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Long-Term Care and Assisted Living – Overview of Select Risks and Trends

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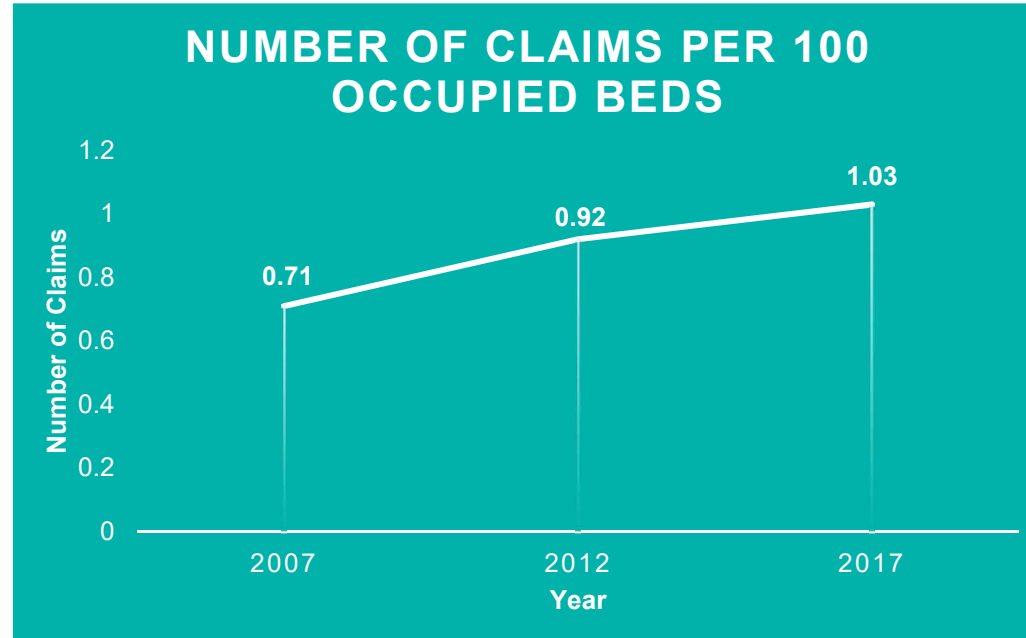


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Civil Claims – General and Professional Liability

Number of Claims

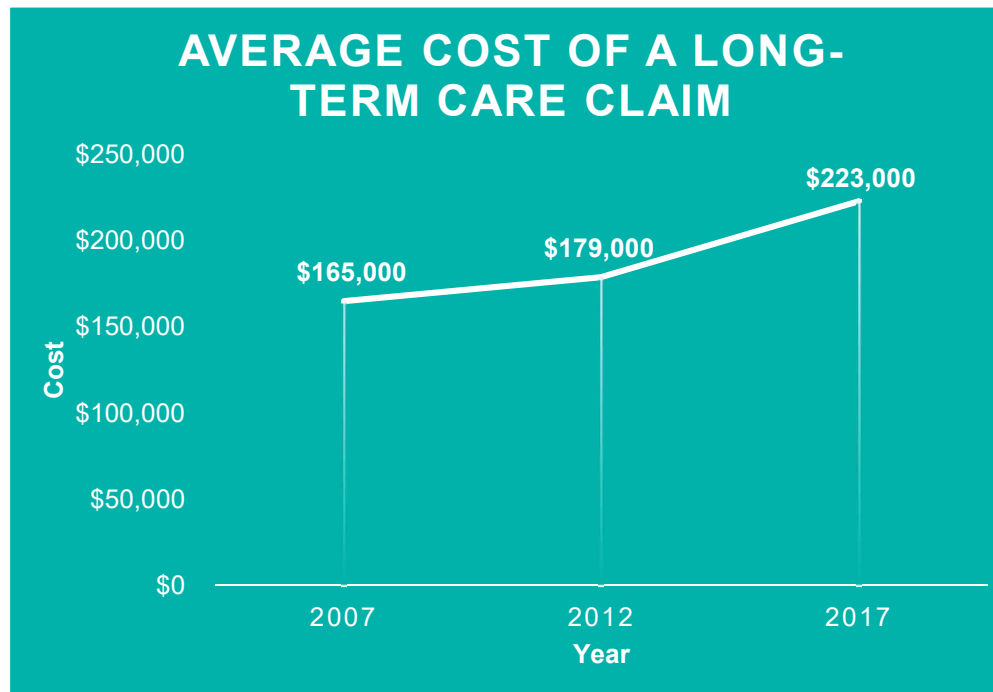
- According to “2017 Long-Term Care: General Liability and Professional Liability Actuarial Analysis” conducted by Aon in 2017, the number of claims per 100 occupied beds has increased over the past ten years¹:



