



TESTIMONY FOR A HEARING ON:  
MANDATORY ARBITRATION

PRESENTED BEFORE:

THE NY STATE ASSEMBLY STANDING COMMITTEE ON CONSUMER AFFAIRS AND  
PROTECTION, JEFFREY DINOWITZ, CHAIR

AND

THE ASSEMBLY STANDING COMMITTEE ON JUDICIARY, HELENE WEINSTEIN, CHAIR

PRESENTED BY:

RICHARD J. MOLLOT

EXECUTIVE DIRECTOR

LONG TERM CARE COMMUNITY COALITION

FEBRUARY 10, 2016

**I. Introduction**

Thank you for the opportunity to testify on this important issue.

My name is Richard Molloy. I am the executive director of the Long Term Care Coalition (LTCCC). LTCCC is a non-profit organization dedicated to improving care and quality of life for residents in nursing homes and assisted living. As a coalition, we include a range of organizations and individuals representing the interests of the elderly and disabled, and their caregivers, across New York. LTCCC focuses on systemic advocacy, conducting research on LTC issues to identify the root causes of problems and develop practicable recommendations to address them.

My testimony today focuses on the impact of pre-dispute arbitration agreements on residents in long term care, particularly those in nursing homes.

## II. Forced Arbitration Hurts Nursing Home Residents, Their Families & Taxpayers in New York State

### 1. Residents & Families

Nursing home residents are among our most vulnerable citizens. By definition, they require 24-hour a day monitoring and care. When an individual needs nursing home care, it is typically a situation that is highly stressful, with limited time or opportunity to consider options and make choices. *Mom had a medical emergency and wound up in the hospital. Now the hospital is pushing her to get out and she can't live safely at home. Family has a couple of days to figure out what's going on with Mom's health, her finances, her house, her insurance and get her into a nursing home.*

It is in this process that Mom, perhaps with a family member, will be given a pile of paperwork to sign. If there is a pre-dispute arbitration agreement in the pile, Mom and her family have just signed away their Constitutional right to ever go to court should she be harmed at any time in the future due to substandard care, abuse or neglect.

Six months from now you find out that Mom has been physically or even sexually abused by staff? *You are bound by the facility's arbitration plan.* A year from now you find out that nobody has been monitoring or repositioning Mom according to her care plan and now she has horrible pressure ulcers? *You are bound by the facility's arbitration plan.* Two years from now Mom has a stroke and dies after being chemically restrained with dangerous antipsychotic drugs without your consent? *You are bound by the facility's arbitration plan.*

**In reality, there is little or no opportunity to read – no matter review and consider – the terms of mandatory, pre-dispute arbitration agreements in nursing home residency contracts.**

Moreover, even if arbitration agreements were explained, residents and their families would be highly unlikely, at the time of admission, to be anticipating the need for litigation against the facility. They would be hoping and expecting that care would be excellent; they would not want to indicate to the facility, at admission, that they were expecting problems and poor care.

In addition, **unlike other commercial settings, nursing home residents cannot (generally speaking) walk out when their nursing home abuses them or provides substandard care.** They are, often literally, a captive audience.

### 2. NY State Taxpayers

Nursing homes are a multi-billion dollar industry in New York, with most of that care being paid for by taxpayers through Medicaid and Medicare. Medicaid pays for the majority of long term care and Medicare pays for the majority of rehab care. **When nursing homes are not held accountable for providing decent care that meets minimum standards, it means that taxpayers are paying for services that are subpar or even worthless.** In addition, we generally

wind up also paying to fix the results of poor care, such as increased hospitalizations, enhanced therapeutic treatments, etc....

Importantly, **lack of accountability perpetuates a system in which it is both acceptable and profitable to provide poor care.** Poor care persists in our nursing homes for one simple reason: the state Department of Health systematically fails to enforce minimum standards and ensure that residents are safe. In the absence of meaningful enforcement, the ability to sue for serious abuse, neglect and wrongful death is often the only way to hold providers accountable when they fail us. In addition, it sends an important message to the industry that they will be held accountable when they fail our residents and fail to provide value for the money we pay them.

