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September 10, 2015

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-3260-P
P.O. Box 8010
Baltimore, MD 21244

Re: Reform of Requirements for Long-Term Care Facilities (CMS-3260-P); Binding Arbitration

To Whom It May Concern:

In response to the proposed rulemaking regarding long-term care facilities, the public has been asked for feedback on "whether agreements for binding arbitration should be prohibited." The answer is unequivocally yes – binding arbitration agreements should be prohibited. The consumer protections proposed by the rule do not solve fundamental, anti-consumer, anti-patient problems that infect all pre-dispute binding arbitration agreements.

Millions of older Americans are abused or neglected in nursing homes every year. As *ProPublica* recently noted, "For decades, federal auditors have flagged dangerous and neglectful conditions in U.S. nursing homes and faulted the government's oversight." The government has issued several recent reports on this topic,[1] finding in 2012, for example, that "85 percent of nursing facilities reported at least one allegation of abuse or neglect to OIG," *i.e.*, the federal government. What's even worse, according to the National Research Council,

> [A] vast reservoir of undetected and unreported elder mistreatment in nursing homes may exist. Because nursing home residents as a class are both extremely physically vulnerable and generally unable either to protect themselves or report elder mistreatment they experience, the physical and emotional costs of elder mistreatment in such environments are likely to be very high.[2]

Indeed, nursing home residents are some of the most fragile individuals in our society and depend on these institutions for their literal survival. The very last thing we should be doing is allowing policies that remove this industry's financial incentive to maintain safe facilities. Yet that is exactly what forced, binding arbitration agreements do, making it impossible for anyone

[1] *See, e.g.*, http://oig.hhs.gov/oei/reports/oei-06-11-00370.pdf; http://oig.hhs.gov/oei/reports/oei-07-13-00010.pdf
[2] http://www.nap.edu/openbook.php?record_id=10406

abused and neglected to hold nursing home companies accountable in court – or at all. The notion that consumers "like" arbitration because it is "quicker and cheaper" is belied by the facts.

Under forced arbitration programs, negligence and abuse cases must be resolved in private, secretive, corporate-designed dispute systems. Anti-patient bias infects this 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 plaintiffs 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. Arbitration proceedings are secretive, often protected by confidentiality rules. 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 the wrongdoing company. This was the finding of the Consumer Financial Protection Bureau (CFPB) in its March 2015 study about the use of forced arbitration clauses in consumer financial contracts.[3] Tens of millions of consumers are subject to these arbitration clauses, but from 2010 through 2012, consumers filed only 411 arbitration cases. At the same time, many millions of consumers benefited from lawsuits.[4]

CFPB found that consumers were extremely disadvantaged in the few arbitration cases that were brought. For example, the agency discovered that consumers were represented by counsel in "roughly 60% of the cases, but companies almost always had counsel."[5] As CFPB found, "Almost all of the arbitration proceedings involved companies with repeat experience in the forum,"[6] specifically "[i]n over 80% of the disputes, the company had participated in at least three other disputes relating to the same product markets in a three-year period."[7] Consumers prevailed in 21.4 percent of cases filed in 2010 and 2011 but companies prevailed in *93 percent of cases* in which companies made claims or counterclaims that were resolved by arbitrators.[8]

Pre-dispute agreements, which residents or families must sign as a condition of admission, are never "voluntary" for the resident. As in the financial services industry, forced arbitration clauses in nursing home contracts are now ubiquitous. Families can't "not sign" what a nursing home is forcing them to sign. They have no choice. This is especially true when families are dealing with emergencies where a family member is being thrown out of hospital after suffering some terrible illness or injury. If the family is lucky, they'll quickly find a facility with a decent reputation, not too many state violations, that hopefully accepts Medicaid – and then just hope

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[3] Consumer Financial Protection Bureau, *Arbitration Study Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a)* (March 2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf

[4] *Ibid*.

[5] *Id*. at 12 (Section 1: Introduction And Executive Summary)

[6] *Ibid*.

[7] *Id*. at 10 (Section 5: What Types Of Claims Are Brought In Arbitration And How Are They Resolved?)