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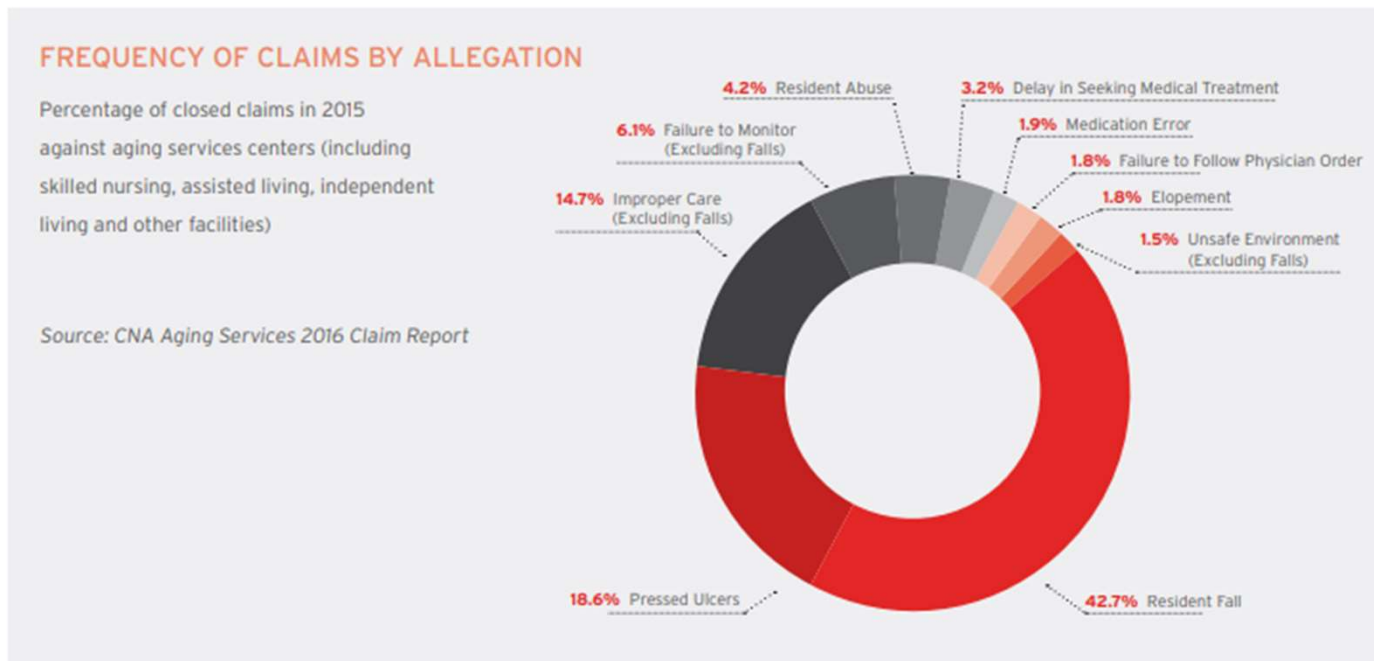
Cost of Claims

