As the population across the country ages, assisted living continues to grow in popularity. Resident care litigation risk has been emerging with more frequency as the mission and vision of assisted living communities evolve. Aging in place is a central philosophical aim of the assisted living movement and the acuity levels of residents are higher and needs increasing through the residency. As in nursing homes, accidents or clinical problems at assisted living centers can translate into liabilities. We have been experiencing an increase in lawsuits across the country against assisted living communities including against individual assisted living nurses. Plaintiff’s attorneys are now targeting assisted living communities after decades of focusing attention on nursing homes. Plaintiff’s attorneys have a “nursing home lawsuit” playbook in hand that they are using on the field against assisted living communities. What do you and your facility need to know? How can you be proactive with risk management and quality assurance? In this article, we will explore the characteristics of the assisted living industry that have interested Plaintiff’s attorneys; provide an overview of the anatomy of an assisted living lawsuit; identify the main claims presented in the lawsuits; and present a few considerations for proactive risk prevention.

Why is the Assisted Living Industry Being Targeted By Plaintiff’s Attorneys?
Plaintiff’s attorneys see assisted living facilities rapidly becoming the nursing homes of the future and suited for the litigation model they developed over the past decades. According to the National Center for Assisted Living, there are over 36,000 licensed assisted living facilities nationwide with an estimated one million residents making their...
A new study shows just how easy it is to catch norovirus, the fast-spreading stomach bug that’s famous for causing misery on cruise ships.

The study tracked a 2010 outbreak of norovirus among young soccer players in Oregon. Seven out of 17 players who attended an out-of-state tournament fell ill with severe vomiting and diarrhea, but curiously, none of them had been in direct contact with the index case -- the first girl to get sick.

Investigators were stumped.

“We conducted a very extensive interview; it’s called a shotgun interview, where we ask about every possible food exposure. There are over 800 questions on the questionnaire,” says Kimberly K. Repp, PhD, an epidemiologist with the Washington County Department of Health and Human Services in Hillsboro, Ore.

That helped the researchers figure out what the sick people ate and what the healthy people didn’t eat.

The common denominator? Cookies. All the girls who got sick had eaten cookies during a Sunday lunch. By Tuesday, they’d all fallen ill.

**Grocery Tote Carried More Than Food**

Norovirus is the leading cause food-borne illness in the U.S. But because the cases were isolated to this relatively small group, rather than widely reported by many people who ate the pre-packaged snacks, researchers didn’t think the cookies themselves were the source.

“It was something about the cookies, we knew, that was associated with the source of the outbreak,” Repp says.

The connection turned out to be a reusable grocery tote bag filled with the cookies and other food items like chips and grapes that had been sitting on the floor of the bathroom where the first girl had repeatedly gotten sick.

The study describes the bag as a reusable open-top grocery bag made from laminated woven polypropylene, a common type you might buy at many grocery stores these days for repeat use.

Investigators swabbed the bag two weeks after the first person fell ill. DNA tests turned up copies of the same strain of norovirus that had infected the girls.

“This is the first-ever reported case of transmitting this virus with an inanimate object, basically,” Repp says.

The study is published in the *Journal of Infectious Diseases*.

The first sick girl said she never touched the bag. So how did the virus get there?

Experts say viral particles likely floated over from the toilet.

“That certainly is an area of active research, involving the dynamics of vomiting, and how are particles dispersed when somebody vomits. There is a limited range, for sure, but exactly how far it is and what the level of risk is 10 feet away or 30 feet away. Certainly, in this case, it was plenty close to allow the virus to float over onto the bag,” says Aron J. Hall, DVM, MSPH, of the CDC’s division of viral diseases.

**Disinfect Surfaces After Someone Gets Sick**

In an editorial on the study, Hall says that it takes as little as 18 copies of a norovirus to make someone sick.

“It’s among the most infectious viruses known to man,” Hall tells WebMD.

“The amount of virus that it would take to get someone sick certainly cannot be seen with the naked eye, and definitely underscores the challenge of removing all potentially infectious virus from a grocery bag, in this case, or..."
Loan Repayment Program

You Passed!

Congratulations to the following professionals for successfully completing the Assisted Living Nurse Specialty certification exam this quarter:

Barbara Bierstedt
Laura Boggio
Jamie D'Aquin
Susan Frances
Kimberly Gray
Debbie Harris
Patti Lefever
Esther Nederhood
Margaret Peplin
Noreen Prescott
Christy Rohlf
Lori Schmick
June Vitrano
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Career Center

Visit our free online Career Center to gain access to the best employers and jobs in the Assisted Living industry. Visit www.alnursing.org/careers.html to get started.

