

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

Dear Administrator Slavitt:

As the Centers for Medicare and Medicaid Services finalizes the federal Requirements of Participation for Long-Term Care Facilities, the National Consumer Voice for Quality Long-Term Care and the undersigned organizations and 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 the 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,