



August 7, 2017

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-3342-P
P.O. Box 8010
Baltimore, MD 21244-1850
Via: <http://www.regulations.gov>

Re: **File code CMS-3342-P**, Medicare and Medicaid Programs; Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements. Docket ID: CMS-2017-0076-0001

Comments in Response to the Centers for Medicare & Medicaid Services' Proposal to Rescind Requirements on Forced Arbitration for Long-Term Care Facilities

The National Association of Consumer Advocates (NACA), a national nonprofit association of attorneys and advocates actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, respectfully submits these comments to oppose the Centers for Medicare & Medicaid Services' (CMS) proposal that would revise its own recent rule on the use of predispute binding mandatory arbitration by long-term care (LTC) facilities.¹

The rule prohibits facilities that participate in Medicare and Medicaid programs from entering into agreements for binding mandatory (or forced) arbitration with residents or their representatives until after disputes arise between the parties. As an organization fully committed to promoting justice for consumers and that has long-observed the deprivation of consumers' rights caused by the use of forced arbitration clauses, NACA strongly disagrees with the CMS proposal that would rescind its well-supported rule. CMS should withdraw its proposal and retain the current rule.

Nursing home operators increasingly require residents and their representatives, as a condition of admission, sign admissions contracts that include terms forcing residents to resolve disputes with nursing home operators in private arbitration instead of in public court. Consequently, residents or their families can be forced into arbitration to resolve serious claims involving injuries or even death caused by facilities' negligence, neglect, or

¹ Centers for Medicare & Medicaid Services (CMS), HHS, *Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities*, 81 Fed. Reg. 68688, 68791, Oct. 4, 2016. 42 CFR 483.70(n), also at 81 Fed. Reg. 68688, <https://www.federalregister.gov/documents/2016/10/04/2016-23503/medicare-and-medicaid-programs-reform-of-requirements-for-long-term-care-facilities>.

abuse. Residents are deprived of due process protections assured to them in a public court system. Instead, facilities choose the arbitration firms and the arbitration process. Further, arbitration proceedings are private and typically confidential. As a result, operators can evade public attention and scrutiny of their misconduct for significant periods of time, while residents remain vulnerable in their care.

I. CMS 2016 rule restored residents' rights to seek accountability.

In October 2016, following a meticulous rulemaking process, CMS issued a rule modernizing standards to improve health and safety in long-term care facilities. Among other requirements, the rule restored the legal rights of residents by prohibiting the use of forced arbitration clauses in LTC facility contracts with residents and their representatives. In its rule, CMS made several astute observations. It noted the typical conditions under which agreements are entered into – when residents are physically or mentally impaired and enrolling in a facility for the first time. It noted the stark difference in bargaining power between LTC facilities and residents. LTC facilities dictate all areas of a resident's life and also the terms and conditions of their residency. It noted the already restricted choices, including financial and geographic limitations, of residents and their surrogates, when selecting and enrolling in LTC facilities.²

CMS also determined that forced arbitration has a “deleterious impact” on the health and safety standards of facilities.³ Forced arbitration clauses remove the significant threat of liability and resulting costs for nursing home facilities that provide substandard care to residents.⁴ Consequently, facilities have little fear of consequences for mistreatment of residents because they would likely evade responsibility for their misconduct in arbitration. Without a liability threat, long-term care facilities typically owned by large corporations and investment firms lack incentive to provide adequate staffing and care to their residents, and instead are entirely motivated by profit.⁵

CMS then determined that residents or their surrogates cannot give fully informed or voluntary consent to forced arbitration provisions, and that the terms are “by their very nature, unconscionable.”⁶ It recognized that arbitration is not voluntary or fair unless residents and their families can choose it, the court system, or other forums after disputes arise.

The CMS rule does not prohibit arbitration. It only prohibits pre-dispute arbitration. CMS noted that post-dispute arbitration agreements were permissible under the rule. By prohibiting pre-dispute arbitration requirements, CMS ensures that residents and their families will have meaningful options when seeking to resolve claims against nursing home operators. NACA strongly supported CMS' thoughtful reasoning and conclusions in its 2016 rule.

² 81 Fed. Reg. 68688, 68793.

³ 81 Fed. Reg. 68688, 68791.

⁴ 81 Fed. Reg. 68688, 68793.

⁵ See, e.g. Marjie Lundstrom, et al, *Unmasked: Who owns California's nursing homes?*, THE SACRAMENTO BEE, Nov. 9, 2014, <http://media.sacbee.com/static/sinclair/Nursing2/index.html>.

