/AIF** proposal specifically precludes nursing homes from being held accountable under this statute for what happens inside their facility if adopted by the "Brogan Task Force"

- ♦ Nursing homes and assisted living facilities can short-circuit litigation and set another barrier to a recovery by a resident by arguing to a court that they had no "duty" to the resident for care and treatment Assisted living facilities stand to benefit most from this provision, since they often maintain that they merely are there to provide basic assistance with activities of daily living When a resident begins to deteriorate and needs additional services, the ALF will argue it had no duty to the resident and not be responsible when they all too often keep a resident in the ALF longer than they should in order to continue to collect revenue from the resident. Under this proposal, there will be no incentive for an ALF to move a resident to a more appropriate setting where his or her growing needs can be met

- Nursing home residents will be subjected to "managed risk" agreements, which will be used to justify the failure to provide care and services to residents For example, if a resident refuses to eat a meal, the nursing home will document that refusal and will have an absolute defense to a claim that the nursing home failed to provide hydration and nutrition to a resident, which resulted in death In this event the nursing home would have no incentive or duty to take further action to see that the resident's basic needs are met through alternative means.

7 Pre-suit requirements

I support pre-suit investigation requirements if they are tailored to the special needs of seniors and cases against long term care facilities The staff proposal recommends using the medical malpractice pre-suit procedures which are not appropriate or adequate for cases involving elders and long term care facilities. AFTL has proposed pre-suit procedures that are more appropriate for these cases Substitute the recommendation of AFTL on pre-suit procedures

8 Impact of Litigation Reforms

The remark under (a) is not an adequate or accurate statement of the impact of the above recommendations. (unlimited caps. when?)

Item (b) needs to affirmatively state that long term care facilities will be except from the civil remedy in Chapter 415 relating to abuse, neglect, and exploitation of the elderly

Question and Answer Chart

The entire "Question and Answer Chart" should be eliminated The answers contain erroneous information that will potentially mislead and confuse policy makers. This Q and A section is an advocacy piece that should more appropriately be handed out by interest groups as these issues are debated during the upcoming session I strongly object to its inclusion in this report.

The Number of Lawsuits

As to the question of whether the number of lawsuits is declining, (see pgs 344, 350, 364), the information obtained by staff from the Hillsborough study clearly indicates a downward trend. I have not reviewed any reliable information that would indicate a different result. For example, reference to the AON study on this issue may not be an accurate reflection of the current trend because the report may have under represented the experience of not for profit facilities. Additionally, we have been given no information on the methodology used by the individual

conducting the central Florida study We do not know the qualifications of the individual collecting or compiling this information Consequently, I submit that reference to other sources on the issue of whether lawsuits against long term care facilities are declining should be omitted The statement that the decline in Hillsborough may not reflect what is happening in the rest of the state, contained on pg 344 is sufficient to convey this point, without pointing to incomplete, nebulous "studies".

Production of Resident Records

The discussion of this issue on pgs 358-359 contain no reference to the fact that the individual or firm requesting the records is billed for the cost of copying. The report leaves the impression that the facility must bear the entire cost of producing the records, which is simply not accurate The report should include information on what a facility typically bills for these records, and whether facilities produce these records in a timely manner

Settlement Costs

The assertion on pgs 359 and 360 that insurers would rather settle than fight, even though they believe their insured has done nothing wrong is unfounded There is no study or other information to back up this statement I have been litigating these matters for over 20 years, and have not found insurers who have conducted business in this manner I am certain Mr. Connor and others have had the same experience in this regard
I recommend removing this statement from the text

The Number of Lawsuits Filed

At the presentation of the liability study in Miami, I took exception to the "fuzzy math" used to calculate the number of lawsuits filed in Florida, "to date". Since we do not know the number of lawsuits filed against long term care facilities in Florida since the enactment of the civil remedy in 1980, we should not speculate This paragraph at the top on pg 364 should be deleted

No Frivolous Lawsuits

The finding from the Hillsborough study that there were no frivolous lawsuits is significant, and should be included in the "Key Findings" for the litigation section. (pgs. 373-374)

Quality of Care

Video Surveillance

The staff had originally recommended the expansion of residents' rights to allow for video surveillance at the option and cost of the resident (Final Draft dated December 14) When was this item taken off of the table? This option should be included for all residents as a means of protection and monitoring Subject to the current rules of evidence and civil procedure, there should be no new restriction on admissibility or discovery of these materials

Long Term Care Facility Incident Reporting

I recommend that serious incident reporting be a part of the risk management proposal submitted by staff. The staff has based its risk management recommendation on the program already in place for hospitals, s 395 10971 Fla Stat (at pg. 236.) In addition to risk management, this statute also includes incident reporting of serious adverse incidents. Incident reporting is an important part of this program and should be included in any risk management statute fashioned for long term care facilities. AFTL has submitted draft legislation in this regard, which should be included in this report as an option

Long Term Care Facility Report Cards

I support the recommendation on pg. 32 to provide consumers with **meaningful** information by way of a long term care facility report card I would include in this report card the information collected regarding serious injury or death, and the number of violations of resident's rights listed by facility. AFTL has submitted draft legislation in this regard, which should be included in this report as an option I also recommend that a clear and comprehensive set of information to be provided to consumers, that would combine the information set forth above, i.e. the number of incidents and violations of resident's rights complaints per facility, and combine the concept of the gold seal designation with the nursing home compare chart, pg. 232 . The goal would be to have all of the comparative information in one place for consumers

Legislative Protection for Quality Assurance/Risk Management Records and Information

I do not agree that the current protections for hospital peer review and risk management be applied in the long term care facility context. (pgs 30 and 266)

Some of the statutory restrictions on discovery and admissibility extended to doctors and hospitals already go to far in keeping relevant and important information from a person seeking redress for injuries Court interpretation of these statutes has been inconsistent, and in some cases has kept original documents, such as the qualifications and disciplinary records of

caregivers from litigants Language protecting peer review and risk management must be carefully crafted to ensure that only information generated during the peer review process would be protected Documents from original sources and state and federal survey and inspection records should not be kept from discovery or held inadmissible. In addition to the extent residents are able to make use of video or electronic monitoring, these items should not be statutorily restricted in terms of discoverability and admissibility

Information relating to fines recommended/imposed/collected

Task Force members requested a breakdown of the amount of fines recommended, imposed, and the amount of fines collected per year The information was provided to us by ACHA and should be included/attached as part of the report to the legislature

Reimbursement and Bankruptcy Recommendations

I take exception to the assertion by staff that there will be a " 2nd wave of bankruptcies" and that the "2nd wave" will be driven by lawsuits. It is well established in this report that the 1st wave of bankruptcies was not driven by lawsuits, and that several chains involved in bankruptcy proceedings will shortly emerge from bankruptcy It is speculative to predict a 2nd wave of bankruptcies, and to attribute the cause of any such bankruptcies to one source or another All reference to the causes of this speculative event should be removed from the report (see for example pgs 27 and 197)

I disagree with the recommendations items 5. and 6 (pg. 34)

#5. *Ensure that Florida's Medicaid rates and liability environment do not combine to make that state's nursing home **uniquely** threatened with bankruptcy*

#6 *Ensure that the providers of liability insurance coverage do **not find** the business opportunities in Florida significantly less attractive than they are in other comparable states*

Availability/Cost of Liability Insurance

Items Missing From the Report:

DOI survey

Review of this issue by the Florida Department of Insurance indicated that the exodus of admitted carriers from the nursing home liability market is not unique to Florida It is happening throughout the nation. Deputy Insurance Commissioner, Suzanne Murphy, made this

statement in her letter to the task force in August Yet, there is no mention of this phenomenon in the materials. In fact, there is no carrier currently exiting the market that is not also discontinuing this line of business nationwide

Aon Study

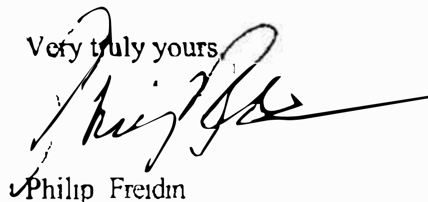
The report does not mention the testimony of the Aon Actuary who stated in Tallahassee that it was the frequency of claims that was of concern to the industry, and not the severity. This is important to note, especially in light of the fact that the litigation reforms proposed by the industry and staff recommendations all address the severity of claims

Testimony of Mr Shuttlesworth of Med Mark

The report needs to include the key remarks from this underwriter, i e, that even if the Legislature were to adopt extremely restrictive measures on causes of action against nursing homes and long term care facilities, the carriers would not return to the marker for a number of years, if at all If they did return, there would be significant restrictions on coverage, he stated, excluding coverage for punitive damages, deducting the cost of defense from coverage limits, and covering only on a claims made basis Also important was Mr. Shuttlesworth's opening remarks that there was no requirement for risk management for nursing homes in Florida, and that this is a key component to the industry in terms of continuing to write this line of business.

I am also enclosing and incorporating a copy of the proposals of the Academy of Florida Trial Lawyers Though I have stated this is not my proposal, I believe it contains many sound points that need to be considered

Very truly yours,



Philip Freidin

PF/med
Encl.

Academy of Florida Trial Lawyers
Proposals Submitted to the Task Force on the Availability and Affordability of Long-Term Care

Introduction The over-riding issue for consideration by this task force must be the quality of care for seniors and disabled citizens of this state The consensus principle determined by the task force is that "care recipients are entitled to adequate and appropriate care while providers are entitled to fair compensation, although they also must be held accountable and responsible for quality of care"

As to each proposal submitted to the task force for inclusion in the final report, the standard must be, does it improve the quality of care for all of those in need of long-term care in this state? If the proposal does not measure up to this standard, it must be rejected

The proposals submitted by the Academy of Florida Trial Lawyers will improve the quality care residents of long-term care facilities These proposals would improve the quality of care and the quality of life for residents by assigning one individual to oversee all incidents involving the safety of residents and to identify and implement ways of preventing such incidents in the future Mandatory prevention and safety training and reporting would also go a long way toward achieving this goal

Most importantly, consumers should be given meaningful information to enable them to compare the safety record and quality of life provided by the nursing homes. The long-term care facility report card will allow consumers to make informed decisions

These proposals will also streamline litigation that occurs when the quality of care is insufficient to protect the safety and health of residents Case screening, evaluation and mediation requirements will eliminate any cases that should not be brought. Presuit mediation will allow cases to be settled at an early stage, avoiding needless litigation expenses

The specific components of our proposal include

A. Nursing Home Residents' Rights Violations Claims Evaluation Procedures

1. Notice to Long-Term Care Facilities

- Residents or their representatives would provide notice to a potential defendant of an intent to pursue a civil remedy for violation of a resident's rights 60 days prior to filing a lawsuit

- Notification must include the rights a defendant has violated that are reasonably identifiable prior to the filing of a lawsuit and commencement of formal discovery.

2. Expert Affidavits

- In cases where the alleged violation of a resident's rights causes physical injury or death, an affidavit is required from an expert. In 1993, the Legislature imposed a requirement that expert witness affidavits be submitted whenever a lawsuit was filed against a nursing home alleging a violation of the right to adequate and appropriate medication and health care AFTL's proposal extends the expert witness affidavit requirement

3. Informal Exchange of Information

- Records in the possession of the defendant must be produced within 10 days of the receipt of a certified notification of intent, including internal and state required incident reports

- If records are not produced within 10 days, the expert affidavit requirement is waived

- Parties may submit questions and requests for production within the 60 day presuit notification period and may take the unsworn statements of parties

- Statute of limitations (and repose) is tolled for the 60 day case evaluation period and any extension

- Case evaluation materials are not discoverable or admissible in civil litigation

4. Fast Track Cases

- Cases shall be placed on the docket pursuant to chapter 415 upon request of the plaintiff (Amend chapter 415 to make mandatory that the judge advance the trial on the docket)

- The proposal would include a clear statement that the provisions of chapter 766 do not apply to cases brought under chapter 400

5. Streamline Litigation

Clarify the law to resolve the issues raised in *Knowles* and *Hamilton cases*, i e , that the cause of action under chapter 400 does not die with the resident and that deceased residents are not limited to damages under the wrongful

death statute (e g , funeral bills)

Conform and amend the language relating to the entities that can be held accountable under section 400 023, F S to those found in the Assisted Living Facility statute, i e., any facility owner, administrator, or staff (s 400 429, F.S), and include management companies

B. Mandatory Mediation

- Presuit mediation is required if requested. Within 30 days of the completion of the case evaluation period and upon the request of a defendant, the parties shall complete mediation within 30 days. (Parties can agree to an extension)

- The current mandatory mediation piece added to chapter 400 in 1999 is repealed

C Punitive Damages Restrictions

1. Caps on Damages

- **The Academy of Florida Trial Lawyers opposes caps on damages.**

- The Legislature addressed the issue of caps on punitive damages in cases arising under chapter 400 in 1999, imposing a three times compensatory damages presumptive limitation. The Academy has taken the position that this restriction is unconstitutional. Punitive damages are the best deterrent possible to prevent abuse and neglect of Florida's vulnerable citizens. There is no justification for protecting nursing homes from the full force of the law when they have engaged in conduct that is willful, wanton, gross or flagrant, reckless or consciously indifferent to the rights of residents Punitive damages provide the long-term care industry incentive to ensure that this conduct does not occur and that nursing home profits are not put before quality care.

2. Criminal Prosecution

- In cases where a court permits the pleading of punitive damages, the court shall refer the individuals involved to the state attorney for criminal prosecution

Abuse and neglect of seniors and vulnerable adults in this state is a crime. Criminal laws to punish this behavior should be enforced Reform in this area will bring the egregious conduct of individuals to the attention of the proper authorities.

D. Mitigation of the Amount of Attorneys Fees in Nursing Home Cases

Nursing home defendants can mitigate the amount of fees Nursing homes that have complied with minimum staffing requirements and have had good track records can introduce these factors to the court in a determination of the amount of an award of attorneys' fees.

Factors to be considered in mitigation include content of a nursing home's state surveys, staffing levels, and record of reports of abuse or neglect during the time of the stay of the resident and one year prior

The court can also consider the timing and amount of settlement offers and whether a defendant demanded presuit mediation

In Florida, if a nursing home resident prevails in a case where death or injury was caused by a violation of his or her rights, the courts will award an attorneys fee in addition to the damages as determined by the jury This law has been on the books since 1980 and other states have this provision as well The purpose of this law is to ensure that the rights of the resident are enforceable by the resident or his or her representative Laws allowing for an award of attorneys fees are found in many consumer protection statutes around the country and are often referred to as "mini attorney general" laws, i e., people are allowed to enforce the rights provided them by law

The award of attorneys fees in Florida needs to stay on the books so that all of the rights guaranteed to Florida nursing home residents can be enforced, such as the rights to privacy, uncensored communications, safekeeping of funds, etc. A right without a remedy is meaningless.

The award of attorneys fees in cases where a residents' rights have been violated allow residents to enforce their rights and improve their quality of life Allowing nursing homes to introduce compliance with staffing requirements and state surveys provides additional incentives for nursing homes to comply with the law and provide quality care to residents Nursing homes with good records will be treated differently by the court than nursing homes with bad records.

E. Quality of Care and Resident Safety/Report Cards

1. Quality of Care Coordinator

A "Quality of Care" Coordinator would be assigned to each facility to develop a systematic review of accidents, injuries, and alleged violations of residents' rights

The Quality of Care Coordinator would be responsible for identification of causes and the implementation of policies to reduce the occurrence of these

events. This is similar to the functions of risk managers (which currently are not required in a nursing home setting) except that the emphasis is on patient safety and the preventive measures, not on how to defend against lawsuits

2. Injury Prevention Training

- Nursing home staff would be required to attend 5 hours of safety and risk prevention classes each year.

3. Incident Reports and Report Cards for Consumers

Violations of residents' rights and incidents where severe injury of death has occurred would be reported to the Agency for inspection Annual report cards for each long-term care facility containing the number of violations and incidents in each category would be made available to the public Consumers could compare the number and type of incidents in each nursing home and the number and type of residents' rights violations cases filed and make informed decisions about where to place their loved ones Failure to make reports as required would constitute a misdemeanor.

F. Streng[illegible] Residents' Bill of Rights

Amend the Residents Bill of Rights to:

Allow voluntary camera surveillance of residents.
State that a long-term care facility may not require nor permit a resident to waive their rights to trial by jury, including arbitration requirements in resident contracts.
Require that residents have the right to know whether a nursing home has liability insurance (would require posting of a notice)

G Statute of Limitations

- State specifically that the applicable statute of limitations is s. 95.11(3)(f). (4 years)

All of these proposals would apply to nursing homes and assisted living facilities.

Task Force on Availability and Affordability of Long Term Care Report Comments

✓ **Page 1** – Paragraph #3

Do these statistics include Medicare expenditures for home health care? If they do not, I believe they should. Medicare spending for home health has increased dramatically since 1983 and is an important source of funding for long term care services.

✓ **Page 11** – Add numbers 6 and 7 to Task Force Principles

6 State and federal funding for long term care services should cover a reasonable cost of care and should be adjusted annually to cover increases in salaries, insurance and other costs of doing business

7 All regulatory mandates intended to improve long-term care should be funded.

Although these two recommendations are not included as principles, they were raised many times as major considerations by several task force members

✓ **Page 13** – Limiting Costly Litigation, bullet 4 (Caps on Claims)

The bullet incorrectly states that caps do not apply if the claimant refuses to arbitrate. Elsewhere in the report, damages are capped when the claimant refuses arbitration. Without caps, insurers will not be able to estimate their losses -- the main reason they are no longer willing to insure long term care providers in Florida. For medical malpractice, if a claimant refuses to enter into arbitration, compensatory damages are capped, and the claimant is not entitled to punitive damages Without caps on damages, the liability insurance problem will not be solved

✓ **Page 13** – Limiting Costly Litigation, last bullet (Death of Resident)

The recommendation allows a claimant to collect compensatory damages based on the pain and suffering of a nursing home or assisted living facility (ALF) resident and the claimant's pain and suffering -- in effect a double dip Under medical malpractice, pain and suffering is based on the patient's pain and suffering To prevent double dipping, the claimant should be required to choose one or the other, but not both

✓ **Page 14** – What is Known About Choice, bullet 3

ADD: The reason for the discrepancy is that nursing home care is an entitlement under Medicaid If a person applies and qualifies for Medicaid and a bed is available, they must receive the service The same is not true for Medicaid coverage of assisted living or community based care. The number of individuals who receive a service is limited by funding. If a person qualifies for the waiver but all slots are filled, he/she is put on a waiting list.

- ✓ **Page 34 –** Reimbursement

ADD: #7

7. Amend the law to provide for an annual cost of living adjustment in the ALF Medicaid waiver to ensure that reimbursement keeps pace with the cost of care.

- ✓ **Page 35 –** What Is Known About Litigation, bullet 9

I agree that there is no relationship between quality and lawsuits. FAHA compared survey data available from AHCA on its own members to that of non-members FAHA members out performed non-members in quality of care, quality of life and administration, had higher staffing ratios, and spent on average $18 more per patient day than non-members Nonetheless, 67 percent had one or more resident rights' claims brought within the past three years compared to 83 percent for non-members The high quality of care and enriched staffing did not insulate FAHA members from resident rights' lawsuits They are just as vulnerable to lawsuits as other nursing homes in Florida

To me, this is the most critical statement of the whole report It confirms FAHA's findings and underlines the seriousness of the current crisis Even with the recognition that OSCAR data varies from state to state, and similarly from Florida geographic area to geographic area, FAHA analyses could not find any statistical relationships between a Quality index based on OSCAR data, and frequency or occurrence of litigation The issue here is that in some cases (and I emphasize "only some cases") litigation is the result of not bad care, but rather accidents that were not preventable. Under the current law, these unfortunate circumstances can and do develop into a claims. Clearly, only a change in law that allows for "accidents" to occur, while it still permits residents (or family, etc) to file a claim when negligence has occurred, is the only reasonable solution

- ✓ **Page 36 –** Litigation Recommendations, #1

Removing the insurance criteria for ALFs will not help facilities financed with bonds. Liability insurance is required as part of the bond covenant Without insurance, an ALF that is funded with bonds will be in default and as a result could suffer serious consequences, including a higher interest rate

- ✓ **Page 37-38 –** Arbitration, (f) on page 38

As I understand arbitration as it applies to medical malpractice cases, punitive damages may not be awarded if there is <u>an offer</u> of arbitration by the defendant even if the claimant rejects it To do otherwise greatly reduces the incentive to arbitrate Recommendation (f) is limited to situations where "the parties agree to arbitrate " It should apply to instances where arbitration is <u>offered</u> by the defendant

✓ **Page 38 –** Standard of Recovery (b)

A claimant should have to prove that an alleged "violation of a resident's right" was due to negligence The allegation of a violation of a resident's right by itself should not be proof of negligence For example, a family member may enter a bedroom and find a resident exposed. A number of reasons beyond the control of facility staff could have contributed to the exposure to an alleged violation of the resident's right to dignity. A facility should not be legally responsible for the exposure that occurred if it was not due to negligence

✓ **Page 39**

The following recommendation of the Florida Life Care Residents Association should be included.

- Allocate a portion of punitive damages from nursing home lawsuits into a newly created Quality of Care Trust Fund administered by the state to provide funds for increased staffing (or for other purposes that improve access to high quality long term care services). I recognize that the amount of funds generated from punitive damages may not be a lot However, to the extent possible, punitive damages should be used to serve a public purpose and not to enrich a family member. Compensatory damages are intended to compensate the claimant for pain and suffering Punitive damages are intended to punish the defendant and should be used to improve care.