- The 2017 AON actuarial analysis also demonstrated that the average cost to defend, settle, or litigate a claim has increased over the past ten years²:



Types of Claims

- According to “Aging Services 2016 Claim Report – Using Evidence to Achieve Excellence: Engage, Lead, Succeed,” published by CNA in 2016, resident falls and pressure ulcers account for the highest percentage of claims in long-term care facilities³



Claims Severity & Frequency

- Overall loss rate for long-term care facilities is expected to increase by 6% during 2018
 - Estimated 2% increase due to claim frequency
 - Estimated 4% increase due to claim severity
- Projected 2018 national loss rate is an average of \$2,450 per occupied bed
- Highest projected loss rate:
 - West Virginia, \$8,380 per occupied bed
- Lowest projected loss rate:
 - **Massachusetts**, \$520 per occupied bed⁴

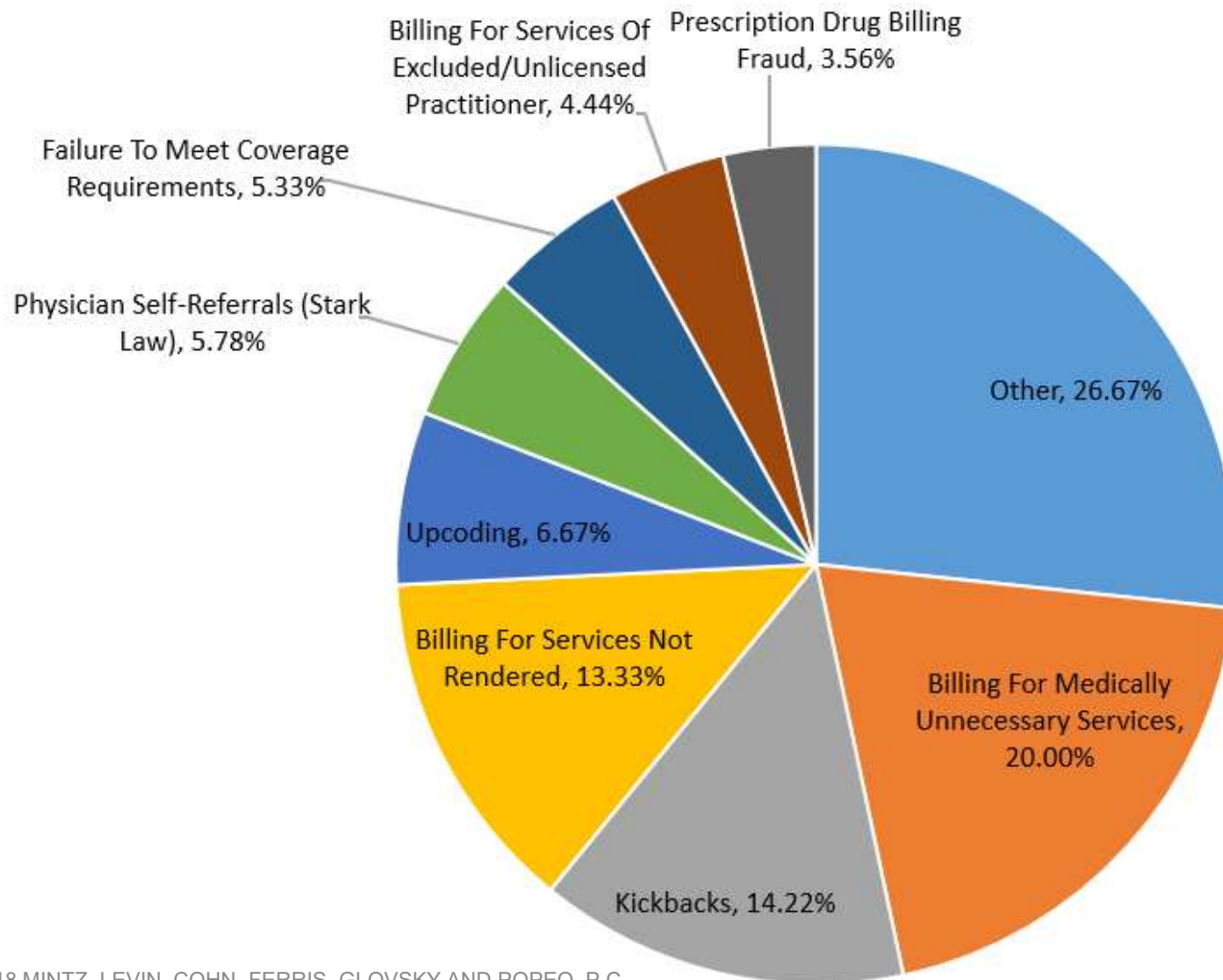




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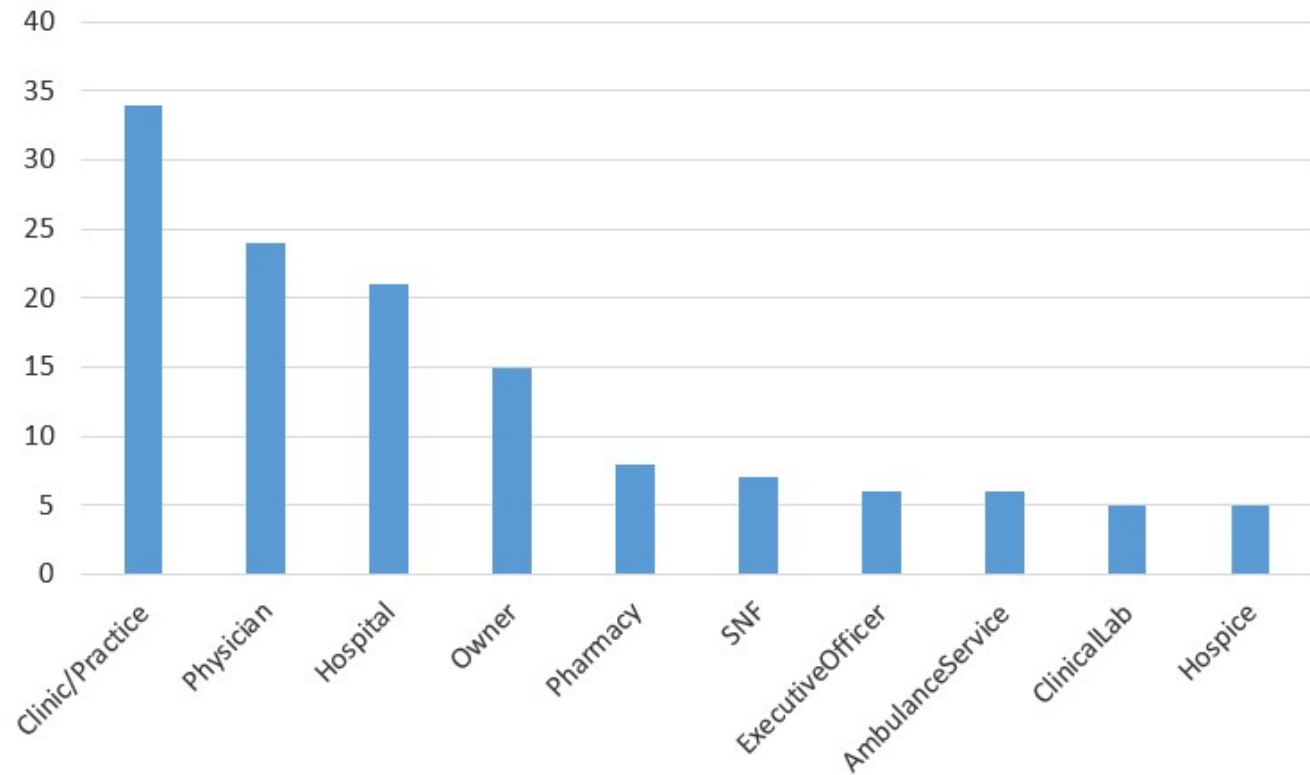
Governmental Action (False Claims Act)

