

August 7, 2017

Centers for Medicare & Medicaid Services
U.S. Department of Health and Human Services
Attention: CMS-3342-P
P.O. Box 8010
Baltimore, MD 21244-1850

Re: CMS—3342-P, Comments Opposing Changes to Strip Legal Rights from Vulnerable Residents in Long-Term Care Facilities

The undersigned organizations dedicated to protecting the health, safety, and welfare of individuals, including seniors, condemn in the strongest possible terms proposed changes to strip legal rights from vulnerable residents in long-term care (LTC) facilities. This cruel proposed rule would repeal current Centers for Medicare & Medicaid Services (CMS) regulations, finalized less than a year ago, prohibiting nursing homes and other LTC facilities from forcing patients into signing pre-dispute arbitration clauses. Moreover, the new proposal would allow these facilities to require a signed forced arbitration agreement as a condition of residing there, which is expressly prohibited by the current rule. Placing a parent or loved one in a nursing home is already one of the most difficult things anyone will ever have to do in life. But forcing the patient or family member to then sign something that violates the resident's legal rights should they suffer future abuse or serious neglect is a horrific thing to do to families. This proposed rule is a disturbing new direction for CMS, which should be protecting patients, not making it easier for facilities to harm them and cover it up.

In October 2016, CMS finalized a rule banning forced arbitration agreements in nursing home and long-term care contracts,¹ ensuring residents who were harmed would have access to the courts, and that facilities would be properly held accountable for abuse, serious neglect, sexual assault, or other harms. When CMS wisely finalized its 2016 rule, it did so after examining years of evidence and studies showing increasing abuse and neglect at nursing homes and the need for *more* accountability. During the comment period for the 2016 rule, CMS said that forced arbitration was supported by industry alone, and that “members of the public, advocates, and members of the legal community, predominantly wanted a prohibition on ‘pre-dispute’ arbitration agreements.” In addition, 34 senators and 16 state attorneys general urged CMS to prohibit forced arbitration agreements because of the coercive nature of the process during admissions, the lack of a neutral arbitrator, and the secretive nature of the proceedings.²

Indeed, no amount of “transparency” can make these contracts fair or voluntary.³ Forced arbitration is a private, secretive rigged system controlled by the at-fault facility. Residents have limited access to important documents that may help their claim. Nursing home arbitration

¹ 81 Fed. Reg. 68688 (Oct. 4, 2016), hereinafter known as “2016 rule.”

² *Id.* at 68867.

³ 82 Fed. Reg. 26649, 26653 (June 8, 2017).

companies have a financial incentive to side with repeat players who generate most of the cases they handle. There is no public record to inform industry practice or to notify the public or regulators. If cases are heard in arbitration, dangerous facilities can prolong misconduct and suppress information about harmful conditions and practices for years.

Forced arbitration agreements are never “voluntary” for the resident. Families cannot refuse what a nursing home is presenting to them, no matter how “visible” or understandable the provision is. During any admission process, families are experiencing enormous stress and pressure to get their loved one into a LTC. Indeed, even the court that granted last year’s injunction against the 2016 rule conceded that “the practice of executing arbitration contracts during the nursing home admissions process raises valid concerns, on a public policy level, since many residents and their relatives are ‘at wit’s end’ and prepared to sign anything to gain admission.”⁴ This coercion would be made even worse under the new proposed rule, which appallingly would allow nursing homes to make signing such a form a condition of admission. Providing a senior or other LTC resident with a “plainly written” document means little when one is coerced into signing it or be denied admission or kicked out of their nursing home.

In 2016, CMS finalized a sensible and fully-supported rule banning forced arbitration clauses in LTC contracts. There is absolutely no reason to undo the agency’s careful work to develop this final rule. We urge you to protect the health and safety of seniors, other LTC residents, and the public, reverse your decision to eliminate these important protections, and reject this extraordinarily-misguided new proposed rule.

Sincerely,

Alliance for Justice
Baltimore Neighborhoods, Inc.
Center for Elder Care & Advanced Illness
Center for Justice & Democracy
Citizen Works
Consumer Action
Consumers for Auto Reliability and Safety
Earthjustice
Florida Consumer Action Network
Florida Alliance for Consumer Protection
Georgia Watch
Homeowners Against Deficient Dwellings

⁴ American Health Care Association v. Burwell, 217 F.Supp.3d 921 (N.D. Northern Mississippi, Oxford Division, 2016).

Institute for Science and Human Values
International Union, UAW
Justice in Aging
National Association of Consumer Advocates
National Center for Health Research
National Center for Transgender Equality
National Consumer Law Center (on behalf of its low income clients)
National Consumer Voice for Quality Long-Term Care
National Employment Law Project
National Employment Lawyers Association
National Health Law Program
National Organization for Women
National Women's Health Network
Progressive Congress Action Fund
Public Citizen
Public Justice
Public Justice Center
Raising Women's Voices for the Health Care We Need
Social Security Works
Texas Watch
The Arc of the United States
The Impact Fund
Washington Advocates for Patient Safety
Woodstock Institute