NURSE Corps Loan Repayment Program (formerly Nursing Education Loan Repayment Program) enables dedicated registered nurses committed to caring for underserved people to serve in hospitals and clinics in some of America’s neediest communities, improving the lives of their patients and transforming their own.

NURSE Corps members help to build healthy communities in poor urban and rural areas as they build their own fulfilling and productive careers.

About the Program

NURSE Corps Loan Repayment Program puts registered nurses (including advance practice nurses and nursing faculty) on a rewarding career path while paying off 60 percent of their unpaid nursing student loans in just 2 years – and an additional 25 percent of the original balance for an optional third year.

In return, NURSE Corps members fulfilling a service obligation at any one of thousands of nonprofit hospitals, clinics and other facilities located in designated primary medical care or mental health Health Professional Shortage Areas across the U.S.

NURSE Corps members enjoy the same the competitive pay and benefits negotiated with their employer as non-members.

Am I Eligible?

To be eligible to apply, you must be a licensed registered nurse (nurse practitioners and other advanced practice nurses are encouraged to apply) or nurse faculty, have completed your training (diploma, associate, baccalaureate or graduate), and be employed full time (at least 32 hours per week) at an eligible critical shortage facility.

You must be a U.S. citizen (born or naturalized) or National and Lawful Permanent Resident and your education must be from an accredited school of nursing located in a U.S. State.

Funding preference is based on your financial need and the facility where you work.

What are Critical Shortage Facilities?

Nurse Corps members work at many different types of Critical Shortage Facilities.

For nurse faculty, any accredited public or private not-for-profit school of nursing located in a U.S. State is a Critical Shortage Facility and an eligible place of employment for Nurse Corps members. Applicants working at schools where at least half of enrolled students come from disadvantaged backgrounds receive funding preference.

For all other registered nurses, including advanced practice nurses, any public or private not-for-profit private organization located in a designated primary medical care or mental health Health Professional Shortage Area across the U.S.

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AALNA is led by a diverse group of volunteer nurses from around the United States.

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Loan Repayment Program (cont.)

health Health Professional Shortage Area that is one of the following types is a Critical Shortage Facility (facilities marked with * receive funding preference) and an eligible place of employment for Nurse Corps members:

Clinics
• Federally Qualified Health Center*, Indian Health Service Health Center*, Native Hawaiian Health Center*, Rural Health Clinic*, Public Health Clinic*

Hospitals
• Any public* or private nonprofit acute care or rehabilitation hospital, including Disproportionate Share Hospitals* and Critical Access Hospitals*

Inpatient Nursing Facilities
• Skilled nursing facility*, nursing home

Outpatient Facilities
• Ambulatory surgical center

Service Providers
• Home health agency, hospice, State or local public health or human services department*

Before You Apply
Applications are accepted once each year. Before you apply, please read the Application and Program Guidance (PDF - 33 pages) (updated annually) carefully. The application includes a contract that obligates you to serve 2 years at the critical shortage facility listed in your application if you are selected to participate in the program. If you are selected and you do not fulfill that obligation, you will face serious financial consequences.

Norovirus Outbreak (cont.)

a bed rail in a hospital, or a doorknob in a nursing home,” he says.

Researchers say the study highlights how easily the virus can travel and how long it can persist on the surfaces where it lands.

“This is a really underestimated route of transmission, and it’s easy to fix,” Repp says. “I don’t know about you, but when I’m done with my clothes, I wash them when they’re dirty. We should probably be washing our reusable bags, too.”

According to the CDC, chlorine bleach is one of the few household cleaners that can kill norovirus. The agency recommends using 5 to 25 tablespoons of bleach per gallon of water to clean and disinfect contaminated surfaces.

“When cleaning an area after someone is ill, we need to not just be thinking about wiping down the toilet area. We need to think about the virus up in the air and landing on everything in that bathroom, and either throwing away or cleaning everything that was exposed,” Repp says.
The National Center for Health Statistics now have residential care community participant web pages for NSLTCP. On these pages, you'll find all the respondent contact materials for the study, frequently asked questions, and a link to the survey’s residential care questionnaire. Everything is listed in the green box, to the left of the screen. To learn more, click here.

Welcome NSLTCP Participants Residential Care Communities

Prevention (cont.)

home in assisted living/residential care communities, including about 131,000 receiving assistance under the Medicaid program. Assisted living is the long term care option preferred by many individuals and their families because of its emphasis on resident choice, dignity, and privacy and assisted living continues to grow while adapting to changes in consumer wants and needs.

