



Standing Up For Seniors:

How the Civil Justice System Protects Elderly Americans

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Introduction

The business of nursing homes has never been more corporate. The vast majority of nursing homes are for-profit and more than half are part of chains. In this industry, profits come with problems. For-profit nursing homes have on average 32 percent fewer nurses and 47 percent higher deficiencies than their non-profit counterparts.¹ The sad fact is that corporate nursing homes put profits ahead of their residents.



Nursing homes are now big business. Corporate chains are anticipating a flood of baby boomers moving into their facilities over the next few years.

This increased emphasis on profits has led to a distressing rise in neglected and abused seniors. Between 2000 and 2008, instances of “immediate jeopardy”—violations likely to result in serious harm or even death—rose 22 percent. More than 90 percent of all nursing homes were guilty of at least one violation.²

There are many laws and regulations aimed at protecting seniors. Nursing homes are bound by law to provide their residents with the “highest practicable physical, mental and psychological well-being.”³ Other rules and regulations mandate that nursing homes provide sufficient nutritional standards, have adequate staff, prevent avoidable pressure sores, and limit the use of chemical restraints. Yet government agencies, non-profit watchdogs and media organizations consistently report that serious problems exist in our nation’s nursing homes.

Loopholes in legislation have been exploited, and regulations and inspections have proven woefully ineffective. The Government Accountability Office (GAO) has highlighted a trend in institutions escaping sanctions by “yo-yoing” in and out of compliance. Homes found with violations are allowed to fix problems within a grace period and thus escape sanctions, only to allow the problems to reappear later on.⁴

The same is true of insurance companies that mislead and defraud vulnerable seniors. Insurance industry regulators protest that they can do nothing. Even when they do raise their hands, they more often than not strike deals to keep fines to a minimum and settlements secret.⁵

With the regulatory and legislative bodies unable to cope with a groundswell of neglect and abuse, the civil justice system has stepped into the breach. Attorneys who represent our nation’s seniors, and their families, play a critical role in uncovering abuse and neglect, and are the most effective force to compel corporate nursing homes to fix their conduct.

Chemical Restraints

Robert Harris was a lively senior suffering from mild dementia. Though still active, he agreed to enter a nursing home to ensure he was well looked after. Once there, he proved to be an energetic and occasionally quarrelsome resident. To those who knew him, Harris was just a regular “grumpy old man.” To the nursing home, however, he was a psychotic that needed to be “chemically restrained.” The nursing home placed Harris on two antipsychotics—Risperdal and Haldol—that caused him to become “an involuntary catatonic prisoner.” He stopped eating and drinking normally. He lost 10 percent of his body mass within a month. He went from being active and talkative to drowsy and confused. Eventually he developed incontinence that required a catheter. That catheter was inserted incorrectly, puncturing Harris’ urethra, which caused a massive infection and eventually killed him.⁶



“Way too many patients in nursing homes are treated with antipsychotics purely to sedate them or to control behaviors that are difficult for the staff.”

Use of chemical restraints has increased in nursing homes over the last several years. Research in Florida found that 71 percent of new nursing home residents were put on psychoactive medication within three months of admission, and 15 percent were put on four or more drugs.⁷ Like Harris, the vast majority had no psychiatric diagnosis; rather they were put on the drugs so the nursing home could more easily manage them. “Way too many patients in nursing homes are treated with antipsychotics purely to sedate them or to control behaviors that are difficult for the staff,” according to Robert A. Stern, an Alzheimer’s specialist and brain researcher at Boston University School of Medicine.⁸

In one case in Illinois, a physician was found to be dosing so many nursing home residents with antipsychotics that his practice was described as “an assembly line.”⁹ In another case in California, nursing home administrators routinely medicated residents with antipsychotics when they argued or complained about their care. The drugs were given without a physician’s prescription, and when the residents resisted, the nursing home staff administered the drugs forcibly.¹⁰