Categories of Conduct FY2018



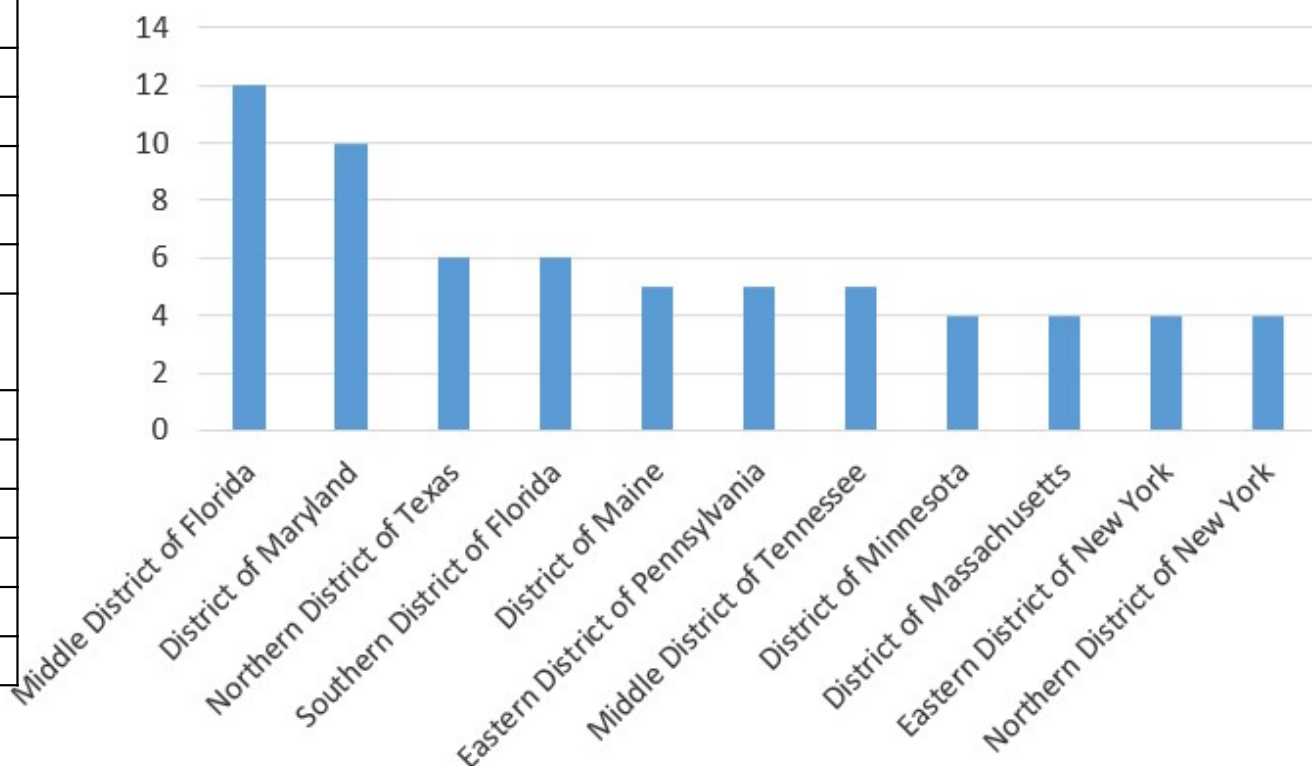
Top 10 Entity Types – FY2018

Entities	Total
Clinic/Practice	34
Physician	24
Hospital	21
Owner	15
Pharmacy	8
SNF	7
Executive Officer	6
Ambulance Service	6
Clinical Lab	5
Hospice	5
Grand Total	131