As far as Plaintiff’s attorneys view, assisted living facilities tend to aggressively market and recruit residents, many times promising staffing levels or services that, in reality, are not available. In an attempt to compete with nursing homes, assisted living facilities are accepting patients with higher acuity including advanced Alzheimer’s disease and cognitive impairment. The nursing home understaffing theory is then pursued with the argument that the assisted living facilities have staffing that is inferior to the staffing levels present in nursing homes and simply cannot meet the needs of the higher acuity residents. Plaintiff’s attorneys capitalize on industry data such as the December report from the Office of Inspector General of the U.S. Department of Health and Human documenting deficiencies in meeting state and federal requirements for assisted living communities providing Medicaid services.

The assisted living industry shares many of the characteristics of nursing home industry from the early 1990’s when nursing home companies were being targeted as defendants in lawsuits. Assisted living has been an untouched industry for many years and the industry is populated with large corporations. The residents’ needs are higher with recent reports showing that 37% of residents were receiving assistance with three of more ADLs; 42% had Alzheimer’s disease or other dementias; 39% provided skilled nursing services by RNs or LPNs and 13% of residents received these services; and 19% of residents received Medicaid funding. Statistics also show that 33% of the residents die in the assisted living facility and 59% are transferred to a long-term care facility. In 2011, 16 states reported making statutory, regulatory, or policy changes impacting assisted living/residential care communities. Overall, there is greater exposure to legal risk when an event occurs at an assisted living community similar and Plaintiff’s attorneys are profiteering.

What is the Anatomy of an Assisted Living Lawsuit?
The basis for an assisted living lawsuit is whether the assisted living facility breached regulatory or community practice standards related to a specific event (fall or other incident) or set of clinical conditions (development of pressure ulcers, UTIs, decline in functional status) during the residency. The inquiry is, in most cases, whether the facility accepted the resident for admission when the resident’s care needs required a higher level of care or the facility failed to properly assess the resident for changes in condition making continued placement unsuitable. As assisted living nurses, you have a multitude of responsibilities and play many roles. In the arena of litigation, the nursing oversight responsibility to assure timely identification of acute clinical problems and to optimally manage physical and behavioral problems becomes a focal point and serves as the basis for claims of direct liability against a nurse. A professional nurse in assisted living may have the responsibility for assessment of potential residents to determine their suitability and safety living in an assisted living environment as well as assessing

Continued on Page 6
Prevention (cont.)

change in condition to determine if a resident needs a higher level of care. Plaintiff’s attorneys seek to establish that a nurse breached the duty owed to a resident by failing to fulfill these responsibilities that then resulted in an incident or development and/or decline in conditions.

Specifically in an assisted living lawsuit, a Plaintiff (the resident or the resident’s representative) must establish a “prima facie case”. A “prima facie case” is an action against an assisted living facility for injury to or death of a resident and must be established by proof of:

- A duty owed by the assisted living facility to the resident (and/or a specific duty owed by the assisted living nurse);
- The standard of care applicable to the assisted living facility governing its care of the resident;
- The breach of that duty by the assisted living facility (or the nurse), either by omitting to perform or by wrongly performing its duty to the resident;
- Damages (i.e., injury to or death to the resident); and
- A proximate causal relationship between the assisted living facility’s breach of duty and the resident’s injury or death.

There are several general defenses that are advanced by the assisted living facility, including:

- The assisted living facility (and/or nurse) conformed to the applicable standard of care;
- The resident’s negligence was a factor contributing to injury or death;
- The resident assumed the risk that was the cause of the injury or death; and
- There is no proximate causal relationship between the assisted living facility’s conduct and the resident’s injury or death.

There are several parties that may be entitled to recover in the lawsuit including:

- A resident who suffered injury due to an assisted living facility’s breach of duty;

Continued on Page 7

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The American Assisted Living Nurses Association (AALNA) values your ongoing support, and we are committed to providing the best value possible for your membership. AALNA members receive the following benefits:

- **STAY CONNECTED!** As an AALNA member you will have access to a nationwide network of assisted living nurses.

- **MAKE YOUR VOICE HEARD!** - AALNA is actively involved in the national policy discussion, and provides assisted living representation on numerous national organizations, boards of directors, committees and initiatives.

- **DISCOUNTS ON CERTIFICATION EXAM** AALNA maintains and administers the exam for Assisted Living Nurse Specialty Certification.

- **SUBSCRIPTION TO GERIATRIC NURSING JOURNAL** AALNA membership includes a one-year subscription to the Geriatric Nursing Journal.