### III. The Desperate Need For Greater Accountability in New York's Nursing Homes

When nursing homes provide decent care and treat their residents with dignity, residents and families don't go to court. Unfortunately, many of New York's nursing homes have longstanding problems.

#### 1. National Nursing Home Report Card<sup>1</sup>

According to Families for Better Care, a non-profit organization which issues report cards on all states' nursing home quality, New York "ranks near the bottom in nursing home care."

Key findings from the NY State Report Card include:

- **"The quality of New York's nursing home care continued to be so dreadfully poor** that the state scored only one above average grade for the second year in a row, squeezing out a "B" in the percentage of facilities with severe deficiencies."
- "New York was one of only five states that scored below average grades in every staffing measure, showing that **the state's nursing homes continue to be chronically understaffed.**"
- **"New York remained anchored at the bottom** of the Northeast region in nursing home quality."

[Emphases added.]

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<sup>1</sup> Families for Better Care Nursing Home Report Card, September 10, 2014. Accessed on February 8, 2016 at <http://nursinghomereportcards.com/state/ny/>. Note: These findings are from the most recent report card issued.

## 2. LTCCC Study: Safeguarding Nursing Home Residents & Program Integrity (2015)<sup>2</sup>

Last year our organization conducted a study to assess the ability of the state to (1) protect nursing home residents and (2) assure appropriate use of the billions of taxpayer dollars spent on nursing home care each year. Following are some of our key findings:

- **Low citations.** The annual average per capita state citation rate is 14%. The average rate for NY is 5% - among the very lowest citation rates in the country.
- **Missing resident harm.** NYDOH only finds harm when it cites a facility 3.33% of the time. This means that facilities rarely face a penalty for deficient practices, even when residents are, in fact, harmed and/or the government has paid for subpar or worthless services.
- **Antipsychotic drugging** of nursing homes residents is a dangerous and pervasive problem, despite the FDA's "Black Box" warning against use of these drugs on elderly people with dementia. NY's rate of off-label drugging is persistently high – roughly 18% of our nursing home residents – yet NYDOH cites facilities for inappropriate drugging at approx. one-quarter of the national rate. Though these drugs are known to be harmful and even deadly, NYDOH only finds harm 2.32% of the time.
- **Pressure ulcers.** "Pressure ulcers are serious medical conditions and one of the important measures of the quality of clinical care in nursing homes," according to the CDC. According to the *Journal of Wound, Ostomy & Continence Nursing*, "In the vast majority of cases, appropriate identification and mitigation of risk factors can prevent or minimize pressure ulcer (PU) formation." **Despite this, New York has a higher than average pressure ulcer rate: 8.76%** (equivalent to over 9000 of our nursing home residents today). **Yet its annual citation rate for poor pressure ulcer care is a fraction of the US average at 0.88%. This is the second lowest in the nation.** In addition to rarely citing for this serious problem, New York only finds harm about half as often as the national average (12.35%). How can a pressure ulcer not be harm?!
- **Staffing** is acknowledged to be one of the most critical indicators of a nursing home's quality and safety. **New York is in the bottom quarter of states in the country in terms of staffing levels and is also among the states least likely to cite a facility for insufficient staffing.** With over 600 facilities and over 100,000 residents, NY DOH only cites for insufficient staff about 13 times a year in total. That means that there is roughly a two percent (2%) chance of a facility receiving a staffing citation in the course of the year. On a per resident basis, **the annual percentage of staffing deficiencies in New**

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<sup>2</sup> Safeguarding Residents & Program Integrity in New York State Nursing Homes: An Assessment of Government Agency Performance, Mollot, Richard, The Long Term Care Coalition (2015). Available at <http://www.nursinghome411.org/?articleid=10094>.

**York is 0.012%. This is about the same as the likelihood of dying in an airplane crash.** For the three year period covered on Nursing Home Compare, NYDOH **never** cited insufficient staffing as having resulted in harm or immediate jeopardy to any resident.