Top 10 Districts – FY2018

COURT	Total
Middle District of Florida	12
District of Maryland	10
Northern District of Texas	6
Southern District of Florida	6
District of Maine	5
Eastern District of Pennsylvania	5
Middle District of Tennessee	5
District of Minnesota	4
District of Massachusetts	4
Eastern District of New York	4
Northern District of New York	4
Grand Total	65



Top 5 Districts with Amounts FY2018

Districts	Total
☐ District of Massachusetts	\$236,985,500.00
United Therapeutics Corporation	\$210,000,000.00
Pfizer, Inc.	\$23,850,000.00
Abiomed Inc.	\$3,100,000.00
Dr. Hung K. Do	\$35,500.00
☐ Northern District of Texas	\$105,373,000.00
DaVita Rx LLC	\$63,700,000.00
University of North Texas Health Science Center	\$13,073,000.00
SightLine Health, LLC	\$11,500,000.00
Pine Creek Medical Center	\$7,500,000.00
Reliant Rehabilitation Holdings, Inc.	\$6,100,000.00
Primex Clinical Laboratories	\$3,500,000.00
☐ Eastern District of Michigan	\$84,500,000.00
William Beaumont Hospital	\$84,500,000.00
☐ Western District of Missouri	\$75,000,000.00
Chemed Corp. and Vitas Hospice Services	\$75,000,000.00
☐ Middle District of Florida	\$72,970,391.00
21st Century Oncology	\$26,000,000.00
Healogics, Inc.	\$22,510,000.00
Americare Ambulance	\$5,500,000.00
North Central Florida Hospice Inc., dba Haven Hospice	\$5,085,024.00
Dermatology Healthcare, LLC	\$4,000,000.00
Michael Frey, M.D.	\$3,000,000.00
Arthur S. Portnow M.D.	\$1,950,000.00
FWC Urogynecology, LLC	\$1,700,000.00
Riverside Spine & Pain Physicians LLC	\$1,491,478.00
Liberty Ambulance Service, Inc.	\$1,200,000.00
Atlantic Mobile Imaging Services, Inc.	\$321,389.00
Total Lab Care, LLC	\$212,500.00

SNF Enforcement Environment – Recent Settlement Examples

Company	Settlement Date	Overview of Allegations	Settlement Amount	CIA?
SavaSeniorCare LLC	N/A - Current Litigation	SavaSeniorCare pressured facilities to increase their Medicare reimbursement by increasing patients' RUG levels without regard for medical necessity of increased therapy.	N/A	No
Southern SNF Management, Inc.	July 18, 2018	Southern SNF Dynamic Rehab and nine affiliated SNFs submitted false claims as a result of inflated RUGs. Allegations included that Southern SNF Management's corporate policies encouraged the provision of medically unreasonable and unnecessary therapy without regard for patients' individual clinical needs.	\$10M	No
Preferred Care Inc.	June 29, 2018	Preferred Care, PCPMG, and Stanton Nursing inflated patients' RUG levels by improperly coding patients for higher amounts of skilled nursing services than they needed or received.	\$540K	No

SNF Enforcement Environment – Recent Settlement Examples

Company	Settlement Date	Overview of Allegations	Settlement Amount	CIA?
Signature HealthCARE LLC	June 8, 2018	Signature submitted false claims by: (1) presumptively placing patients in the highest RUG level, without regard for patients' individual clinical needs; (2) providing the minimum number of minutes required to bill at a given reimbursement level while discouraging therapists from providing additional therapy; and (3) pressuring therapists and patients to complete the planned minutes of therapy even when patients were sick or declined to participate in therapy.	\$30M	Yes
New Oaklawn Investments, LLC and Elmcroft Senior Living, Inc.	March 29, 2018	Oaklawn improperly billed Medicare for patient rehabilitation services at the Ultra High and Very High RUG for certain services that were not reasonably or medically necessary.	\$5.2M	No
Caring Heart Rehabilitation and Nursing Center, et al.	March 28, 2018	Defendants billed Medicare for skilled therapy services that were either not delivered or that were medically unnecessary.	~\$4.75M total	No