The use of antipsychotics to sedate seniors is not just a matter of unethical care. As in the case of Robert Harris, there are very real side effects associated with the practice, particularly in the case of seniors who are on a variety of other prescribed medications that may interact with the

antipsychotics. In the California case several residents developed complications and three died. The Food and Drug Administration (FDA) has warned of an increased risk of death associated with antipsychotic use in dementia patients.¹¹ According to Dr. Victor Molinari, professor of aging at the University of South Florida and lead researcher on the Florida study, psychotropic medications may be causing a wide array of problems. "It seems the use of psychoactive medication is trumping the use of nondrug treatments," says Dr. Molinari. "It could well be that we're causing problems like falls, confusion and delirium, and hospitalizations."¹²

Lawmakers have already attempted to crack down on the use of antipsychotics in nursing homes by enacting legislation aimed at minimizing their use. Yet there are loopholes in the legislation, and nursing homes have exploited them to the point that antipsychotic use has actually increased.¹³

Without effective legislation, and with an inspection system that allows nursing homes to yo-yo in and out of compliance unpunished, many residents and their families have turned to trial attorneys for protection.

Trial attorneys have not just helped to get individual patients off stifling antipsychotics; they have also tackled the problem at its source. Huge pharmaceutical conglomerates have exploited seniors by encouraging the use of psychotropic drugs that were never intended for nursing home use. Eli Lilly, for instance, illegally marketed its antipsychotic Zyprexa for use in nursing homes to treat sleep disorders and dementia, despite warnings from the FDA that such use was inappropriate. Eli Lilly made \$36 billion from Zyprexa between 2000-2008, but the pharmaceutical giant was held accountable in both civil and criminal court and forced to pay \$1.4 billion in fines. Those legal actions not only halted the inappropriate use of Zyprexa on elderly patients, but also resulted in a Corporate Integrity Agreement, which allowed independent entities to review the corporation's compliance with federal law.¹⁴

Forced Arbitration

In 2003, 65-year-old Charles McAlister, a Mississippi nursing home resident with no legs, developed severe pressure sores on his hips as a result of negligent care, resulting in a massive infection that led to his death. When his family sought justice they were told McAlister—who was illiterate, unable to see or hear well and demented—had signed an arbitration agreement that barred them from a courtroom.¹⁵ In Mississippi in 2002, nursing home resident Irene Hight was found seriously dehydrated by her daughter after being left without fluids for 24 hours. Nursing home staff refused to call an ambulance and left Hight's daughter to wheel her mother to the hospital across the street, where she died hours later. Yet again, Hight's family was denied an opportunity to hold the nursing home accountable by a forced arbitration agreement they had hurriedly signed upon admission.¹⁶



Forced arbitration clauses are hidden in the fine print of a variety of consumer contracts. The clauses dictate that in the event of a dispute a consumer cannot take their case to court, but must instead submit to mandatory and binding arbitration, usually with an arbitrator picked by the company supplying the contract. Nursing homes are increasingly inserting forced arbitration clauses into the piles of admission documents, and thus slyly stripping the constitutional rights of millions of seniors. In the largest chains of nursing homes, as many as three out of four new patients are forced to sign a mandatory binding arbitration clause before admission.¹⁷

Many times these seniors are under considerable stress and have no idea what they are signing, let alone understand the full repercussions of a forced arbitration clause. They do not realize they are signing away their constitutional rights, nor do they know that the industry-funded arbitration system so heavily favors businesses that their chances of ever prevailing are very low.¹⁸ Often they are led to believe their admission is contingent upon signing everything as they are told. Rarely are they given an opportunity to read the documents. Instead, the most they can expect is for a nursing home official to offer a brief description of the document, without explaining its true ramifications. When that senior develops an agonizing bed sore, is abused by a staff member or dies from dehydration or infection caused by inadequate care, their access to justice is essentially cut off.

Lawmakers and regulators offer no recourse. Federal legislation to outlaw nursing home arbitration has yet to pass. The last resort is trial attorneys.

“There isn’t a day that goes by that I don’t think about him and how he died. Maybe after everything is over then I can let him rest in peace.”