✓ **Page 41 –** First Q & A

According to trial lawyers with whom I spoke, the 25 percent and 15 percent are for add-on attorney fees, above and beyond a percentage of the award that is agreed upon as a contingency fee. The percentages for contingency fees are set by rules of the Florida Bar Assuming this is correct, the plaintiff's attorney could receive a percent of the award as a contingency fee plus up to 25 or 15 percent as an add-on fee You may want to verify if this is correct.

✓ **Page 42 –** Second Q & A

It still isn't clear from the answer to the question if insurance companies will cover the higher aggregate compensatory cap of $750,000 If they won't, this could hurt non-profit providers I only know of one case against a non-profit nursing home that went to court If the higher aggregate compensatory cap may be awarded through arbitration, but is treated as if it were a punitive damage award by insurance companies, nursing homes would be forced to pay the damages out of pocket Punitive damages are not covered by insurance. Many more nursing homes than the one percent that now go to court could potentially be hit with the higher compensatory cap than are now subject to punitive damages as a result of a trial If this is the case, perhaps the second tier cap should be eliminated and some other way of addressing punitive damages for the most egregious cases, i e , criminal acts, should be considered

Informational Report of the Task Force on Availability and Affordability of Long-Term Care for the Florida Legislature in Response to House Bill 1993

Volume 2: Research

The Task Force voted 12-4 (3 absent) on February 5, 2001 to accept this report, with areas of disagreement and agreement thoroughly documented. Conclusions and options were not voted on by the Task Force.

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VIII. Task #4
Liability and Long-Term Care Viability[1]

> HB 1993 (h) The effect of lawsuits against nursing homes and long-term care facilities on the cost of nursing home care and on the financial stability of the nursing home industry in the state (i) The kinds of incidents that lead to the filing of lawsuits and the extent to which frivolous lawsuits are filed (j) The cost of liability insurance coverage for long-term-care providers and the extent to which such costs affect the affordability of care
> (k) The availability of liability insurance coverage for long-term-care providers through Florida insurance companies

This report will address the issues surrounding liability and long-term care facility viability Specifically, we will describe the nature and extent of lawsuits brought against nursing homes (and to a lesser degree, assisted living facilities) and then the impact this has on the cost of and access to liability insurance for nursing homes and assisted living facilities

First, we will report on a series of analyses conducted using data from 1) a 10 year retrospective study of lawsuits brought against nursing homes under Chapter 400 023 (Civil Enforcement) of the Florida Statutes in one Circuit Court, 2) a dataset that links the lawsuit database with the Health Care Financing Administration's On-line Survey, Certification and Reporting (OSCAR) database for a time series analysis of the relationship between case-mix and quality measures and lawsuit frequency, 3) a statewide dataset of all jury-tried nursing home cases for a 10-year period, 4) a subset of the lawsuit database that includes settlement costs, 5) a 4-year retrospective study of lawsuits brought against assisted living facilities, and 6) a convenience sample of nursing homes regarding their experience with medical record requests

In addition to statistical analysis, the findings are triangulated with data from key informant interviews Individuals consulted for this study include nursing home litigation plaintiff and defense attorneys, a circuit court judge, nursing home corporate office risk managers and operations directors, assisted living multi-facility companies, liability insurance brokers, the Florida Department of Insurance and the Agency for Health Care Administration (AHCA), geriatric medical practitioners, and long-term care trade associations [2]

Second, we will report on a series of analyses that are based on data collected by other sources regarding the cost of and access to liability insurance Data sources include 1) the Department of Insurance, 2) Aon Actuarial Services for comparisons of Florida and the U S of liability claims, and 3) AHCA's report on the cost of liability insurance for nursing homes and the extent to which it is covered by Medicaid reimbursement

Finally, we will identify policy implications and suggest a framework for addressing long-term care facility liability issues

---

[1] This section was prepared by Mary Oakley, M.A., Florida Policy Exchange Center on Aging, University of South Florida and Christopher E Johnson, Ph D , University of Florida

[2] The statement " high occupancy rates could discourage efforts to reduce costs or improve quality" seem to be contradicting the recommendation to increase occupancy levels through CON control (Grofic –374)

Research Methods

Information on the number of lawsuits filed against nursing homes in Florida is not available on a statewide basis It was learned through inquiries with the Florida Bar and the State Supreme Court in the earliest phase of this study that statistics on liability cases filed in Florida are collected, but nursing home lawsuits are not distinguishable from all other liability cases. This fact, coupled with the time constraints for conducting the research, made it necessary to limit the scope of the study to a regional sample.

Circuit Court Litigation Study[1]

The Circuit Court in Hillsborough County, Florida was selected as the litigation study site after a systematic assessment was done of the public access record keeping systems in Florida's 20 circuit courts Contact with the Clerk of Court's office in each circuit was necessary because there are no uniform standards imposed on Florida's court system regarding public access data, and the particulars of any circuit's case coding and record keeping system are not known at the state level. The objective of this assessment was to determine which circuit court had a comprehensive automated court docketing system that would enable us to quickly search for and identify all Chapter 400 lawsuits brought against area nursing homes from 1990 to date It was determined that Hillsborough County's public access system, which had been identified by public information officials at the state level as likely to be one of the most complete and sophisticated systems in Florida, was most suitable for this study. It had the added convenience of being in close proximity to the University of South Florida, which made it feasible for staff to collect the data with low travel costs Further, Hillsborough County has 31 nursing homes and was known to have had a high level of nursing home litigation activity. These factors were likely to produce a sufficient number of lawsuits for statistical analyses.

Representativeness Selected mainly for practical reasons, the county nonetheless holds up quite well in tests of representativeness. Appendix 1 provides demographic and long-term care statistics for Florida's 67 counties and shows that Hillsborough is comparable to the state average on a number of variables related to access to long-term care options (e.g., the ratio of nursing home and assisted living beds and allocations for home and community based alternatives) Six of the 31 homes operating at present in Hillsborough are not-for-profit (19 3%) which is not significantly different from the state where 21% of nursing homes are not-for-profit.

Hillsborough is largely an urbanized county and is known to be a region of Florida that has had much litigation activity Therefore, *it should not be assumed without verification* that the number of lawsuits filed or the percentage of the homes sued is representative of the litigation experience of nursing homes in all regions of Florida

Data reported for the Hillsborough County study regarding the nature, rather than the number, of nursing home lawsuits is more likely generalizable Key informants support the assumption that most causes of action under Chapter 400 area fairly standard, although details of individual cases will differ

---

[1] I want to join the request of Victoria Fierro that members be furnished with the data compiled by the staff (Connor 10) Staff Response Any Task Force member may receive a free copy of the Hillsborough County Circuit Court Litigation Database (in Excel or SPSS) by signing a limited use agreement that asks only that you not distribute copies to others or publish analyses without permission from the University of South Florida This is standard copyright protection of intellectual property that is used for all data, regardless of whether it came from public data or was sponsored by public dollars. Others (outside the Task Force) may receive this database for the cost of reproduction/mailing and with a signed limited use agreement

Therefore, the descriptive statistics of the Hillsborough County lawsuits should offer the Task Force substantial insight into the nature of nursing home lawsuits in the State of Florida.

Procedures Two consecutive search procedures were conducted to identify resident care related lawsuits filed against Hillsborough County nursing homes from 1990 to date using the Circuit Court's automated public access records systems. The search was limited to the Circuit Civil database, which includes only lawsuits with damages greater than $15,000. Attorneys experienced with nursing home litigation provided assurance that few, if any, Chapter 400 lawsuits would be below the $15,000 circuit court threshold and thus missed in the search.

The first search procedure was completed in August 2000 using the official public documents records system. Lawsuits that have had any judicial action are recorded in this database and 266 nursing home lawsuits were identified in the initial search. A second search was completed on February 7, 2001 using Hillsborough County's Clerk's Recording Computer System (CRCS), 183 additional nursing home lawsuits were identified. The CRCS is a docketing system with a record of all lawsuits filed in the county, whether or not the case has had judicial action. Lawsuits are commonly registered on the CRCS the same day the complaint is filed. The CRCS can be accessed via courthouse terminals or on-line (if a user's account has been established).

Using the most current nursing home directory published on-line by Florida's Agency for Health Care Administration (AHCA), the name of each nursing home in current operation was entered as a database query to determine if the name appeared as a defendant in the database. The next step in the search procedure was to enter the names of all present owners of each nursing home in the county, based on the AHCA directory information. All court case identification numbers of the lawsuits discovered in the initial and subsequent search procedures were catalogued in a study "master list."

As the cases against a defendant were identified through a query, the court case filing documents were viewed on-line and compared with the nursing home name and the owner's name in the AHCA directory. Where additional defendant names were noted in the filing document, such as prior owners and former nursing home names, or where names differed even slightly from the AHCA directory listing, all new names, variations of known names, and standard abbreviations of names were each entered as a defendant query. This second stage in the search process (which research assistants Debbie Hedgecock and Debbi Gavin Dreschnack dubbed "threading") contributed substantially to the thoroughness of the lawsuit search and to our ability to reconstruct the histories of properties that had undergone name and ownership changes.

Once the initial lawsuit identification process was complete, the court case ID numbers were consecutively submitted in limited batches to the record room personnel to obtain a hard copy of each case file. Files were reviewed and specific information extracted to complete the detailed court case summary form that is included in Appendix 2. These forms were used in both paper and electronic versions for manual check off or computer lap-top entry in the courthouse record room. The data from the completed case summary forms were then compiled in a database at the University of Florida. Each nursing home lawsuit was assigned a building code that tied it to a property address. The unit of analysis was the nursing home property, or physical plant.

Circuit Court Database of Lawsuits and On-line Survey, Certification and Reporting (OSCAR) System (Linked Database)

The Hillsborough County Circuit Court study building codes were linked with the Health Care Financing Administration's On-line Survey, Certification and Reporting (OSCAR) system OSCAR is a database of survey deficiency and other structural variables related to nursing homes The dependant variable was the number of lawsuits experienced by each nursing home from 1996 through 1999 The 28 buildings that had been in continuous operation since at least 1996 through at least the end of 1999 were used in this analysis, excluding the newest properties as well as buildings that had closed before 1999 The pre-1996 litigation experience of the 28 facilities could not be used in the analysis because corresponding information from this earlier time frame was unavailable in the OSCAR dataset, which includes the last four annual nursing home surveys only

The purpose of the analysis was to test if resident case-mix variables and survey performance measures specified in an analytic model were statistically related to lawsuit frequency within the Hillsborough County nursing home sample

The independent, or possible predictor variables used in the model included structural, case-mix and quality, and survey citations *Structural variables* included number of licensed beds, not-for-profit or for-profit ownership *Resident case-mix and quality variables* ratio of residents with dependencies in eating; ratio of bedfast + chairfast residents, ratio of incontinent residents, ratio of residents with feeding tubes, ratio of residents with dementia, ratio of residents receiving rehabilitative services; ratio of Medicaid residents; ratio of residents with contractures; ratio of residents with in-house acquired pressure sores; and ratio of residents with unplanned weight loss All ratios were calculated using the total number of residents in the nursing home as the denominator. *Survey citation variables* included total number of survey deficiencies (all F-tags cited), citation for insufficient number of staff (F-353), citation for high rate of medication errors

Jury-Verdicts Database

Information on nursing home cases that have gone to trial is available and readily accessible though the *Florida Jury Verdict Reporter* and on-line legal databases such as Westlaw, and this report includes an account of all reported nursing home lawsuits that have gone to trial in Florida from 1990 through June 2000. This represents less than 2% of all Chapter 400 cases against nursing homes, as 98% or more of the cases are settled out of court

Settlement Costs

The Hillsborough County lawsuits study provided us with some insight into actual settlement costs, based on information found in 35 case files. Settlement details are rarely disclosed in public documents, and it is uncertain whether disclosure in these 35 cases can be solely attributed to random events, such as a clerical oversight Accordingly, these cases and settlements are not necessarily representative of all Chapter 400 lawsuits and settlements in Hillsborough County

Data Description

Lawsuits

A total of 449 resident care related lawsuits filed against nursing homes in Hillsborough County Circuit Court from 1990 through February 7, 2001 were identified in the two consecutive search

procedures (A total of 438 Chapter 400 lawsuits were filed during the decade of 1990 through 2000, with 11 cases added from January 1, 2001 and February 7, 2001.) The count of 449 lawsuits includes 20 cases that named two separate Hillsborough County nursing homes as defendants in the suit (each dual defendant case was counted as one lawsuit against each nursing home defendant) The count of 449 does not include cases identified that were screened out after a review of the court file revealed the case was not applicable to the study, such as contract disputes, worker's compensation claims, and visitor slip and fall suits. At least 103 of the 449 lawsuits are open cases and the rest had been resolved, generally through out of court settlements (98% or more) or through jury trial

Although a thorough and systematic effort was made to identify all suits brought against area homes, the study's lawsuit net is most likely an undercount Cases would be missed if defendant names were recorded in the docketing system by court personnel using unconventional abbreviations or if misspelled Also, some prior owners and prior names of existing properties may have been missed in our defendant queries because the complete ten-year ownership and name change histories of all properties were not available to us. These gaps in the histories are mainly pre-1995, when nursing home litigation was less prevalent than post-1995 Finally, the study may have missed altogether the litigation experience of any property unknown to us that had permanently closed before 1995 (as the property would not be listed in available directories)

Nursing Homes

The search process worked backward in time to identify all lawsuits brought against Hillsborough County nursing homes since 1990, beginning with inquiries about the 31 properties in current operation A total of 35 nursing homes were identified, which includes four properties that have closed but had an operating and litigation history in the county throughout much of the past decade Two other buildings in the study sample of 35 are newly constructed and have opened since 1998

The litigation history of each nursing home in the sample reflects not only suits brought against present owners and operators, but also against prior owners and operators of the property, where applicable As mentioned in the Research Methods section, each lawsuit was assigned a building code that tied it to a physical plant address All suits filed against a property were applied to that property whether it had one or more owners through its operating history (i e. different defendants or organizations named in the suits).

It was not possible to obtain reliable accounts for all Hillsborough County nursing home ownership changes that occurred prior to 1996 AHCA's records, based on HCFA's change of ownership (CHOW) files with the Agency's updates, are accurate and complete regarding activity from 1996 to date, but are less consistent for prior periods Information about pre-1996 histories was gathered from a variety of additional sources, including AHCA certificate of need reports, phone calls to AHCA's area office, and the Hillsborough County court documents The histories of most properties were sufficiently traced in this way, but gaps remain in some histories.

The Hillsborough County study sample includes free-standing nursing homes owned by for-profit multi-facility (national) corporations and smaller for-profit chains or independents At this time six of the nursing homes are owned by not-for-profit organizations, and three of these facilities are located on continuing care retirement community campuses The sample does not include hospital-based skilled nursing units

Results

Distribution of Nursing Home Lawsuits

Table 1 displays trend data of the number of lawsuits filed each year in Hillsborough County and the distribution of the suits across the nursing homes (the number of properties that had one or more lawsuits filed against it each year) Only in 1990 did the number of filed lawsuits match the number of homes sued, six homes each had one suit filed against it In subsequent years, one or more homes had two or more lawsuits filed against it

Table 1
Chapter 400 Lawsuits Against Hillsborough County Nursing Homes, 1990 - 2000

Year of lawsuit filing	**1990**	**1991**	**1992**	**1993**	**1994**	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**
Number of lawsuits filed during the year	6	6	19	18	10	27	34	56	98	100	64
Percentage of total lawsuits filed from 1990 - 2000 (N=438)	1 4	1 4	4 3	4 1	2 3	6 2	7 7	12 8	22 4	22 8	14 6
Number of nursing homes with one or more lawsuits filed that year	6	4	11	13	8	13	17	18	28	26	22

Multiple filings against individual nursing homes became pronounced in 1997 when 56 lawsuits were filed against 18 different buildings One nursing home experienced 11 suits filed against it in 1997, for instance, including eight separate suits filed in one batch as evidenced by the consecutive identification numbers assigned to these cases by the court. The next year, 1998, 22 nursing homes had more than one lawsuit including two buildings that each had ten

1998 and 1999 were the peak years of the decade for lawsuit filing in Hillsborough County. 87% of the nursing homes in operation at the time were sued in both of these years One hundred lawsuits were filed against 26 nursing homes in 1999 and 98 Chapter 400 suits were filed against 28 homes in 1998 Forty-five percent of the 438 nursing home lawsuits identified for the ten-year period (1990-2000) were filed within just the two-year period of 1998 and 1999

There was a decline, relative to 1998 and 1999, in the frequency of lawsuits filed in 2000, although filings remained at a high level Seventy-one percent of the nursing homes were sued in 2000, when 64 suits were filed against 22 nursing homes Not shown in the tables is the lawsuit activity in early 2001 By February 7, the day our second search procedure concluded, eleven suits had been filed in 2001 against nine nursing homes in the county For the sake of perspective, these filings within the first 38 days of 2001 have exceeded by one the number of lawsuits filed throughout 1994 (see Table 2) It is difficult to predict how many cases will be filed by the end of 2001, but it was noted that the very first complaint filed in Hillsborough County Circuit Court this year, issued record number 2001-000001, was a Chapter 400 nursing home lawsuit

Table 2 shows the percentage of nursing homes that had one or more cases filed against it each year, from 1995 through 2000 Table 2 focuses on the last five years of the decade, as over eighty percent of all lawsuits identified in the ten-year period have been filed since January 1, 1995 (Percentages given in Table 2 are based on the total number of nursing homes that were in operation *throughout* the year, per counts shown)

Table 2
Percentage of Hillsborough County Nursing Homes with Lawsuits 1995 - 2000

Year	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**
Nursing Homes (N)	32	32	32	32	30	31
Percentage of homes with one or more suits	40.6	53 1	56 2	87 5	86 6	71 0

From 1990 through 1995, less than half of the nursing homes operating in the county had experienced a resident care-related lawsuit By the end of 1996, 53% of the facilities had one or more lawsuits At the close of 1998, the percentage of homes sued had risen to 87% and held at that level through 1999

Table 3 provides detail on the cumulative number of lawsuits the 35 facilities in the full study sample experienced from 1990 through February 7, 2001 This includes nursing homes that have closed before the end of the decade as well as homes that have recently opened. In fact, one of the two homes that, to the best of our knowledge, have not been sued is a newly constructed 45-bed facility that opened in late 1999 Thus only *one* nursing home that has been in operation through much of the study period has experienced no resident care related lawsuits to date The rest of the homes, 33, have had Chapter 400 lawsuits This established suit-free nursing home is not a typical free-standing facility, it is part of a Continuing Care Retirement Community with only a portion of its beds potentially open to the public Twenty of its 60 beds are "sheltered" and reserved for the member/residents of the private, not-for-profit retirement community

Table 3
Cumulative Distribution of Chapter 400 Lawsuits (1990 - 2/7/2001)
Against Hillsborough County Nursing Homes (N=35)

Cumulative lawsuits 1/1/1990-2/7/2001	0	1-5	6-10	11-16	17-29	33-35
Nursing homes (N=35)	2	6	10	7	8	2
Percentage of all homes in sample	5 7	17 1	28 6	20 0	22 8	5 7

Summary
The average number of lawsuits per nursing home is 13
Half of the nursing homes in the sample had 10 or fewer lawsuits, half had 11 to 35

33 of the 35 nursing homes in the sample, 94%, have been sued at least once The cumulative number of Chapter 400 lawsuits individual nursing homes received ranges past 30 Summary statistics reported in Table 3 show that half of the nursing homes had 10 or fewer suits, half had 11 to 35 Seven of the homes have had more than 20 lawsuits, including one property that permanently closed in December 1998 Overall, the average number of suits per nursing home in the sample was 13

Three of the four not-for-profit nursing homes that have been in continuous operation in the county during the study period have experienced one or more Chapter 400 lawsuits Additionally, two former for-profit homes (that had a litigation history as for-profits) have very recently come under not-for-profit ownership

Nature of the Lawsuits

The descriptive statistics reported in this section for Tables 4 through 6 regarding the nature of the lawsuits are based on a subset of the 449 lawsuits identified in this study Case summaries were completed and an analysis was conducted of the lawsuits identified in the initial search procedure completed in August 2000 A maximum of 253 lawsuits (or 266 cases, as 13 suits had dual nursing home defendants) were available for this analysis. The number of cases that could be used in each profile is reported in Tables 4-6, and varies according to the information available in court files for the variables considered

Resident's Length of Stay The majority of lawsuits were brought by or on behalf of individuals who had been discharged from the home, including decedents, instead of by current nursing home residents Table 4 displays the length of stay (LOS) of the plaintiffs in 213 cases (LOS could not be determined from the case files for 40 suits) Continuing-stay residents are included among the 213 cases and the LOS recorded for these plaintiffs is elapsed time from date of admission to the date of lawsuit filing.

