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## Risk Insights: Senior Living & LTC

### Episode 1: Insights from the Front Lines Part 1

Welcome to the Risk Insights: Senior Living & LTC podcast, hosted by Tara Clayton with Marsh's Senior Living & Long-term Care Industry Practice. Each month, Tara, a former litigator and in-house attorney, speaks with industry experts about a variety of challenges and emerging risks facing the industry.

#### Tara Clayton

Hello and welcome to Risk Insights Senior Living and Long-Term Care. I'm your host Tara Clayton. In our podcast series we dive into topics that matter most to senior living and long-term care providers. In today's episode I'm joined by two industry experts in the area of senior care litigation to talk about some challenges we are seeing as well as some practical strategies.

Joining us today is John Hall Jr., partner with Hall Booth Smith in the Atlanta office and Drew Graham, partner with Hall Booth Smith in the New York office. John, Drew, thank you guys for joining us today. I know both of you guys are very well known in this space, but just in case we have any new listeners who are new to senior living or long-term care and haven't yet gotten to know either one of you. John, I'll kick it to you first to just give us a little bit of introduction of who you are and how you're connected into the senior care space.

#### John Hall Jr.

Sure, it's John Hall. I'm with Hall Booth Smith. I've been representing senior care facilities since the, ooh, I hate to say it, but late 80s, mid 80s forward and Drew joined me in the 90s and we've been working on it together since then. We've tried senior living cases and managed a number of them. Our firm is nationwide in terms of the national work we do and then have regional offices, so we appreciate the opportunity and feel passionate about defending these senior care health care heroes and happy for the chance to talk about it.

#### Drew Graham

I would second everything John said. I joined the firm in the early 90s about the time that post-acute and senior living related litigation was beginning to grow and so we have been pleased to be part of that unfortunate growth, I guess, in many ways, but we've been in it since it started.

#### Tara Clayton

Well, thank you again. Thank you both for being on. Speaking of the unfortunate growth from a litigation standpoint that we've seen, kind of what I wanted to talk with you both today about, you know, we're seeing, I would say even the past several years, we've seen really an increase to an increase in the lawsuits and claim values against senior care providers. We're seeing organizations facing increased scrutiny, tightening regulatory expectations, courts are increasingly being asked to sort through complex situations that involve aging, illness, but then caregiving all at the same time and, you know, from my perspective, these cases aren't rarely are they simple cases. I know the other side wants to try to make them that way, but they're really not when you look at the medical complexity that can be involved with some of our seniors, the risk that just as we age that are there regardless of what care and services we have in place things are going to happen.

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And I know both of you guys explore these issues in depth in your recently published book, *Aging Accusations and Accountability*. And so I'd like to talk to both of you today to unpack some of the insights that you guys identify in the book, what you're seeing play out in today's courtrooms against senior care providers, and then let's weave in through our discussion some practical tips really to help providers and defense attorneys that are listening help them kind of navigate this rapidly evolving landscape of senior care litigation.

## John Hall Jr.

No, thank you. You know, senior living is dealing with something that society wants to avoid, the inevitability of death. In many of these cases, people are in conditions, the last stages of their lives, and it is correlated with individuals being difficult in terms of they have their loved ones they're not keeping at home like the American tradition in the 50s and 60s were. They're putting them in some other facility, so it's creating this guilt that comes that then gets reflected over into the senior living folks.

And it's really a shame because you got people in the senior living industry that are spending three in the morning changing our mothers and fathers diapers and spending there and brushing their hair and talking with them and spending moments, and all that's contrast with the unfortunate development in the last 20 years of a group of plaintiff's lawyers who focus on generational wealth. They don't really care about the individualized single value of a case. They want to know what they can do to grow ridiculous money, and they use manipulation through marketing and other structures to get to that manipulation by making ridiculous anchored demands that then come back and make it difficult to get these cases resolved.

So our reason for writing the book was to show somebody standing up for the providers in this side and standing against the growth on generational wealth demands from plaintiff's lawyers and try to find a way that we can get back to what's reasonable. We want to get fair compensation on those cases that we owe. We don't want to pay compensation on those cases we don't owe, and we want to be sure that we have a reasoned process to go through and do that, and that's what we've sort of outlined with the book.

Drew has been a leader in the country in the senior living world for a long time, and I joined with him. He gives me the privilege of occasionally joining with him and trying these cases on a national basis, and we would see people who didn't have the background or information that Drew had or too tangentially that I've had, and we thought we need to put this out where people can read it, and so that's why we wrote the book.

## Drew Graham

I think that's right. I mean, one of the things about these cases are that they're both legally complex because of the regulatory aspect of the case that's not always present in traditional medical malpractice cases against maybe health systems or physicians, and then they're emotionally complex, and so at times resolving these cases up and through presenting to juries and arbitrators is, as John mentioned, sort of weighted by the fact that many of the medical issues that we're talking about are essentially unavoidable in most instances.

I was just going to say, making sure that we help our colleagues in the defense bar and then anybody in the broader part of the country that's interested in this information understand how we make these assessments that we're required to make under the legal system as it currently exists.

