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

August 7, 2017

Re: Docket ID CMS-3342-P, Comments Regarding CMS's Proposed Revisions to Requirements for Forced Arbitration Agreements in Long-Term Care Facilities

Introduction

Public Citizen is grateful for the opportunity to submit comments to the Center for Medicare and Medicaid Services (CMS) on this important topic. Public Citizen is a national non-profit organization with more than 400,000 members and supporters. We represent the public interest through lobbying, litigation, administrative advocacy, research, and public education on a broad range of issues including the problem of forced arbitration. We oppose in the strongest possible terms efforts to reverse critical legal protections for residents of long-term care (LTC) facilities by repealing the current rule that bans forced arbitration agreements. These recently promulgated regulatory provisions protect seniors from fine-print contract clauses that deny residents access to the courts to seek compensation for fraud, abuse, neglect, medical malpractice, or other harms suffered at LTC facilities. Reversing these protections will force seniors, other LTC residents, and their families to seek redress in secretive arbitration proceedings where the outcome is often stacked against them.

We strongly oppose any attempt to change the rule because it is grounded in fact-based analysis and strong public support. Taking protections away from vulnerable residents—protections that are critical to fostering accountability by LTCs—would be a shameful setback for the rule of law and for elderly protection. We urge you not to eliminate these critical protections, and instead allow implementation of the rule to move forward.

1. The Ban on Pre-Dispute Arbitration Agreements is a Commonsense Policy that Protects an LTC Residents' Access to Justice

On October 4, 2016, CMS issued a final rule entitled “Reform of Requirements for Long-Term Care Facilities.”¹ The 2016 rule included commonsense provisions to protect residents of LTC facilities, including seniors or members of their families, from signing away their rights at one of the most vulnerable periods of their lives. The CMS final rule prohibits LTC facilities from asking residents and prospective residents to sign pre-dispute arbitration agreements, including demands that they sign away their rights as a condition of admission as well as attempts to impose such agreements on current residents. The rule also specifies that post-dispute arbitration agreements with residents must be entered voluntarily, that the selection of a neutral arbitrator must be agreed on by both parties, and that the venue must be convenient to both parties.

Even though its strong final rule was just released less than a year ago, CMS has begun to backtrack and recently released a proposed rule that eliminates these critical and commonsense provisions. CMS’s notice of proposed rulemaking declares that implementing the existing rule’s provisions “would likely impose unnecessary or excessive costs on providers.”² Based on this unwarranted reversal of its previous assessment of the interests of patients and providers, CMS now proposes not just allowing pre-dispute arbitration agreements between LTCs and residents, but explicitly allowing LTCs to refuse admission to a resident who is unwilling to sign away his or her rights.

2. The Process Leading to the 2016 Rule’s Promulgation Was Extensive and Based on Solid Legal Authority

The 2016 rule is critical because it protects prospective residents at a vulnerable time of their lives. During the process of admission to a nursing home, which often takes place under stressful conditions following a recent hospital stay or a medical emergency, residents and their family members are presented with nonnegotiable admission documents to complete and sign. Many facilities’ admission contracts, which can be as long as 70 pages,³ contain forced arbitration clauses that require residents to surrender their right to bring legal claims against the facilities in court. Instead, these terms require residents to resolve disputes with the nursing homes in private likely biased arbitration proceedings.

In issuing its 2016 rule prohibiting the use of such pre-dispute arbitration agreements, CMS made extensive findings based on a comprehensive record. In addition to reviewing the more than 9,000 comments it received, CMS

¹ 81 Fed. Reg. 68688 (Oct. 4, 2016), hereinafter known as “2016 rule.”

² 82 Fed. Reg. 26649, 26550 (June 8, 2017).