[8] *Id*. at 12 (Section 1: Introduction And Executive Summary)

nothing horrible happens. Yet in far too many cases, something horrible does happen. In such situations, families should have the option of proper legal recourse in court.

Moreover, it is not just the resident or their family who suffers as a result of the forced arbitration process. We all suffer. Lawsuits against long-term care institutions provide an economic incentive for them to become safer. And when disputes are resolved secretly without trial and without a public record, wrongdoers can prolong misconduct and suppress for years information about dangerous practices.

Clearly, not every case of abuse and neglect results in a trial or even a claim. However, many academic scholars have written that the influence of jury verdicts in civil cases, of which there are relatively few, is vastly disproportionate to their number. Jury verdicts provide "signals" or warnings that certain types of practices will not be tolerated. According to the Rand Institute for Civil Justice, "The jury's decision in any particular case indicates the potential costs of engaging in behavior similar to the defendant's."[9] Indeed, history shows that companies hit with large verdicts or settlements often act immediately to change hazardous conditions. Examples of cases where nursing home residents or their families have sued and won improvements to existing safety standards include:

- A 78-year-old woman, admitted to a nursing home for short-term hip and wrist rehabilitation, died after suffering severe pressure sores, malnourishment and dehydration. As part of the settlement, the company changed its patient monitoring and care procedures in each of its 65 nursing homes. *Olson v. Chisolm Trail Living & Rehabilitation Center*, No. 98-0363 (Caldwell County Ct., Tex., verdict August 26, 1999).

- A 63-year-old Alzheimer patient was strangled to death by the restraints in her bed rails while sleeping. As part of the settlement, the nursing home agreed to numerous operational reforms, while the bed rail manufacturer agreed to warn its customers about the dangers of entrapment. *Trew v. Smith & Davis Mfg. Co.*, No. SF 95-354 (Santa Fe County Jud. Dist. Ct., N.M., verdict July 19, 1996).

- A 79-year-old nursing home patient suffering from Alzheimer's disease drowned in a bathtub after being left unattended. As a result of this lawsuit, the nursing home installed safety strips in bathtubs and exercised closer supervision of its elderly patients. *Beale v. Beechnut Manor Living*, No. 90-18826 (Harris County Dist. Ct., Tex., verdict May 21, 1992).

And in *Lavender v. Skilled Healthcare Group*, No. DR060264 (Humboldt County Superior Ct., Cal., settlement September 8, 2010), Skilled Healthcare Group settled with a class of approximately 32,000 current and former residents of Skilled Healthcare LLC health and rehabilitation facilities, including family members of residents, who sued Skilled Healthcare

[9] Moller, Erik, Pace, Nicholas M. & Stephen J. Carroll, *Punitive Damages in Financial Injury Jury Verdicts,* Rand Institute for Civil Justice, Document No. MR-888-ICJ (1997). *See also*, Galanter, Marc, "Real World Torts: An Antidote To Anecdote," 55 *Maryland L. Rev.* 1093 (1996); Landes, William M. & Richard A. Posner, *The Economic Structure of Tort Law*. Cambridge: Harvard University Press (1987).

Group for understaffing in their facilities in violation of California state law. The $50 million settlement also included injunctive relief valued at approximately $12.8 million, requiring Skilled Healthcare Group to staff their facilities to meet state-mandated minimum requirements.

Lawsuits are critical for both supplementing the government's efforts to ensure safe facilities and compensating those who are injured. Lawsuits hold companies directly accountable to those whom they have hurt and do so in a neutral court of law, which provides victims with at least some semblance of justice. Forcing claims into secretive, private arbitration systems ultimately circumvents rules about standards of conduct that have evolved over the years to protect nursing home patients who have no way to protect themselves.

In sum, banning forced, pre-dispute arbitration clauses would significantly improve patient safety and restore patients' rights. We strongly urge adoption of a rule that bans pre-dispute binding arbitration clauses in long-term care contracts.

Thank you for your time and attention to this matter.

Very sincerely,

Joanne Doroshow
Executive Director