

July 27, 2007 Received by S. Moses on July 24, 2007

Stephen Moses, President
The Center for Long Term Care Reform, Inc.
2212 Queen Anne Avenue North - #110
Seattle, WA 98109

[Steve Moses's replies follow in red and/or underline.]

[NYSBA Bar Association and Compact Working Group responses are blue]

Re: Compact for Long Term Care

Dear Mr. Moses:

I am writing on behalf of the New York State Bar Association Elder Law Section Compact Working Group. We have reviewed the draft of your report on the New York State Compact for Long Term Care and wish to provide you with additional information regarding how the Compact idea was conceived and developed. When the New York State Bar Association Elder Law Section met with legislators to discuss public policy issues affecting seniors and people with disabilities, it became clear to the leadership of the Section that legislators were grappling with many of the issues that our clients confronted on a daily basis – how to pay for long term care. Upon learning of the Compact, the legislature charged the Elder Law Section to further develop this alternative approach to long term care financing since the existing proposals were not viable.

While long term care insurance remains a viable option, it still requires medical underwriting, excluding those with pre-existing conditions, and is prohibitively expensive, even by insurance industry guidelines, for many others. The question, and the challenge we all face, is whether we are going to simply maintain the status quo and continue to “fix” a Medicaid system that is broken, or adopt a new way of thinking about how to finance long term care. The Compact is the New York State Bar Association Elder Law Section’s proposal that represents an entirely new way of thinking about long term care.

We offer the following comments on the report and trust that you will take these comments into account in preparing your final report:

[On May 31, 2007, I provided a draft copy of our LTC Compact report to all who participated in the study. I requested comments and explained the final report would be published in "late July." I will answer these comments here and include them in the final report.]

1. The report begins with the statement that New York has one of the lowest long term care insurance penetration rates in the nation. This is not true. Studies from the Long Term Care Strategy Group and LifePlans, Inc show that New York is among the 18 states that exceed the national average of 5.9% with a penetration rate of 8%. [Moses: My source, a publication of America's Health Insurance Plans (AHIP), is cited in the report at Endnote #12. It shows New York's LTCi market penetration rate among people 50 plus years of age to be between 1% and 5%, the lowest of four categories cited. Your source may use different definitions, but in any case an 8% market penetration is extremely low.]

Our source, the latest LifePlans, Inc. and LTCG survey, is the source for AHIP. The AHIP report you refer to is 5 years old. As you know, LTCG and LifePlans are the premier research groups for LTCi.

With regard to New York's LTCi penetration rate, in the overall scheme of things perhaps 8% is low. Long Term Care Insurance should have a 70% penetration rate nationwide. However, the general lack of LTCi purchases is not the point you are trying to make in the report. You are saying that New York State had a low penetration rate because we have too generous a Medicaid program. In that case, we have to compare New York's penetration rate with other states. By that standard, New York State - even with its Medicaid program - does better than 32 other states, many of which have virtually no Medicaid program at all. This seems like a disingenuous use of data to support your own personal opinion.

2. The report states that:

There is no hard evidence that New Yorkers use home equity, through reverse mortgages or otherwise, to fund long-term care. Besides, New York Medicaid exempts up to \$750,000 worth of home equity for any Medicaid recipient who expresses an intent to return to the home. Page 4.

Working Group Comment – This implies that New Yorkers do not use the equity value of their homes to pay for long term care costs. This statement is misleading because many individuals on Medicaid lose the value of their homes due to Medicaid's estate recovery rights against the home once the individual dies. Furthermore, individuals requiring long term care services in their home often use the equity in their home to pay for these costs through reverse mortgages or lines of credit. Even individuals who are on Medicaid require the equity in their homes to cover monthly expenses since Medicaid only allows the individual to keep income of about \$700 per month.

[Moses: NY is a "medically needy" state. Medical expenses including the cost of nursing home care are deducted from income before the income standard you cite is applied. Thus people can have many thousands of dollars of income and qualify for Medicaid. They need a "cash flow" problem to qualify, but not low income.]

If you have hard evidence that New Yorkers use reverse mortgages in significant numbers to fund LTC, you should provide it. Otherwise, I stand by the report's conclusion that there is none.

As to recovery of home equity from recipients' estates, New York's rate of estate recovery is less than one-third the national average according to an AARP study at http://www.aarp.org/research/assistance/medicaid/2007_07_medicaid.html. Medicaid planners frequently advertise their services and to help clients avoid estate recovery.