In Massachusetts in 2005, 93-year-old John Donahue lost an eye when a nurse’s aide’s negligence caused a mechanical lift to puncture his face. The nursing home waited 15 hours to transport him to the hospital, where doctors were forced to remove his eye. He contracted an infection and died six weeks later. Again, when the family sought justice they were told that Donahue had allegedly volunteered to sign an arbitration agreement four years after being admitted to the home, and in a state that nursing home staff noted as “confused, depressed and delusional.” Attorneys for John’s family fought the forced arbitration for two years until a court finally agreed and allowed the case to go forward.¹⁹ John’s stepdaughter, Marlene Owens, told the *Boston Herald* that the nursing home’s actions had prevented her from finding peace. “There isn’t a day that goes by that I don’t think about him and how he died. Maybe after everything is over then I can let him rest in peace.”²⁰

Unfortunately, John Donahue marks the exception, not the rule. Many courts have been compelled to uphold forced arbitration clauses, as the documents are designed to thwart any attempt to pursue justice in a court of law. Even so, attorney after attorney has taken on nursing homes and the forced arbitration clauses they impose on seniors in an attempt to hold them accountable for the pain and suffering they have inflicted.

Insurance Denials

Rudy was born in 1914 on a farm in South Dakota. He lived and worked on that farm his whole life, raising a family there. Rudy's two children eventually grew up and moved away, and, after 63 years of marriage, Rudy's wife Lucille died. Rudy continued to live all alone on the farm, until eventually his doctor told him it was time to move into a nursing home.



Rudy had prepared for the day. Years earlier he had listened to an insurance salesman who had persuaded him of the benefits of long-term care insurance. Rudy had signed up and faithfully paid the premiums ever since. When he moved to the nursing home, the insurance company duly paid the benefits it had promised... at first. Then, after three years in the home, Rudy got a letter from the company telling him his care was no longer "medically necessary."²¹

Unbeknownst to Rudy, he was just one of thousands of seniors who had their benefits cut by insurance companies that put profits before people. Those companies had signed up a flood of seniors for long-term care insurance in the 1990s, but did not like the idea of paying the benefits they had promised. Many of these insurance companies had miscalculated the mortality rates. As Rudy himself put it, "I have lived too long." In response, insurance company executives started searching for ways to deny claims and cut off benefits. Seniors all over the country began receiving form letters cutting off their benefits. Many letters remarkably claimed that their stay in the nursing home had "rehabilitated" them and they should be ready to leave.

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Insurance companies have long embraced delaying tactics to avoid paying claims. Internal insurance company documents exposed during litigation have revealed actions such as locking checks in safes until claimants complained, delaying payments until they were a year late, and disposing of important correspondence during routine "pizza parties." But undoubtedly the

most shameful use of delay tactics has been by insurance companies involved in long-term care insurance. According to Mary Beth Senkewicz, a former senior executive at the National Association of Insurance Commissioners (NAIC), “the bottom line is that insurance companies make money when they don’t pay claims...They’ll do anything to avoid paying, because if they wait long enough, they know the policyholders will die.”²²

Insurance executives calculated that few of their terminated policyholders would ever do anything about it. There was no one to complain to, and their benefits were so small the executives believed no attorney would take their case. And even if they did complain, the insurance companies were prepared to wait them out.

Attorneys, however, did step up. Through painstaking discovery, attorneys across the country began finding evidence of corporate programs aimed at terminating senior’s benefits, whether or not they were needed. Insurers called their profit-making schemes names such as “The Blitz” and “Bring Back a Billion,” and offered their employees everything from pizza to doubled income to reduce claims.²³

“[The company] made it so hard to make a claim that people either died or gave up.”

In Montana, the family of 77-year-old Mary Rose Derks was forced to sell the family business to pay bills that her long-term care insurer, Conseco, denied for more than four years. Mary’s case exposed a variety of tricks used to deny claims: deliberately mailing the wrong forms and then denying claims on the basis of incorrect paperwork; declaring policyholders have abandoned the claim if they fail to submit forms within 21 days; and withholding payment until the policyholder submitted documents not even required under the terms of the policy. In the words of former agent Betty Hobel, the company “made it so hard to make a claim that people either died or gave up.”²⁴

Mary’s case brought a Congressional investigation of Conseco and the long-term care insurance industry, which found that complaints about long term care insurance had skyrocketed 92 percent between 2001 and 2006, the period in which insurers began to lose money. That Congressional investigation in turn spurred a General Accounting Office (GAO) investigation into the decline in quality of care associated with private investment groups’ purchases of nursing homes.

