Long Term Care

In the United States, Human Rights Watch has documented widespread inappropriate use of antipsychotic drugs in older people in nursing facilities, often without informed consent, both of which arise primarily from inadequate enforcement of existing laws and regulations. Our report, "They Want Docile: How Nursing Homes in the United States Overmedicate People with Dementia," is based on visits to 109 nursing facilities, mostly with above-average rates of antipsychotic medication use, in six states.

Every week, more than 179,000 people in nursing homes in the US are given antipsychotic drugs even though they have not been diagnosed with any condition for which their use is approved. Often, facilities administer the drugs without making any effort to seek informed consent. Many nursing homes use these drugs not to treat a specific medical condition—such as psychosis or a neurological disorder—but because of their sedative effect. Antipsychotic drugs make nursing home residents easier to control by pacifying and sedating them.

While symptoms of dementia can be distressing for the people who experience them, their families, and nursing facility staff, evidence of the benefits of treating these symptoms with antipsychotic drugs is weak. More importantly, studies find that on average, antipsychotic drugs almost double the risk of death in older people with dementia.

In 2012, the US' Centers for Medicare & Medicaid Services (CMS) created an initiative in recognition of the unacceptably high prevalence of antipsychotic drug use. While the initiative may have contributed to reductions in the use of antipsychotic medications over the last six years, many nursing home residents are still routinely given these drugs. Effective regulation and oversight of nursing homes, including meaningful sanctions for noncompliance with mandatory standards, is essential.

Our research found several significant shortcomings in enforcement of federal regulations to protect nursing home residents, from the underestimation of harm cited to the inadequate deterrent effect of fines around these drugs' use.[1] We found that penalties for noncompliance were often limited to monetary fines that may not be significant enough to deter malfeasance. Our quantitative analysis of fines assessed in all states between 2014 and 2016 found that 80 percent were less than $10,000 and 20 percent between $10,000 and $100,000.

[1] The most recent Office of Inspector General analysis is from many years ago, but it found that less than half of the civil money penalties imposed at that time were paid and that seventy percent of penalties received a reduction. Office of Inspector General, "Nursing Home Enforcement: The Use of Civil Money Penalties," April 2005, https://oig.hhs.gov/oei/reports/oei-06-02-00720.pdf. Facilities automatically obtain a 35 percent reduction in the civil money penalty imposed if it waives its right to a hearing. The opportunities to challenge a citation and its attached penalty are numerous as well. CMS, "Mandatory Immediate Imposition of Federal Remedies and Assessment Factors Used to Determine the Seriousness of Deficiencies for Nursing Homes," July 29, 2016, https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-16-31.pdf.

There are also concerns about access to justice through courts of law for individuals harmed in nursing facilities: in 2016, CMS banned the use of pre-dispute arbitration clauses, describing them as "fundamentally unfair" because "it is almost impossible for residents or their decision-makers to give fully informed and voluntary consent to arbitration before a dispute has arisen."[2] It concluded that "residents should have a right to access the court system if a dispute with a facility arises."[3]

CMS noted "there is significant evidence that pre-dispute arbitration agreements have a deleterious impact on the quality of care for Medicare and Medicaid patients" in nursing facilities.[4] It also emphasized that while arbitration proceedings are widespread in healthcare, the "significant differential in bargaining power" between residents and nursing facilities—the former depends on the latter for almost all their needs—make it "unconscionable" for such facilities to demand, as an admission condition, that residents sign a pre-dispute agreement for binding arbitration.

However, in June 2017, the new administration did a complete about-face, with CMS issuing a new proposed rule that not only would eliminate provisions prohibiting pre-dispute arbitration, but would allow facilities to deny admission to a resident who refuses to sign the arbitration agreement.[5]

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[2] Ibid., p. 68792.

[3] Ibid. [list from p. 68793]. See also, Tripp, Lisa, ''A Senior Moment: The Executive Branch Solution to the Problem of Binding Arbitration Agreements in LTC facilities Admission Contracts'', *Campbell Law Review Symposium*, vol. 31(2) (2009); Tripp, Lisa, ''Arbitration Agreements Used by LTC facilities: An Empirical Study and Critique of AT&T Mobility v. Concepcion'', *American Journal of Trial Advocacy*, vol. 35(87) (2011); and Bagby, K. and Souza, S., ''Ending Unfair Arbitration: Fighting Against the Enforcement of Arbitration Agreements in Long-Term Care Contracts'', *Journal of Contemporary Health Law & Policy*, vol. 29 (2013).

[4] Ibid.

[5] CMS, "Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities: Arbitration Agreements," *Federal Register*, vol. 82(109) (2017), https://www.gpo.gov/fdsys/pkg/FR-2017-06-08/pdf/2017-11883.pdf (accessed September 10, 2017).