### **3. U.S. Inspector General Study of Medicare Rehab in Nursing Homes**<sup>3</sup>

- **OIG found in 2014 that an astounding one-in-three short term, Medicare nursing home patients are harmed** within a month of entering a nursing home.
- Physician reviewers found that **59% of the time, these adverse events and incidents of harm, including falls, pressure ulcers and medication errors, were preventable.**
- **OIG calculated that, as a result, 1,538 residents died, 10,742 residents experienced harm and Medicare paid \$208 million for hospitalizations of nursing home residents, just in the month of August 2011.**

## **IV. Recommendations & Conclusion**

### **1. Conclusions**

- Pre-dispute arbitration clauses in nursing home (and other residential care) contracts undoubtedly exacerbate a situation that is, by its nature, heavily weighted against vulnerable nursing home residents and their families.
- Arbitration can only be a fair choice when it is entered into on an *ad hoc* basis, when the reasons for a dispute are known and both parties have the opportunity to consider their best options.
- Pre-dispute arbitration in nursing homes fundamentally robs residents who have been seriously harmed as a result of abuse or neglect of any chance to be heard or seek redress in a meaningful way.

### **2. Recommendations & Comments**

- **Federal requirements.** Currently, federal regulations for nursing homes are being revised and it is unknown whether CMS will prohibit or merely restrict pre-dispute arbitration agreements in nursing homes. We urge the Assembly to monitor this and other federal developments (i.e., case law) over the next six to 12 months with an eye to developing policies that will safeguard protections for residents and their families in the future.
- **Assembly Bill A108.** I believe that this bill would provide further protections to consumers. A small but important part of the problem with arbitration in general is that

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<sup>3</sup> Adverse Events in Skilled Nursing Facilities: National Incidence Among Medicare Beneficiaries, DHHS Office of the Inspector General, Report OEI-06-11-00370 (February 2014). Accessed at <http://oig.hhs.gov/oei/reports/oei-06-11-00370.pdf>.

it lacks both transparency and accountability. This bill, if passed, would improve that. In addition, it would be useful if this information were collected and posted in one, publicly available location, such as on the NYDOH website or the NY Attorney General's website.

- **Assembly Bill A8191.** Though I think that this bill sets out good protections, particularly in respect to limiting pre-dispute mandatory arbitration, I believe that it is preempted in important ways by current interpretations of federal law, particularly in respect to the Federal Arbitration Act of 1925.
- **Absence of written findings.** The absence of written, publicly available findings in consumer arbitration and government remedies against nursing homes (IDR, IIDR and ALJ hearings) for substandard care, fraud and/or abuse is an issue of growing concern. Fundamentally, the absence of these records facilitate the provision of substandard care, worthless services and fraud in too many nursing homes. The fact that a substantial majority of care is paid for by tax-payers should, we believe, make this a matter of significant concern to the public and our state leaders.

### **3. Resources For Further Information on Nursing Home Care and Concerns for New York's Residents and Families**

- LTCCC Memoranda in Support of Key NY State Legislation for 2016 [<http://www.nursinghome411.org/?articleid=10097>]
  - LTCCC Memo in Support of Safe Staffing Standards for Nursing Homes
  - LTCCC Memo in Support of Informed Consent for Antipsychotic Drugging
  - LTCCC Memo in Support of Family Legal Rights When a Resident Has Died
  - LTCCC Memo in Support of Reporting Death & Felony Crimes in Certain Adult Care Facilities
- Left Behind: The Impact Of The Failure To Fulfill The Promise of The National Campaign To Improve Dementia Care. [<http://www.nursinghome411.org/?articleid=10091>]
- New Federal Regulations Proposed For Nursing Homes [<http://www.nursinghome411.org/?articleid=10095>]
- Mandatory Managed Care in New York State Nursing Homes: A Review and Assessment of Current Access & Quality [<http://www.nursinghome411.org/?articleid=10076>]
- Piecing Together Quality Long-Term Care: A Consumer's Guide to Choices and Advocacy in New York [<http://www.nursinghome411.org/?articleid=10045>]
- NY Nursing Home Enforcements [<http://www.ltccc.org/enforcements/archives.shtml>]

Thank you again for your interest in this serious issue and for this opportunity to present testimony before your Committees.