- **FREE SUBSCRIPTION TO NCAL FOCUS** Through our partnership with the National Center for Assisted Living (NCAL), AALNA members receive NCAL Focus each month.

- **DISCOUNTS ON CEUS AND STAFF TRAINING MATERIALS**

- **DISCOUNTS ON LONG TERM CARE INSURANCE**

Benefit from being part of a nursing organization run for nurses, by nurses. Start your AALNA membership today by visiting www.alnursing.org or calling (707) 253-7299!
Prevention (cont.)

- A resident who suffered injury due to an assisted living facility’s breach of duty, through a guardian, conservator, or next friend;
- The estate of a resident who died due to an assisted living facility’s breach of duty; or
- A spouse or other person entitled to bring a loss of consortium (companionship) claim.

With respect to potential defendants who can be in the lawsuit, they include:
- The assisted living corporation or partnership;
- The owner, operator or management company of the assisted living facility;
- Individuals with ownership interest in the assisted living company; and/or
- An individual staff member whose conduct contributed to the resident’s injury or death.

A lawsuit against an assisted living facility for injury or death to a resident may usually be brought in state courts of general jurisdiction and may also be brought in federal court if certain requirements are met. A lawsuit may also be brought pursuant to an enforceable arbitration agreement.

The plaintiff may be required to offer proof of the assisted living facility’s standard of care and its breach of that standard through expert testimony. The state regulations, while serving as some evidence of the standard of care, are the minimum required for facility licensure. Plaintiff’s attorneys also look to national and community standards of practices as well as the assisted living facility’s policies and procedures. We will discuss the need to evaluate current policies and procedures and revise, if necessary, to comply with state regulations and facility practices as part of risk management and prevention.

The Plaintiff in the lawsuit may recover for medical expenses, pain and suffering, and other compensatory damages generally recoverable in personal injury or wrongful death actions. The Plaintiff may recover punitive damages where the defendant’s conduct evidences a wanton disregard for the rights of the resident.

There are several theories of liability against an assisted living community. Specific Plaintiff’s tactics are highlighted later in this article. Generally, we see the following theories of liability alleged:
- Common Law Negligence;
- Violations of the Consumer Protection Act;
- Violations of the Adult Protection Act or Vulnerable Adult Act;
- Negligent Hiring and/or Retention;
- Violation of Residents’ Rights;
- Breach of Contract;
- Violation of State Regulations;
- Loss of Consortium;
- Wrongful Death; and
- Punitive Damages.

While each lawsuit is different and is based on individualized facts and state-specific regulations, they have similar characteristics. More and more, with Plaintiff’s attorneys sharing information and conducting seminars on assisted living lawsuits, we are seeing the same prosecution models and playbooks used across the country.

What are the Most Common Claims in an Assisted Living Lawsuit?
Understanding the most common claims in an assisted living lawsuit (which are also the most frequent resident or family complaints), allow communities to create more proactive risk management and prevention programs, additional staff training, revised policies and procedures all which serve not only to reduce litigation risks but serve to enhance the quality of care and life of residents.

Continued on Page 8
Prevention (cont.)

The events or conditions that most often form the basis of an assisted living lawsuit relate to:

- Falls
- Inconsistent, Incomplete or Erroneous Documentation
- Abuse (Physical and Sexual)
- Understaffing/Inadequate Staffing
- Failure to Transfer or Discharge
- Elopement/Wandering
- Failure to Supervise
- Non-Compliance with Facility Policies and Procedures
- Changes in Condition
- Medication Administration Errors
- Corporate Negligence
- Wound Issues
- Wrongful Death

How to Take a Proactive Approach to Litigation Risk Management?

Litigation risk management and reduction is part of a community’s overall Quality Assurance and risk management programming. It is recommended that policies and procedures, admissions procedures and criteria are scrutinized then the necessary changes for compliance with state regulations and community practices be implemented. Below are some additional considerations for your community to include in proactive risk management and quality improvement plans.

**Formal Expectations Management Programs** - Most residents and families do not know what to expect at an assisted living facility and have expectations that may be unrealistic. Residents and families may be experiencing emotions such as grief, guilt, fear and anger which set the stage for conflict. Setting realistic expectations with residents and families through formal programs at admission and continuing management of the expectations through the residency will significantly reduce the chances and opportunities of a resident or family member filing a formal lawsuit against the community. We develop and customize programs for our assisted living community providers that are easy and cost-effective and suggest you consider program objectives to be on quality of care and a sense of well being through communication and family partnerships, ensuring that families fully understand the realities of assisted living life including the risk, educating staff to recognize and communicate Illness trajectories and changes in condition for continued assessment related to placement.

