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August 3, 2017

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

Re: Medicare and Medicaid Programs; Revision of Requirements for Long-Term
Care Facilities: Arbitration Agreements; CMS-3342-P

Submitted electronically through <http://www.regulations.gov>

Dear Administrator Verma:

AARP, with its nearly 38 million members in all 50 States and the District of Columbia, Puerto Rico, and U.S. Virgin Islands, is a nonpartisan, nonprofit, nationwide organization that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse.

AARP writes to express our grave concerns about and opposition to the Centers for Medicare & Medicaid Services' (CMS) proposed rule revising the requirements that long-term care (LTC) facilities, also referred to as skilled nursing facilities and nursing facilities, must meet to participate in the Medicare and Medicaid programs. We are alarmed that CMS' decision to remove provisions prohibiting binding pre-dispute arbitration will very likely have dangerous and harmful impacts on nursing facility residents, as well as their families, and place them at even greater risk than they faced before CMS addressed this issue in 2016 when it promulgated the final rule, "Reform of Requirements for Long-Term Care Facilities" (81 FR 68688) (2016 final rule). References to nursing facilities in these comments refer to LTC facilities.

Further, we question CMS' authority to reverse its prior position on pre-dispute arbitration. In proposing this regulation, CMS asserts its authority to promulgate regulations in order to protect nursing facility residents. However, this proposed regulation instead scales back nursing facility residents' protections in favor of easing anecdotal claims of administrative burden for nursing facilities, contrary to CMS' authority to protect residents. The proposed regulation will eliminate federal and state law protections placing residents at even greater risk than prior to CMS' 2016 regulations, which precluded pre-dispute arbitration. Some states have also enacted legislation to limit a facility's ability to require arbitration, so the proposed federal regulation would not only reverse the protections finalized in 2016, but also authorize a practice that is contrary to some state laws. In short, pre-dispute binding arbitration agreements are wholly inappropriate where health and life are at risk.

In addition, the harmful impact of this proposed rule could be exacerbated if some recently proposed Medicaid cuts are enacted. Reduced payments to nursing facilities could worsen nursing home quality and increase the chances that residents may be in a dispute with a facility and need to access the court system to seek redress.

For the reasons described below, we urge CMS to retain the prohibition on pre-dispute arbitration provisions in long-term care facility admission contracts. In the alternative, AARP urges CMS to simply rescind the sections of the final regulation entitled "Reform of Requirements for Long-Term Care Facilities" (81 FR 68688) (2016 final rule) which addressed arbitration, rather than adopting the proposed rule.

I. CMS Lacks The Statutory Authority to Eliminate Protections For Nursing Facility Residents As It Proposes To Do In This Regulation.

Enacted in response to widespread abuse and neglect, the Nursing Home Reform Act authorizes CMS to require that nursing homes, as a condition of Medicare or Medicaid funds, "must protect and promote the rights of each resident" by complying with a comprehensive list of substantive and procedural "Residents' Rights." 42 U.S.C. §§ 1395i-3(c)(1)(A), 1396r(c)(1)(A). These rights include free choice, being fully informed, and fair dispute resolution — including the "right to voice grievances . . . without discrimination or reprisal" and "the right to prompt efforts by the facility to resolve grievances." *Id.* §§ 1395i-3(c)(1)(A), 1396r(c)(1)(A). Further, Congress authorized the Secretary to impose "other requirements" and "establish[]" "any other rights" to protect residents. *Id.* §§ 1396r(c)(1)(A)(xi), (d)(4)(B).

As the legal underpinning for the proposed regulation removing the ban on pre-dispute arbitration, CMS cites several statutory authorities. None of these authorities cited permit CMS to promulgate regulations that will actively harm the legal position of nursing facility residents:

- Authority to promulgate regulations that are “adequate to protect the health, safety, welfare, and rights of residents and to promote the effective and efficient use of public moneys.”¹
- Authority to establish “such other requirements relating to the health and safety [and well-being] of residents...as the Secretary may find necessary.”²
- Authority to establish “other right[s]” for residents, in addition to those set forth in statute, to “protect and promote the rights of each resident.”³

And yet, in the proposed regulation, CMS’ stated justification for changing its position on pre-dispute arbitration seems to amount to one that the interests of nursing facilities should take precedence over the legal rights of residents. CMS’ proposed rule addresses concerns raised by nursing facilities. While CMS acknowledges the concerns expressed about the use of arbitration agreements in LTC facilities in their earlier rulemaking, CMS’ attempts to address those concerns through changes regarding transparency fall well short and indeed are insufficient. The way to address the legal rights of residents is to retain the prohibition on pre-dispute arbitration provisions in long-term care facility admission contracts.