Table 4
Profile of Chapter 400 Lawsuits Plaintiff Information

	Number	Percentage
Resident's Length of Stay:	N=213	**100%**
Less than 30 days	28	13 1
Between 1 and 3 months	39	18 3
3 to 6 months	30	14 1
Between 6 months and 1 year	29	13 6
1 to 3 years	49	23 0
More than 3 years	38	17 8
Bringing Suit on Resident's Behalf:	**N=219**	**100%**
Resident alone [1]	25	11 4
Son or daughter	65	29 7
Spouse	22	10 0
Other relative	8	3 6
Cannot determine relationship	59	26 9
Legal guardian, not relative	40	18 3

[1] Resident brought suit on his or her own behalf, with an attorney but no personal representative

A substantial proportion of the plaintiffs had a short-term stay in the nursing home · 31% stayed 90 days or fewer, including 13% who stayed fewer than 30 days In five cases (2 3%) the length of stay was less than one week Approaching half (45 5%) of all plaintiffs had nursing home stays lasting no longer than six months Fifty-nine percent stayed one year or less. Of the 41% with stays exceeding one year, more stays were in the 1 – 3 year range (23%) than in the three years plus range (18%) Lawsuits were filed by or on behalf of very long stay residents, with LOS from 5 – 15+ years, in 18 cases

The median length of stay in Florida's collective nursing homes has been declining for more than a decade, corresponding with the steady rise in the number of short-term rehabilitative stays Half of all nursing home admissions in 1997 stayed only 28 days or fewer, and 81% of all admitted to a nursing home in Florida in 1996 were discharged within 90 days, according to nursing home resident profile reports published by AHCA The high representation of short-term residents within the sample of plaintiffs reflects the high rates of short-term nursing home utilization in the state as a whole

Plaintiff Personal Representatives Personal representatives filed suit with or on behalf of nursing home residents and former residents in 88 6% of the cases In at least 43 4% of the suits, personal representatives were family members and most often sons and daughters (29 7%), followed by spouses (10%) and other relatives (3 6%), such as the resident's niece Additionally, in 25 of the 59 lawsuits where the personal representative's relationship to the resident could not be determined from cases files but the representative and the resident had the same last name and could reasonably be assumed to be personally related to the resident, raising the total proportion of family members to 54 7% -- over half of the cases

A legal guardian not related to the resident was the personal representative in 18 2% of the cases. And there was no representative in 11 2% of the cases the resident brought suit on his or her own, with an attorney The plaintiffs who acted alone were most often continuing-stay nursing home residents

Plaintiff Attorneys A total of 50 different law firms or practices representing plaintiffs contributed to the filing of the 253 lawsuits in the Hillsborough County sample Six law firms filed five or more suits each, totaling 73 5% of all suits, including one firm that filed 52 5% of the suits Twenty-six percent of the suits were filed by 44 other law firms that brought four or fewer lawsuits each

Case Type and Processing As shown in Table 5, more than half of the Chapter 400 complaints (56 3%) have an allegation in addition to the violation or infringement of residents rights More than one-third of the cases (36 6%) are brought for wrongful death, including 30% where wrongful death is coupled with the allegation of negligent survival Negligent survival is noted without wrongful death in 19 7% of the cases and 49 7% overall (when cases with the dual allegations of wrongful death and negligent survival are factored in) Chapter 400 cases without allegations of wrongful death or negligent survival constitute 43.6% of the lawsuits.

Allegations other than wrongful death or negligent survival are infrequently added to Chapter 400 lawsuits Other specific allegations include breach of fiduciary duty (5%), vicarious liability or misleading advertising claims (1 6% each), as well as "other" (13%), which includes descriptions of general negligence but not specified as "negligent survival "

Table 5
Hillsborough County Chapter 400 Case Type and Processing Information

Type of Case (N=243)	Number	Percentage
Residents Rights (alone)	106	43 6
Residents Rights AND		
Wrongful death with negligent survival	*73*	
Wrongful death without negligent survival	*16*	
Total wrongful death cases	89	36 6
Negligent Survival without wrongful death	48	19 8
Time From Resident Discharge to Lawsuit Filing (N=187)	**N/A**	**Cumulative Percent**
Within 6 months		11 2
Within 12 months		44 9
Within 18 months		70.1
Within 2 years		88 8
Within 2 1/2 years		94 7
Within 4 years		100%
Time From Lawsuit Open to Close (N=221)		
Within 6 months		9 0
Within 12 months		33 5
Within 18 months		67 9
Within 2 years		85 5
Within 2 1/2 years		91 9
Within 3 1/2 years		99 1
Within 3 3/4 years		100%
Plaintiff Attorney fees and costs (N=217)	**Number**	**Percentage**
Subtracted from settlement	147	67 7
Paid by defendant in addition to settlement	70	32 3

Time From Resident Discharge to Lawsuit Filing The vast majority of Chapter 400 cases (for which discharge date is known) were filed within two years of resident discharge (88.8%), as shown in Table 5 Close to half of all cases (44 9%) were brought within one year of resident discharge. Although the statute of limitations extends to a maximum of four years for cases that can be brought under Chapter 400, 94 7% of the cases were filed within 2 ½ years

Lawsuit Processing Time Open to Close The court appears to be responsive to the need to process Chapter 400 cases relatively quickly, considering the advanced age and failing health common among plaintiffs As shown in Table 5, the majority of closed cases (67 9%) were resolved (generally through out-of-court settlement) within 18 months, including one third that closed within 12 months of filing The litigation process took longer than two years in 14 5% of the cases, and all cases were closed within 3 ¾ years of filing

Plaintiff Attorney Fees and Costs. The prevailing party, either plaintiff or defendant, is entitled to recover legal fees per Chapter 400.023 (civil enforcement). The majority of case files, 67 7%, included a documented stipulation that both parties would bear their own costs, per mutual agreement. In these cases it is likely that plaintiff attorney fees and costs were subtracted from the settlement paid by the defendant

In the 32 2% of case files where this document was not found, it is likely that plaintiff attorney fees and costs were paid by the defendant as a separate element of damages [1]

Summary of the Allegations

Many Chapter 400 complaints include a complete listing of all residents rights specified in F S. 400 022, including the right to receive uncensored mail, participate in religious activities, and to be treated courteously, fairly, and with the fullest measure of dignity (see Appendix 3) This listing of all of the residents rights was noted in about half of the cases, whereas other complaints contained a reference to the body of residents rights in 400 022 Still, the primary cause of action in virtually all Chapter 400 lawsuits is the infringement of the right to receive "adequate and appropriate health care" (Chapter 400.022 1 (l)) The infringement or violation of this specific right is clearly stated in the complaints in addition to the complete listing of, or reference to, the resident's rights under 400.022.

The language in the complaints would indicate that a secondary cause of action in many cases is an infringement of the right to privacy (400 022 1 (m)) and dignity (400 022 1 (n)) The phrase, "certain acts in violation of resident's privacy and dignity" is included in 45% of the complaints, but in very few cases are these acts specified in more detail in the complaint

[1] The study implies that the rules are the same for any "prevailing party " Chapter 400 provides that a prevailing defendant may be entitled to recover reasonable attorney's fees pursuant to s 57 105 which only allows recovery if "the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial· (a) Was not supported by the material facts necessary to establish the claim or defense; or (b) Would not be supported by the application of then-existing law to those material facts (Grofic --402)

Table 6
Profile of Chapter 400 Lawsuits Summary of Allegations (N=225)

Allegations of physical condition(s): Pressure sores, falls, dehydration or malnutrition/weight loss	**Number**	**Percentage**
Cases with two or more allegations		
Pressure sore(s) with dehydration and/or weight loss	42	18 7
Pressure sore(s) with fall(s)	32	14 2
Pressure sore(s), fall(s) and dehydration and/or weight loss	27	12 0
Fall(s) with dehydration And/or weight loss	18	8 0
Total cases with two or more allegations	119	52 9
Cases with single allegation		
Multiple falls (two or more)	27	12 0
Single fall with injury	24	10 7
Pressure sore(s) with no complication noted[1]	23	10 2
Pressure sore(s) with complications	12	5 3
Dehydration and/or weight loss	9	4 0
Other singular allegation suits[2]	11	4 9
Total cases with one allegation	106	47 1
Summary		
Total cases involving pressure sores (alone or with additional allegations)	136	60 4
Total cases involving falls (alone or with additional allegations)	128	56 8
Total cases involving both pressure sores and falls	59	26 2
Additional allegations (added to allegations of physical condition)	**Number**	**Percentage**
Complaint includes allegation of abuse or neglect		
Neglect (alone)	15	6 7
Abuse (alone)	26	11 5
Abuse and neglect (both)	15	6 7
Total cases citing abuse or neglect	56	24 9
Other allegations, in order of frequency		
Inadequate staff training or communication	148	65 8
"Certain acts in violation of resident's privacy or dignity"	101	44 9
Worsening of an existing condition	57	25 3
Inadequate number of staff	56	24 9
Failure to notify a physician	46	20 4
Failure to carry out a physician's order	26	11 5
Medication errors or mismanagement	17	7 5
Specifies less serious grievances, such as cold food or slow response to a call light	9	4 0
Failure to question physician's order that seems ill - advised	3	1 3

[1] Complication such as localized infection, septicemia, hospitalization, or amputation
[2] Includes "worsening of existing condition" (alone), aspiration or choking, and "burn like injuries "

The Hillsborough study sample includes 225 cases for which court files were obtainable (i e , not a lost record or one on loan to a judge) and sufficiently complete to include in an analysis of allegations (Twelve files from earlier years, for instance, were "destroyed" and contained only basic filing and case disposition information) A summary of the allegations included in the 225 Chapter 400 lawsuits is shown in Table 6

Pursuant to the complaint of an infringement of the right to adequate and appropriate health care, all Chapter 400 lawsuits contained allegations pertaining to the resident's physical condition. Specifically, 95% of the 225 cases involved one or more of the following conditions or incidents pressure sores, falls, dehydration and malnutrition or weight loss.

Multiple Allegations A slight majority (52 9%) of the cases included two or more of these fundamental allegations, 47 1% only one Among the cases with two or more allegations, as listed in Table 6 in order of prevalence, pressure sore(s) with dehydration and/or weight loss appeared in 18 7% of all complaints, pressure sores with falls(s) in 14 2%, pressure sore(s) with fall(s) and dehydration and/or weight loss in 12%, and falls with dehydration and/or weight loss in 8% of all cases

Single allegations Cases involving a singular fundamental allegation most often involved falls (22.7%), including multiple falls (12%) or a single fall with injury (10 7%) In 15 5% of the cases, pressure sores alone were cited in the complaint either with no medical complications mentioned (10.2%) or with complications (5 3%) such as localized infection, generalized infection, or amputation Dehydration and/or weight loss were cited as the only allegations in 4% of the cases. These two related conditions appear far more frequently in cases also involving pressure sores or falls, and they are commonly cited in tandem in complaints

Considering all suits in summary, with either single or multiple allegations, the most frequent allegation is the development of pressure sores or the worsening of a pressure sore that was present upon admission Just over 60% of all plaintiffs suffered from pressure sores A close second in terms of prevalence in complaints is the incidence of falls, with 56 8% of all suits citing either a single fall with injury or multiple falls (two or more) In more than one-fourth of all complaints (26 2%), both leading allegations appear pressure sores and falls

Abuse and neglect The specific allegations of resident abuse or neglect were included in a minority of Chapter 400 complaints. As shown in Table 6, resident abuse (alone) was specified in 11 5% of the suits, resident neglect (alone) in 6 7%, and the combined allegations of resident abuse and neglect were cited in 6 7% of the cases. Overall, one-fourth (24 9%) of the Chapter 400 cases included specific allegations of either abuse, or neglect, or both Charges of abuse or neglect were more likely to be included in cases that involved falls than in cases that did not

Although allegations of either abuse or neglect were limited to 24.9% of all Chapter 400 complaints, 57% of the nursing homes in the sample had at least one lawsuit filed against it that included an allegation of either abuse or neglect (20 facilities out of 35) Seven of the nursing homes with a lawsuit that included an allegation of abuse or neglect were among the relatively infrequently sued buildings that had accumulated a total of six or fewer lawsuits since 1990. The 13 buildings in the balance had accumulated seven to 27 lawsuits (per lawsuits netted in the initial search procedure)

Allegations of abuse imply the abuse of residents by staff, but in several cases the complaint clarified the abuse was perpetrated by other residents. The allegation of resident neglect appears in cases that also carry the allegation of negligent survival as well as in cases that do not

Other allegations Table 6 lists in order of frequency other allegations that were found in complaints in addition to the fundamental allegations of pressure sores, falls, and dehydration or malnutrition/weight loss. Inadequate staff training and communication is the most prevalent additional allegation, cited in 65.8% of all lawsuits The allegation that the nursing home has an inadequate number of staff is included in 24.9% of the cases, and is most frequently cited with the inadequate staff training and communication allegation

One fourth of the cases noted the worsening of an existing physical condition The nursing home's failure to notify a physician was added to the complaint in 20 4% of the cases, and failure to carry out a physician's order in 11 5% In three cases (1.5%) the complaint included mention that the nursing home should have questioned a physician's order that was apparently ill-advised

Only nine of the 225 cases (4%) included allegations such as cold food or slow response to a resident call light While experience informs us that nursing home residents often do have such grievances, these less serious matters rarely contributed to causes of action under Chapter 400

Frivolous Lawsuits One of the issues before the Task Force is to determine "the kinds of incidents that lead to the filing of lawsuits and the extent to which frivolous lawsuits are filed" We have found that the term frivolous is used with different intended meanings For example, long-term care providers will refer to a lawsuit involving a pressure sore as frivolous if the resident was at such high risk for pressure sore development due to underlying medical conditions that the sore was not preventable, in the provider's opinion, despite diligent efforts to avert it

Frivolous is not explicitly defined in Florida statutes The term has been defined in case law as "so clearly devoid of merit both on facts and law as to be completely untenable" (Allen v Estate of Dutton) The *Water's Dictionary of Florida Law* similarly defines frivolous as "readily recognizable as devoid of merit" It is also defined as "of little weight or importance, having no basis in law or fact, light, slight, sham, irrelevant, superficial"

The legal definitions of the term frivolous do not apply to the lawsuits that have been filed in Hillsborough County under Chapter 400 All of the complaints list one or more serious allegations pertaining to the resident's physical condition and cite the violation of the statutory right to adequate and appropriate health care as the cause of action These lawsuits are fundamentally about pressure sores, falls, dehydration, and malnutrition or weight loss among nursing home residents, and none of these conditions or incidents is a minor matter in this population, or any other

By the time a Chapter 400 lawsuit is filed there is also generally no question as to whether the resident's condition or injury, in fact, exists. Plaintiff attorneys have access to medical records in preparation for a lawsuit and have invariably substantiated the resident does indeed have a pressure sore, a fractured hip, or has lost weight before a lawsuit is officially filed in court. The valid question that does remain in the face of the material facts is whether the resident's condition or injury occurred due to a failing on the part of the nursing home to provide "adequate and appropriate health care."[1]

Potential nursing home lawsuits in the form of written requests for medical records sent to nursing homes by plaintiff attorneys are quite often considered by the recipients to be "lawsuits," although they are not These requests may sometimes probe into matters that prove to be frivolous, as all record requests do not evolve into lawsuits If a Chapter 400 case has been filed in circuit court, however, it is most unlikely to be a frivolous lawsuit, per the legal definition of the term But to determine whether the lawsuits had merit, meaning the nursing home was at fault for the incident or injury, would be well beyond the scope of this study and nearly impossible to assess based on the public records of settled cases available in courthouse files.

[1] I concur with the observation regarding the "cause" of a resident's condition, and believe it is at the heart of the litigation crisis. (Grofic –404)

Medical record requests to a nursing home signal that lawyers are developing a case that may be used in a legal proceeding against the nursing home In general the following procedural steps take place when a medical record is requested [1]

Step 1) A form letter is received by the nursing home administrator from an attorney that requests the records about a specific resident that was a patient in the home This letter also includes authorization from the family of the resident to release the records to the law firm

Step 2) In nursing home chains, the record request is forwarded to corporate headquarters for review by the company's legal team This team consults with the administrator and determines whether or not the record has been correctly made. The form is then sent back to the administrator

Step 3) The administrator now must produce the records and send them to the appropriate law firm The actual copying of the paper records requires that three copies are made and this can take several hours depending on how long the patient was a resident in the home. This task is carried out by the medical records department, or an LPN or CNA may actually compile the records for copying

Step 4) After the copies are made, they are boxed and sent to the appropriate law firm

Research was conducted by the Florida Health Care Association in order to ascertain what the experience of nursing home members has been with medical record requests One area that was mentioned on the survey as being very problematic was step (1) Some facilities mentioned that it was difficult trying to ascertain who had authorization and who did not This was a non-scientific convenience sample, but it does provide some information about how these requests impact the home 79 facilities, for example, reported receiving seven to eight records requests from attorneys over the past year 24 facilities reported receiving 40 to 50 requests for medical records during the year Research that I [Chris Johnson] have conducted independent of the task force makes the 40 to 50 medical record request figure seem somewhat high, however, homes that are in litigious parts of the state will more than likely experience more requests than in other parts of the state Facilities responding to the FHCA survey indicated that record requests have doubled since two years ago and have tripled this past year

The impact of the record request is felt at the nursing home level due to the labor required to assemble the records for attorneys 50 of the 53 facilities that responded to the FHCA survey indicate that 30% to 45% of all of the records requests actually end up as lawsuits 53 facilities further indicated that eight to ten hours of labor time was required for these homes to process the request

After the medical record request process is complete, the attorneys will either pursue a case or not pursue legal action. If legal action is begun, the major effects at the home level are felt during the discovery phase The nursing home must then produce additional documents such as time cards and minutes from meetings that took place at the home during the time period in question The law firms will have experts review the medical records and they may ask for additional items to help their analysis Lawyers may take depositions, both the plaintiff and defense legal teams. These depositions can take an entire day to complete and remove the staff member from his or her daily responsibilities Some nursing home chains will send in paralegals to assist the home to prepare for the lawsuit

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[1] The discussion contains no reference to the fact that the individual or firm requesting the records is billed for the cost of copying The report leaves the impression that the facility must bear the entire cost of producing the records, which is simply not accurate The report should include information on what a facility typically bills for these records, and whether facilities produce these records in a timely manner (Freidin –405)

Costs associated with reproducing records during discovery and medical records requests periods were estimated at between $1,200-$1,500 Facilities also estimated that the costs associated with defending a single claim averaged between $25,000 - $35,000 These ranges cannot be empirically verified, but if correct they represent a rather large burden on the nursing homes Factoring lost time to react to various requests and depositions and the nursing home facility feels quite an impact from legal activity, even when no suit ever is filed against the home One important question that these issues raise is How much of these costs are reasonable costs associated with simply being in the nursing home business? That is both an empirical and health policy question that requires further analysis

Settlement Costs

Over 95% of nursing home lawsuits are settled out of court This does not differ from the rate of settlement before trial of all other types of liability cases in Florida (brought against various businesses and industries), according to the Florida Department of Insurance.

All but 16 cases were closed in the sample of 266 Hillsborough County lawsuits (identified in the initial search procedure) The files of nearly all closed cases included a document stating that a settlement had been reached Although the financial details of the settlement were disclosed in only 35 cases (see Appendix 5) and the rest of the settlements were sealed, it can be determined from documentation in most cases, and safely assumed for the rest, that the defendant paid

The joint stipulation that both parties will bear their own costs, found in 67 7% of the case files, is a key indicator the defendant paid a settlement to the plaintiff In the cases where the joint stipulation is absent from the files, it can generally be assumed the plaintiff attorney recovered fees and costs from the defendant on top of the settlement, per Chapter 400 023 If the plaintiff does not prevail, the defendant is entitled to recover legal defense costs from the plaintiff, per 400 023 For this reason it cannot be ruled out entirely that the defendant may have prevailed in some of the cases where the joint stipulation regarding legal fees was not found Through an interview with a very experienced nursing home litigation defense attorney, however, it was learned that the defendant almost invariably pays some amount in settlement

That the defendant nearly always pays a settlement to the plaintiff may say more about the context in which nursing home cases are litigated than it signifies an acceptance of blame by the nursing homes in all cases Defendants are reportedly under considerable pressure from their insurers to settle lawsuits as quickly as possible, even in the cases where the nursing home strongly believes it should not be held liable for resident injuries that have occurred Whether and when to settle lawsuits are business decisions insurance and nursing home companies make, and expenses are contained through early settlement Legal costs mount on both sides when cases are contested, greatly increasing the cost of the claim as time goes on An experienced defense attorney may successfully negotiate a reduced settlement for the nursing home that believes it has been wrongly accused. But if the reduction that can be won won't cover the costs of the legal defense, which can range from $100,000 - $200,000, it makes economic sense to simply pay the demand without paying for a fight [1,2]

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[1] The pressure that homes are under to settle early due to mounting attorney's fees and pressure from insurers underscores the need to adopt strong incentives to arbitrate claims early not only to benefit very aged residents who litigate, but to minimize costs that must be borne by the remaining patients residing at the facility . This is an accurate observation, and I believe that, for arbitration to be a successful alternative to litigation, a nursing home should not be made to admit liability as a condition of entering arbitration It will create an unnecessary barrier (Grofic -406).

[2] The assertion that insurers would rather settle than fight, even though they believe their insured has done nothing wrong is unfounded There is no study or other information to back up this statement I

Settlement negotiations are based on the predicted outcome of the case if it were brought to trial As the magnitude of jury verdicts in nursing home trials increases, so does the leverage the plaintiff attorneys have to win larger settlements A case involving a resident hip fracture due to a fall, for example, is likely to settle for more today than it would have typically settled for merely six months ago Settlements of $500,000 or more for Chapter 400 cases have now become quite common.