The attorneys representing Rudy not only settled his case, but put a stop to the company’s tactic of denying every claim. These and similar cases have had the effect of keeping a vigilant watch on insurance companies looking to exploit the nation’s seniors.

Neglect

In 1996, 78-year-old Margaret Hutcheson was admitted to a nursing home for short-term rehabilitation. In the short time she was there, Margaret suffered severe pressure sores, malnourishment, dehydration, and eventually died.



Unfortunately, Margaret Hutcheson's story is completely unremarkable. Stories of negligence are all too common in America's nursing homes. A nursing home resident has her leg amputated after becoming infested with maggots; an

Alzheimer's patient dies trapped in a freezer; a Florida nursing home resident suffers from multiple falls, severe weight loss, multiple pressure sores, infections, dehydration, and eventually death by starvation.²⁵

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These stories are all the more horrific for being commonplace. A 2004 investigation of federal records by the *Detroit News* found that 14,000 patients died nationwide of malnutrition and dehydration over a four-year period.²⁶ In response, nursing home officials claimed dehydration was just a normal stage of dying and, “not necessarily something people should be alarmed with.”²⁷ Experts, however, disagree. “Obviously, we’re all going to die at some point,” said Jeanie Kayser-Jones, a professor of nursing at the University of California San Francisco, “but people should not be dying of malnutrition or dehydration. It’s really neglect, and we should call it what it is.”²⁸

As more and more nursing homes are taken over by for-profit corporate chains, the pressure to cut costs and lower staffing levels grows. The inevitable consequence is a greater frequency of neglect. Regulatory systems offer little deterrence. When inspections find violations nursing homes often get away with paying a fine, or even without a fine by correcting a violation within a grace period. Problem nursing homes yo-yo in and out of compliance unpunished.

There is no yo-yoing in the civil justice system. The attorneys representing neglected seniors offer no grace period. In fact, there are many examples of negligent nursing homes changing

their ways after being held accountable in a court of law.

The attorneys representing the family of Margaret Hutcheson, who died from malnourishment and dehydration, obtained an agreement from the nursing home corporation that it would change its patient monitoring and care procedures in each of its 65 nursing homes. In Texas in 1990, a 79-year-old nursing home resident with Alzheimer's slipped and fell in a bathtub after being left unattended. The bath overflowed for 15 minutes before staff found the man dead from drowning. Nursing home officials then attempted to cover up the drowning by having the autopsy report altered. Attorneys representing the dead man's family not only succeeded in holding the nursing home accountable, but also forced the home to install safety strips in bathtubs throughout the facility.²⁹

In each case, the civil justice system not only obtained restitution for the family, but provided a very real incentive for the nursing home to fix its ways for good.

Bed Rail Deaths

In New Mexico in 1993, 63-year-old Alzheimer's patient Billie Trew was strangled to death by the restraints on her bed rails while sleeping. When Billie's family sought justice in court, they found that at least 20 other patients had died and more than 60 had been injured in similar beds. The bed manufacturer had known of the strangling problem, but had done nothing to prevent it.³⁰



Nursing home residents are at risk in beds in multiple ways. Residents are sometimes trapped between or under the rails themselves, or in gaps between the mattress' edges and bed frame.³¹ The Food and Drug Administration (FDA) has recorded nearly 500 deaths associated with bed rails over the last quarter century, a figure that many experts believe may just be the tip of the iceberg.³²

Injuries associated with bed rails are not purely a result of poor design. Rails are often unnecessary, and while experts say they cut down on the number of falls, they also exacerbate injuries when there are falls, because residents fall from a greater height when trying to climb over the rail. Federal agencies and medical experts have encouraged nursing homes to reduce their reliance on bed rails.³³

The dangers are well-known to nursing homes, but regulatory warnings have proved largely ineffective. No federal agency has ever issued a recall of a defectively designed bed, and even the federal minimum standards are voluntary.³⁴ But where federal agencies have failed, the civil justice system has succeeded.