CMS lacks the authority to issue a regulation that fails to protect residents – particularly when it places LTC facility residents in a worse legal position than any other party to a contract. The proposed regulation will eliminate protections currently available for LTC facility residents under federal and state law. As discussed above, the proposed regulation would deprive residents of the benefits of the current regulation and goes against CMS’ authority to promulgate regulations that protect residents. To the extent that CMS may be relying on the authority to promulgate regulations “to promote the effective and efficient use of public moneys,” the regulations still need to be for the benefit of Medicare and Medicaid nursing facility residents and not to their detriment.

Furthermore, from a resident’s perspective, the proposed regulation (see below) removes LTC facility residents’ contract protections, grounded in law, protections all parties to a contract otherwise have. The key elements to the proposed regulation are:

1. The arbitration agreement must be in plain language.
2. The arbitration agreement must be explained to the resident and his or her representative in a form, manner and language that he or she understands.
3. The resident must acknowledge that he or she understands the arbitration agreement.
4. The arbitration agreement must not contain any language that prohibits or discourages a resident’s or anyone else’s communication with surveyors and other government officials.
5. A notice regarding the use of binding arbitration agreements must be posted in an area of the facility visible to residents and visitors.

¹ 42 U.S.C. §§ 1395i-3(f)(1), 1396r(f)(1).

² 42 U.S.C. §§ 1395i-3(d)(4)(B), 1396r(d)(4)(B).

³ 42 U.S.C. §§ 1395i-3(c)(1)(A)(xi), 1396r(c)(1)(A)(xi); *see also* 82 Fed. Reg. at 26,651 (listing of authority).

6. Signing an arbitration agreement can be a condition of admission.
7. If a facility and resident resolve a dispute through arbitration, a copy of the signed binding arbitration agreement and the arbitrator's final decision must be retained by the facility for five years, and be available for inspection upon request by CMS or its designee.⁴

These provisions all make it easier for a nursing facility to establish on paper that the arbitration provisions were fully understood by the resident, even if there is evidence that the resident, at the time of signing the agreement, could not possibly have understood what he or she was giving up by signing the agreement. Moreover, by permitting facilities to make the signing of arbitration agreements a condition of admission, CMS has eviscerated one of the most significant protections under contract law and the Federal Arbitration Act – the understanding that a contract is only enforceable if it is not entered into as a result of coercion, misrepresentation, fraud or duress or otherwise unconscionable.

From the perspective of a potential nursing facility resident who is coming out of a hospital in medical crisis or in another circumstance and is desperate for care, the opportunities for them to be taken advantage of during the admission process are extensive. Looking for a LTC facility without an arbitration requirement may not even be an option due to time pressures or lack of available facility options. The emotional circumstances of admission to a LTC facility combined with the facility's superior bargaining power and knowledge increase the risks that arbitration agreements between the facility and a resident will not be fully understood by the resident and/or the resident's representative or will be coerced, unfair, or unconscionable. The proposed regulation provides new obstacles for the resident and/or her family to surmount when and if they have to challenge the formation of the arbitration agreement based on any of these contract defenses noted previously. This is despite a statement from CMS that "the proposed rule does not purport to regulate the enforceability of any arbitration agreement, and does not pose any conflict with the language of the FAA." However, in fact, the proposed rule would pose such a conflict because it could impact the enforceability of arbitration agreements.

Some states have specific protections that prevent parties in weaker bargaining positions from being coerced into unfair contracts for this reason. But the CMS proposed regulation eliminates those much needed protections for the most vulnerable parties to a contract — potential nursing facility residents who are seeking care in the midst of a medical crisis. We are concerned about a weaker federal standard undercutting protections for citizens in states with stronger state laws today. If these proposed regulations were to become final, facilities could cite these minimal federal requirements (plain language, language that a resident understands, etc.) as CMS' seal of approval for the facility's arbitration agreements.

Specifically, CMS claims: "[u]pon reconsideration, we believe that arbitration agreements are, in fact, advantageous to both providers and beneficiaries because they

⁴ 82 Fed. Reg. at 26,653.

allow for the expeditious resolution of claims without the costs and expense of litigation.”⁵ But this conclusion is contravened by the evidence the agency pointed to in the 2016 final rule.

II. In 2016, CMS Properly Exercised Its Authority to Protect Nursing Facility Residents When It Banned Pre-Dispute Arbitration As Fundamentally Unfair and Nothing Has Changed to Alter That Unfairness.

