August 7, 2017

Seema Verma

Administrator

Centers for Medicare & Medicaid Services

Department of Health and Human Services

Room 445-G, Hubert H. Humphrey Building

200 Independence Ave. S.W.

Washington, D.C. 20201

**Re: Medicare and Medicaid Programs; Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements**

**CMS–3342–P**

**RIN 0938–AT18**

**Submitted electronically through** [**http://www.regulations.gov**](http://www.regulations.gov)

Dear Administrator Verma:

[Brief introduction of organization submitting comments, with explanation of why your organization is interested in the federal nursing home regulations.]

We are writing in opposition to the proposed rule allowing the use of pre-dispute binding arbitration agreements in nursing home admission contracts. This proposed rule is unfair to residents and families and would harm residents’ rights, safety, and quality of care.

We urge the Centers for Medicare and Medicaid Services (CMS) to withdraw the proposed regulation for the reasons we outline below.

**Pre-dispute binding arbitration agreements are inherently unfair to residents.**

Pre-dispute binding arbitration agreements force individuals to make decisions prior to any dispute occurring and without the information they need to decide how to respond in a way that is in their best interests. These agreements would apply even when severe neglect, serious injuries, or death occurs. Additionally, the terms are unfair to residents. They frequently allow the nursing facility to select the arbitrator, the rules for the arbitration process, and where the arbitration will be held. In addition, there is a strong incentive for arbitrators to find in favor of the facility since this can assure them of repeat business.

**Pre-dispute binding arbitration agreements restrict resident choice.**

Prospective residents and their families often have little actual choice of nursing facilities due to their geographic location, specific needs, or the necessity of immediate placement when facing imminent hospital discharge. Residents and families often feel they have no choice but to sign the agreement, or they will not be admitted to the facility and receive the care they need.

Of particular concern, CMS’s proposed regulation would leave residents in a worse position than they are in today by permitting nursing facilities to require residents to consent to pre-dispute binding arbitration as a condition of admission. Such a requirement would allow nursing facilities to hold residents hostage; residents would be forced to agree to arbitration upfront and lose their constitutional rights or be turned away and denied care.

**Proposed transparency provisions are meaningless.**

CMS is incorrect in its claims that it is protecting the interests of LTC residents by requiring that the agreement be in plain language, explained in a form and manner residents understand and that residents acknowledge they understand the agreement. Such provisions do not negate the fact that pre-dispute arbitration agreements severely restrict resident choice, and essentially eliminate it when they are a condition of admission. These proposed transparency requirements do not make up for taking away resident choice – the provisions just mean that residents will understand in plain language that they have no choice.

**Arbitration can be expensive.**

Arbitration is often touted as a lower cost, less burdensome alternative to the traditional legal system. In reality, arbitration can be equally or even more costly than bringing a court claim.[[1]](#footnote-1)

**Arbitration lessens accountability for poor care.**

Arbitration lessens the degree of nursing home accountability for poor care, abuse, and neglect, which in turn, can lead to more, not fewer, injuries, and greater costs to taxpayer-funded programs like Medicare.

We urge you to withdraw the proposed regulation and retain the ban on pre-dispute binding arbitration. If, for whatever reason, you are unwilling to continue the current ban on pre-dispute arbitration, we recommend that you revise the federal nursing facility regulations so that they do not address arbitration at all. The proposed regulations are, by far, worse than nothing.

Thank you for the opportunity to comment and for your consideration of our comments.

Sincerely,

Your Name Your Title

1. Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a), CONSUMER FIN. PROTECTION BUREAU, Appendix A at 43 (2015), *available at* http://files.consumerfinance.gov/f/201503\_cfpb\_arbitration-study-report-to-congress-2015.pdf. [↑](#footnote-ref-1)