More than one-half the states have Medically Needy Programs and the rest have Miller Trusts. States aren't doing this to be generous. They allow it because there is no other way unless they are willing to have the elderly dying in the street. How can care costing more than income be described as a "cash flow" problem? Should people in need of long term care services with incomes over the poverty level be ignored if they cannot raise enough money for both care and food? If long term care insurance is the answer, then at least acknowledge that many people cannot get coverage due to a pre-existing condition or they cannot afford it (again, using industry standard guidelines).

The people that have many thousands of dollars are already using those dollars towards the cost of long term care. What happens after that? They have no means by which to live and they need to access the equity in the home.

The fact that a state has failed to pursue recovery of assets it is otherwise legally authorized to pursue doesn't change the fact that the state has the right to recover and people have to expect the recovery to take place if and when they become a Medicaid recipient. No rational person would go onto Medicaid on a mere hope and a prayer that Medicaid recovery in a particular state is less than one third of the national average so maybe their asset will be able to be preserved.

3. The report states that:

The legislators told the interest groups—who were constantly importuning them for more long-term care funding and fewer constraints on Medicaid-funded care—to recognize the seriousness of the LTC financing problem, stop complaining and propose something positive for a change. Page 5.

Working Group Comment – the Elder Law Section was never advised by the legislators to “stop complaining”. Rather, we determined on our own that we wished to become more proactive in the legislative and public policy arena pertaining to long term care issues. The result of that effort was the Compact proposal. We continue to work with legislators to find alternative ways to finance long term care costs in New York.

[Moses: The report reflects what I was told by a legislative interviewee. I'll include your denial parenthetically in the report.]

4. The report states that:

The lawyers, frustrated first by former-Governor Pataki's efforts to constrain Medicaid LTC eligibility and later by the Deficit Reduction Act of 2005, which federally mandated the same kinds of controls (e.g. longer and stronger asset transfer penalties, a home equity exemption cap, etc.), saw the futility of fighting change and took up the challenge. Page 5.

Working Group Comment – we reiterate that it was our own desire to become involved in the legislative process to formulate alternative solutions to financing long term care costs in New York. Furthermore, our efforts were begun in the middle of 2004, long before the DRA was passed. Therefore, this statement is misleading in that it implies that the reason we decided to make a proposal such as the Compact was that we “saw the futility of fighting change.”

[Moses: The report reflects my understanding of the circumstances as communicated by interviewees.]

5. The report states that:

Senator Golden, Herz's boss and a key committee chairman, countered an appeal from the elder law bar opposing Medicaid cut backs by asking them to suggest a positive solution that would avoid cutting Medicaid. Pages 6 – 7.

Working Group Comment – this statement is inaccurate. The NYSBA Elder Law Section decided on its own to create an innovative solution to long term care financing. In January 2005, the Section wrote and adopted a Long Term Care Report (in collaboration with Gail Holubinka) which included the Compact Proposal as a chapter within that report (Chapter 6). The Section was not initially requested by Bob Herz or anyone else to make a proposal or to stop complaining, nor was this endeavor prompted by frustration. The idea for the proposal came out of the Section's own desire to become part of the solution and not because we were prompted by a third party or out of any sense of frustration. Your report already supports this conclusion where it states that “[n]evertheless, ... [the elder law attorneys], were surprised to find around this time that the legislative branch had already taken up the gauntlet and translated the Compact proposal into draft legislation.” The reason we were surprised to learn of the legislation is that we were not at that point responding to anything anyone had said to us; rather, we were acting on our own initiative to become part of the solution. Once it was discovered that the legislature had an interest in creating legislation based on the Compact, we began to work with the legislature in doing so. This work is

reflected in revised Compact legislation that has been submitted to the New York legislature since March 2005.

[Moses: Again, the report reflects my understanding based on interviews with key players.]

6. The report states that "Elder Lawyers Say." (page 9). This should read "Elder Law Attorneys Say."

[Moses: "Elder lawyers" is a term of art used by many as a synonym for "Elder Law Attorneys."]

7. Who Opposes (Supports) the LTC Compact and Why? The titles of these sections would seem to indicate that specific individuals have specific reasons for supporting or not supporting the Compact. However, the sections provide a variety of unattributed statements that are sometimes unrelated to the Compact's viability and often contain misstatements and inaccuracies. There is value in noting public opinion, but not in this case. The stated purpose of the report was to provide facts, insight, and the information needed to evaluate. Given this criteria, we believe readers should be able to expect attributed input by individuals with expertise and program knowledge. As such, their statements would represent genuine differences of informed opinion rather than offhand comments without merit or applicability that serve to confuse, not clarify, the issues.