In 2016, CMS properly implemented its statutory authority to protect nursing facility residents when it determined that pre-dispute arbitration provisions should not be permitted in admission contracts because they are fundamentally unfair to nursing facility residents. To that end, CMS concluded:

we are convinced that requiring residents to sign pre-dispute arbitration agreements is fundamentally unfair because, among other things, it is almost impossible for residents or their decision-makers to give fully informed and voluntary consent to arbitration before a dispute has arisen. We believe that LTC residents should have a right to access the court system if a dispute with a facility arises, and that any agreement to arbitrate a claim should be knowing and voluntary.⁶

CMS’ deliberative process included not only reviewing the significant volume of comments they received, but also conducting a literature review and reviewing court opinions regarding LTC facility arbitration. CMS noted that many articles reviewed “provided evidence that pre-dispute arbitration agreements were detrimental to the health and safety of LTC facility residents.”⁷

When a potential nursing home resident and/or their representative or family is selecting a nursing facility, they are rightly focused during this stressful time on finding quality care that best meets the needs of the prospective resident. They are not focused on possible future disputes. Yet disputes between a facility and resident and/or their representative or family can involve abuse, assault, malnutrition, neglect, dehydration, sepsis, and even death. Nursing home residents and their families should be able to make an informed and *voluntary* decision about whether to submit a dispute to arbitration *after* the dispute has occurred.

Further, CMS concluded that in order to ensure that residents are protected in their relationships with LTC facilities, it needed to preclude the use of agreements that allowed residents to be bound by pre-dispute arbitration provisions that are entered into “when the would-be resident is physically and possibly mentally impaired, and is encountering such a facility for the first time.”⁸ Indeed, the volatility of the LTC facility admission process makes it a particularly dangerous time for residents and their

⁵ 82 Fed. Reg. at 26,651.

⁶ 81 Fed. Reg. at 68,792.

⁷ 81 Fed. Reg. at 68,793, 68,797

⁸ 81 Fed. Reg. at 68,792

families to make decisions about waiving constitutional rights to access the judicial system to resolve future unknown disputes. And, in many cases, “geographic and financial restrictions severely limit the choices available” to a potential resident and her family.⁹ As noted above, CMS previously acknowledged that given the “unique circumstances” of long-term care facilities, “demand[ing], as a condition of admission, that residents or their representatives sign a pre-dispute agreement for binding arbitration that covers any type of disputes between the parties for the duration of the resident’s entire stay, which could be for many years,” would virtually take away residents’ rights to make informed and voluntary choices over how to pursue claims of wrongdoing.¹⁰

In addition, while CMS now argues that the proposed rule addresses transparency regarding arbitration, the resolution of disputes -- such as those involving abuse and neglect -- through the process of arbitration actually prevents transparency, because it shields facilities from having their poor quality or dangerous conditions exposed to the public and prevents judges from making findings of fact and conclusions of law that will influence future nursing facility conduct. This proposed regulation does not address the more fundamental problems associated with the secrecy of arbitration and alternative dispute resolution: judicial inability to give guidance on legal issues of abuse and neglect and resident inability to make his claims/allegations known to the general public and/or the media. The lack of transparency in binding pre-dispute arbitration thus deprives future residents, their families, and advocates of information that may be helpful to select safe and appropriate LTC facilities and to encourage facilities’ legal compliance before disputes arise. We believe that this fundamental problem with arbitration can only be addressed if CMS permits only post-dispute arbitration agreements. By restricting the regulations’ provisions on allowable arbitration to disputes in which the parties know precisely what they are waiving, CMS would increase the likelihood that it will enhance the needed transparency in serious and potential systemic disputes.

III. CMS’ Claims that It Proposes to Reverse Well-Founded Protections Against Pre-Dispute Arbitration Because It Is Now Convinced Arbitration Is Efficient Are Factually Unsupportable.

CMS claims that it has reconsidered its position about the ills of pre-dispute arbitration based on undefined statements presumably from members of the nursing facility industry that arbitration is efficient. These assertions are not supportable and indeed are belied by the real case histories detailed below that demonstrate that motions to compel arbitration resulted in years of delays for victims who needed to secure judicial remedies. The following is an analysis of abuse and neglect cases involving nursing facility residents or their families who ultimately *successfully* challenged the validity of the arbitration agreements in their case. As you can see, the process of simply

⁹ Id.
¹⁰ Id.

challenging the enforceability of the agreement takes years and that is without resolving the underlying allegations of abuse or neglect.