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In the words of geriatrician and bioethicist Steven Miles of the University of Minnesota, “Government sanctions cost a couple of thousand bucks. A lawsuit can cost \$500,000 to a million; it gets much more attention.”³⁵ Lawsuits over poorly designed beds and inappropriate use of rails have greatly reduced their use. In the case of Billie Trew, the nursing home agreed to reduce use of restraints, and the manufacturer agreed to warn customers about the dangers of entrapment. The result was a 90% reduction in the use of restraints.³⁶

Scams

In the 1980s and 1990s, insurance agents from the Inter-state Service Insurance Agency signed up thousands of seniors for long-term-care policies with promises of premiums that were low and would stay fixed. What the seniors did not know was that while the insurance company could not increase individual premiums, it could increase the “policy rate,” thereby raising the premiums for everyone. One 83-year-old man purchased a policy with an annual premium of \$1,498 in 1987 only to find that by 1996 it had increased over 400 percent to \$6,158. Others saw increases of up to 800 percent. Insurance regulators said they were powerless to act, because the policies were technically legal. Unable to afford the premiums, many simply dropped the policies, each time allowing the insurance company to keep the accumulated premiums without ever having to make a payment.³⁷



Seniors have long been a target for unscrupulous insurance executives and outright fraudsters.

Inter-state’s scam was by no means the only one. Seniors have long been a target for unscrupulous insurance executives and outright fraudsters. In the 1990s, fraudsters took over the National Heritage Life Insurance Company, and over the next several years defrauded the mostly elderly policyholders of \$450 million.³⁸ Insurance giant Prudential ripped off millions of seniors by “churning” life insurance policies—tricking customers with existing life insurance policies into buying new policies that were more expensive but offered no additional benefits. In 2003, United American Insurance settled charges that it had defrauded senior citizens in the sale of Medicare policies.³⁹ United American agents pretended to be representing federal agencies and aggressively pressured hundreds of seniors into buying insurance that was more expensive and less comprehensive than the insurance they already had.

The insurance industry likes to pretend all insurance fraud is perpetrated by consumers. In truth, insurance companies themselves have frequently engaged in fraud, and done so on a scale so massive that regulators are hard pressed to do anything about it. However, the civil justice system has not balked at holding insurance companies accountable. When finally caught, Prudential offered its customers compensation worth two cents for every dollar they had lost. Attorneys eventually secured \$410 million. Other giant life insurance companies, such as John Hancock, Met Life, and New York Life have all been forced to compensate policyholders for similar schemes.⁴⁰ In

the case of Inter-state's scam, while regulators were unable to act, attorneys obtained more than \$12 million for more than 13,000 seniors, rolled back premiums and ensured future increases were banned.⁴¹

Abuse

On his first two nights in an Arkansas nursing home run by the corporate Beverly chain, a quadriplegic patient was sodomized by a male orderly. When he complained, the orderly was suspended and eventually fired. It turned out the orderly had a criminal record, including a felony conviction, had never completed training to be a nurse's aide, and lied about his previous employment, none of which Beverly Enterprises ever checked. The patient, obviously traumatized, sought justice in a court of law, at which point Beverly Enterprises claimed the sodomy had been consensual.⁴²



Researchers at the National Center on Elder Abuse estimate as many as 1.5 million seniors are abused every year. Yet experts believe most incidences of abuse never come to the attention of authorities. For every case that does get reported, five more go unreported.

Much abuse can be traced to nursing home corporations who are negligent in hiring staff. A 2005 investigation by the Michigan Attorney General's Office found more than eight percent of the state's nurse's aides had outstanding criminal warrants, despite rules requiring nursing homes to undertake yearly background checks. A *Sun Sentinel* investigation in Florida found more than 3,500 people with criminal records, including rape, robbery and murder, were allowed to work with the elderly over a two decade period. Even when facilities did run background checks and found criminal records, they often ignored the results.⁴³

Researchers at the National Center on Elder Abuse estimate as many as 1.5 million seniors are abused every year. Yet experts believe most incidences of abuse never come to the attention of authorities. For every case that does get reported, five more go unreported.⁴⁴ Many nursing home residents are afraid of the repercussions of reporting abuse to largely ineffectual regulatory authorities.