Additionally, attorney fees and costs are a consideration in settlement because the prevailing party would be entitled to recover legal fees as part of a judgment if the case went to trial. It is probable that the availability of add-on attorney's fees in Chapter 400 023 affects the overall settlement, whether or not these fees and costs are specified

The Hillsborough County lawsuits afford some insight into actual settlement costs, based on information found in 35 case files (see Appendix 4 table) Settlement details are rarely disclosed in public documents, and it is uncertain whether disclosure in these 35 cases (14%) can be solely attributed to random events, such as a clerical oversight Accordingly, these cases and settlements are not necessarily representative of all Chapter 400 cases and settlements in Hillsborough County

Settlement amounts reported for the 35 lawsuits total $12,580,084, an average of $359,431 per case The average settlement amount for the eighteen 1991-1995 cases is $311,393 and $410,294 for the seventeen 1996 – 1999 cases, a difference of $98,901 Settlements ranged from $10,000 to $ one million dollars.

Plaintiff attorney fees and costs were taken from the settlement amount (contingency), rather than paid by the defendant as an additional element of the settlement, in the majority of cases (30 out of 35) These charges were paid on top of settlements in three cases, and there is insufficient documentation in two cases to categorize

Sixteen different law firms overall represented the plaintiffs in this sample of 35 cases One firm represented the plaintiff in just over half of the cases, however

Plaintiff attorney fees and costs are detailed in 26 of the 35 cases files Attorney fees totaled $4,552,521, or $175,097 per case on average. (In three cases, costs were aggregated with the fees and thus counted as fees) Additionally, plaintiff attorney costs totaled $ 531,751 in the 21 cases where this detail was shown, averaging $24,464 per case. Attorney fees ranged from $25,000 to $400,000, and costs ranged from $1,204 to $90,234 per case.

The net to the plaintiff is generally the settlement amount minus attorney costs and fees and minus liens, if applicable Net amounts were specified in 22 case files a total of $4,713,803, or $214,254 average per case Plaintiff's net was paid to the resident's legal guardian, or guardianship, in 15 of the 22 cases, to the resident's estate or trust in four cases, and was not specified in three cases

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have been litigating these matters for over 20 years, and have not found insurers who have conducted business in this manner. I am certain Mr Connor and others have had the same experience in this regard (Freidin –407) Staff Response· the statement in the report is from the perspective of the provider, not the insurer, and is based primarily on discussions with providers (nursing homes) that have reluctantly agreed to settle even though they believe they had done all that could be done to prevent the outcome/cause of action and should therefore not be held liable

Medicare or Medicaid liens were paid from the settlement and reduced the plaintiff's net in at least 15 cases (for which this detail was provided). In three additional cases subtractions for liens other than for Medicaid or Medicare parts A or B were noted and ranged from $2,750 for "liens" to $82,015 for "Humana Health Care Plans " As shown in the appendix 4 table, Medicaid liens ranged from $282 to $38,272, totaling $62,816 collected from eleven settled lawsuits Medicare liens were paid from 12 lawsuit settlements, totaling $ 251,952

Multivariate Analysis Predictors of Nursing Home Litigation in Hillsborough County[1]

Using a linked database of the Circuit Court lawsuit database and four years of OSCAR data that addresses structural, process, and outcome data, we built a multivariate model that attempted to explain the quantity of lawsuits The model was run using a generalized least squares estimation of a cross-sectional time series The model was significant, per a chi square test Findings are displayed in Table 7 The co-efficient (or the z-score) is the relative contribution to the model for predicting lawsuits Only one co-efficient was significant (p= 00) and it was the structural variable of the number of beds. The ratio of residents who have feeding tubes approached significance (p= 06). No other structural, process, or quality measures were significantly associated with litigation experience

Table 7
Predictors of Nursing Home Litigation in Hillsborough County Florida

Variable (N = 28)	Coefficient	Std. error	z	Probability
Structural				
Beds	+0 01	0 00	+3 25	0 00**
Not for profit	+0 11	0 43	+0 25	0 80
Medicaid ratio	-0 26	0 92	-0.28	0 78
Case-Mix				
Incontinence ratio	+1 52	1 35	1 13	0 26
Eating dependency ratio	-0 55	1 26	-0 43	0 67
Bed/chairfast ratio	0 057	0.57	+1.00	0.32
Tube feeding ratio	+5 79	3 11	+1 87	0 06
Rehab patient ratio	+0 97	2 04	+0 48	0.63
Dementia ratio	+0 02	1 12	+0.02	0.98
Quality Measures/Deficiencies				
Medication errors	-0 02	0 07	-0.23	0 82
Cited for low staff	+0 26	0 41	+0.62	0.54
Total F-tag deficiencies	-0 01	0 03	-0.28	0 78
Acquired pressure sores ratio	+0 20	0 67	+0 29	0 77
Acquired contractures ratio	+5 32	5 85	+0 91	0 36
Unplanned weight loss ratio	+0 19	2 74	+0 07	0 94

** significant at the 0 01 level

A sensitivity analysis of the model was conducted by subsequently removing three variables (rehabilitative services ratio, dementia ratio, and tube-feeding ratio) The results remained the same.

Facility size was the variable significantly related to lawsuit frequency The size of the 28 nursing homes ranged from 42 to 266 beds, with a mean of 138 beds One obvious interpretation of size as a

[1] The definition of quality used by the Task Force staff in the Hillsborough County Civil Court Litigation study was too narrow in scope (Fierro – Freidin –416)

predictor is greater licensed capacity means higher probability of suits due to greater exposure to risk, the likelihood of a lawsuit is increased with each additional resident.

Another interpretation of the finding is there may be qualitative differences between large and small facilities that affect the likelihood of lawsuits Although we could not examine these variables in our analysis, small facilities may have lower staff turnover or the ability to offer a greater degree of individualized resident care than many larger facilities Smaller facilities may feel less institutionalized and impersonal Greater affiliation between residents and staff may not preclude a problematic resident outcome, but a sense of trust will reduce the likelihood of a litigious response when a problem occurs

Most notable among the many variables tested that were not associated with lawsuit frequency was pressure sore incidence (the percentage of residents with sores that developed after admission to the nursing home) It would be reasonable to expect facilities that are more successful in pressure sore prevention would also be more successful in preventing lawsuits, since 60% of the Chapter 400 cases involve pressure sores The relative incidence of pressure sores would seem to be a good indicator of care performance, as well.

It would also be reasonable to expect that homes with a greater number of survey deficiencies, presumably indicative a quality problems, would have more lawsuits because quality problems expose them to higher litigation risk, but this relationship was not found in the analysis It is open to debate, however, whether the number of survey deficiencies is a reliable indicator of quality, even though surveys were conducted by the same licensure and inspection office in this sample, which would control for regional variations in inspection practices

One interpretation of the lack of finding a connection between quality measures and lawsuit frequency is the decision to sue nursing homes may be based on some factors unrelated to the quality of care delivered in a facility. What goes into the decision to sue is an insight that would have undoubtedly contributed to the explanatory power of the predictive model, if the factors could be known, measured, and tested. Another interpretation is that the quality variables tested in this model were actually not good measures of quality despite their face value validity. Yet, if attorneys often base the decision to bring suit on the merits of the individual case alone, regardless of the performance record of the facility in which the incident occurred, then even reliable indicators of quality (or facility performance) would not be predictive of lawsuits

A limitation of the analytical model is there may be effects across time periods that we were unable to capture It could be that the number of lawsuits a facility experienced in the prior year has a bearing on the number of lawsuits that will be brought against it in the current year Homes that have been sued before may be more likely to be sued again, conversely, a trend of few or no lawsuits may continue Ideally, we would have included the number of lawsuits in the prior year as an independent variable in this analysis, but the four-year limitation of the OSCAR dataset did not allow us to run this variable with confidence in the model

This model also does not take into account effects that could be occurring simultaneously that may affect lawsuit frequency The untested hypothesis is that there is a relationship between the number of lawsuits, quality of care (including staffing characteristics and stability), facility financial viability, and the elements of an attorney's decision to sue a nursing home These are independent equations that should be estimated simultaneously, since each could potentially affect the other and they are all determined during the particular time period (year) This model could not be run as part of this analysis due to the limitation in the availability of data that can be used to estimate the equations

Assisted Living Facility Lawsuits

A search was also done in the Circuit Court database for lawsuits filed against assisted living facilities (ALFs) in Hillsborough County The names of the 125 ALFs in current operation were each entered as a defendant query, as well as the names of the current owners (per AHCA's ALF directory listing). There was no attempt made to search for lawsuits filed against previous owners of existing properties. A follow up search on the CRCS was not conducted for ALFs, which would have identified any recently filed lawsuits It is most likely that the number of ALF lawsuits identified is an undercount

The search identified a total of 16 resident care related lawsuits filed against nine different ALFs from 1990 through 1999 Of the nine facilities sued, 7 2% of the 125 ALFs in operation, six had only one lawsuit and three had accumulated either three or four Five of the nine facilities, over half, had an extended congregate care (ECC) or a limited nursing services (LNS) license in addition to a standard ALF license (Of the 125 ALFs in the county, 26 have an ECC license, 20 8%, and 16 have an LNS license, 12 8%) These suits were brought under Chapter 400 and generally involved allegations of the failure to provide adequate and appropriate health care

Jury-Trial Lawsuits

A total of 67 nursing home lawsuits that have gone to trial in Florida from 1990 through midyear 2000 were identified A summary of each of these cases, including synopsis and outcome, is provided in Appendix 5 Lawsuits from 20 different Florida counties have been tried, including five from Hillsborough representing just 1% of the 449 nursing home cases that were filed in that county More than a third (36%) of the tried cases had been filed in 1997 (15) and 1998 (9). The defendant prevailed in 19 4% of the trials Verdicts were for the plaintiff in 25 cases, for the defendant in 13, a settlement was reached before verdict in 28, and one case was dismissed by the court

Verdicts awarded to the plaintiffs ranged from $22,000 to $20 million dollars The average amount awarded in verdicts was $2,924,203, with a median award of $555,092 The total amount awarded in 25 verdicts was $73,105,069

The total amount plaintiffs received in the 28 tried cases that were settled before verdict was $15,625,500 Settlements ranged from $125,000 to $1 5 million The average settlement of $555,053 was 80% less than the average awarded by jury verdict The median settlement of $425,000 was $130,092 less than the median award by verdict

The total amount awarded to plaintiffs in Florida, by verdict and settlement, in the 67 nursing homes cases that have gone to trial is $88,730,569 (for the 53 case in which the plaintiff prevailed) If these 67 cases represent 2% of all nursing home lawsuits that have been filed since 1990, then an estimated 3,350 Chapter 400 lawsuits have been brought against nursing homes in Florida in the past ten years Experienced plaintiff and defense attorneys believe that 1% or less of the lawsuits go to trial, which would mean there have been more than 6,000 suits filed against nursing homes in Florida from 1990 to date.[1]

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[1] In Miami, I took exception to the "fuzzy math" used to calculate the number of lawsuits filed in Florida, since we do not know the number of lawsuits filed against long term care facilities in Florida since the enactment of the civil remedy in 1980, we should not speculate (Freidin –410) Staff Response Experienced attorneys report that less the 1% of lawsuits go to trial if 67 cases went to trial since 1990 Hard math would calculate 01x=67 so 67– 01=6,700

Nursing homes

The number of lawsuits filed against nursing homes in Hillsborough County rose dramatically through the 1990s, but the frequency fell off in 2000 Sixty-four Chapter 400 lawsuits were filed in the county in 2000 versus 100 in 1999 There is limited information available to determine whether or not a recent decline in lawsuit frequency has been experienced elsewhere in the state of Florida Key informants, including corporate risk managers, a prominent defense attorney, and nursing home association representatives have the clear impression that nursing home litigation has increased in the state as a whole since 1998, both in terms of the number of lawsuits filed and the severity of the suits (the dollar amount of the damages). The Florida Department of Insurance also concluded from its study that nursing home claims are growing both in frequency and severity [1]

AON Worldwide Actuarial Services released an updated analysis of claims data from national multi-facility nursing home corporations (Aon, 2001) The annual reported claims have increased from 12 9 per 1000 beds in 1995 to 28 per 1000 beds in 1999 [2] In addition, the loss costs increased from $10,000 per occupied bed in 1999 to $12,700 per occupied bed in 2000

A newspaper investigative reporter team in Central Florida has identified lawsuits filed in circuit court since 1995 against the current owners of all Orange County nursing homes. This team has found the number of lawsuits filed from 1998 through the fall of 2000 to be more than three times greater than the number of suits filed from 1995 through 1997

The Agency for Health Care Administration's survey of Florida nursing homes offered the best opportunity to collect data that would enable us to know what percentage of the nursing home industry had experienced one or more lawsuits in the past three years. Unfortunately, most facilities chose not to respond to the optional item about litigation that had been added to this questionnaire (AHCA's survey instrument is included in Appendix 6) Of the 123 for-profit and not-for-profit nursing homes that did answer this question, 70% reported the facility has had one or more resident care related lawsuits since January 1, 1997

[1] The information obtained by staff from the Hillsborough study clearly indicates a downward trend I have not reviewed any reliable information that would indicate a different result. For example, reference to the AON study on this issue may not be an accurate reflection of the current trend because the report may have under represented the experience of not for profit facilities Additionally, we have been given no information on the methodology used by the individual conducting the central Florida study We do not know the qualifications of the individual collecting or compiling this information Consequently, I submit that reference to other sources on the issue of whether lawsuits against long term care facilities are declining should be omitted (Freidin –411). Staff Response: The Department of Insurance found in its study that nursing home claims were increasing in both frequency and severity.

[2] The Aon Actuary who stated in Tallahassee that it was the frequency of claims that was of concern to the industry, and not the severity (Freidin –409) Staff Response The Aon actuary stated in her presentation to the task force that (lack of) predictability of losses was the issue (from the perspective of insurers) and that the large number of claims was *more* of the problem She did not state that claims severity was not a concern among insurers Other insurance experts interviewed consistently explain that it is both the frequency and the severity of claims that is of concern, and both factors contribute to the unpredictability of losses

The Department of Insurance surveyed all Florida continuing care retirement communities (CCRC) earlier this year and found that 52 of the 67 properties (77 6%) had one or more claims in 1999 and so far in 2000 Most CCRCs, which include nursing homes on the campuses, are not-for-profit

Assisted Living Facilities

From all reports, including claims data released in the Department of Insurance's liability study, there have been far fewer lawsuits filed against Florida assisted living facilities than nursing homes The total number of lawsuits is still relatively small, but the trend is an increase in both the frequency and severity of ALF lawsuits

Only seven percent of the ALFs in Hillsborough County had experienced a Chapter 400 lawsuit and no facility had accumulated more than four According to an insurance broker who places liability coverage for nearly one-third of Florida's ALF providers (500-600 facilities for the past 15 years), there had typically been only one or two reported lawsuits per year among his statewide ALF clients prior to 1998 In 1999 there were approximately 12, and there had been 25 reported by the fall of 2000 ALF providers that carry the additional Extended Congregate Care (ECC) or Limited Nursing Services (LNS) license are more likely to be sued than standard licensed ALFs, as was found in Hillsborough County The severity of the ALF Chapter 400 suits tends to be comparable to the nursing home lawsuits, with expected settlements often at $350,000 and out to $ one million dollars per case

AHCA Nursing Home Survey Results

A survey of Florida nursing facilities was conducted on the topic of liability insurance by the Agency for Health Care Administration in September, 2000 in response to a mandate in House Bill 2329

> The Agency shall report by 12/31/00 on the cost of liability insurance for Florida nursing homes for fiscal years 1999 and 2000 and the extent to which these costs are not being compensated by the Medicaid program. Medicaid participating nursing homes shall be required to report to the agency information necessary to compile this report

A survey questionnaire was mailed or e-mailed to 648 nursing homes (see questionnaire in Appendix 6) Completed questionnaires were returned to AHCA from 446 facilities, a 69% response rate

Nursing Home Litigation AHCA kindly agreed to add an item on nursing home litigation to their questionnaire to collect statewide data on the prevalence of lawsuits for the Task Force liability study The question read, "Have one or more lawsuits been filed in court against this facility for a resident care related incident since January 1, 1997 to date?" Because a question about lawsuits was outside of AHCA's study mandate, this item was marked "optional" and majority of the respondents, 72.4%, did not answer this question

Of the 27 6% of facilities that did answer the lawsuit question (N=123), 70% (86 homes) reported yes, the facility has had one or more resident care lawsuits since 1997, and 30% (37 homes) reported no

Not-for-profit facilities were slightly over-represented among the 123 facilities that responded to the lawsuit item Thirty respondents, 24%, were not-for-profit and 21% of all Florida nursing homes are not-for-profit Of the 30 not-for-profit respondents, 43 3% (13 homes) said the facility has had one or more lawsuits and 56 7% (17 homes) said the facility has not had a resident care related lawsuit since January 1, 1997 Among for-profit facilities responding to the lawsuits question, 77.8% said yes and 22 2% said no.

Liability insurance changes in policy coverage The AHCA survey revealed that 40 nursing homes (9% of the 446 respondents) are either entirely without liability insurance now, or will be "going bare" by February 1, 2001 Just five nursing facilities in the state had no liability coverage in June the majority of the 40 homes lost or dropped coverage since July 2000 A total of 128 nursing homes (28 7% of the 446 respondents) are reportedly self-insured

While most facilities currently have liability insurance, many have experienced a reduction in the amount of insurance coverage upon policy renewal Deductibles were higher than before for 69 3% of the facilities, did not change (or the question did not apply) for 24 4%, and 6 3% of the facilities renewed with lower policy deductibles. Coverage variables such as policy limits were not reduced upon renewal for 56.4% of the respondents but did decrease for 43 6%. Fifty-nine facilities, or 13% of the 446 respondents, reported their liability coverage changed from occurrence to claims-made, which is a considerable reduction in the scope of coverage

National Perspective Comparison of State Resident Rights and Elder Abuse Statutes[1]

All nursing facilities that receive Medicare or Medicaid under the Omnibus Budget Reconciliation Act of 1987 are held accountable for residents' rights as listed in 42 U S C §1396r Even so, Florida and other states also have residents' rights in their state statutes and/or administrative codes.

In order to provide a national perspective on tort liability related to nursing home residents' rights and elder abuse laws, staff reviewed two recent reports (GeneralCologne Re, no date, Agency for Health Care Administration, unpublished data) that summarized the tort liability statutes in regard to nursing home resident rights There were discrepancies between the two sources, so staff conducted a search of state statutes to verify the information listed in the published report by GeneralCologne Re and found errors of interpretation and in representation of data For example, GeneralCologne Re reported that Idaho had a patient bill of rights but it actually applied to assisted living facilities and not nursing facilities They reported that Kentucky had no specific provision for punitive damages, however the Kentucky Statutes §216 515 (26) state that "action may be brought.. to enforce such rights and to recover actual and punitive damages for any deprivation or infringement on the rights of a resident " The Maine Rev Stat Ann 22 §22 7921, *et seq.* specifies that a Residents'council with limited power and authority is a "residents' right" and no other rights are specified In addition, the GeneralCologne Re report does not clearly distinguish if the cause of action, recoverable damages, attorney's fees, and other aspects of their laws apply to resident rights, elder abuse and neglect, or both sets of laws (i e , attorney's fees may be recoverable under elder abuse but not resident rights laws)

Two graduate students (a third-year Stetson University law student and a second-year Ph D Aging Studies student) searched online databases, including MegaLaw, FindLaw, Westlaw, Lexis-Nexus Academic Universe, along with individual state websites to gain access to state statutes and/or administrative codes Where possible, relevant word or subject searches were used to identify applicable state statutes If particular state statute databases did not offer such searches, law review articles, trade journals, treatises or the GeneralCologne Re report provided the statute and it was located For this brief study, the following data were collected (see Appendix 8).