- *Shotts v. OP Winter Haven*, 86 So. 3d 456 (Fla. 2011) (after three years court ruled arbitration agreement limiting remedies to aggrieved parties violated public policy).
- *Extencicare Homes, Inc. v. Whisman*, 478 S.W.3d 306 (Ky. 2015) (after three years, affirming denial of motion to compel arbitration where power of attorney authorized daughter to defend suits brought against resident, she was not precluded from filing suit on his behalf by signing arbitration agreement).
- *Blankfeld v. Richmond Health Care, Inc.*, 902 So. 2d 296 (Fla. Dist. Ct. App. 2005) (after four years, reversing order to compel arbitration where arbitration agreement was signed by healthcare proxy and arbitration agreement provisions violated public policy by limiting remedies available to residents).
- *GGNSC v. Johnson*, 109 So.3d 562 (Miss. 2013) (after three years, affirming finding that sister had no apparent authority to bind nursing facility resident to arbitration agreement).
- *Diversicare Leasing Corp. v. Hubbard*, 189 So. 3d 24 (Ala. 2015) (after two years, affirming denial of motion to compel arbitration where resident was found in facility unresponsive and died of sepsis the next day, personal representative had no authority to bind decedent to agreement).
- *Thornton v. Allenbrooke Nursing & Rehab. Ctr., LLC*, 2008 Tenn. App. LEXIS 392 (Tenn. Ct. App. 2008) (after two years, affirming denial of motion to compel arbitration where daughter was not authorized to forfeit nursing facility resident's right to trial and resident sustained multiple injuries in facility's care).
- *Blackmon v. LP Pigeon Forge, LLC*, 2011 Tenn. App. LEXIS 473 (Tenn. Ct. App. 2011) (after three years, affirming denial of motion to compel arbitration where nursing facility resident died as a result of organ failure and infection to sore site, son was not authorized to bind resident to arbitration agreement).
- *Boler v. Sec. Health Care, LLC*, 2014 OK 80 (Okla. 2014) (after two years, affirming arbitration agreement was not binding on nursing facility resident's representatives who were not parties to the arbitration agreement).
- *Griego v. St. John Healthcare & Rehab. Ctr., L.L.C.*, 2013 N.M.App. Unpub. LEXIS 129 (N.M. Ct. App. 2013) (after two years, affirming finding that arbitration agreement unconscionable for precluding resident from filing suit after being attacked by another resident, but enabling nursing facility to bring claims in court against residents).

- Evangelical Lutheran Good Samaritan Soc’y v. Kolesar, 2014 Ark. 279 (Ark. 2014) (after three years, affirming denial of motion to compel arbitration).
- Bedford Care Center-Monroe Hall, LLC v. Lewis, 923 So. 2d 998 (Miss. 2006) (after two years, affirming invalidity of arbitration agreement where conservator intentionally did not sign agreement and understood completing paperwork meant that she had not agreed to arbitration agreement).
- Ashburn Health Care Ctr., Inc. v. Poole, 286 Ga. App. 24 (Ga. Ct. App. 2007) (after three years, finding arbitration agreement to be invalid because husband signed and marriage alone was not legally sufficient to bind him or resident’s son to agreement they were not parties to).
- Duke v. Kindred Healthcare Operating, Inc., 2011 Tenn. App. LEXIS 122 (Tenn. Ct. App. 2011) (after four years, affirming invalidity of power of attorney and therefore invalidating arbitration agreement).
- Adams Cmty. Care Ctr., LLC v. Reed, 37 So. 3d 1155 (Miss. 2010) (after four years, affirming denial of motion to compel arbitration due to invalidity of agreement where decedent’s sons were allowed to sign on two separate occasions, but neither had legal authority to do so).

Conclusion

CMS acted properly and within its statutory authority to protect the rights of nursing facility residents when it banned pre-dispute arbitration in the 2016 final rule. The agency’s reversal of those protections is unsupportable now, particularly in the manner in which CMS proposes to do so in this proposed rule.

AARP urges CMS to retain the prohibition on pre-dispute arbitration provisions in long-term care facility admission contracts. In the alternative, AARP urges CMS to simply rescind the sections of the final regulation entitled “Reform of Requirements for Long-Term Care Facilities” (81 FR 68688) (2016 final rule) which addressed arbitration, rather than adopting the proposed rule.

AARP appreciates the opportunity to provide comments on this important proposed rule impacting LTC facility residents and their families. If you have questions, please contact me or Rhonda Richards (rrichards@aarp.org) on our Government Affairs staff at 202-434-3770.

Sincerely,



David Certner
Legislative Counsel & Legislative Policy Director