⁶ 81 Fed. Reg. 68688, 68792.

II. In 2017, CMS fails to provide reasonable justification for rescinding the rule.

In June 2017, CMS issues its proposed revisions to its requirements for long-term care facilities, specifically seeking to rescind the ban on forced arbitration clauses in admission contracts. First, CMS asserts that its proposal “would support the resident’s right to make informed choices,”⁷ when in fact it would do the opposite. Forced arbitration clauses in long-term care admissions contracts take away their residents’ right to a jury trial. As a condition of admission, residents and their families are deprived of their ability to choose how to resolve disputes against the nursing home providers, sophisticated corporate entities. CMS is seeking to eliminate a choice for LTC residents that it had restored to them merely 10 months ago.

Second, CMS proposes cosmetic changes that purportedly would improve transparency in forced arbitration, including the following requirements: explanation of arbitration terms to residents; maintenance of records of arbitration agreements that were exercised in disputes; “plain language” for arbitration agreements; and posted notices of arbitration clauses. None of these proposals address the fundamental problems of forced arbitration, that it is a secret, private system that favors corporate repeat players over injured residents. If CMS reverses its rule and permits forced arbitration clauses in nursing home contracts, none of the proposed changes would provide residents with meaningful ability to seek remedies for harm.

Third, the proposal authorizing nursing facilities to require a resident to agree to arbitration as a condition of admission would make matters even worse for residents. Given that facilities can evade responsibility through forced arbitration, even more providers would require forced arbitration for admission. Individuals will be completely deprived of their choice and their constitutional rights.

Fourth, in its proposal, CMS claims that ending the use of forced arbitration clauses “would likely impose unnecessary or excessive costs on providers.”⁸ CMS should be more concerned about the cost implications and limited resources that exist for its taxpayer-funded Medicare and Medicaid programs when forced arbitration prevents residents from seeking recourse against substandard nursing home operators. CMS is entitled to reimbursement in nursing home negligence and abuse cases where Medicare and/or Medicaid paid any medical expenses on behalf of residents. Without liability, medical care costs from unnecessary injuries and abuses are paid by Medicare and Medicaid, and CMS is denied reimbursement for covering the costs of injuries caused by facilities.

In addition, LTC facilities can reduce unnecessary costs by eliminating expenses related to preventative injuries and deaths that result from subpar provider practices. Evidence shows that patient and resident safety standards at nursing home facilities have declined. Expenditures for skilled-nursing-facility care more than doubled over a decade, from \$12

⁷ Centers for Medicare & Medicaid Services (CMS), HHS, *Medicare and Medicaid Programs; Revision of Requirements for Long Term Care Facilities: Arbitration Agreements*, 82 FED. REG. 26650, June 8, 2017, <https://www.gpo.gov/fdsys/pkg/FR-2017-06-08/pdf/2017-11883.pdf>.

⁸ 82 Fed. Reg. 26650.

billion in 2000 to \$26 billion in 2010.⁹ Costs from preventable harm to residents –caused by substandard treatment, inadequate resident monitoring, and failure or delay of necessary care – were a huge contributor to the expenditure increase.¹⁰ As explained above, the threat of liability from residents’ ability to seek remedies in court for harm is a *necessary* potential cost to operators to ensure residents’ safety and health. The threat of liability will incentivize facilities to provide better care. Ultimately, operators’ renewed focus on residents’ health and safety simply to avoid liability also will save significant public funds.

Finally, in its 2016 rule CMS noted that its rule prohibiting forced arbitration clauses in admissions documents is limited to facilities that participate in the Medicare and Medicaid programs. *“If a facility wishes to continue to utilize pre-dispute agreements, it is free to continue in business without Medicare or Medicaid residents,”*¹¹ CMS wrote. This point should make clear that facilities have a choice on whether to participate in programs, and that CMS’ ultimate responsibility is to fulfill the missions of the programs, including guarding the health safety, and well-being of their beneficiaries.

We urge CMS to prioritize seniors’ health and safety and withdraw the proposed regulation. CMS must retain the current rule that prohibits the use of forced arbitration in LTC admission contracts and restores access to court for injured residents and their families.

Sincerely,

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⁹ Department of Health and Human Services, *Office of Inspector General, Adverse Events in Skilled Nursing Facilities: National Incidence Among Medicare Beneficiaries*, Feb. 2014, <http://1.usa.gov/MTafe>.

¹⁰ *Id.*

¹¹ 82 Fed. Reg. 26652.