1 which states have residents' rights provisions that include civil rights, health care rights, or a limited set of rights (e g , the right to a resident council),
2 what is the content of those rights,

[1] Written by Debbie Hedgecock and Will Garland

3. of those states that have resident rights, which states provide for an individual private right of action and what is the legal basis of these provisions (civil, negligence, or common law),
4. of those states with resident rights, do the statutes provide for injunctive relief,
5. which states have elder abuse and neglect laws, and
6. of those states with elder abuse and neglect laws, which states provide for an individual private right of action, and what is the legal basis of these provisions

There was some difficulty in identifying appropriate statutes The online databases could not be searched in a consistent manner (i e , some allowed free text searching, others required the statute), and most provided disclaimers that the statutes listed might not include the most recent legislative changes to state laws. In addition, there is little consistency among state laws concerning the placement or wording of residents' rights, the penalties for violating those rights, or the granting of a private right of action to an injured resident (or family member) Some states have enumerated residents' rights provisions (clearly expressed and outlined even though the legal meaning of certain terms may be unclear), while others state only that a resident has rights but do not list any specific rights. There is no consistency in the legal weight given the residents' rights provision among states. Some place residents' rights provisions in the administrative code but most are found in the public health or welfare section statutes A state statute carries more weight than an administrative code Some states provide for criminal penalties and/or a fine, others do not Many state laws are stricter regarding applicable penalties for the non-reporting of known elder abuse than are the laws for actual violations of residents' rights While a state can expressly provide or deny a private right of action through its state statutes, according to Quin (1999)

> A nursing home resident may file a cause of action against the nursing facility, regardless of whether a private right of action exists within that state, based on theories of intentional or unintentional torts. Some common types of intentional torts are fraud, assault, and battery In these cases, the resident must show the requisite intent on the part of the defendant The defendant must have "intended the consequences against which the law protects the plaintiff," although the defendant need not have a malicious intent The majority of cases, however, involve unintentional acts or negligence Negligence is defined as 'the failure to exercise reasonable care to avoid injury or damage to person or property ' In order to succeed in a suit alleging negligence, the nursing home resident must prove the four traditional elements of any cause of action in tort 1) duty, 2) breach of duty, 3) causation, and 4) damages

In a general comparison of the content of residents' rights, Arkansas has most of the same rights as Florida. Although Florida has a fairly lengthy residents' rights statute, some states go beyond Florida For example, some states include the following rights in their residents' rights statute (which reflect Federal nursing home residents' rights)

1. The right for residents to not have to participate in experiments, experimental procedures or be examined by students.
2. The right that a resident would not be required to perform work of any type for a facility
3. The right for married couples to share a room if living in the same facility and if physician approved
4. The right for married couples to have private visits with one another.
5. Resident use of tobacco or alcohol as long as such use fits state building/facility codes/regulations

Although other states had listed within residents' rights statutes or in a statute section immediately following the residents' rights statutes, the general process residents can use to pursue rights violations, only Florida provides a description of the legal action process, particularly regarding the

recovery of attorney's fees (§400 023) Furthermore, only Florida mentions resident death in its civil enforcement section of residents' rights violations

A total of 33 states have full residents' rights in state statutes Twelve of these also have health-related rights Three states have a limited residents' rights statute (e g 1-5 rights) Of the 33 states with residents' rights statutes, 15 have a private or civil cause of action Within those, five also have a negligence cause of action and nine have injunctive relief Six states have only injunctive relief for violations of residents' rights

All but three states have an elder abuse and neglect statute The three states protect elders as part of their dependent adult laws Nineteen of these states have a negligence cause of action; five of those also have a private or civil cause of action associated with elder abuse and neglect Four states have only injunctive relief (three offer injunctive relief in addition to private/civil or negligence cause of action)

The 15 states with both resident rights and a private cause of action are Arkansas, California, Florida, Georgia, Illinois, Kentucky, Louisiana, Massachusetts, Minnesota, Missouri, New Jersey, North Dakota, Oklahoma, Texas, and Wisconsin Nine of these states cover reasonable attorney fees for residents' rights violations but only Florida specifies 12 ways to set reasonable attorney's fees, including contingency fees In summary, seven states, including Florida, have civil resident rights with a private right of action and provisions for attorney fees and punitive damages Of those, only two states also have health-related resident rights Arkansas and Florida.

Liability Insurance

Litigation against long-term care facilities is a difficult phenomenon for researchers to quantify on a statewide basis and reliably describe the extent of this activity, as details about litigation are not openly disclosed In contrast, the behavior of the insurance companies can be readily observed, and it is apparent that the liability insurance market for long-term care providers has dramatically deteriorated in Florida The insurance market for nursing homes is in a state of crisis, and the ALF providers are experiencing the collateral effects of this crisis

The Department of Insurance (DOI) noted in its September 2000 report that "the long-term care liability insurance market in Florida has shrunk significantly " DOI's research revealed that 23 insurance companies that provided liability coverage for long-term care facilities in Florida in the past three years are no longer writing these policies Of the 17 other insurers that reported they are currently writing coverage, only four companies wrote more than two policies in the state in 2000

At the time of DOI's study (initial data request to the insurers was in April 2000), half or more of the nursing home liability insurance business was already being handled by excess and surplus lines (E & S) companies, also known as non-admitted carriers The entry of E & S companies into an insurance market signals instability in the market, as these are the high-risk carriers and insurers of last resort Unlike admitted or voluntary companies that are regulated by the DOI and must have prior approval for rate increases and changes in policy provisions and cancellations, E & S carriers' rates and practices are not regulated by the state which enables them to quickly react to changes in the market There is no imposed limit on the premiums E & S carriers may charge and these insurers can exit the market at will Medmarc Casualty is now the last admitted insurance company writing liability coverage for nursing homes in Florida and this company has issued notice that it will withdraw from the market effective February 1, 2001, leaving only a few E & S companies to cover the state's nursing home industry Thus the insurance market has further eroded since DOI completed its study.

The replacement of admitted companies with unregulated E& S insurers is a partial explanation for the inordinate increases in insurance premiums reported by many providers this year--some increases in excess of one thousand percent The high loss ratios of some insurance companies (claims paid over premiums collected), documented by DOI, indicate large hikes in premiums are justifiable in this market, although very difficult for the nursing homes to afford Insurers had been losing money [1]

Insurance Premiums

AHCA will have the most comprehensive and current data available on changes in liability insurance[2] premiums for Florida nursing homes from their September survey of the industry Although these findings are not yet available to include in this report, this information is expected to be available during the 2001 Legislative session

The Department of Insurance collected data on liability insurance premiums from CCRCs and documented a rapidly worsening trend in their September report The average percent increase in total premiums was 15 3% from 1998 to 1999 and 73 4% from 1999 to 2000 (with half of the respondents unable to report what their premium renewal rate would be, having not reached their 2000 renewal date, and thus excluded from this calculation) Between 1998 and 1999, 6 8% of the CCRCs experienced premium increases in excess of 100% Between 1999 and 2000, 42% had premiums that more than doubled, and 12% had increases in excess of 1,000% [3]

CCRCs are particularly vulnerable in a deteriorated insurance market and are adversely impacted by soaring insurance premiums for several reasons Most properties are owned by organizations that do not have a national base to spread the liability risk and lack the leverage of large numbers to negotiate lower premiums Church sponsored properties are in a precarious position when operating expenses exceed revenues, as churches have competing demands on financial resources and may be unable to commit the subsidy they would need to pay to continue as long-term care providers when this is not their primary mission Further, all Florida CCRCs are required by law to maintain liquid reserves equal to 15% of operating expenses (after a start up year rate of 30% and based on a three year average), which includes the cost of insurance CCRCs must try to pay not only the vastly increased premiums, but also set aside additional sums of cash to comply with reserve requirements (that have escalated along with the liability premiums) This double-hit adversely impacts debt ratios and places many not-for-profit providers out of the eligibility parameters to borrow new money or meet the requirements of their existing bond issues

The Task Force has received testimony and letters from providers who have experienced enormous increases in insurance premiums for greatly reduced liability coverage (see Appendix 7 for a

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[1] The Task Force received testimony from Mr Shuttleworth of the insurance industry who announced that as of February 2001, reinsurers were no longer going to write long-term care reinsurance in Florida He further testified that even if all the tort reform proposals submitted by the nursing home industry were approved by the Florida Legislature, the insurers would not be coming back until after the insurance "tail" was past and there was sufficient court testing of the reforms He would not estimate the length of the insurance "tail" but it will probably be in the range of 2 to 5 years or more (Fierro – Freidin –413)

[2] Mr Shuttleworth of stated that even if the Legislature were to adopt extremely restrictive measures on causes of action against nursing homes and long term care facilities, the carriers would not return to the marker for a number of years, if at all If they did return, there would be significant restrictions on coverage, he stated, excluding coverage for punitive damages, deducting the cost of defense from coverage limits, and covering only on a claims made basis (Freidin –414)

[3] Review of this issue by the Florida Department of Insurance indicated that the exodus of admitted carriers from the nursing home liability market is not unique to Florida (Freidin –412)

summary)[1] The many accounts of the rapid deterioration in the insurance market are substantiated in a written statement from Clayton Deen, Vice President of Brown & Brown, Inc., Florida's largest insurance brokerage firm and the seventh largest in the nation. Regarding the changes in pricing of professional and general liability insurance from late 1999 to March 2000, Mr. Deen wrote:

> Our "best price" available to non-profit nursing clients in October 1999 was $372.00 per nursing bed for $1,000,000/$3,000,000 limits. Pricing for nursing facilities, even non-profits with no losses as of March 2000 start at a bed rate of $1,000 and higher. Even this level of pricing will generally require a retention of $50,000 to $100,000 per claim with no annual aggregate stop loss. If a facility has losses the bed rate can jump to $2,000 and as much as $5,000 or more, according to the severity of the claims. Retentions above the $100,000 level are common requirements for homes with adverse losses.
> Few clients with losses are in a position to pay this amount of premium and retain losses with no annual stop loss cover. Their alternative is to "go bare" and wait out the inevitable. There are no remaining admitted markets and the excess and surplus markets do not remain committed when losses threaten to penetrate into their coverage.
> *In 41 years in the insurance industry, I have not witnessed a worse "melt-down" of the legal environment and the insurance market for nursing home professional coverage.*
> [italics added]

At five public testimony hearings and from over 400 letters received, the testimony about insurance increases has been consistent. Appendix 7 summarizes the testimony of one adult family care home provider, five assisted living facility providers, and 20 continuing care retirement community providers. The remarks come from a total of 474 residents as well. There is no relief for the increased insurance costs and so these costs are passed on to consumers.

Assisted Living Facility Insurance

According to insurance brokers, there are now between four and six insurers willing to write liability coverage for ALFs in Florida, down from 12 earlier in 2000. Premiums have gone from $50.00 - $100.00 to $450 - $1,000 per bed. A 20 bed ALF is charged about $17,000 now compared to a premium of $3,000 in 1999.

Brokers were aware of five ALFs that closed in 2000 due to an inability to afford higher premiums. These were providers who cared for state-supported residents (SSI-eligible Optional State Supplementation clients). OSS-accepting providers typically run on a very tight margin, if there is any margin at all, and can neither absorb greatly increased costs of insurance nor pass the increase on to their state-supported residents (for whom they receive a fixed reimbursement).

Assisted living providers do not have the option to drop liability coverage, as state laws require insurance for the renewal of an ALF license. If insurance cannot be afforded, the ALF is forced to sell or close.

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[1] It is unfair to highlight only one portion of the extensive public testimony and input we have heard and received over the last several months. (Freidin –418) Staff Response: As many task force members have noted, the insurance crisis is paramount and yet the data on insurance costs are not available (pending a report by AHCA). The testimony was used to supplement. On the other hand, the documentation on the areas of poor and good quality in Florida's nursing homes relative to the nation has been documented extensively in Chapter in quality.

Facilities that carry an ECC or LNS license are also facing hard choices due to the insurance market These special licenses permit ALF providers to care for a frailer resident population As a higher frailty level is viewed by insurance companies as an adverse risk, ECC and LNS facilities are being asked to relinquish their special license or discontinue admittance of heavier care residents as either a condition for policy renewal, or renewal at a rate they can possibly afford to pay To be a provider in Florida's Assisted Living for the Elderly Medicaid waiver program, ALFs must have either an ECC or LNS license As of this writing, the Department of Elder Affairs has had no reports of ALE providers withdrawing from the waiver program, although the insurance market undoubtedly places the future of the program in jeopardy

Rate-setting Rationale

Some find it puzzling that even the providers with no history of lawsuits or paid claims are now being charged exorbitant premiums by insurance companies There are several factors to consider in an effort to understand insurance companies' pricing practices. First and foremost, insurance companies are in business to make a profit. If companies pay out in claims more than they take in through premiums, they must be able to adjust their pricing to cover losses or they will leave the market.

Insurers must know what to charge, based on a predictable pattern of claims activity They must be able to accurately assess the liability risk In Florida, insurers have witnessed an ever-upward climb in both the number and severity of claims, with no ceiling in sight, making it impossible to assess the extent of potential losses.

The principles of universality and large numbers apply to underwriting Insurance rates must take into account all properties in a market sector, those with good records, poor records and records in between Moreover, when insurance companies perceive any and all long-term care providers operating in this environment to be vulnerable to future lawsuits, even facilities with good records are viewed as a high risk

The long-term care industry is poorly understood by most insurers, and relatively few have been active in this market at any point in time Developing sophistication in individualized risk assessment is hampered by a lack of sufficient interest, as the total long-term care market is very small relative to other markets (homeowners or car insurance, for example), lack of data and limited experience overall Many insurers have entered this market and quickly exited, after sustaining losses. Very few companies have a long track record writing policies for the long-term care industry to contribute to an information base for underwriting

Further, insurers familiar with the broader health care market find it vexing that few long-term care providers have facility-based risk management programs that are standard in the acute care setting There is a consensus of opinion that the implementation of comprehensive risk management programs would be an extremely important component of an effort to resuscitate the long-term care insurance market in Florida. Risk management programs are successful in loss prevention and serve to improve quality of care, as issues are continually identified and addressed Aggressive risk management programs are expensive to implement, but it's difficult to imagine how the long-term care industry can afford to be without them any longer

Finally, premiums are likely to remain prohibitively high as long as insurers are operating in a non-competitive market With only a handful of E & S companies writing policies, there is no incentive to lower rates and no regulatory authority to review pricing practices Insurers, particularly admitted carriers, are highly unlikely to return to this market while it remains in its volatile state. Instead, actuaries will want to see a stable pattern of claims activity for at least one or two years, on which to base their pricing

and coverage decisions, before venturing back in They must first be certain they can make money in the market It is an open question whether and which long-term care providers can survive the wait

Even if there are tort law changes that will make future losses more predictable for insurers, there are hundreds of pending lawsuits against Florida nursing homes that will be unaffected by any caps on damages that may be applied prospectively The magnitude of this liability "tail" is estimated to total hundreds of millions of dollars For instance, there are at least 103 open Chapter 400 lawsuits in Hillsborough County at this time If these suits are resolved with the average settlement of $410,294 (per late 1990's settlements in the county disclosed in court records), that is $42,260,282 in pending liability in one Florida county alone

Because many facilities now have greatly reduced insurance coverage (higher deductibles and lower policy limits), facilities will pay more out of pocket to settle these suits This pending liability, coupled with the expense of high insurance premiums and the difficulty in attracting new capital, will place heavy financial pressure on this industry that some facilities will not be able to sustain And it is most probable that the not-for-profit facilities and local independent operators have less capacity to hang on than many national corporation owned facilities Some provider fall-out seems inevitable

Florida has a temporary measure in effect per House Bill 2329, for fiscal year 2000/2001 only, to allow qualifying nursing homes to pass through to Medicaid some of the increased costs of liability insurance To be eligible for this special interim rate adjustment, subject to class ceilings, a nursing home must have at least 65% Medicaid utilization and the insurance premium increase must affect the total Medicaid per diem by at least 5% This Medicaid allowance for liability insurance premiums, that is helping some providers cope with increased costs, will not be extended beyond the June 30, 2001 expiration date of the provision, according to AHCA

The Interdependence of Tort Law and Liability Insurance

In the Tort Reform and Insurance Act of 1986, the Florida Legislature recognized that "tort law and the liability insurance systems are interdependent and interrelated " Without available and affordable liability insurance "many injured persons will be unable to recover damages for either their economic losses or non-economic losses" and that legislative action was "necessary to protect the people's right to affordable insurance coverage " (Academic Task Force for Review of the Insurance and Tort Systems, Discussion Draft, December 16, 1987, page 16)

The 1980's Academic Task Force for the Review of the Insurance and Tort Systems concluded that the increase in medical malpractice loss payments was not the result of a deterioration in the quality of medical care in Florida (Medical Malpractice Recommendations, November 6, 1987, page 37) Instead, the most significant and powerful predictor of medical malpractice claims frequency and severity was the degree of urbanization (population density) of an area (Final Fact-Finding Report on Insurance and Tort Systems, March 1, 1988, page 270)

The litigation analysis conducted for the 2000 Task Force on the Availability Affordability of Long-term Care in Florida did not determine a statistically significant relationship between quality measures and the frequency of lawsuits against nursing homes in Hillsborough County, 87% of which had been sued And it is noted that while most lawsuits are brought for pressure sores and falls, Florida nursing homes have far fewer deficiencies than nursing homes throughout the nation for pressure sores and activities of daily living services, accidents and accident prevention (see Task 3 Quality, in this report) It should be recognized that poor care or facility negligence or neglect is not at the root of all unfortunate incidents and outcomes in all long-term care settings

At the same time, a private right of action should be preserved for long-term care consumers because justifiable causes of action do arise, including resident abuse or neglect But as more nursing homes become uninsured, and 40 homes have decided they must "go bare" already, the private right of action for legitimate claims is weakened Facility insolvency stemming from the insurance crisis is a practical threat to the right of action as well, as no nursing homes in Florida have evidently been sued after declaring bankruptcy

The tort system is dependent on the availability of affordable liability insurance, and so are the nursing home and assisted living facility industries for their viability Affordable premiums will not reappear in a non-competitive, indeed decimated, private insurance market Tort law reforms that would curtail the increasing trend in frequency and severity of claims yet preserve reasonable recovery for acts of negligence or abuse are necessary before the market can begin to be restored. It is clear that private insurers will not return before the effects of tort reforms are demonstrated and claims activity becomes more predictable

Private Market Insurance Alternatives

There are no good substitutes for a competitive private insurance market. The few alternatives that can be explored to implement, as a crisis intervention measure, may possibly address the issue of insurance availability but would not solve the fundamental problem of lack of affordability of liability insurance Some alternatives do not foster the return of private insurers to the market and may actually discourage their return The private insurance alternatives outlined per request for the Task Force by J Sterling Shuttleworth, C E.O. of Uni-Ter underwriting Management Corp. are 1) Insurance risk apportionment plans, 2) Assigned risk plans, 3) a Catastrophe fund, and 4) Risk retention groups. Mr Shuttleworth cautioned that these possible alternatives require careful review and may not be "workable" in Florida, would not be easy to implement if feasible, and suggested it may be necessary to tie options together

1 *Insurance risk apportionment plans* are more commonly known as JUAs (Joint Underwriters Association) This option requires insurance company participation and actuarial soundness, which means rates charged must cover losses If deficits occur, policyholders would be assessed to cover the deficit. Policy coverage would be of a reduced nature than is offered in the private market

The Department of Insurance would need to initiate a JUA for nursing homes (and perhaps assisted living facilities) in Florida and DOI is not at all in favor of doing so It also seems highly questionable how a JUA would have the participation of private insurers when so few companies are currently writing coverage for Florida nursing homes, and only one of the insurers is regulated by DOI

The American Insurance Association identified 10 states, including Florida, with medical malpractice JUAs (Kansas, Massachusetts, Minnesota, New Hampshire, New York--NY's JUA is now in the process of dissolving, Pennsylvania, Rhode Island, South Carolina, and Wisconsin) Only Pennsylvania and Wisconsin's JUAs cover nursing homes, but very few "four or five" in PA and "several" in Wisconsin.

Additionally, Texas is now launching a JUA for nursing homes, beginning with coverage for non-profit facilities only Variable rates are charged based on an exemplary set of standardized criteria for individualized risk assessment (discussed in the Task 3 Quality section of this report) The coverage will be for medical (professional) liability only and for claims made policies, not occurrence, and coverage for attorney's fees awarded to or incurred by the plaintiff is excluded The policies are subject to assessment to recoup any deficits sustained by the JUA and premiums are structured to increase each year The first year per bed rates start at $538 for zero deductible, $1 million/$3 million limits for providers with the

lowest risk score and range to $5,631 per bed for providers with the highest risk scores Coverage may not be affordable for facilities with a claims history.

2 *Assigned risk plan* is described as a possible option to a JUA that would entail the Florida Department of Insurance working with the insurance industry to form a "reduced limit capacity plan" for long-term care providers (insurance coverage would be very limited).

3 *A catastrophe, or excess fund* would be managed by a special state entity and would provide excess above the low limits policies issued by private insurance companies (per alternative 2 above, for example) An excess fund would be mandatory, assessable and potentially changeable each year

4 *Risk retention groups* were created with the Product Liability Risk Retention Act of 1981 which allowed those seeking protection from product liability claims to form either "risk retention groups" for group self-insurance or "purchasing groups" to obtain group insurance from an insurance company The major impact of the Act was to preempt many state laws that prohibited or hindered the formation of interstate retention groups or purchasing groups States still have some regulatory control Businesses or persons with similar types of risk may form an RRG to insure against their liability exposure. It is limited to members who have similar exposure because of their trade, product, service, premise, or operation For example, anesthesiologists formed a risk retention group for medical malpractice liability insurance (Harkavy, 1986) Some purchasing groups are providing coverage for nursing homes but as of April 2000, no RRGs have been formed for nursing homes (Risk Retention Reporter, April 2000) Purchasing Groups are easier to form but they are no stronger than the insurance company from which they purchase coverage RRGs are more complex and expensive In fact of the eight RRGs that have recently gone out of business, six of them were in the healthcare sector (Risk Retention Reporter, October, 2000)

Since these alternative insurance plans would need to be self-supporting and not operated at a deficit, it is unlikely that premiums established for adequate insurance coverage would differ substantially from the extremely high rates charged at present in the private market The insurance premiums are high because insurance losses are high. Unless losses can be effectively reined in, rates are likely to remain high and increasingly out of reach for many providers.

Summary of Key Findings on Litigation and Liability Insurance

Listed below are some policy relevant observations from the results of the litigation research conducted in Hillsborough County [1]

- Nursing home lawsuits are widespread in Hillsborough County 87% of the homes in the area have experienced one or more Chapter 400 lawsuits, including 3/4 of the not-for-profit facilities Half of the nursing homes have had more than 10 lawsuits, with most suits incurred within the last few years

- In vivid contrast to the widespread litigation experience among nursing homes, only seven percent of the assisted living facilities in Hillsborough County (nine out of 125 ALFs) had between one and four Chapter 400 lawsuits.