³ Benjamin Pomerance, *Arbitration over Accountability? The State of Mandatory Arbitration Clauses in Nursing Home Admission Contracts*, 16 FLA. COASTAL L. REV. 153 (2015).

conducted a literature review and also reviewed court opinions involving arbitration in LTC facilities. Many of the articles reviewed provided evidence that predispute arbitration agreements were detrimental to the health and safety of LTC facility residents (*See, e.g.*, Tripp, Lisa, “A Senior Moment: The Executive Branch Solution to the Problem of Binding Arbitration Agreements in LTC facilities Admission Contracts”, *Campbell Law Review Sym. 2009*, 31 *Campbell L.Rev.* 157 (2009); Tripp, Lisa, “Arbitration Agreements Used by LTC facilities: An Empirical Study and Critique of *AT&T Mobility v. Concepcion*”, 35 *Am. J. Trial Advoc.* 87 (2011); and Bagby, K. and Souza, S., “Ending Unfair Arbitration: Fighting Against the Enforcement of Arbitration Agreements in Long-Term Care Contracts”, 29 *J. Contemp. Health L. & Pol’y* (2013)). These articles discuss, among other things, the unequal bargaining power between the resident and the LTC facilities; inadequate explanations of the arbitration agreement; the inappropriateness of presenting the agreement upon admission, an extremely stressful time for the residents and their families; negative incentives on staffing and care as a result of not having the threat of a substantial jury verdict for sub-standard care; and the unfairness of the arbitration process for the resident.⁴

CMS found that “[t]he resident’s immediate need for nursing care and lack of experience with arbitration means that residents are unlikely to ask for time to seek legal advice concerning the agreement for binding arbitration.”⁵ As a result, “meaningful or informed consent for predispute arbitration is often lacking.”⁶ The 2016 rule also noted that the agency’s literature review found “that the use of arbitration agreements has increased in LTC facilities in recent years,”⁷ and cited multiple sources of research to support its claim.

CMS spent considerable time analyzing the data it collected before promulgating the 2016 rule. Unsurprisingly, LTC providers “overwhelmingly” demanded that CMS withdraw the pre-dispute arbitration provisions.⁸ However, almost all other commenters, such as “members of the public, advocates, and members of the legal community, predominantly wanted a prohibition on ‘pre-dispute’ arbitration agreements.”⁹

All of “[t]hese considerations... led CMS, the federal agency responsible for oversight of the Medicare and Medicaid programs that fund care at many nursing homes, to conclude that, when entered into at the time of admission of a patient to a long-term care facility, ‘predispute arbitration clauses are, by their very nature, unconscionable’ because ‘it is virtually impossible

⁴ *Id.*, *supra* note 1, at 68793 (Oct. 4, 2016).

⁵ *Id.* at 68797.

⁶ *Id.* at 68796.

⁷ *Id.* at 68794.

⁸ *Id.* at 68692 rule and Reed Smith Client Alert, “CMS Issues Sweeping Final Rule Significantly Changing the Requirements for Long-Term Care Facilities Participating in the Medicare and Medicaid Program, available at <https://www.reedsmith.com/en/perspectives/2016/10/cms-issues-sweeping-final-rule-significantly-chang>.

⁹ *Id.*

for a resident or their surrogate decision-maker to give fully informed or [give] voluntary consent to such arbitration provisions.”¹⁰

CMS’s decision to ban forced arbitration clauses was based on solid legal authority. Congress gave authority to CMS to promulgate the 2016 regulations, most notably in the following provisions of the Social Security Act:

- Sections 1102(a) and 1871, which authorize the Secretary of Health and Human Services to issue rules as may be necessary to the efficient “administration” of programs under the Department;¹¹
- Section 1866, which requires all Medicare providers and suppliers agree to certain conditions in order to participate in the Medicare program;¹²
- Section 1902(a)(27), which requires that Medicaid providers meet all requirements set out in the Medicaid providers agreement;¹³
- Section 1902(a)(28), which requires that States ensure that Medicare nursing facilities meet all the provisions of section 1919(b)-(d) of the Act;¹⁴
- Sections 1819 and 1919, which charge the Secretary with protecting the health, safety, and welfare of LTC residents;¹⁵
- Sections 1819(d)(4)(B) and 1919(d)(4)(B), which require LTC facilities to meet such other requirements relating to the “health, safety, and well-being” of residents or relating to the physical facilities as the Secretary *may find necessary*.¹⁶
- Sections 1819(c)(1)(A)(xi) and 1919(c)(1)(A)(xi), which broadly grant the Secretary authority to establish “*any other right*” as the Secretary may deem necessary.¹⁷

CMS’s broad statutory authority, coupled with its extensive literature review and consideration of public comments that overwhelmingly urged the agency to ban forced arbitration clauses in LTC facilities, provides ample support for the 2016 rule. The deliberate and thoughtful process that led to that rule should not be overturned.

