



CENTER FOR JUSTICE & DEMOCRACY
185 WEST BROADWAY
NEW YORK, NY 10013
TEL: 212.431.2882
centerjd@centerjd.org
<http://centerjd.org>

July 14, 2017

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

Re: Docket ID CMS-2017-0076; Proposed Revision of Requirements for Long-Term
Care Facilities: Arbitration Agreements CMS-3342-P

To Whom It May Concern:

We strongly oppose proposed rule CMS-3342-P, which would repeal current CMS regulations prohibiting nursing homes from forcing patients (or their representatives) into signing pre-dispute arbitration clauses. Equally disturbing, the proposed rule would remove current prohibitions against facilities requiring residents to sign forced arbitration agreements as a condition of residing there. This gives nursing homes express authority to oust patients who will not agree to such a violation of their legal rights. This is a shocking and monstrous new direction for CMS, whose mission should be protecting Medicare and Medicaid beneficiaries, not contributing to their abuse and neglect.

Millions of older Americans are harmed in nursing homes every year. The U.S. Department of Health and Human Services Office of Inspector General (OIG) has issued several recent reports on this topic, finding abuse and neglect at most facilities.¹ New reports surface every year about how badly long-term care is deteriorating, and how badly government regulation is failing. The *New York Times* reported just this month:

While special focus status is one of the federal government's strictest forms of oversight, nursing homes that were forced to undergo such scrutiny often slide back into providing dangerous care, according to an analysis of federal health inspection data. Of 528 nursing homes that graduated from special focus status before 2014 and are still

¹ See, e.g., U.S. Department of Health and Human Services Office of Inspector General, *Nursing Facilities' Compliance With Federal Regulations for Reporting Allegations of Abuse or Neglect* (August 2014), <https://oig.hhs.gov/oei/reports/oei-07-13-00010.pdf>; U.S. Department of Health and Human Services Office of Inspector General, *Adverse Events In Skilled Nursing Facilities: National Incidence Among Medicare Beneficiaries* (February 2014), <http://oig.hhs.gov/oei/reports/oei-07-13-00010.pdf>

operating, slightly more than half – 52 percent – have since harmed patients or put patients in serious jeopardy within the past three years.²

Lawsuits are critical for both supplementing the government’s safety efforts and compensating those who are injured. Lawsuits often force long-term care facilities to change hazardous conditions after government regulation has failed.³ Lawsuits hold nursing homes directly accountable to those whom they have hurt, and because they do so in a neutral court of law, they provide victims with at least some semblance of justice. This is not possible in private, secretive arbitration.

Anti-patient bias infects the forced arbitration process. Nursing home arbitration companies have a financial incentive to side with repeat players who generate most of the cases they handle. Arbitrators are also not required to have any legal training and they need not follow the law. Court rules of evidence and procedures that protect patients do not apply. There is limited discovery, making it much more difficult for individuals to have access to important documents that may help their claim. There is no public record to inform industry practice or to notify the public or regulators. Decisions are enforceable with the full weight of the law even though they may be legally incorrect. This is especially disturbing because these decisions are binding. Sometimes, victims must split the sizeable costs of arbitration with the nursing home.

Yet as abusive a process as arbitration can be, what is perhaps more significant is the disappearance of claims altogether when forced arbitration clauses appear in contracts, providing practical immunity to a dangerous nursing home. Wrongdoers can prolong misconduct and suppress for years information about dangerous conditions and practices.

As CMS well knows from its prior extensive rulemaking process, forced arbitration agreements are never “voluntary” for the resident. Families cannot “not sign” what a nursing home is forcing them to sign, no matter how “visible” or understandable the provision is. This would be especially so under the new proposed rule, which shockingly would allow nursing homes to make signing such a form a condition of admission. Obviously, patients will have no choice. Families are often dealing with emergencies where a family member is being thrown out of a hospital after suffering some terrible illness or injury. If the family is lucky, they’ll quickly find a facility with a decent reputation and not too many state violations that hopefully accepts Medicaid – and then just hope nothing horrible happens. Yet in far too many cases, something horrible does happen. Families must have the option of proper legal recourse in court if it does.

Nursing home residents are among the most fragile individuals in our society. They depend on these institutions for their literal survival. The very last thing we should be doing is allowing policies that remove the nursing home industry’s financial incentive to maintain safe facilities. Yet that is exactly what this proposed rule would do, making it impossible for anyone abused and neglected to hold nursing home companies accountable in court – or at all. We strongly urge

² Jordan Rau, “Poor Patient Care at Many Nursing Homes Despite Stricter Oversight,” *New York Times*, July 5, 2017, <https://www.nytimes.com/2017/07/05/health/failing-nursing-homes-oversight.html>

³ See, e.g., Center for Justice & Democracy, *Lifesavers 2016: CJ&D’s Guide to Lawsuits that Protect Us All*, <https://centerjd.org/content/lifesavers-2016>

rejection of this proposed rule and ask CMS to maintain current regulations that ban forced arbitration clauses in long-term care contracts.

Thank you for your time and attention to this matter.

Very sincerely,

A handwritten signature in black ink, appearing to read "Joanne", followed by a long horizontal line extending to the right.

Joanne Doroshow
Executive Director