[1] The finding from the Hillsborough study that there were no frivolous lawsuits is significant, and should be included in the "Key Findings" for the litigation section (Freidin –403) Staff response Staff found that none of the allegations in the lawsuits were frivolous There is no way of determining the merits of the lawsuit

- The primary cause of action in all Chapter 400 lawsuits is the alleged violation or infringement of one particular residents right only the right to adequate and appropriate health care All suits are first and foremost about health care issues and 95% specifically involve pressure sores, falls, dehydration or unplanned weight loss These allegations are not frivolous per the legal definition of the term, yet it could not be assessed in this study whether incidents were due to poor care or inevitable health decline

- Only three of the numerous statutory rights prompt or contribute to cause of action adequate and appropriate health care, privacy and dignity, abuse and neglect An infringement of the right to privacy and dignity is an allegation included in 45% of the complaints that otherwise focus on health care The right to be free from abuse in its various forms is specified in 400 022 1(o), and abuse is included as a separate allegation in 11 5% of the complaints

  Neglect is not explicitly mentioned in the body of residents rights, although "adequate and appropriate health care" reasonably implies the absence of neglect A separate allegation of neglect was included in 6 7% of the complaints and the same percentage of complaints carried a specific allegation of both abuse and neglect Overall, allegations of *either* abuse or neglect were found in one-fourth of the Chapter 400 complaints

- The majority of the complaints included an allegation regarding staff inadequacy Specifically, 65 8% cited inadequate staff training and communication as the problem and 24 9% stated there was an inadequate number of staff

- There would be less of an impact than expected if the four-year statute of limitations was reduced and the provision for add-on attorney's fees was removed

  It is not specified within Chapter 400 023 what statute of limitations is applicable, but it is generally understood to be a maximum of four years Florida Statute 95 11, Limitations of Actions, provides that an action based on statutory liability must be brought within four years of the accrual of the cause of action The statute of limitations for wrongful death lawsuits is two years Although 36 6% of the lawsuits were subject to the two-year limitation as wrongful death cases, 88 8% of all the Chapter 400 lawsuits were filed within two years of the cause of action and 95% were filed within two and a half years

  Plaintiff attorney fees and costs were evidently not paid by the defendant as a specified add-on to the settlement in nearly 70% of the Hillsborough County cases The common practice of accepting cases on a contingency fee basis has evidently not limited access to legal representation Attorneys from at least 50 different law firms filed suit against nursing homes on behalf of hundreds of nursing home residents and former residents in Hillsborough County

- No clear and consistent connection between lawsuits and quality measures has been found Quality measures based on OSCAR resident case-mix and survey deficiency data were tested in a statistical analysis as possible predictors of nursing home lawsuits and they were not significantly related to the number of lawsuits the Hillsborough County nursing homes experienced

- Out of the 15 states that have a private cause of action associated with residents' rights, seven have provisions for attorney fees and punitive damages Of those, only two states have health related rights as well Arkansas and Florida

- Nine percent of nursing homes in Florida are either entirely without liability insurance now, or will be "going bare" by February 1, 2001 This is up from 1% in June 2000.

- Most facilities experienced a reduction in the amount of insurance coverage deductibles increased for 69% of the facilities and decreased for 6% Policy limits decreased for 44% Liability coverage changed from occurrence to claims-made (a considerable reduction in the scope of coverage) for 13% of the facilities. (AHCA unpublished survey data)

- Assisted Living Facilities (ALF), who are required by statute to hold liability insurance, are being told by insurers to give up their Extended Congregate Care or Limited Nursing Service licenses in order to receive liability insurance (Public Testimony)

- ALFs are also required to hold an ECC or LNS license to accept residents who are on the Medicaid Waiver Without an ECC or LNS license, these ALFs will have to discharge their residents and nursing homes will be their only alternative

- Continuing Care Retirement Communities (CCRC) experienced a 74% increases in their premiums in 2000 (the average increase in 1998 and 1999 was 15%), 12% had increases in excess of 1000% (DOI published report) Florida CCRCs are required by state law to have 15% of their operating costs (including expected liability insurance costs) set aside in a reserve fund.

- The last admitted insurance carrier (one that is regulated by the Department of Insurance) in the Florida nursing home insurance market has announced that it is ending its liability coverage for long-term care facilities in February 2001 [1]

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[1] The Florida Department of Insurance was unable to find a single insurer that was leaving Florida that was not doing so as part of a broader national strategy (Connor –206)

Academic Task Force for the review of the Insurance and Tort Systems (November 6, 1987) *Medical Malpractice Recommendations* State of Florida.

Academic Task Force for the review of the Insurance and Tort Systems (December 16, 1987) *Discussion Draft Tort Reform Alternatives* State of Florida

Academic Task Force for the review of the Insurance and Tort Systems (March 1, 1988) *Final Facts Finding Reports on Insurance and Tort Systems* State of Florida

Bourdun, T & Dubin, S (January 17, 2000) *Florida Long Term Care General and Professional Liability Actuarial Analysis* Columbia, Maryland AON Worldwide Actuarial Solutions

Bourdun, T & Dubin, S (February 12, 2001) *Florida Long Term Care General and Professional Liability Actuarial Analysis* Columbia, Maryland AON Worldwide Actuarial Solutions

Department of Insurance (September 20, 2000) Report on Florida Long-Term Care Liability Insurance Market for Nursing Homes Tallahassee, FL The Department

GeneralCologneRe (n d). *50-State Long-Term Care and Tort Liability Survey Information A Comprehensive Guide.* Stamford, CT GeneralCologneRe

Quin, A S (Spring 1999) Imposing Federal Criminal Liability on Nursing Homes A Way of Deterring Inadequate Health Care and Improving the Quality of Care Delivered? *Saint Louis University Law Journal 42*, 653 at 679

By the Committees on Appropriations; Judiciary; Health, Aging and Long-Term Care; and Senator Brown-Waite

309-1899A-01

1 A bill to be entitled
2 An act relating to long-term care; amending s.
3 400.0073, F.S , clarifying duties of the local
4 ombudsman councils with respect to inspections
5 of nursing homes and long-term-care facilities,
6 amending s. 400.021, F S ; defining the terms
7 "controlling interest" and "voluntary board
8 member" and revising the definition of
9 "resident care plan" for purposes of part II of
10 ch. 400, F.S , relating to the regulation of
11 nursing homes; creating s 400.0223, F S ;
12 requiring a nursing home facility to permit
13 electronic monitoring devices in a resident's
14 room; specifying conditions under which
15 monitoring may occur, providing that electronic
16 monitoring tapes are admissible in civil or
17 criminal actions, providing penalties; amending
18 s 400.023, F S ; providing for election of
19 survival damages, wrongful death damages, or
20 recovery for negligence; providing for
21 attorney's fees for injunctive relief or
22 administrative remedy; providing that ch 766,
23 F S., does not apply to actions under this
24 section; providing burden of proof; providing
25 that a violation of a right is not negligence
26 per se, prescribing the duty of care;
27 prescribing a nurse's duty of care; eliminating
28 presuit provisions; eliminating the requirement
29 for presuit mediation, creating s. 400 0233,
30 F.S; providing for presuit notice, prohibiting
31 the filing of suit for a specified time;

1 in either a civil or criminal action brought in a Florida
2 court
3 (10)(a) A licensee who operates a nursing home
4 facility in violation of this section is subject to a fine not
5 exceeding $500 per violation per day under ss. 400 102 and
6 400.121.
7 (b) A person who willfully and without the consent of
8 the resident hampers, obstructs, tampers with, or destroys an
9 electronic monitoring device or tape shall be guilty of a
10 misdemeanor of the first degree punishable as provided in s
11 775.082 or s. 775.083.
12 Section 4. Effective July 1, 2001, and applying to
13 causes of action accruing on or after that date, section
14 400 023, Florida Statutes, is amended to read·
15 400.023 Civil enforcement.--
16 (1) Any resident whose rights as specified in this
17 part are violated ~~deprived or infringed upon~~ shall have a
18 cause of action ~~against any licensee responsible for the~~
19 ~~violation~~ The action may be brought by the resident or his or
20 her guardian, by a person or organization acting on behalf of
21 a resident with the consent of the resident or his or her
22 guardian, or by the personal representative of the estate of a
23 deceased resident regardless of the cause of death If the
24 action alleges a claim for the resident's rights or for
25 negligence that caused the death of the resident, the claimant
26 shall be required to elect either survival damages pursuant to
27 s 46.021 or wrongful death damages pursuant to s. 768 21 ~~when~~
28 ~~the cause of death resulted from the deprivation or~~
29 ~~infringement of the decedent's rights~~ If the action alleges a
30 claim for the resident's rights or for negligence that did not
31 cause the death of the resident, the personal representative

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1 of the estate may recover damages for the negligence that
2 caused injury to the resident.The action may be brought in
3 any court of competent jurisdiction to enforce such rights and
4 to recover actual and punitive damages for any violation of
5 ~~deprivation or infringement on~~ the rights of a resident or for
6 negligence Any resident who prevails in seeking injunctive
7 relief or a claim for an administrative remedy is entitled to
8 recover the costs of the action, and a reasonable attorney's
9 fee assessed against the defendant not to exceed $25,000. Fees
10 shall be awarded solely for the injunctive or administrative
11 relief and not for any claim or action for damages whether
12 such claim or action is brought together with a request for an
13 injunction or administrative relief or as a separate action,
14 except as provided under s. 768.79 or the Florida Rules of
15 Civil Procedure ~~Any plaintiff who prevails in any such action~~
16 ~~may be entitled to recover reasonable attorney's fees, costs~~
17 ~~of the action, and damages, unless the court finds that the~~
18 ~~plaintiff has acted in bad faith, with malicious purpose, and~~
19 ~~that there was a complete absence of a justiciable issue of~~
20 ~~either law or fact. Prevailing defendants may be entitled to~~
21 ~~recover reasonable attorney's fees pursuant to s. 57.105~~ The
22 theories of recovery ~~remedies~~ provided in this section are in
23 addition to and cumulative with other legal and administrative
24 actions ~~remedies~~ available to a resident and to the agency,
25 and the provisions of chapter 766 do not apply.
26 (2) In any claim brought pursuant to this part
27 alleging a violation of resident's rights or negligence
28 causing injury to or the death of a resident, the claimant
29 shall have the burden of proving, by a preponderance of the
30 evidence, that
31 (a) The defendant owed a duty to the resident;

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(b) The defendant breached the duty to the resident,

(c) The breach of the duty is a legal cause of loss, injury, death or damage to the resident, and

(d) The resident sustained loss, injury, death or damage as a result of the breach.

Nothing in this part shall be interpreted to create strict liability. A violation of the rights set forth in s. 400.022 or in any other standard or guidelines specified in this part or in any applicable administrative standard or guidelines of this state or a federal regulatory agency shall be evidence of negligence but shall not be considered negligence per se.

~~(2) Attorneys' fees shall be based on the following criteria:~~

~~(a) The time and labor required;~~

~~(b) The novelty and difficulty of the questions;~~

~~(c) The skill requisite to perform the legal service properly;~~

~~(d) The preclusion of other employment by the attorney due to the acceptance of the case;~~

~~(e) The customary fee;~~

~~(f) Whether the fee is fixed or contingent;~~

~~(g) The amount involved or the results obtained;~~

~~(h) The experience, reputation, and ability of the attorneys;~~

~~(i) The costs expended to prosecute the claim;~~

~~(j) The type of fee arrangement between the attorney and the client;~~

~~(k) Whether the relevant market requires a contingency fee multiplier to obtain competent counsel;~~

~~(1) Whether the attorney was able to mitigate the risk of nonpayment in any way.~~

<u>(3) In any claim brought pursuant to s. 400.023, a licensee, person or entity shall have a duty to exercise reasonable care. Reasonable care is that degree of care which a reasonably careful licensee, person or entity would use under like circumstances.</u>

<u>(4) In any claim for resident's rights violation or negligence by a nurse licensed under Part I of chapter 464, such nurse shall have the duty to exercise care consistent with the prevailing professional standard of care for a nurse. The prevailing professional standard of care for a nurse shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances is recognized as acceptable and appropriate by reasonably prudent similar nurses.</u>

<u>(5)</u>~~(3)~~ A licensee shall not be liable for the medical negligence of any physician rendering care or treatment to the resident except for the <u>administrative</u> services of a medical director as required in this part. Nothing in this subsection shall be construed to protect a licensee from liability for failure to provide a resident with appropriate observation, assessment, nursing diagnosis, planning, intervention, and evaluation of care by nursing staff.

~~(4) Claimants alleging a deprivation or infringement of adequate and appropriate health care pursuant to s. 400.022(1)(k) which resulted in personal injury to or the death of a resident shall conduct an investigation which shall include a review by a licensed physician or registered nurse familiar with the standard of nursing care for nursing home residents pursuant to this part. Any complaint alleging such~~

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1 ~~a deprivation or infringement shall be accompanied by a~~
2 ~~verified statement from the reviewer that there exists reason~~
3 ~~to believe that a deprivation or infringement occurred during~~
4 ~~the resident's stay at the nursing home. Such opinion shall~~
5 ~~be based on records or other information available at the time~~
6 ~~that suit is filed. Failure to provide records in accordance~~
7 ~~with the requirements of this chapter shall waive the~~
8 ~~requirement of the verified statement.~~
9 ~~(5) For the purpose of this section, punitive damages~~
10 ~~may be awarded for conduct which is willful, wanton, gross or~~
11 ~~flagrant, reckless, or consciously indifferent to the rights~~
12 ~~of the resident.~~
13 ~~(6) To recover attorney's fees under this section, the~~
14 ~~following conditions precedent must be met:~~
15 ~~(a) Within 120 days after the filing of a responsive~~
16 ~~pleading or defensive motion to a complaint brought under this~~
17 ~~section and before trial, the parties or their designated~~
18 ~~representatives shall meet in mediation to discuss the issues~~
19 ~~of liability and damages in accordance with this paragraph for~~
20 ~~the purpose of an early resolution of the matter.~~
21 ~~1. Within 60 days after the filing of the responsive~~
22 ~~pleading or defensive motion, the parties shall:~~
23 ~~a. Agree on a mediator. If the parties cannot agree on~~
24 ~~a mediator, the defendant shall immediately notify the court,~~
25 ~~which shall appoint a mediator within 10 days after such~~
26 ~~notice.~~
27 ~~b. Set a date for mediation.~~
28 ~~c. Prepare an order for the court that identifies the~~
29 ~~mediator, the scheduled date of the mediation, and other terms~~
30 ~~of the mediation. Absent any disagreement between the parties,~~
31

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~~the court may issue the order for the mediation submitted by the parties without a hearing.~~

~~2. The mediation must be concluded within 120 days after the filing of a responsive pleading or defensive motion. The date may be extended only by agreement of all parties subject to mediation under this subsection.~~

~~3. The mediation shall be conducted in the following manner:~~

~~a. Each party shall ensure that all persons necessary for complete settlement authority are present at the mediation.~~

~~b. Each party shall mediate in good faith.~~

~~4. All aspects of the mediation which are not specifically established by this subsection must be conducted according to the rules of practice and procedure adopted by the Supreme Court of this state.~~

~~(b) If the parties do not settle the case pursuant to mediation, the last offer of the defendant made at mediation shall be recorded by the mediator in a written report that states the amount of the offer, the date the offer was made in writing, and the date the offer was rejected. If the matter subsequently proceeds to trial under this section and the plaintiff prevails but is awarded an amount in damages, exclusive of attorney's fees, which is equal to or less than the last offer made by the defendant at mediation, the plaintiff is not entitled to recover any attorney's fees.~~

~~(c) This subsection applies only to claims for liability and damages and does not apply to actions for injunctive relief.~~

~~(d) This subsection applies to all causes of action that accrue on or after October 1, 1999.~~

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1 ~~(7) Discovery of financial information for the purpose~~
2 ~~of determining the value of punitive damages may not be had~~
3 ~~unless the plaintiff shows the court by proffer or evidence in~~
4 ~~the record that a reasonable basis exists to support a claim~~
5 ~~for punitive damages.~~
6 ~~(8) In addition to any other standards for punitive~~
7 ~~damages, any award of punitive damages must be reasonable in~~
8 ~~light of the actual harm suffered by the resident and the~~
9 ~~egregiousness of the conduct that caused the actual harm to~~
10 ~~the resident.~~
11 Section 5. Effective July 1, 2001, and applying to
12 causes of action accruing on or after that date, section
13 400 0233, Florida Statutes, is created to read.
14 400 0233 Presuit notice, investigation, notification
15 of violation of resident's rights or alleged negligence;
16 claims evaluation procedure; informal discovery; review.--
17 (1) As used in this section, the term:
18 (a) "Claim for resident's rights violation or
19 negligence" means a negligence claim alleging injury to or the
20 death of a resident arising out of an asserted violation of
21 the rights of a resident under s. 400.022 or an asserted
22 deviation from the applicable standard of care.
23 (b) "Insurer" means any self-insurer authorized under
24 s 627.357, liability insurance carrier, Joint Underwriting
25 Association, or any uninsured prospective defendant.
26 (2) Prior to filing a claim for a violation of a
27 resident's rights or a claim for negligence, a claimant
28 alleging injury to or the death of a resident shall notify
29 each prospective defendant by certified mail, return receipt
30 requested, of an asserted violation of a resident's rights
31 provided in s 400.022 or deviation from the standard of care

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1 A bill to be entitled
2 An act relating to long-term care; amending s.
3 400.0073, F.S , clarifying duties of the local
4 ombudsman councils with respect to inspections
5 of nursing homes and long-term-care facilities;
6 amending s 400 021, F S ; defining the terms
7 "controlling interest" and "voluntary board
8 member" and revising the definition of
9 "resident care plan" for purposes of part II of
10 ch. 400, F.S , relating to the regulation of
11 nursing homes, requiring the Agency for Health
12 Care Administration and the Office of the
13 Attorney General to study the use of electronic
14 monitoring devices in nursing homes; requiring
15 a report; amending s. 400 023, F.S ; providing
16 for election of survival damages, wrongful
17 death damages, or recovery for negligence,
18 providing for attorney's fees for injunctive
19 relief or administrative remedy, providing that
20 ch 766, F S., does not apply to actions under
21 this section, providing burden of proof,
22 providing that a violation of a right is not
23 negligence per se; prescribing the duty of
24 care; prescribing a nurse's duty of care;
25 eliminating presuit provisions, eliminating the
26 requirement for presuit mediation; creating s.
27 400.0233, F.S; providing for presuit notice,
28 prohibiting the filing of suit for a specified
29 time, requiring a response to the notice;
30 tolling the statute of limitations, limiting
31 discovery of presuit investigation documents;

1 monitoring devices in nursing home facilities, an analysis of
2 the potential ramifications of requiring facilities to install
3 such devices when requested by or on behalf of a resident, the
4 impact of the devices on the privacy and dignity of both the
5 resident on whose behalf the device is installed and other
6 residents who may be affected by the device, the potential
7 impact on improving the care of residents, the potential
8 impact on the care environment and on staff recruitment and
9 retention, appropriate uses of any tapes if mandated by law,
10 including methods and time frames for reporting any
11 questionable incidents to the facility and appropriate
12 regulatory agencies, appropriate security needed to protect
13 the integrity of tapes for both the protection of the resident
14 and direct care staff, and the potential ramifications on the
15 care environment of allowing the use of recorded tapes in
16 legal proceedings, including any exceptions that should apply
17 if prohibited. The Agency for Health Care Administration shall
18 have the lead on the study and shall submit the findings and
19 recommendations of the study to the Governor, the Speaker of
20 the House of Representatives and the President of the Senate
21 by January 1, 2002.
22 Section 4. Effective May 15, 2001, and applying to
23 causes of action accruing on or after that date, section
24 400.023, Florida Statutes, is amended to read:
25 400.023 Civil enforcement.--
26 (1) Any resident whose rights as specified in this
27 part are violated ~~deprived or infringed upon~~ shall have a
28 cause of action ~~against any licensee responsible for the~~
29 ~~violation~~. The action may be brought by the resident or his or
30 her guardian, by a person or organization acting on behalf of
31 a resident with the consent of the resident or his or her

1 guardian, or by the personal representative of the estate of a
2 deceased resident regardless of the cause of death. If the
3 action alleges a claim for the resident's rights or for
4 negligence that caused the death of the resident, the claimant
5 shall be required to elect either survival damages pursuant to
6 s. 46.021 or wrongful death damages pursuant to s. 768.21 ~~when~~
7 ~~the cause of death resulted from the deprivation or~~
8 ~~infringement of the decedent's rights~~. If the action alleges a
9 claim for the resident's rights or for negligence that did not
10 cause the death of the resident, the personal representative
11 of the estate may recover damages for the negligence that
12 caused injury to the resident.The action may be brought in
13 any court of competent jurisdiction to enforce such rights and
14 to recover actual and punitive damages for any violation of
15 ~~deprivation or infringement on~~ the rights of a resident or for
16 negligence. Any resident who prevails in seeking injunctive
17 relief or a claim for an administrative remedy is entitled to
18 recover the costs of the action, and a reasonable attorney's
19 fee assessed against the defendant not to exceed $25,000. Fees
20 shall be awarded solely for the injunctive or administrative
21 relief and not for any claim or action for damages whether
22 such claim or action is brought together with a request for an
23 injunction or administrative relief or as a separate action,
24 except as provided under s. 768.79 or the Florida Rules of
25 Civil Procedure. Sections 400.023-400.0238 provide the
26 exclusive remedy for a cause of action for recovery of damages
27 for the personal injury or death of a nursing home resident
28 arising out of negligence or a violation of rights specified
29 in s. 400.022. This section does not preclude theories of
30 recovery not arising out of negligence or s. 400.022 which are
31 available to a resident or to the agency. The provisions of

chapter 766 do not apply to any cause of action brought under ss. 400.023-400.0238.~~Any plaintiff who prevails in any such action may be entitled to recover reasonable attorney's fees, costs of the action, and damages, unless the court finds that the plaintiff has acted in bad faith, with malicious purpose, and that there was a complete absence of a justiciable issue of either law or fact. A prevailing defendant may be entitled to recover reasonable attorney's fees pursuant to s. 57.105. The remedies provided in this section are in addition to and cumulative with other legal and administrative remedies available to a resident and to the agency.~~

(2) In any claim brought pursuant to this part alleging a violation of resident's rights or negligence causing injury to or the death of a resident, the claimant shall have the burden of proving, by a preponderance of the evidence, that

(a) The defendant owed a duty to the resident;

(b) The defendant breached the duty to the resident;

(c) The breach of the duty is a legal cause of loss, injury, death or damage to the resident, and

(d) The resident sustained loss, injury, death or damage as a result of the breach.

