

MEMORANDUM

A.11340 (Lunsford)/S.10171 (Cleare)

AN ACT to amend the estates, powers and trusts law, in relation to the payment and distribution of damages in wrongful death actions

LeadingAge New York and its not-for-profit, mission-driven long-term care provider members oppose this legislation, which would amend the estates, powers and trusts law to expand the damages recoverable in a wrongful death action to include compensation for the loss of companionship, loss of services and support, and loss of nurture and guidance. We are keenly aware of the heartbreaking losses that are endured with the death of a loved one, and that these losses are particularly difficult to bear when the death is caused by wrongful conduct. However, we must oppose this legislation due to significant concerns around its impacts on health care costs and ultimately access to care, especially in light of the distressed financial condition of the state's not-for-profit and public long-term care providers and the inadequacy of Medicaid rates.

The expansion of damages authorized by this legislation will only add to already exorbitant liability insurance premium costs in New York State. The actuarial firm Milliman has estimated that legislation of this type could increase New York's already high medical professional liability premiums by nearly 40 percent.¹ This considerable increase would be on top of the already exorbitant premium costs New York's non-profit long-term care providers currently shoulder. Liability insurance premiums are high in New York, at least in part, due to its history of high damage awards, even in the absence of the expanded damages authorized by this bill. A 2022 report from Diederich Healthcare² showed that in 2021, New York had the highest cumulative medical liability payout of any state in the country, as well as the highest medical malpractice payout per capita. It is also noteworthy that, while New York State considers legislation that will further drive up liability insurance costs, many other states have comprehensive provisions to contain excessive medical liability insurance costs, including limits on damages. New York does not, and this is part of the reason New York's medical malpractice insurance and payout costs far exceed every other state in the country.

The substantial increase in liability insurance costs driven by this legislation will only exacerbate the financial distress of New York's long-term care providers. These providers are paid primarily by Medicaid and will have to absorb a substantial increase in liability premiums within already inadequate Medicaid rates.

Further, as this legislation is being considered, it is critical to acknowledge and reconcile with the devastating underfunding of the long-term/post-acute care system being exacerbated by skyrocketing

¹ Review of NY Bills S.74-A/A.6770: Proposed Expansion of NY's Wrongful Death Act, <https://www.nycji.org/research>.

² Diederich Healthcare, 2022 Medical Malpractice Payout Analysis, <https://medmal.diederichinsurance.com/2022-medical-malpractice-payout-analysis/>

costs, staffing shortages, financial losses, and again, inadequate Medicaid reimbursement. With 75 percent of nursing home days paid for by Medicaid, and a Medicaid funding shortfall that exceeds \$1 billion, our not-for-profit and public long-term care providers cannot afford the sizeable increase in liability premiums that this legislation would trigger. It is simply untenable and will only drive more mission-driven health care providers out of operation, further limiting access to high-quality, non-profit long-term care services for those individuals who need it most.

The already high liability costs and litigious environment of New York State are discouraging health care professionals from pursuing careers in New York. Shortages of health care professionals are already creating gaps in access to care. In aging services, there are few geriatricians, at a time when we need more people specializing in working with older adults. The state should avoid implementing new policies that further threaten access to critical services when the aging population is growing.

In sum, the added costs of this legislation will add to the strain on a system of care that is already struggling to stay afloat. It places mission-driven and public providers at higher risk of closure and may leave many consumers with less desirable avenues of care. This bill also threatens to exacerbate access to care issues not only for older adults, but for individuals throughout the health care continuum.

If the state wishes to adjust the damages recoverable in liability actions, it must be done in a responsible manner that considers increases in costs to providers, adjusts Medicaid rates to cover those costs, includes reasonable protections to contain those costs, and ensures access to care throughout the health care continuum.

For these reasons, LeadingAge NY opposes A.11340 (Lunsford)/S.10171 (Cleare).

LeadingAge New York represents over 350 not-for-profit and public long term care providers, including nursing homes, home care agencies, senior housing, retirement communities, assisted living, adult care facilities, adult day health care and managed long term care.

Contact: Sarah Daly, sdaly@leadingageny.org