3. CMS’s Call for “Further Analysis” is Unwarranted

In its notice proposing a new rule, CMS said that “[w]e have determined that further analysis is warranted before any rule takes effect.”¹⁸ As noted above, the previous rule was the product of

¹⁰ Brief of Public Citizen, Inc., as Amicus Curiae, Supporting Respondents, p. 5, *Kindred Nursing Centers Limited Partnership v. Clark*, 2017 WL 345125 (2016).

¹¹ 42 U.S.C. 1302 and 42 U.S.C. 1395hh.

¹² 42 U.S.C. 1935cc.

¹³ 42 U.S.C. 1396a.

¹⁴ 42 U.S.C. 1396a and 42 U.S.C. 1396r.

¹⁵ 42 U.S.C. 1395i-3 and 42 U.S.C. 1396r.

¹⁶ 42 U.S.C. 1395i-3 and 42 U.S.C. 1396r (emphasis added).

¹⁷ *Id.* (emphasis added).

¹⁸ *Id.*, *supra* note 2, at 26650.

extensive analysis by CMS, and that analysis was clear: public comments and the data supplied to the agency overwhelmingly supported prohibiting pre-dispute arbitration clauses.

The current proposed rule states in conclusory fashion that a “policy change” to current critical protections for seniors and others in LTCs would “achieve a better balance between the advantages and disadvantages” of forced arbitration clauses “for residents and providers.”¹⁹ The newly proposed rule also cites concerns the 2016 rule would conflict with the Trump Administration’s Executive Order 13771, which directs agencies to repeal two existing regulations for every new regulation—even though the order has no application to rules finalized before its issuance. The invocation of the inapplicable executive order is a telling indication that CMS’s proposed rule rests not on a reasoned determination that there is information justifying reconsideration of the extensive analysis that led to the 2016 rule, but on a change in policy that prioritizes the avoidance of imposing costs on LTC providers over the health and safety of seniors and other vulnerable LTC residents.

CMS should not proceed with consideration of its proposed rule. However, if they do not change course than it is incumbent upon CMS to conduct a rigorous analysis of the entire record of the 2016 rulemaking, just as the agency did before issuing the 2016 rule. Such an analysis, properly conducted, will invariably lead to the same assessment of this pervasive harm to the elderly and their families.²⁰

4. The Agency Must Provide a Reasoned Explanation of Any Change to the Rule

The previous rule was promulgated after extensive consideration by CMS of comments that advocated both prohibiting and allowing the use of pre-dispute arbitration agreements. The agency points to no new information on the subject; the arguments it now claims support reconsideration of the rule were already presented and given complete consideration. The preliminary conclusions that the agency offers to support its proposed repeal of the 2016 rule’s arbitration provisions directly contradict those that it reached in the earlier proceeding. If the agency were to finalize its proposal based on such conclusions, it would be required to provide an explanation of its change of view sufficient to establish that its action reflected a reasoned consideration of the record rather than an arbitrary and capricious change of mind.

¹⁹ *Id.*, *supra* note 2, at 26550.

²⁰ We strongly disagree with the district court court’s opinion in *American Health Care Association v. Burwell*, 217 F.Supp.3d 921 (N.D. Northern Mississippi, Oxford Division, 2016) stating that it did not consider the administrative record to be “strong,” *Burwell* at 24, because CMS did not conduct its “own independent study of whether arbitration agreements harm resident health.” *Id.* Although CMS’s rulemaking notice cites the court’s legal analysis of the Federal Arbitration Act, it does not purport to rely on that legal reasoning as the basis for its proposed action, nor does it adopt the court’s passing observation about failure to conduct an independent study. In any event, if the court’s observation were valid, it would apply equally if CMS were to adopt its new proposal without conducting an independent study.