Nothing in this part shall be interpreted to create strict liability. A violation of the rights set forth in s 400.022 or in any other standard or guidelines specified in this part or in any applicable administrative standard or guidelines of this state or a federal regulatory agency shall be evidence of negligence but shall not be considered negligence per se.

~~(2) Attorneys' fees shall be based on the following criteria:~~

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1 ~~(a) The time and labor required;~~
2 ~~(b) The novelty and difficulty of the questions;~~
3 ~~(c) The skill requisite to perform the legal service~~
4 ~~properly;~~
5 ~~(d) The preclusion of other employment by the attorney~~
6 ~~due to the acceptance of the case;~~
7 ~~(e) The customary fee;~~
8 ~~(f) Whether the fee is fixed or contingent;~~
9 ~~(g) The amount involved or the results obtained;~~
10 ~~(h) The experience, reputation, and ability of the~~
11 ~~attorneys;~~
12 ~~(i) The costs expended to prosecute the claim;~~
13 ~~(j) The type of fee arrangement between the attorney~~
14 ~~and the client;~~
15 ~~(k) Whether the relevant market requires a contingency~~
16 ~~fee multiplier to obtain competent counsel;~~
17 ~~(l) Whether the attorney was able to mitigate the risk~~
18 ~~of nonpayment in any way.~~
19 (3) In any claim brought pursuant to s. 400 023, a
20 licensee, person or entity shall have a duty to exercise
21 reasonable care. Reasonable care is that degree of care which
22 a reasonably careful licensee, person or entity would use
23 under like circumstances
24 (4) In any claim for resident's rights violation or
25 negligence by a nurse licensed under Part I of chapter 464,
26 such nurse shall have the duty to exercise care consistent
27 with the prevailing professional standard of care for a nurse.
28 The prevailing professional standard of care for a nurse shall
29 be that level of care, skill, and treatment which, in light of
30 all relevant surrounding circumstances is recognized as
31

acceptable and appropriate by reasonably prudent similar nurses.

(5)~~(3)~~ A licensee shall not be liable for the medical negligence of any physician rendering care or treatment to the resident except for the administrative services of a medical director as required in this part Nothing in this subsection shall be construed to protect a licensee, person, or entity from liability for failure to provide a resident with appropriate observation, assessment, nursing diagnosis, planning, intervention, and evaluation of care by nursing staff.

(6) The resident or the resident's legal representative shall serve a copy of any complaint alleging in whole or in part a violation of any rights specified in this part to the Agency for Health Care Administration at the time of filing the initial complaint with the clerk of the court for the county in which the action is pursued. The requirement of providing a copy of the complaint to the agency does not impair the resident's legal rights or ability to seek relief for his or her claim.

(7) An action under this part for a violation of rights or negligence recognized herein is not a claim for medical malpractice, and the provision of s. 768.21(8) do not apply to a claim alleging death of the resident

~~(4) Claimants alleging a deprivation or infringement of adequate and appropriate health care pursuant to s. 400.022(1)(k) which resulted in personal injury to or the death of a resident shall conduct an investigation which shall include a review by a licensed physician or registered nurse familiar with the standard of nursing care for nursing home residents pursuant to this part Any complaint alleging such~~

~~a deprivation or infringement shall be accompanied by a verified statement from the reviewer that there exists reason to believe that a deprivation or infringement occurred during the resident's stay at the nursing home. Such opinion shall be based on records or other information available at the time that suit is filed. Failure to provide records in accordance with the requirements of this chapter shall waive the requirement of the verified statement.~~

~~(5) For the purpose of this section, punitive damages may be awarded for conduct which is willful, wanton, gross or flagrant, reckless, or consciously indifferent to the rights of the resident.~~

~~(6) To recover attorney's fees under this section, the following conditions precedent must be met:~~

~~(a) Within 120 days after the filing of a responsive pleading or defensive motion to a complaint brought under this section and before trial, the parties or their designated representatives shall meet in mediation to discuss the issues of liability and damages in accordance with this paragraph for the purpose of an early resolution of the matter.~~

~~1. Within 60 days after the filing of the responsive pleading or defensive motion, the parties shall:~~

~~a. Agree on a mediator. If the parties cannot agree on a mediator, the defendant shall immediately notify the court, which shall appoint a mediator within 10 days after such notice.~~

~~b. Set a date for mediation.~~

~~c. Prepare an order for the court that identifies the mediator, the scheduled date of the mediation, and other terms of the mediation. Absent any disagreement between the parties,~~

1 ~~the court may issue the order for the mediation submitted by~~
2 ~~the parties without a hearing.~~
3 ~~2. The mediation must be concluded within 120 days~~
4 ~~after the filing of a responsive pleading or defensive motion.~~
5 ~~The date may be extended only by agreement of all parties~~
6 ~~subject to mediation under this subsection.~~
7 ~~3. The mediation shall be conducted in the following~~
8 ~~manner:~~
9 ~~a. Each party shall ensure that all persons necessary~~
10 ~~for complete settlement authority are present at the~~
11 ~~mediation.~~
12 ~~b. Each party shall mediate in good faith.~~
13 ~~4. All aspects of the mediation which are not~~
14 ~~specifically established by this subsection must be conducted~~
15 ~~according to the rules of practice and procedure adopted by~~
16 ~~the Supreme Court of this state.~~
17 ~~(b) If the parties do not settle the case pursuant to~~
18 ~~mediation, the last offer of the defendant made at mediation~~
19 ~~shall be recorded by the mediator in a written report that~~
20 ~~states the amount of the offer, the date the offer was made in~~
21 ~~writing, and the date the offer was rejected. If the matter~~
22 ~~subsequently proceeds to trial under this section and the~~
23 ~~plaintiff prevails but is awarded an amount in damages,~~
24 ~~exclusive of attorney's fees, which is equal to or less than~~
25 ~~the last offer made by the defendant at mediation, the~~
26 ~~plaintiff is not entitled to recover any attorney's fees.~~
27 ~~(c) This subsection applies only to claims for~~
28 ~~liability and damages and does not apply to actions for~~
29 ~~injunctive relief.~~
30 ~~(d) This subsection applies to all causes of action~~
31 ~~that accrue on or after October 1, 1999.~~

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~~(7) Discovery of financial information for the purpose of determining the value of punitive damages may not be had unless the plaintiff shows the court by proffer or evidence in the record that a reasonable basis exists to support a claim for punitive damages.~~

~~(8) In addition to any other standards for punitive damages, any award of punitive damages must be reasonable in light of the actual harm suffered by the resident and the egregiousness of the conduct that caused the actual harm to the resident.~~

Section 5. Effective May 15, 2001, and applying to causes of action accruing on or after that date, section 400.0233, Florida Statutes, is created to read:

400.0233 Presuit notice; investigation; notification of violation of resident's rights or alleged negligence; claims evaluation procedure; informal discovery; review.--

(1) As used in this section, the term:

(a) "Claim for resident's rights violation or negligence" means a negligence claim alleging injury to or the death of a resident arising out of an asserted violation of the rights of a resident under s. 400.022 or an asserted deviation from the applicable standard of care.

(b) "Insurer" means any self-insurer authorized under s. 627.357, liability insurance carrier, Joint Underwriting Association, or any uninsured prospective defendant.

(2) Prior to filing a claim for a violation of a resident's rights or a claim for negligence, a claimant alleging injury to or the death of a resident shall notify each prospective defendant by certified mail, return receipt requested, of an asserted violation of a resident's rights provided in s. 400.022 or deviation from the standard of care.

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By the Committee on Elder & Long-Term Care and
Representative Green

1 A bill to be entitled
2 An act relating to long-term care, amending s
3 400 0073, F S , relating to state and local
4 ombudsman council investigations, requiring
5 ombudsman verification and reporting of nursing
6 home staff on duty and the posting thereof;
7 providing penalty for refusal of a nursing home
8 or assisted living facility to allow entry to
9 an ombudsman, amending s. 400 021, F S ;
10 revising definitions; defining "controlling
11 interest" and "voluntary board member",
12 creating s. 400.0223, F.S., requiring nursing
13 homes to allow electronic monitoring of
14 residents in their rooms; requiring posting of
15 notice, providing facility requirements;
16 providing penalties, amending ss 400 023 and
17 400.429, F S ; providing for civil actions to
18 enforce nursing home and assisted living
19 facility residents' rights, providing who may
20 pursue such actions; providing for attorney's
21 fees and costs; providing the burden of proof;
22 providing evidence of breach of duty; providing
23 certain liability; limiting period for
24 commencement of actions; providing definitions;
25 providing for claims involving death of the
26 resident; providing for punitive damages;
27 providing nonenforceability of judgments or
28 agreements concealing certain information;
29 requiring facility report of a judgment or
30 agreement to the Agency for Health Care
31 Administration within a specified period,

1 (8) The facility administrator may require a resident
2 or legal representative who wishes to install an electronic
3 monitoring device to make the request in writing.
4 (9) Subject to the Florida Rules of Evidence, a tape
5 created through the use of electronic monitoring shall be
6 admissible in either a civil or criminal action brought in a
7 Florida court.
8 (10)(a) A licensee who operates a nursing home
9 facility in violation of this section is subject to a fine not
10 exceeding $500 per violation per day pursuant to s. 400.102.
11 (b) A person who willfully and without the consent of
12 a resident or legal representative hampers, obstructs, tampers
13 with, or destroys an electronic monitoring device or tape
14 commits a misdemeanor of the first degree, punishable as
15 provided in s 775.082 or s. 775.083.
16 Section 4. Effective October 1, 2001, section 400 023,
17 Florida Statutes, is amended to read·
18 (Substantial rewording of section See
19 s. 400.023, F S., for present text.)
20 400.023 Civil actions to enforce nursing home
21 residents' rights --
22 (1)(a) Sections 400 023-400.0242 provide the exclusive
23 remedy for any civil action against a nursing home licensee,
24 facility owner, facility administrator, or facility staff for
25 recovery of damages from personal injury to or death of a
26 nursing home resident arising out of negligence or deprivation
27 of rights specified in s 400 022. This exclusivity applies to
28 and includes any claim against an employee, agent, or other
29 person for whose actions the licensee is alleged to be
30 vicariously liable and to any management company, parent
31 corporation, subsidiary, lessor, or other person alleged to be

directly liable to the resident or vicariously liable for the actions of the licensee or its agent.

(b) However, ss. 400.023-400.0242 do not prohibit a resident or a resident's legal guardian from pursuing any administrative remedy or injunctive relief available to a resident as a result of a deprivation of the rights specified in s. 400.022, whether or not the deprivation of rights resulted in personal injury to, or the death of, the resident. In any case where there is a deprivation of rights that does not involve personal injury or death, including any claim for injunctive relief or an administrative remedy, the prevailing party shall be entitled to recover reasonable attorney's fees, not to exceed $25,000, and costs from the nonprevailing party; however, the joinder of a claim under this paragraph with a claim under paragraph (a) shall not be the basis for an award of fees or costs in such claim under paragraph (a). Except as otherwise set forth in this paragraph, it is the intent of the Legislature that this provision for attorney's fees be interpreted in a manner consistent with federal case law involving an action under Title VII of the Civil Rights Act.

(c) In addition to the remedies provided in ss. 400.023-400.0242, a resident, a resident's legal guardian, or the personal representative of the estate of a deceased resident may pursue an action under s. 415.1111. In addition, a resident or a resident's legal guardian shall be entitled to pursue a claim for damages or injunctive relief for those violations of s. 400.022 that do not result in personal injury or death.

(2) A claim pursuant to ss. 400.023-400.0242 may be brought by the resident or his or her legal guardian, by a person or organization acting on behalf of a resident with the

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1 consent of the resident or his or her guardian, or, if the
2 resident has died, the personal representative of the estate
3 of the deceased resident
4 (3) In any claim brought pursuant to ss
5 400.023-400.0242, the claimant has the burden of proving by a
6 preponderance of the evidence that
7 (a) Each defendant had an established duty to the
8 resident;
9 (b) Each defendant breached that duty;
10 (c) The breach of that duty is the proximate cause of
11 the personal injury to, or the death of, the resident, or the
12 proximate cause of the deprivation of the resident's rights
13 specified in s. 400 022; and
14 (d) The proximate cause of the personal injury, death,
15 or deprivation of the resident's rights resulted in damages.
16 (4) For purposes of ss. 400.023-400 0242, a licensee
17 breaches its established duty to the resident when it fails to
18 provide a standard of care that a reasonably prudent nursing
19 home would provide under the same or similar circumstances A
20 deprivation of the rights specified in s. 400.022 or in any
21 other standard or guidelines specified in this part or in any
22 applicable administrative standard or guidelines of this state
23 or a federal regulatory agency shall be evidence of a breach
24 of duty by the licensee
25 (5) A licensee shall not be liable for the medical
26 negligence of any physician rendering care or treatment to the
27 resident except for the services of a medical director as
28 required in this part Nothing in this subsection shall be
29 construed to protect a licensee from liability for failure to
30 provide a resident with appropriate observation, assessment,
31

1 nursing diagnosis, planning, intervention, and evaluation of
2 care by nursing staff.
3 (6) An action for damages brought under ss.
4 400.023-400.0242 must be commenced within 2 years after the
5 date on which the incident giving rise to the action occurred
6 or within 2 years after the date on which the incident is
7 discovered, or should have been discovered with the exercise
8 of due diligence. However, the action may not be commenced
9 later than 4 years after the date of the incident or
10 occurrence out of which the cause of action accrued. In any
11 action covered by this subsection in which it is shown that
12 fraud, concealment, or intentional misrepresentation of fact
13 prevented the discovery of the injury, the period of
14 limitation is extended forward 2 years from the time that the
15 injury is discovered, or should have been discovered with the
16 exercise of due diligence, but such period may not in any
17 event exceed 7 years after the date that the incident giving
18 rise to the injury occurred.
19 (7) As used in ss. 400.023-400.0242, the term:
20 (a) "Claimant" means any person who is entitled to
21 recover damages under this part.
22 (b) "Licensee" means the legal entity identified in
23 the application for licensure under this part which entity is
24 the licensed operator of the facility.
25 (c) "Medical expert" means a person duly and regularly
26 engaged in the practice of his or her profession who holds a
27 health care professional degree from a university or college
28 and has had special professional training and experience, or a
29 person who possesses special health care knowledge or skill,
30 concerning the subject upon which he or she is called to
31 testify or provide an opinion.

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1 (d) "Resident" means a person who occupies a licensed
2 bed in a facility licensed under this part.
3 (8) Sections 768.16-768.26 apply to a claim in which
4 the resident has died as a result of the facility's breach of
5 an established duty to the resident. In addition to any other
6 damages, the personal representative may recover on behalf of
7 the estate pursuant to ss. 768.16-768.26. The personal
8 representative may also recover on behalf of the estate
9 noneconomic damages for the resident's pain and suffering from
10 the time of injury until the time of death. The limitations
11 set forth in s. 768.21(8) do not apply to a claim maintained
12 under this section where a resident has died as a result of
13 the nursing home's breach of a duty to the resident.
14 (9) For the purpose of this section, punitive damages
15 may be awarded for conduct which is willful, wanton, gross or
16 flagrant, reckless, or consciously indifferent to the rights
17 of the resident.
18 (10) Discovery of financial information for the
19 purpose of determining the value of punitive damages may not
20 be had unless the plaintiff shows the court by proffer or
21 evidence in the record that a reasonable basis exists to
22 support a claim for punitive damages.
23 (11) In addition to any other standards for punitive
24 damages, any award of punitive damages must be reasonable in
25 light of the actual harm suffered by the resident and the
26 egregiousness of the conduct that caused the actual harm to
27 the resident.
28 (12) Any portion of an order, judgment, arbitration
29 decision, mediation agreement, or other type of agreement,
30 contract, or settlement that has the purpose or effect of
31 concealing information relating to the settlement or

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1 resolution of any claim or action brought pursuant to this
2 part is void, contrary to public policy, and may not be
3 enforced. No court shall enter an order or judgment that has
4 the purpose or effect of concealing any information pertaining
5 to the resolution or settlement of any claim or action brought
6 pursuant to ss. 400 023-400 0242 Any person or governmental
7 entity has standing to contest an order, judgment, arbitration
8 decision, mediation agreement, or other type of agreement,
9 contract, or settlement that violates this subsection A
10 contest pursuant to this subsection may be brought by a motion
11 or an action for a declaratory judgment filed in the circuit
12 court of the circuit where the violation of this subsection
13 occurred
14 (13) The defendant must provide to the agency a copy
15 of any resolution of a claim or civil action brought pursuant
16 to ss 400.023-400.0242 within 90 days after such resolution,
17 including, but not limited to, any final judgment, arbitration
18 decision, order, mediation agreement, or settlement. Failure
19 to provide the copy to the agency shall result in a fine of
20 $500 for each day it is overdue The agency shall develop
21 forms and adopt rules necessary to administer this subsection.
22 Section 5. Subsections (1) through (11) of section
23 400.023, Florida Statutes, as amended by this act, shall apply
24 to causes of action accruing on or after October 1, 2001.
25 Subsections (12) and (13) of section 400.023, Florida
26 Statutes, as amended by this act, shall apply to causes of
27 action in existence on October 1, 2001.
28 Section 6. Effective October 1, 2001, and applicable
29 to causes of action accruing on or after that date, section
30 400.0235, Florida Statutes, is created to read·
31

By the Fiscal Responsibility Council and Committee on Elder & Long-Term Care and Representatives Green and Murman

1 A bill to be entitled
2 An act relating to long-term care; amending s.
3 400.0073, F.S., relating to state and local
4 ombudsman council investigations, requiring
5 ombudsman verification and reporting of nursing
6 home staff on duty and the posting thereof,
7 providing penalty for refusal of a nursing home
8 or assisted living facility to allow entry to
9 an ombudsman; amending s. 400.021, F.S.;
10 revising definitions, defining "controlling
11 interest" and "voluntary board member";
12 creating s. 400.0223, F.S., requiring nursing
13 homes to allow electronic monitoring of
14 residents in their rooms, requiring posting of
15 notice, providing facility requirements,
16 providing penalties, amending s. 400.023, F.S.,
17 providing for election of survival damages,
18 wrongful death damages, or recovery for
19 negligence, providing for attorney's fees for
20 injunctive relief or administrative remedy,
21 providing that ch. 766, F.S., does not apply to
22 actions under this section, providing burden of
23 proof; providing that a violation of a right is
24 not negligence per se, prescribing the duty of
25 care, prescribing a nurse's duty of care,
26 eliminating presuit provisions, eliminating the
27 requirement for presuit mediation; requiring a
28 copy of complaint to be served to the Agency
29 for Health Care Administration, creating s.
30 400.0233, F.S., providing for presuit notice;
31 prohibiting the filing of suit for a specified

1 (10)(a) A licensee who operates a nursing home
2 facility in violation of this section is subject to a fine not
3 exceeding $500 per violation per day pursuant to s. 400.102.
4 (b) A person who willfully and without the consent of
5 a resident or legal representative hampers, obstructs, tampers
6 with, or destroys an electronic monitoring device or tape
7 commits a misdemeanor of the first degree, punishable as
8 provided in s. 775.082 or s. 775.083.
9 Section 4. Effective July 1, 2001, and applying to
10 causes of action accruing on or after that date, section
11 400.023, Florida Statutes, is amended to read:
12 400.023 Civil enforcement.--
13 (1) Any resident whose rights as specified in this
14 part are violated ~~deprived or infringed upon~~ shall have a
15 cause of action for long-term care facility negligence ~~against~~
16 ~~any licensee responsible for the violation~~. The action may be
17 brought by the resident or his or her guardian, by a person or
18 organization acting on behalf of a resident with the consent
19 of the resident or his or her guardian, or by the personal
20 representative of the estate of a deceased resident regardless
21 of the cause of death. If the action alleges a claim for the
22 resident's rights or for negligence that caused the death of
23 the resident, the claimant shall be required to elect either
24 survival damages pursuant to s. 46.021 or wrongful death
25 damages pursuant to s. 768.21 ~~when the cause of death resulted~~
26 ~~from the deprivation or infringement of the decedent's rights~~.
27 If the action alleges a claim for the resident's rights or for
28 negligence that did not cause the death of the resident, the
29 personal representative of the estate may recover damages for
30 the negligence that caused injury to the resident.The action
31 may be brought in any court of competent jurisdiction to