**Consistent and Complete Documentation** – The first action a Plaintiff’s attorney takes prior to filing a lawsuit is requesting and reviewing the resident’s assisted living record, the administrative file and admission contracts. What he/she is hoping to find are inconsistencies between the admission assessments and level of care the resident is to receive, the resident’s conditions and any changes and continued assessments (care plans) to evaluate continued suitable placement. In addition, to timely and accurately documenting care and services, it is important to document discussions with staff, physicians, residents and families. Document that labs were gathered, that results were sent timely and any new orders properly placed in the record and compliance noted. Often we are faced with incomplete MARs and TARs which makes defending the record and care more difficult. Record audits should be regularly conducted for compliance with state regulations and policies and procedures.

**Continuing Assessments to Evaluate Suitability for Placement and/or Increased Need for Services for Aging in Place** – Liability risks are compounded when residents remain in an assisted living facility that cannot provide the appropriate care. Admission criteria should be consistently applied, with resident needs reassessed regularly and documented prominently in the record and recommendations for home care, physical therapy and other ancillary services be noted. Involuntary transfer of a resident to a skilled nursing facility may otherwise result in unnecessary operational, legal and risk management problems.

**Assess and Address Changing Staffing Needs** – Most staffing levels established in state regulations are minimum only. Plaintiff’s attorneys focus on understaffing for budgetary savings and lack of staffing to support corporate liability and greed. Employing staff in sufficient number, with ability and training to provide the basic resident care, assistance, and supervision required, based on the assessment of the acuity levels and residents needs is the best defense to these claims. Monitor the adequacy of staffing ratios based on

Continued on Page 9
residents’ needs at regular intervals.

**Analyze Marketing Materials Including Internet Advertising** – Analyze marketing materials to determine if they are consistent with the level of services provided. Be certain that information on the internet is current, accurate and that organizations are properly identified. A legal review should be completed on all marketing materials including that services or statements that could present exposure.

**Review Admissions Agreements, House Rules and Resident Handbooks** - Review resident contracts for consistency of terms. Focus on areas such as discharge and retention policies. Expectations management programs should be included in the Admissions Agreements as well as House Rules.

**Review and Revise Policies and Procedures as Necessary** - Draft policies and procedures that address operational, business and clinical issues to promote consistency in actual practices by the staff and compliance with state regulations and “best practices”. Monitor the staff for compliance of established policies and include outcomes in annual competency and performance evaluations.

**Assessment of Residents’ Rights** - Liability can also arise through a violation of resident rights, as established in state resident rights statutes. Ongoing assessment of a facility’s compliance with residents’ rights should be an integral part of the risk management program. Document the monitoring and evaluation of a resident rights compliance program to create a strong defense.

Violations related to protection of resident funds and financial matters, receipt of mail, security of personal property, and abusive staff behavior may be subject to heightened scrutiny and made part of a lawsuit.

**Implement an Arbitration Agreement and Training Program** – An arbitration agreement is a contract that requires all disputes between a resident and an assisted living facility to be resolved through binding arbitration before a neutral arbitrator as opposed to a judicial forum. Properly executed by the resident or legal representative the agreement is enforceable and reduces significantly the cost and expense of a lawsuit and the reward to a Plaintiff. Arbitration agreements are not desirable for a Plaintiff’s attorney as history shows that recovery in arbitration is nearly 30%-35% less. We have successfully rolled-out arbitration programs for many assisted living providers and have seen a reduction in claims.

**Summary and Conclusion**

The need for proactivity in risk management, prevention and enhanced quality assurance is accelerating in the assisted living industry with increased claims and lawsuits facing providers. The changing landscape, mission and vision of assisted living requires risk identification and awareness of problems or potential problems that may result in loss. Timely identification is the cornerstone of a successful risk management program. Hopefully understanding more about the strategies employed by Plaintiff’s attorneys will help with the continued design and implementation of your community’s programs.

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**Rebecca Adelman, Esq.** – Ms. Adelman is a Shareholder of Hagwood Tipton Adelman, PC and practices in the Memphis, Tennessee office. She is a member of the Board of Directors and serves as the firm’s President. For over 20 years, Rebecca has concentrated her practice in healthcare law, long-term care assisted living and medical malpractice defense litigation. Her expertise and her scope of practice involve all insurance defense litigation areas including premises and product liability as well as employment law. Additionally she serves as legal advisor to AALNA Board of Directors. Please feel free to contact her at radelman@hatlawfirm.com.