Hospice Enforcement Environment – Recent Settlement Examples

Company	Settlement Date	Overview of Allegations	Settlement Amount	CIA?
Caris Healthcare, L.P.	June 25, 2018	Caris Healthcare's aggressive admissions and census targets resulted in Caris admitting and recertifying patients who were ineligible for hospice. Caris also submitted claims for patients whose medical records did not support a terminal prognosis.	\$8.5M	No
Health and Palliative Services of the Treasure Coast, Inc.	May 18, 2018	Relators, who were former physicians employed by the hospice facilities, alleged that the defendants knowingly claims for hospice services provided to ineligible patients.	\$2.5M	Yes
Vitas Hospice Services LLC and Vitas Healthcare Corporation	October 30, 2017	Vitas: (1) knowingly submitted false claims to Medicare for services to hospice patients who were not terminally ill; and (2) inflated patient's level of care by submitting claims for continuous home care services that were not supported. The company used "aggressive marketing tactics and pressured staff to increase the volume of continuous home care claims, without regard to whether the patients actually required this level of care."	\$75M	Yes

Hospice Enforcement Environment – Recent Settlement Examples

Company	Settlement Date	Overview of Allegations	Settlement Amount	CIA?
Haven Hospice	December 21, 2017	<ul style="list-style-type: none"> Haven treated at least 63 patients with lengths of stay exceeding 3 years. The government alleged that (1) Haven's medical records lacked documentation that a patient had a prognosis of 6 months or less upon initial start of hospice or upon recertification; and (2) Haven's diagnoses were not supported only with inconsistent practitioner information. 	\$5M	Yes
Genesis Healthcare Inc.	June 16, 2017	<p>Genesis hospice facilities submitted false claims for hospice services provided to patients who were not terminally ill.</p> <p>Note: Genesis subsidiaries also include nursing facilities and rehab providers and the settlement also covered allegations of RUG inflation and providing worthless services.</p>	\$53.6M	No
Evercare Hospice and Palliative Care	July 2016	<p>Evercare submitted claims for hospice services on behalf of patients whose medical records did not support that they were terminally ill. Evercare's business practices discouraged physicians from recommending that ineligible patients be discharged.</p>	\$18M	No

Home Health and Personal Care Attendant Enforcement Environment – Recent Settlement Examples

Company	Settlement Date	Overview of Allegations	Settlement Amount	CIA?
Hope In-Home Care, LLC	July 2, 2018	<p>The government alleged that Hope:</p> <ol style="list-style-type: none"> 1) employed uncertified “personal care aides” who were ineligible to provide services and billed for their services; 2) falsified documents and statements in order to qualify ineligible beneficiaries for services; 3) made false statements in prior authorization requests; 4) billed for services that were not performed; and 5) hired family members of Medicaid beneficiaries as “personal care aides” and submitted ineligible claims for compensation for care provided by those family members. 	\$3M (Medicaid-only)	No
Health Quest Systems, Inc. and certain of its subsidiaries (Health Quest)	July 9, 2018	Health Quest is an integrated hospital system that provides acute and post-acute services. The settlement covered multiple allegations, including an allegation that Health Quest submitted claims for home health services that lacked sufficient medical records to support the claims, including lack of documentation of a face-to-face encounter with a physician.	\$14.7M	Yes
Home Health Care of East Tennessee, Inc. and affiliated companies.	September 5, 2017	This settlement resulted from a Self-Disclosure of Stark/Anti-Kickback violations based on improper payment arrangements with physicians. The Settlement Agreement also covered allegations of claims for home health services lacking documentation of a face-to-face encounter and other documentation issues. According to the Settlement Agreement, the potential liabilities of the self-disclosed action was \$42M.	\$1.8M	No