The last thing I would say is one part of the book that we focus on is the absence of economic damages, which separates this from a large part of the traditional, again, litigation against health systems and physicians that people typically associate with health care litigation. That's just absent here, and so the plaintiff's bar that John mentioned and their pursuit of generational wealth have pivoted to creating anger narratives that, you know, in very, very rare instances there are some things that may make folks angry, but for the vast majority of these cases these are heroes that took care of our loved ones and provided tremendous care over, in some instances, years.

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## Tara Clayton

There's a line in the book that to me really jumped out around this concept of kind of explaining, not storytelling, but explaining to jurors what truly happens day in day out inside of these communities, and it was caring for seniors often means confronting the natural consequences of aging, not simply preventing them, which I think that kind of hits this on the nail.

To your point, John, we're defending something that people don't want to talk about, you know, it's not death and dying, it's not an aging in general, it's not something we want to talk about, but it's a reality.

I think about falls, that's the common claim driver that we see in these lawsuits, where we know the risk that as you age, external and internal factors that increase that risk that you're going to fall, regardless of where you're living, what setting you're in.

Knowing the challenges that we're seeing, you guys hit on a lot of different, what I call kind of defense strategies, to start how we look at approaching defending ourselves against these claims, maybe just a couple of them. One of them that that jumped out at me was around the concept of investigating allegations. One thing that I remember reading is the book talks about the gap between how care actually happens inside senior care communities, versus how those situations are later interpreted, either in an investigation, be it regulatory, or in a courtroom setting.

So from your perspective, when an adverse event happens, how does that gap shape the accusations that follow, and what do you guys see gets lost between the lived reality of caregiving and what's happening day-to-day inside of these communities, versus that legal narrative that a plaintiff's counsel is putting out there? Drew, we'll start with you this time.

## Drew Graham

Yeah, I think, John, I think I'll let you talk about the narrative, because I know, you know, you're doing a lot of work in that area. I think I'll take the regulatory issue in that one of the confusing parts of this, beginning in the 90s, was the idea that the state and federal governments were under a mandate to provide certain regulations, particularly around reimbursement.

If certain types of post-acute care were going to receive payments, or if they were going to have licensure granted by the state to operate, that they needed to regulate them. And those, that line of thinking is certainly present in institutional health care, health systems, particularly.

What gets confusing in this, in this work, is that regulatory findings of non-compliance, so adverse findings, seem to be taking an outsized role in crafting a narrative about what a case is about. So, for example, if a regulator finds that a fall could have been avoided, then the, unfortunately, the narrative opportunity has been exploited by the plaintiff bar to make that either conspiratorial or intentional by the operator, when, in fact, it was just a risk-based determination.

And whether it was avoidable or not is really something that the jury needs to determine, not the regulator. But I think the overlay of regulatory compliance, which is a necessity in our society, in this particular part of the system, has taken an outsized role and created narratives that are really never the way the regulations should have been utilized in the first place.

And that seems to be getting worse, certainly in skilled nursing, but in senior living, as states post-COVID make changes to their regulations to address maybe acute problems or problems that, you know, electric wheelchairs, for example, that trend and may go, you know, are temporary in many respects. We are seeing regulations that are easy to exploit for, in civil litigation, for purposes other than determining whether the defendant's care was reasonable. John, do you want to talk about the narrative issues here?

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John Hall Jr.

Yeah, yeah. I'm blessed, and so is the industry, to have somebody like Drew who understands the ins and outsides of regulatory. So I'm happy he always trains me up as we go through these cases and look at them.

But I think it's pretty basic in terms of how the outcome comes and why there's a disconnect between reality and juries. It's sort of the Stephen Covey concept. Let's begin with the end in mind. So what can we do to deal with that?

The problem is nobody follows these providers day in, day out, as they go into a room, tap somebody on the back, help them with their chair, give them, you know, a glass of water, do that. They don't chart those things because they're not charted. They're not required to chart those things. And it's not directly care, but in a senior living and other process, it matters.

And what you have to do to preserve that is, the minute you get a claim, you ought to plan within the first 120 days of that claim. And if it's a lawsuit you're doing at that point, you need to reach out to those providers, because unfortunately, in this industry, people do move. So you need to connect with them early.

And you need to not just ask them, what did you do? Where did you see? Where did this go? Do you know if they fell? What you need to do is say, what were you doing that day? Let's look at your schedule. Let's talk about all the information you were doing. And what's your normal routine?

How often would you see, you know, Miss Nellie? How often would you talk? Did you know her? Did you see her family? Did you discuss it? And you know these folks are trying to make a claim against you, and we know you did the right thing. Will you talk with us and help us?

And if you do that early on and form the relationship with the providers, that helps you be able to, in the end, at trial, put up a narrative through somebody who really knows that person.

Drew and I tried a case. We had a person who had left the home years before the trial came up, but because Drew and his team had kept toast with him and made it clear that this was about her and kept encouraging and kept following, she took off her job and came for a week and sat with the trial and stood up and talked.