In the face of a regulatory system that often enables criminals to work with the elderly, and offers little beyond irregular and ineffective facility inspections, it has been trial attorneys that have proven to be the only force capable of holding corporate nursing homes to account. In the Beverly Enterprises case, a jury found the nursing home giant had been negligent in hiring the orderly and awarded the patient compensatory damages and punitive damages.

Medical Errors

In 1996 in Connecticut, 71-year-old Gloria Bonaffini went into Bridgeport Hospital for routine heart surgery. Doctors told her she would likely be home within the week. She never left. Gloria contracted a staph infection deep inside her sternum and spent more than a year in the hospital before finally dying.



Gloria's death was no fluke. Bridgeport hospital was plagued with infections caused by poor hygiene and chronically inadequate facilities. The hospital's faulty ventilators contaminated the air with dust, and flies buzzed overhead during open-heart surgery. Doctors and nurses wore non-sterile clothing and often did not wash their hands. As many as one in five surgical patients entering the same operating room as Gloria came out with infections.⁴⁵

“The case, which involves four patients who contracted infections inside Bridgeport Hospital, also exposes how the bottom line influences decisions that allow germs to flourish in what are supposed to be the most sterile quarters in a hospital.”

The systematic problems at Bridgeport only came to light when the hospital's records were made public during litigation in the Connecticut Supreme Court. In the words of the *Chicago Tribune*, which examined those records, “the case, which involves four patients who contracted infections inside Bridgeport Hospital, also exposes how the bottom line influences decisions that allow germs to flourish in what are supposed to be the most sterile quarters in a hospital.” Hospital administrators had long known of the infection problem but dismissed possible solutions, such as replacing the air filtration system and putting infected patients in private rooms, because they considered them too costly.

Preventable medical errors kill and seriously injure hundreds of thousands of Americans every year. The Institute of Medicine's (IOM) seminal study of preventable medical errors estimated as many as 98,000 people die every year at a cost of \$29 billion.⁴⁶ If the Centers for Disease Control (CDC) were to include preventable medical errors as a category, these conclusions would make it the sixth leading cause of death in America.⁴⁷

Senior citizens are particularly at risk. While representing just 13 percent of the population, seniors account for 34 percent of all adverse drug events.⁴⁸ Long-term care residents suffer 1.9 million adverse drug events every year, 70 percent of which are preventable. As many as 86,000 of these events are fatal or life-threatening.⁴⁹

The civil justice system not only allows patients to seek justice for their injuries, it also encourages providers and hospitals to institute patient safety systems that help prevent negligence. In the case of Bridgeport Hospital, civil actions on behalf of patients killed and injured by infections eventually prompted administrators to embark on a \$30 million renovation. The hospital upgraded its air filtration system and hand washing stations, and made change to staff practices, such as a prohibition on doctors wearing scrubs home. These improvements drastically cut infection rates, from 22 percent of cardiac surgery patients to nearly zero.⁵⁰

Conclusion

The business of nursing homes is now far more corporate than ever before. The “mom and pop” homes of times past have been largely replaced by corporate chains. These corporations see nursing homes, and the huge influx of baby boomers destined to move to them, as profit centers. They will do anything to protect these profits.

Unfortunately, it is the residents of nursing homes who have suffered the consequences of this drive for ever more profits. These elderly patients have suffered the neglect that results when corporations put profits before people.

Regulators are of little recourse to the elderly. Part of the problem is a hodgepodge of state regulation governing nursing homes and insurance companies. It is unrealistic to expect government agencies to be able to protect nursing home residents when the abuses they are subject to are so commonplace. Nor has the industry shown anything more than a cursory attempt to regulate itself.

Trial attorneys have proven to be the most effective representative of injured and abused nursing home residents. Without the vast and permanent bureaucracy of the regulatory and legislative systems with which they work hand in hand, trial attorneys are able to respond to the frequent injustices to which seniors are subject.

As the corporatization of senior living continues, it is clear trial attorneys will play an ever more vital role as the last, and often only, line of defense for nursing home residents.

Endnotes

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- ⁴¹ *Long-term care insurance, hearing before the Senate Special Comm. on Aging*, 106th Cong. (Sept. 13, 2000) (statement of lead plaintiff counsel Allan Kanner, Allan Kanner & Associates, New Orleans)

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⁵⁰ *Supra*, Note 45.