Home Health Enforcement Environment – Recent Settlement Examples



Company	Settlement Date	Overview of Allegations	Settlement Amount	CIA?
Amedisys Inc.	April 2014	Amedisys allegedly billed Medicare for nursing and therapy services that were medically unnecessary or provided to patients who were not homebound, or otherwise misrepresented patients' conditions to increase its Medicare payments. Government alleged that the billing violations were the result of management pressure.	\$150M	Yes
ResCare Iowa Inc.	February 2015	ResCare Iowa billed the government for services provided to Medicare and Medicaid patients in Iowa without a documented face-to-face exam.	\$5.6M	No

Employees – Discrimination, Wage/Hour/Whistleblowers

- Employment Law Issues
 - Independent Contractors
 - Wage/Hour
 - Whistleblowers
 - What makes a whistleblower?
 - Employee Safety
 - Harassment
 - Discrimination
 - Resident Abuse
 - Fraud/Intentional Misconduct
 - Excluded Persons
 - Drug Diversion

IT Risk

- Data Breach - gap analysis, privacy (generally) and HIPAA/security plan, training, and culture
- Ransomware – backup plan
- Unauthorized use and disclosure

Contracts/Vendor Management

Vendors represent a significant vulnerability:

Access to systems/network

Subcontracting

Assignment

HIPAA

Contract management – expiration, termination

Assisted Living Residence Deposit Case

In August 2018, Massachusetts Superior Court ruled that a resident in an assisted living facility can bring a class action alleging that a “community fee” charged at the start of residents’ leases violated G.L.c. 186, §15B, the security deposit provision in the Massachusetts landlord-tenant statute, a Superior Court judge has ruled. *Hennessy v. Brookdale Senior Living Communities, Inc., et al.*, Lawyers Weekly No. 09-092-18.

“Although the Legislature expressly exempted such facilities from having to comply with certain statutes that regulate health care facilities and from any zoning requirement that cluster developments obtain a special permit, it did not exempt such facilities from the fee limitations and security deposit requirements that apply to all residential tenancies.” Disregarding a March 2018 Superior Court decision.

An appeal is pending.

Marijuana

In 2016 in Massachusetts and Rhode Island, state courts challenged an employer's ability to pass on employing medical marijuana users based on federal illegality and in September 2018, a Connecticut federal court did the same.

Barbuto v. Advantage Sales & Marketing, LLC, SJC-12226, the Massachusetts Supreme Judicial Court determined that an employer has obligations to accommodate lawful medical marijuana users under Massachusetts disability discrimination laws.

Noffsinger v. SSC Niantic Operating Co. LLC dba Bride Brook Nursing & Rehabilitation Center, the court explored whether a candidate for employment was properly denied employment because, pursuant to the Connecticut Palliative Use of Marijuana Act ("PUMA"), she treats her post-traumatic stress disorder by taking synthetic marijuana pills.

Federal Drug Free Workplace Act – Court rejected the argument that DWFA required SSC to refuse to hire. DFWA doesn't require drug testing and doesn't prohibit federal contractors from employing someone who uses illegal drugs outside of the workplace.

FCA – Court rejected argument that FCA bars SSC from hiring plaintiff (hiring a medical marijuana user would defraud the government)

Marijuana

- PUMA's anti-discrimination provision is not preempted by federal law and SSC is not exempt based on the federal
- CSA and FDCA – do not regulate employment
- ADA - provides that an employer may only prohibit an employee from the illegal use of drugs “at the workplace and contains a “saving clause” (allowing states to enact greater protections for persons who suffer from disabilities)

Marijuana

- Employers should –
- Tread carefully before taking any adverse action with respect to an employee or applicant who tests positive for marijuana in a state that explicitly protects medical marijuana users, such as Connecticut, Massachusetts, or Rhode Island.
- Federal law no longer represents the safe harbor employers in these states once assumed it was.
- Cases like these challenge employers' notions about medical marijuana use and force them to deal head-on with whether and how to employ and accommodate medical marijuana users.

Acknowledgements

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