You know, we knew that the case was going well. The minute on the stand, she talked about brushing the hair of the lady that was at issue and taking care of her and how she liked to use, you know, this kind of brooch or that kind of brooch in her hair and those sorts of things.

So it's developing those things. It's not just medical records. Then it's obviously the medical records. You know, those are going to be the home, the treatment records. Those are going to be things that are going to get put up and dealt with. So you need to be sure you cross your eyes and dot your Ts.

Unfortunately, too many times, you know, you get into routine rote entries and people forget to make those entries. And the plaintiff's lawyer will get up and say, nobody for days went in this lady's room because there's nothing charted. Well, nothing charted does not mean not done.

And that's where you can overcome that by establishing these folks, but also work on the front end to make sure that your charting is well so that you can carry through and do the defense.

And then the narrative, you know, to skip over the big middle and go toward the end. The narrative in front of the jury is to give them the permission to forgive themselves that they're not taking care of their own mother and dad.

You do that through voir dire. You talk to him about the inevitability of this circumstance. You put to, you know, raise up those people that are spending day in, day out, night in, night out, taking care of their loved ones and raise

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them up on the front end and get them to acknowledge that's a great service in society and that without that we couldn't do these things.

And once you start in voir dire, the start out when you're first questioning the jurors, once you start that, you set a mindset that can later be used to help support the care. Well, ma'am, you didn't chart this. No, but I went in that room 10 times that day and I always did.

And being able to do those sorts of issues and then both dealing with the regulatory side, as Drew said, because his team is excellent at preventing those things that shouldn't be in the courtroom and shouldn't be in that level from getting there.

And most plaintiff's lawyers do not understand it. They think it's a regular man-mouth game. It always intrigues me when I see, you know, I get involved in these cases that Drew and his team's worked up and they basically just blocked out the plaintiff's lawyer because he didn't understand the regulations and how those work and he think doesn't understand the difference between, you know, an assisted living home and a senior, you know, senior living home and all of the different groups that are coming along.

And so doing that kind of work earlier and let me back up and Drew will probably may want to add a little comment about this. The key to is if you're a provider or you're an insurer of a provider, need you go through and make sure those folks understand their corporate structure and they're maintaining the appropriate corporate walls between the corporate structures.

So you don't, you know, what happens is plaintiff's lawyer is going to name every entity that in any way has a fingertip that could be associated with this and if you don't maintain your corporate structure you get into a lot of trouble in being able to do these trials.

It's a lot harder when we're not doing, you know, senior living home down the street. Instead we're doing XYZ Corporation in New York, ABC Corporation from Missouri, this corporation in Georgia and then the home down the street. It creates a whole different visual and perspective.

So front-end work on that even before there's a fall or a claim can make a whole lot of difference. And Drew, I know you're passionate on corporate structure so I'll jump that over to you real quick and then promise we'll hush, Tara.

## Tara Clayton

No, this is great. We love this stuff.

## John Hall Jr.

I know. We do, we do.

## Drew Graham

And on that point, Tara, you know this well. You know, we have a growing aging population in a way that we've never seen in the world frankly and in our lifetimes. We're going to be in a position where a significant number of the population is over 85.

So when we talk about corporate structure we need to understand that the individuals and the entities that are building the capacity within these companies to provide good care to our seniors who need support is a noble venture and they're doing great work by building these companies, by setting them up in ways that they can provide health care for the employees that that work there and provide guidance and structure and good services and the power of bulk purchasing and many other things.

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So I think one of the things that as an industry we need to focus on in 2026 and urgently is how do we tell the narrative story of why corporations are set up this way. I don't think anybody would question, you know, why Ford has divisions or why Coca-Cola has bottling companies but I think when we get to senior care it strikes me as remarkable that people are inclined to believe that this is just John Smith who created this and he's running it out of his own personal checkbook.

It just doesn't, we need to evolve and what the good news is across institutional health care, across corporate America, we have a lot of people that are skilled in helping people that are not involved on a day-to-day basis and in the way corporations and LLCs and other things are structured and we have a lot of great resources to turn to.

So one of the things we're focusing on as a firm and as an industry through organizations is helping people find new ways to talk about this and get ahead of this issue that if there's more than one layer of corporate entity that there is some sort of alter ego or corporate veil that needs to be addressed, misuse of the form.

## Tara Clayton

As we wrap up today's episode, it's clear that senior living litigation is both complex and deeply emotional. Our caregivers are true health care heroes, dedicating themselves to the daily challenges of caring for our loved ones. Yet, there's often a disconnect between the realities of caregiving and the legal narrative shaped in courtrooms, especially when regulatory findings are misused.

Early and ongoing communication with care providers and families is essential to build a strong humanized defense. We also touched on the concept of anchoring, how plaintiffs use exaggerated demands, and the importance of educating jurors on the real value of money to counteract this.

In part two, we'll explore practical strategies for managing regulatory impact, integrating risk management with litigation, and potential legislative changes to create a fairer system. I encourage you to subscribe and join us for the next episode as we dive deeper into these critical topics. Thanks so much for listening.

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