



August 5, 2016

Andy Slavitt  
Acting Administrator  
Centers for Medicare and Medicaid Services  
Department of Health and Human Services  
Room 445-G, Hubert H. Humphrey Building  
200 Independence Ave., Washington, D.C. 20201

Dear Acting Administrator Slavitt:

As the Centers for Medicare and Medicaid Services (CMS) finalize the federal Requirements of Participation for Long-Term Care Facilities, the National Consumer Voice for Quality Long-Term Care and the 58 undersigned organizations and nearly 800 individuals join the *New York Times* in urging CMS to ban pre-dispute arbitration clauses in nursing home contracts.

Nursing home contracts with pre-dispute arbitration clauses are unfair and disadvantageous to nursing home residents for a number of reasons. When consumers sign an arbitration clause, they sign away forever their constitutional right to a trial by jury. Choosing arbitration or a trial is a very important decision, and should be given careful consideration. Yet, pre-dispute arbitration agreements force individuals to make a decision before a dispute arises, even in cases of alleged severe neglect, serious injuries or death. To make matters worse, residents and their families are required to decide at the time of admission - a time generally of great stress. As the *New York Times* writes, "Prospective patients do not have the necessary information to make a decision about signing the clauses. How could they before a dispute even arises? In essence, families are being asked to anticipate the likelihood of grievous harm and legal ramifications. A nursing home admission is stressful and confusing enough without your being asked to sign away your right to sue."

The arbitration process also tends to be slanted against consumers such as nursing facility residents. The *New York Times* states, "Corporations of all sorts love forced arbitration because it overwhelmingly tilts in their favor and shields them from liability." Arbitration companies have a financial incentive to side with nursing facilities, who are responsible for sending the companies cases on an ongoing basis. Discovery is limited in arbitration, hindering plaintiffs from developing their cases. Arbitration proceedings are secretive, often protected by confidentiality rules. In addition, arbitration can be costly and more expensive than court. For instance, while court filing

fees are relatively nominal, arbitrators charge by the hour, with the extensive costs generally split between the parties. This means that arbitration may not be financially possible for many residents and families, leaving them with no legal recourse. Finally, consumers typically cannot appeal the arbitrator's decision, which is one of the fundamental principles in the court system.

As part of the proposed regulations, CMS rightly recognizes the significant negative impact of pre-dispute arbitration agreements, proposing regulatory language that would set various procedural protections. However, no amount of procedural protections can change the basic fact that pre-dispute arbitration clauses require residents and their families to decide about arbitration in a vacuum. And CMS's proposed revisions, no matter how well-intentioned, would make matters worse. As a result of this proposed language, nursing facilities would cite the regulatory language to courts as evidence that CMS approves nursing facility arbitration. They would argue that compliance with the regulation was proof that the arbitration agreement and the circumstances surrounding its signing were fair.

Arbitration may be a good choice for residents and their families in certain situations. The key is that it must be a choice, and one that is made after a dispute has arisen. Any pre-dispute arbitration agreement is unfair to residents and should not be allowed.

Sincerely,



Lori Smetanka, J.D.  
Executive Director



Robyn Grant, MSW  
Director of Public Policy and  
Advocacy

### Organizations

DC	AARP
MN	Advocacy Solutions for Quality Long Term Care, Inc.
AK	Alaska Office of the Long Term Care Ombudsman
CO	American Association of Nurse Assessment Coordination (AANAC)
DC	American Federation of State, County & Municipal Employees (AFSCME)
AR	Arkansas Advocates for Nursing Home Residents
TX	Association of Veteran Women, Inc.
CA	California Advocates for Nursing Home Reform (CANHR)
CA	California Long Term Care Ombudsman Association
CA	California Office of the State Long Term Ombudsman

PA CARIE - Center for Advocacy for Rights & Interests of the Elderly  
CA Casa Santa Maria  
DC Center for Elder Care and Advanced Illness, Altarum Institute  
DC Center for Medicare Advocacy, Inc.  
NC Commissioner's Advisory Committee for Henderson County  
VT Community of Vermont Elders (COVE)  
CO Compassion & Choices  
CO Disability Law Colorado  
NY Elder Justice Subcommittee of Metro Justice  
FL Families for Better Care  
MD Family Council Ellicott City Health & Rehabilitation Center  
CA Foundation Aiding the Elderly (FATE)  
HI Galiher DeRobertis Waxman  
IA Iowa Office of the State Long-Term Care Ombudsman  
CA Justice in Aging  
KS Kansas Advocates for Better Care  
DC Lanier Health Services  
NY Long Term Care Community Coalition  
MA Massachusetts Executive Office Elder Affairs  
MD Maryland Long Term Care Ombudsman Program  
MA Massachusetts Advocates for Nursing Home Reform  
MI Michigan Elder Justice Initiative  
MD Montgomery County Maryland Long Term Care Ombudsman Program  
NY MFY Legal Services, Inc.  
VA National Academy of Elder Law Attorneys  
CA Long Term Care Ombudsman Services of San Luis Obispo County  
NC National Association of Local Long Term Care Ombudsmen  
TX National Association of State Long-Term Care Ombudsman Programs  
AL Nursing Home Law Group, P.C.  
TX Nursing Home Victims Coalition, Inc.  
OH Ohio Long Term Care Ombudsman Program  
OK Oklahoma Office of the State Long-Term Care Ombudsman  
CA Ombudsman Services of San Mateo County  
SC Our Mother's Voice  
CA Personal Assistance Services Council  
WA Resident Councils of Washington  
SC Sandy Evans Consulting  
NY Terence Cardinal Cooke Health Care Center Family Council  
TX Texas Department of Aging and Disability Services  
TX Texas Office of the Long-Term Care Ombudsman  
DC The Cochran Firm  
MA The Law Office of David J. Hoey  
GA The Keenan Law Firm  
VA Virginia Poverty Law Center

MD Voices for Quality Care  
WA Washington Long-Term Care Ombudsman Program for Southeast Washington  
WV West Virginia Bureau of Senior Services  
CA WISE & Healthy Aging

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*The National Consumer Voice for Quality Long-Term Care (formerly NCCNHR) is a 501(c)(3) nonprofit membership organization founded in 1975 by Elma L. Holder that advocates for quality care and quality of life for consumers in all long-term-care settings.*

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