In *Federal Communications Commission v. Fox Television Studios, Inc.*, the U.S. Supreme Court addressed the legal standard governing whether an agency’s reversal of a prior action is arbitrary and capricious. In such circumstances, the Court held,

the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. Sometimes it must – when, for example, its new policy rests upon *factual findings that contradict* those which underlay its prior policy. It would be arbitrary or capricious to ignore such matters. In such cases it is not that further justification is demanded by the mere fact of policy change, but that a *reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.*²¹

Justice Kennedy, in concurring with the majority, expounded on the principle, noting that “an agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate.”²²

Here, in the rulemaking process leading to the 2016 rule, CMS conducted extensive analysis and received an overwhelming number of comments supporting a ban on forced arbitration. CMS then concluded that there was “significant evidence that pre-dispute arbitration agreements have a deleterious impact on the quality of care for Medicare and Medicaid patients, which clearly warrants our regulatory response.”²³ The agency provided extensive citations of the support in the record for its conclusions. (*see* pages 2-3 of this letter for some of the citations relied on by the agency). In the face of such reasoned analysis and fact finding, it cannot now suffice for CMS to assert without substantial support that a change in policy is warranted simply to better “balance” the interests of nursing home and other vulnerable residents with those of corporate nursing homes.²⁴ The agency cannot rescind the critical protections of the 2016 rule without supplying a reasoned, record-based explanation for reversing its assessment of the extensive evidence illustrating the negative impact of forced arbitration on nursing home and other LTC residents. Given the overwhelming number of comments that opposed the use of pre-dispute arbitration agreements because of dangers to the health, safety, and welfare of LTC residents, there is no reasoned basis for reversing the agency’s previous, well-justified conclusions.

5. Added “Transparency” Provisions Do Not Protect Residents from a Coercive Process

CMS’s proposed regulation seeks to rely solely on informational provisions to substitute for the protections provided by the 2016 rule. It proposes to retain provisions requiring that arbitration agreements be explained to and understood by residents or their representatives, and to add

²¹ 556 U.S. 502, 515-16 (2009) (emphasis added; citation omitted).

²² *Id.* at 537.

²³ *Id.*, *supra* note 1, at 68791.

²⁴ *Id.*, *supra* note 2.

requirements that LTCs write their arbitration agreements in “plain language” and that LTCs post a visible notice to residents that they are bound by arbitration.²⁵

These provisions do nothing to address the real problem of forced arbitration. For example, when a senior is required to sign a pre-dispute arbitration agreement on entering a nursing home, the agreement involuntarily strips the patient of rights without true consent—whether the patient understands the agreement or not. Indeed, even the court that granted last year’s injunction that stopped enforcement of the 2016 rule conceded that “this court does agree with [CMS] that the practice of executing arbitration contracts during the nursing home admissions process raises valid concerns, on a public policy level, since many residents and their relatives are ‘at wit’s end’ and prepared to sign anything to gain admission.”²⁶

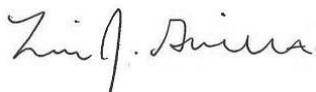
LTC facilities insert pre-dispute arbitration clauses into their agreements in order to ensure that the harms that they commit will never come to light. Thus, providing a senior or other LTC resident with a coercive document that is written plainly is cold comfort when he or she is forced to sign away a constitutional right or be denied needed care.

Conclusion

Our strong objection to CMS’s proposal to reverse commonsense protections for seniors and other residents of LTCs is founded on a principle that while arbitration may be a preferred process for *some*, it should be not a required option for *all*. Particularly in the LTC context, no truly voluntary agreement to arbitrate is possible until after a dispute has arisen, and at a time when a patient is not forced to choose between signing and being denied desperately needed care. Forcing LTC residents to give away their access to justice in court at a traumatic time preys on residents’ and their families’ vulnerabilities. CMS should be doing all that it can to protect and honor them rather than eliminating critical protections for their well-being.

We urge you to protect the health and safety of seniors, other LTC residents, and the public by maintaining the provisions of CMS’s existing rule.

Sincerely,



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²⁵ *Id.*, *supra* note 2, at 26653.

²⁶ *American Health Care Association v. Burwell*, 217 F.Supp.3d 921 (N.D. Northern Mississippi, Oxford Division, 2016).