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1 enforce such rights and to recover actual and punitive damages
2 for any violation of ~~deprivation or infringement on~~ the rights
3 of a resident or for negligence Any resident who prevails in
4 seeking injunctive relief or a claim for an administrative
5 remedy is entitled to recover the costs of the action, and a
6 reasonable attorney's fee assessed against the defendant not
7 to exceed $25,000. Fees shall be awarded solely for the
8 injunctive or administrative relief and not for any claim or
9 action for damages, whether such claim or action is brought
10 together with a request for an injunction or administrative
11 relief or as a separate action, except as provided under s
12 768.79 or the Florida Rules of Civil Procedure Sections
13 400 023-400 0238 provide the exclusive remedy for a cause of
14 action for recovery of damages for the personal injury or
15 death of a nursing home resident arising out of negligence or
16 violation of rights specified in s. 400 022 This section
17 shall not be construed as precluding theories of recovery not
18 arising out of negligence or s 400.022 that are available to
19 a resident or to the agency The provisions of chapter 766 do
20 not apply to any cause of action brought under ss.
21 400.023-400.0238. ~~Any plaintiff who prevails in any such~~
22 ~~action may be entitled to recover reasonable attorney's fees,~~
23 ~~costs of the action, and damages, unless the court finds that~~
24 ~~the plaintiff has acted in bad faith, with malicious purpose,~~
25 ~~and that there was a complete absence of a justiciable issue~~
26 ~~of either law or fact. Prevailing defendants may be entitled~~
27 ~~to recover reasonable attorney's fees pursuant to s. 57.105.~~
28 ~~The remedies provided in this section are in addition to and~~
29 ~~cumulative with other legal and administrative remedies~~
30 ~~available to a resident and to the agency.~~
31

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1 (2) In any claim for long-term care facility
2 negligence causing injury to or the death of a resident, the
3 claimant shall have the burden of proving, by a preponderance
4 of the evidence, that
5 (a) The defendant owed a duty to the resident,
6 (b) The defendant breached the duty to the resident,
7 (c) The breach of the duty is a legal cause of loss,
8 injury, death, or damage to the resident, and
9 (d) The resident sustained loss, injury, death, or
10 damage as a result of the breach.
11
12 Nothing in this part shall be interpreted to create strict
13 liability. A violation of the rights set forth in s. 400 022
14 or in any other standard or guidelines specified in this part
15 or in any applicable administrative standard or guidelines of
16 this state or a federal regulatory agency shall be evidence of
17 negligence but shall not be considered negligence per se.
18 ~~(2) Attorneys' fees shall be based on the following~~
19 ~~criteria:~~
20 ~~(a) The time and labor required,~~
21 ~~(b) The novelty and difficulty of the questions,~~
22 ~~(c) The skill requisite to perform the legal service~~
23 ~~properly,~~
24 ~~(d) The preclusion of other employment by the attorney~~
25 ~~due to the acceptance of the case,~~
26 ~~(e) The customary fee,~~
27 ~~(f) Whether the fee is fixed or contingent,~~
28 ~~(g) The amount involved or the results obtained,~~
29 ~~(h) The experience, reputation, and ability of the~~
30 ~~attorneys,~~
31 ~~(i) The costs expended to prosecute the claim,~~

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1 ~~(j) The type of fee arrangement between the attorney~~
2 ~~and the client;~~
3 ~~(k) Whether the relevant market requires a contingency~~
4 ~~fee multiplier to obtain competent counsel;~~
5 ~~(l) Whether the attorney was able to mitigate the risk~~
6 ~~of nonpayment in any way.~~
7 (3) In any claim for long-term care facility
8 negligence, a licensee, person, or entity shall have a duty to
9 exercise reasonable care. Reasonable care is that degree of
10 care which a reasonably careful licensee, person, or entity
11 would use under like circumstances.
12 (4) In any claim for long-term care facility
13 negligence, a nurse licensed under part I of chapter 464 shall
14 have the duty to exercise care consistent with the prevailing
15 professional standard of care for a nurse. The prevailing
16 professional standard of care for a nurse shall be that level
17 of care, skill, and treatment which, in light of all relevant
18 surrounding circumstances, is recognized as acceptable and
19 appropriate by reasonably prudent similar nurses.
20 (5)~~(3)~~ A licensee shall not be liable for the medical
21 negligence of any physician rendering care or treatment to the
22 resident except for the administrative services of a medical
23 director as required in this part. Nothing in this subsection
24 shall be construed to protect a licensee, person, or entity
25 from liability for failure to provide a resident with
26 appropriate observation, assessment, nursing diagnosis,
27 planning, intervention, and evaluation of care by nursing
28 staff.
29 (6) The resident or the resident's legal
30 representative shall serve a copy of any complaint alleging,
31 in whole or in part, the violation of any rights specified in

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this part to the Agency for Health Care Administration at the time of filing the initial complaint with the clerk of the court for the county in which the action is pursued.

~~(4) Claimants alleging a deprivation or infringement of adequate and appropriate health care pursuant to s. 400.022(1)(k) which resulted in personal injury to or the death of a resident shall conduct an investigation which shall include a review by a licensed physician or registered nurse familiar with the standard of nursing care for nursing home residents pursuant to this part. Any complaint alleging such a deprivation or infringement shall be accompanied by a verified statement from the reviewer that there exists reason to believe that a deprivation or infringement occurred during the resident's stay at the nursing home. Such opinion shall be based on records or other information available at the time that suit is filed. Failure to provide records in accordance with the requirements of this chapter shall waive the requirement of the verified statement.~~

~~(5) For the purpose of this section, punitive damages may be awarded for conduct which is willful, wanton, gross or flagrant, reckless, or consciously indifferent to the rights of the resident.~~

~~(6) To recover attorney's fees under this section, the following conditions precedent must be met:~~

~~(a) Within 120 days after the filing of a responsive pleading or defensive motion to a complaint brought under this section and before trial, the parties or their designated representatives shall meet in mediation to discuss the issues of liability and damages in accordance with this paragraph for the purpose of an early resolution of the matter.~~

~~1. Within 60 days after the filing of the responsive pleading or defensive motion, the parties shall:~~

~~a. Agree on a mediator. If the parties cannot agree on a mediator, the defendant shall immediately notify the court, which shall appoint a mediator within 10 days after such notice.~~

~~b. Set a date for mediation.~~

~~c. Prepare an order for the court that identifies the mediator, the scheduled date of the mediation, and other terms of the mediation. Absent any disagreement between the parties, the court may issue the order for the mediation submitted by the parties without a hearing.~~

~~2. The mediation must be concluded within 120 days after the filing of a responsive pleading or defensive motion. The date may be extended only by agreement of all parties subject to mediation under this subsection.~~

~~3. The mediation shall be conducted in the following manner:~~

~~a. Each party shall ensure that all persons necessary for complete settlement authority are present at the mediation.~~

~~b. Each party shall mediate in good faith.~~

~~4. All aspects of the mediation which are not specifically established by this subsection must be conducted according to the rules of practice and procedure adopted by the Supreme Court of this state.~~

~~(b) If the parties do not settle the case pursuant to mediation, the last offer of the defendant made at mediation shall be recorded by the mediator in a written report that states the amount of the offer, the date the offer was made in writing, and the date the offer was rejected. If the matter~~

1 ~~subsequently proceeds to trial under this section and the~~
2 ~~plaintiff prevails but is awarded an amount in damages,~~
3 ~~exclusive of attorney's fees, which is equal to or less than~~
4 ~~the last offer made by the defendant at mediation, the~~
5 ~~plaintiff is not entitled to recover any attorney's fees.~~
6 ~~(c) This subsection applies only to claims for~~
7 ~~liability and damages and does not apply to actions for~~
8 ~~injunctive relief.~~
9 ~~(d) This subsection applies to all causes of action~~
10 ~~that accrue on or after October 1, 1999.~~
11 ~~(7) Discovery of financial information for the purpose~~
12 ~~of determining the value of punitive damages may not be had~~
13 ~~unless the plaintiff shows the court by proffer or evidence in~~
14 ~~the record that a reasonable basis exists to support a claim~~
15 ~~for punitive damages.~~
16 ~~(8) In addition to any other standards for punitive~~
17 ~~damages, any award of punitive damages must be reasonable in~~
18 ~~light of the actual harm suffered by the resident and the~~
19 ~~egregiousness of the conduct that caused the actual harm to~~
20 ~~the resident.~~
21 Section 5. Effective July 1, 2001, and applying to
22 causes of action accruing on or after that date, section
23 400 0233, Florida Statutes, is created to read
24 400 0233 Presuit notice, investigation; notification
25 of violation of resident's rights or alleged negligence,
26 claims evaluation procedure, informal discovery; review.--
27 (1) As used in this section, the term:
28 (a) "Claim for long-term care facility negligence"
29 means a negligence claim alleging injury to or the death of a
30 resident arising out of an asserted violation of the rights of
31

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(14)~~(13)~~ "Nursing service" means such services or acts as may be rendered, directly or indirectly, to and in behalf of a person by individuals as defined in s. 464.003

(15)~~(14)~~ "Planning and service area" means the geographic area in which the Older Americans Act programs are administered and services are delivered by the Department of Elderly Affairs

(16)~~(15)~~ "Respite care" means admission to a nursing home for the purpose of providing a short period of rest or relief or emergency alternative care for the primary caregiver of an individual receiving care at home who, without home-based care, would otherwise require institutional care

(17)~~(16)~~ "Resident care plan" means a written plan developed, maintained, and reviewed not less than quarterly by a registered nurse, with participation from other facility staff and the resident or his or her designee or legal representative, which includes a comprehensive assessment of the needs of an individual resident, the type and frequency of services required to provide the necessary care for the resident to attain or maintain the highest practicable physical, mental, and psychosocial well-being, a listing of services provided within or outside the facility to meet those needs, and an explanation of service goals The resident care plan must be signed by the director of nursing and the resident, the resident's designee, or the resident's legal representative

(18)~~(17)~~ "Resident designee" means a person, other than the owner, administrator, or employee of the facility, designated in writing by a resident or a resident's guardian, if the resident is adjudicated incompetent, to be the resident's representative for a specific, limited purpose

(19)~~(18)~~ "State ombudsman council" means the State Long-Term Care Ombudsman Council established pursuant to s 400 0067

(20) "Voluntary board member" means a director of a not-for-profit corporation or organization who serves solely in a voluntary capacity for the corporation or organization, does not receive any remuneration for his or her services on the board of directors, and has no financial interest in the corporation or organization The agency shall recognize a person as a voluntary board member following submission of a statement to the agency by the director and the not-for-profit corporation or organization which affirms that the director conforms to this definition The statement affirming the status of the director must be submitted to the agency on a form provided by the agency

Section 3. The Agency for Health Care Administration and the Office of the Attorney General shall jointly study the potential use of electronic monitoring devices in nursing home facilities licensed under part II of chapter 400, Florida Statutes The study shall include, but not be limited to, a review of the current use of electronic monitoring devices by nursing home facilities and their residents and other health care facilities, an analysis of other state laws and proposed legislation related to the mandated use of electronic monitoring devices in nursing home facilities, an analysis of the potential ramifications of requiring facilities to install such devices when requested

by or on behalf of a resident; the impact of the devices on the privacy and dignity of the resident on whose behalf the device is installed and other residents who may be affected by the device, the potential impact on improving the care of residents, the potential impact on the care environment and on staff recruitment and retention, appropriate uses of any tapes if mandated by law, including methods and timeframes for reporting any questionable incidents to the facility and appropriate regulatory agencies, appropriate security needed to protect the integrity of tapes for the protection of the resident and direct-care staff; and the potential ramifications on the care environment of allowing the use of recorded tapes in legal proceedings, including any exceptions that should apply if prohibited The Agency for Health Care Administration shall lead the study and shall submit the findings and recommendations of the study to the Governor, the President of the Senate, and Speaker of the House of Representatives by January 1, 2002

Section 4 Effective May 15, 2001, and applying to causes of action accruing on or after that date, section 400 023, Florida Statutes, is amended to read:

400.023 Civil enforcement —

(1) Any resident whose rights as specified in this part are violated ~~deprived or infringed upon~~ shall have a cause of action ~~against any licensee responsible for the violation~~ The action may be brought by the resident or his or her guardian, by a person or organization acting on behalf of a resident with the consent of the resident or his or her guardian, or by the personal representative of the estate of a deceased resident regardless of the cause of death. If the action alleges a claim for the resident's rights or for negligence that caused the death of the resident, the claimant shall be required to elect either survival damages pursuant to s 46 021 or wrongful death damages pursuant to s 768 21 ~~when the cause of death resulted from the deprivation or infringement of the decedent's rights.~~ If the action alleges a claim for the resident's rights or for negligence that did not cause the death of the resident, the personal representative of the estate may recover damages for the negligence that caused injury to the resident The action may be brought in any court of competent jurisdiction to enforce such rights and to recover actual and punitive damages for any violation of ~~deprivation or infringement on~~ the rights of a resident or for negligence. Any resident who prevails in seeking injunctive relief or a claim for an administrative remedy is entitled to recover the costs of the action, and a reasonable attorney's fee assessed against the defendant not to exceed $25,000 Fees shall be awarded solely for the injunctive or administrative relief and not for any claim or action for damages whether such claim or action is brought together with a request for an injunction or administrative relief or as a separate action, except as provided under s. 768.79 or the Florida Rules of Civil Procedure Sections 400 023-400.0238 provide the exclusive remedy for a cause of action for recovery of damages for the personal injury or death of a nursing home resident arising out of negligence or a violation of rights specified in s 400.022 This section does not preclude theories of recovery not arising out of negligence or s 400 022 which are available to a resident or to the agency The provisions of chapter 766 do not apply to any cause of action brought under ss 400 023-400.0238 ~~Any plaintiff who prevails in any such action~~

~~may be entitled to recover reasonable attorney's fees, costs of the action, and damages, unless the court finds that the plaintiff has acted in bad faith, with malicious purpose, and that there was a complete absence of a justiciable issue of either law or fact. A prevailing defendant may be entitled to recover reasonable attorney's fees pursuant to s. 57.105. The remedies provided in this section are in addition to and cumulative with other legal and administrative remedies available to a resident and to the agency.~~

(2) In any claim brought pursuant to this part alleging a violation of resident's rights or negligence causing injury to or the death of a resident, the claimant shall have the burden of proving, by a preponderance of the evidence, that:

(a) The defendant owed a duty to the resident;

(b) The defendant breached the duty to the resident;

(c) The breach of the duty is a legal cause of loss, injury, death, or damage to the resident; and

(d) The resident sustained loss, injury, death, or damage as a result of the breach.

Nothing in this part shall be interpreted to create strict liability. A violation of the rights set forth in s. 400.022 or in any other standard or guidelines specified in this part or in any applicable administrative standard or guidelines of this state or a federal regulatory agency shall be evidence of negligence but shall not be considered negligence per se.

~~(2) Attorneys' fees shall be based on the following criteria:~~

~~(a) The time and labor required;~~

~~(b) The novelty and difficulty of the questions;~~

~~(c) The skill requisite to perform the legal service properly;~~

~~(d) The preclusion of other employment by the attorney due to the acceptance of the case;~~

~~(e) The customary fee;~~

~~(f) Whether the fee is fixed or contingent;~~

~~(g) The amount involved or the results obtained;~~

~~(h) The experience, reputation, and ability of the attorneys;~~

~~(i) The costs expended to prosecute the claim;~~

~~(j) The type of fee arrangement between the attorney and the client;~~

~~(k) Whether the relevant market requires a contingency fee multiplier to obtain competent counsel;~~

~~(l) Whether the attorney was able to mitigate the risk of nonpayment in any way.~~

(3) In any claim brought pursuant to s. 400.023, a licensee, person, or entity shall have a duty to exercise reasonable care. Reasonable care is that degree of care which a reasonably careful licensee, person, or entity would use under like circumstances.

(4) In any claim for resident's rights violation or negligence by a nurse licensed under part I of chapter 464, such nurse shall have the duty to exercise care consistent with the prevailing professional standard of care for a nurse. The prevailing professional standard of care for a nurse shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances is recognized as acceptable and appropriate by reasonably prudent similar nurses.

(5)~~(3)~~ A licensee shall not be liable for the medical negligence of any physician rendering care or treatment to the resident except for the administrative services of a medical director as required in this part. Nothing in this subsection shall be construed to protect a licensee, person, or entity from liability for failure to provide a resident with appropriate observation, assessment, nursing diagnosis, planning, intervention, and evaluation of care by nursing staff.

(6) The resident or the resident's legal representative shall serve a copy of any complaint alleging in whole or in part a violation of any rights specified in this part to the Agency for Health Care Administration at the time of filing the initial complaint with the clerk of the court for the county in which the action is pursued. The requirement of providing a copy of the complaint to the agency does not impair the resident's legal rights or ability to seek relief for his or her claim.

(7) An action under this part for a violation of rights or negligence recognized herein is not a claim for medical malpractice, and the provision of s. 768.21(8) do not apply to a claim alleging death of the resident.

~~(4) Claimants alleging a deprivation or infringement of adequate and appropriate health care pursuant to s. 400.022(1)(k) which resulted in personal injury to or the death of a resident shall conduct an investigation which shall include a review by a licensed physician or registered nurse ... with the standard of nursing care for nursing home residents pur... ...is part. Any complaint alleging such a deprivation or infringe... ...ied statement from the reviewer that ...e exists reason to believe that a deprivation or infringement occurred ...ing home. Such opinion shall be based ...ecords or other information available at the time that suit is filed. Failure to provide records in accordance with the requirements of this chap... ...ve the requirement of the verified statement.~~

~~(5) For the purpose of this section, punitive damages may be awarded for conduct which is willful, wanton, gross or flagrant, reckless, or consciously indifferent to the rights of the resident.~~

~~(6) To recover attorney's fees under this section, the following conditions precedent must be met.~~

~~(a) Within 120 days after the filing of a responsive pleading or defensive motion to a complaint brought under this section and before trial, the parties or their designated representatives shall meet in mediation to discuss the issues of liability and damages in accordance with this paragraph for the purpose of an early resolution of the matter.~~

~~1. Within 60 days after the filing of the responsive pleading or defensive motion, the parties shall:~~

~~a. Agree on a mediator. If the parties cannot agree on a mediator, the defendant shall immediately notify the court, which shall appoint a mediator within 10 days after such notice.~~

~~b. Set a date for mediation.~~

~~c. Prepare an order for the court that identifies the mediator, the scheduled date of the mediation, and other terms of the mediation. Absent any disagreement between the parties, the court may issue the order for the mediation submitted by the parties w[illegible]~~

~~2. The mediation must be concluded within 120 days after the filing of a responsive pleading or defensive motion. The date may be extended only by agreement of all parties subject to mediation under this subsection.~~

~~3. The mediation shall be conducted in the following manner:~~

~~a. Each party shall ensure that all persons necessary for complete settlement authority are present at the mediation.~~

~~b. Each party shall mediate in good faith.~~

~~4. All aspects of the mediation which are not specifically established by this subsection must be conducted according to the rules of practice and procedure adopted by the Supreme Court of this state.~~

~~(b) If the parties do not settle the case pursuant to mediation, the last offer of the defendant made at mediation shall be recorded by the mediator in a written report that states the amount of the offer, the date the offer was made in writing, and the date the offer was rejected. If the matter subsequently proceeds to trial under this section and the plaintiff prevails but is awarded an amount in damages, exclusive of attorney's fees, w[illegible] to or less than the last offer made by the defendant at mediation, the plaintiff is not entitled to recover any attorney's fees.~~

~~(c) This subsection applies only to claims for liability and damages and does not apply to actions for injunctive relief.~~

~~(d) This subsection applies to all causes of action that accrue on or after October 1, 1999.~~

~~(7) Discovery of financial information for the purpose of determining the value of punitive damages may no[illegible]~~

~~court by proffer or evidence in the record that a reasonable basis exists to support a claim for punitive damages.~~

~~(8) In addition to any other standards for punitive damages, any award of punitive damages must be reasonable in light of the actual harm suffered by the resident and the egregiousness of the conduct that caused the actual harm to the resident.~~

Section 5. Effective May 15, 2001, and applying to causes of action accruing on or after that date, section 400.0233, Florida Statutes, is created to read:

400.0233 Presuit notice; investigation; notification of violation of resident's rights or alleged negligence; claims evaluation procedure; informal discovery; review.—

(1) As used in this section, the term:

(a) "Claim for resident's rights violation or negligence" means a negligence claim alleging injury to or the death of a resident arising out of an asserted violation of the rights of a resident under s. 400.022 or an asserted deviation from the applicable standard of care.

(b) "Insurer" means any self-insurer authorized under s. 627.357, liability insurance carrier, joint underwriting association, or uninsured prospective defendant.

(2) Prior to filing a claim for a violation of a resident's rights or a claim for negligence, a claimant alleging injury to or the death of a resident shall notify each prospective defendant by certified mail, return receipt requested, of an asserted violation of a resident's rights provided in s. 400.022 or deviation from the standard of care. Such notification shall include an identification of the rights the prospective defendant has violated and the negligence alleged to have caused the incident or incidents and a brief description of the injuries sustained by the resident which are reasonably identifiable at the time of notice. The notice shall contain a certificate of counsel that counsel's reasonable investigation gave rise to a good-faith belief that grounds exist for an action against each prospective defendant.

(3)(a) No suit may be filed for a period of 75 days after notice is mailed to any prospective defendant. During the 75-day period, the prospective defendants or their insurers shall conduct an evaluation of the claim to determine the liability of each defendant and to evaluate the damages of the claimants. Each defendant or insurer of the defendant shall have a procedure for the prompt evaluation of claims during the 75-day period. The procedure shall include one or more of the following:

1. Internal review by a duly qualified facility risk manager or claims adjuster;

2. Internal review by counsel for each prospective defendant;

3. A quality assurance committee authorized under any applicable state or federal statutes or regulations; or