[Moses: The intent of the report was to convey a fair sampling of the comments pros and cons about the LTC Compact grouped by stakeholder or interest group. All interviewees are listed at the end of the report.]

Some examples of statements that invite misunderstanding are:

- a) An anonymous provider is quoted as saying a federal waiver is unlikely to be granted (page 11). Who made this statement? What is it based upon? And, since the legislation already states the program will not proceed without a waiver, how does this unsubstantiated comment address the merits or viability of the Compact proposal?

[Moses: I granted anonymity to respondents who requested it. Otherwise comments would have been inhibited. Readers can use their own judgment whether the comments are credible. The purpose of this report was to get all the arguments on the table grouped by general source and type. The point about the federal waiver is relevant because many people and organizations are being asked to invest large amounts of time and resources in evaluating the LTC Compact and forming official positions when this commenter believes it has no chance to gain federal approval regardless of its merits.]

It is irrelevant who the person is, but when you identify someone as a participant in the argument one has every to presume that the participant possesses some modicum of knowledge about the issue. Readers of your report will certainly feel this way. One does not gather data or fuel debate with the off-handed opinion of anyone who's wiling to give it. This is supposed to be a report – not a man on the street interview for the 10:00 o'clock news. The readers of reports may not expect names but they do expect knowledge making the approach you have adopted disingenuous.

- b) Elsewhere in the report (page 11) it states that "[t]his lawyer points out that the National Academy of Elder Law Attorneys has not endorsed the New York LTC Compact. He says that NAELA's leadership does not believe the Compact would be a good model for the rest of the country." The unidentified lawyer is wrong. In fact, the Board of Directors recently adopted a public policy resolution at a meeting held on June 29, 2007 formally approving programs, such as the Compact, that seek alternative means of financing long term care. That resolution was supported by the Board of Directors, including members of the Executive Committee of NAELA , all of whom comprise current NAELA leadership.

[Moses: The cited individual expressly requested to remain anonymous. He or she is entitled to his or her opinion. I tried to cite proponents from the Compact from among

groups that generally oppose it. In this case, I was trying for balance to cite an opponent of the Compact from a group that would generally favor it.

You need to remove this statement from the report as you have been advised that this interviewee is flat out wrong and the statement made directly conflicts with NAELA's official policy. NAELA leadership supports the Compact as evidenced by its recently adopted resolution by the Board of Directors. Why would you want to publish a statement by an anonymous interviewee who is so obviously wrong? This would only serve to significantly diminish the credibility of this report.

- c) Yet another example appears under the heading "NY Department of Health Says:" (page 11). Again the report quotes an unnamed source who "raises the issue of whether or not private LTC insurers will evolve the new kinds of products to coordinate with Compact requirements and benefits". Such a statement would seem to imply familiarity with long term care insurance and the long term care industry. However, the next statement is that the insurance industry is supporting the Compact because they want to avoid the risk of selling large policies and don't want to sell lower priced policies. First, the insurance industry isn't supporting the Compact and the second part of statement, if true, would mean long term care insurers want to put themselves out of business.

[Moses: The comment was cited accurately. In fact a representative of the insurance industry was intimately involved in design of the Compact and in the earlier stages, an important LTC insurance company supported the Compact.

Aside from the fact they have nothing to do with the Compact as a public financing program, the comments make it clear that the speaker's grasp of the subject may make their comments less than useful.

In closing, we wish to express our gratitude for your undertaking the time to create this report. However, we are disappointed that the value of the study is undermined due to the substitution of unattributed and unsubstantiated opinions for empirical data.

[Moses: Readers can form their own opinions. I'll include your comments and my replies in the final report. It is worth noting that your comments do not take issue with the report's conclusions or recommendations.]

It should be obvious from our comments that we have serious concerns about your conclusions and recommendations, which are largely based on unsubstantiated sources, misuse of data and assumptions that are not accurate. Long term care is only a partial solution and cannot be touted as the panacea (the 5.9% national penetration rate supports this conclusion). We know the Medicaid system is broken. These are the reasons we developed the Compact and, quite frankly, we believe it to be the best option for financing long term care. Shooting unsubstantiated bullets at it won't solve the nation's or New York State's long term care crisis. We welcome the opportunity to engage in serious discussion, with people who are willing to identify themselves and who can demonstrate a solid working knowledge of the issues. Anything less is simply a waste of everyone's time.

Please feel free to contact me if you would like to discuss any of these points in greater detail prior to publishing your report.

Sincerely,

NEW YORK STATE BAR ASSOCIATION ELDER LAW SECTION COMPACT WORKING GROUP

Howard S. Krooks, Co-Chair

Compact Working Group Members

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