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Honorable Seema Verma, Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Room 445-G, Hubert H. Humphrey Building
200 Independence Ave. S.W.
Washington, D.C. 20201

Re: Department of Health and Human Services Proposed Rule on Medicare and Medicaid Programs; Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements; File Code CMS-3342-P; RIN 0938-AT18; 82 Fed Reg. 26649 (June 8, 2017); (Submitted electronically through <http://www.regulations.gov>)

Dear Administrator Verma:

On behalf of the American Bar Association (ABA), which is the largest voluntary membership organization of legal professionals in the United States with more than 400,000 members from all 50 states, the District of Columbia, and other jurisdictions, I am writing to share our concerns regarding the above-referenced proposed rule (Proposed Rule) by the Department of Health and Human Services' Centers for Medicare & Medicaid Services (CMS). The Proposed Rule would expressly authorize the use of mandatory, pre-dispute arbitration provisions in long-term care admissions contracts and would permit nursing homes to require residents to agree to such arbitration provisions as a condition of admission to the facility.

As we explained in our previous comment letter to CMS in response to its original proposed rule¹ and as discussed more fully below, the ABA opposes the use of binding forms of alternative dispute resolution involving residents in disputes with long-term care facilities unless the parties agree to do so voluntarily and knowingly after a dispute arises. Therefore, we respectfully request that CMS withdraw the Proposed Rule. In addition, we urge CMS to retain the current rule prohibiting long-term care facilities from entering into agreements for binding arbitration with a resident or their representative until after a dispute arises between the parties and requiring those post dispute agreements to meet the criteria for such agreements and proceedings set forth in the existing rule.²

¹ The ABA's September 30, 2015 comment letter to CMS concerning its original proposed rule titled "Medicare and Medicaid Programs, Reform of Requirements for Long-Term Care Facilities," is available at https://www.americanbar.org/content/dam/aba/uncategorized/GAO/2015sept30_longtermcarefacilities_1.pdf

² The long-term care facility regulations provide that a facility "must treat the decisions of a resident representative as the decisions of the resident to the extent required by the court or delegated by the resident, in accordance with applicable law." 42 C.F.R. § 483.10(b)(4). Therefore, wherever residents are referred to herein, we intend to include situations in which a representative is acting lawfully on behalf of the resident.

1. The Proposed Rule harms residents' rights and interests, in violation of CMS's regulatory mandate.

The regulatory responsibility of CMS reached a major turning point 30 years ago with the enactment of the Nursing Home Reform Act of 1987 (part of the 1987 Omnibus Budget Reconciliation Act). Regulations promulgated under this Act are broad and focus on resident empowerment and protection. CMS cites the following authorities:

- 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.”³
- Authority to establish “such other requirements relating to the health and safety [and well-being] of residents as the Secretary may find necessary.”⁴
- 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.”⁵

Contrary to this regulatory authority, the Proposed Rule significantly fails to protect residents' rights and interests.

Arbitration is a method of dispute resolution in which a neutral decision-maker is selected by one or both parties to resolve a dispute. In an arbitration agreement, a party agrees to waive the rights to sue and to a trial by jury, to participate in a class action lawsuit, or to receive any type of judicial review apart from the very limited grounds applicable to setting aside arbitration decisions, all theoretically in return for a speedy and cost-effective settlement. Recent court decisions have applied the Federal Arbitration Act, 9 U.S.C. §2, which was enacted in 1925, to a multitude of different types of disputes. Arbitration can be a viable means of resolving nursing home resident-facility disputes – but only after the dispute has arisen.

Nursing home admission is an extremely emotionally and physically challenging event for the prospective residents and their family. It is virtually impossible for an applicant or family representative to give fully informed, voluntary consent to arbitration provisions relating to facility admission. The applicant and family may not understand the provision, which is generally couched in legal phrases and included in a much larger set of confusing admissions material.

Even if the provision is explained in plain language and the applicants acknowledge they understand the agreement, as prescribed in the Proposed Rule, they really have no choice or bargaining power. Even if the Rule were modified specifically to require voluntariness, prospective residents are typically frail, have chronic health conditions, are coming directly from the hospital, and they and their families are under severe pressure to culminate admission. Refusing to agree to the arbitration clause in most cases means that care will be denied; the nursing home staff rarely have authority to negotiate or waive the provision. Under the Proposed

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

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

⁵ 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).

Rule, any sense of resident choice, autonomy, voluntariness, and empowerment is lost. In the rare case of refusal to agree to a “voluntary” pre-dispute arbitration provision, the refusal risks creating unwanted tension with the nursing home from the start, possibly leading to retaliation, no matter how much the document purports to be voluntary.

Anticipating the possibility and nature of future disputes with the facility is the last thing on a resident or family’s mind when seeking nursing home care. They are not thinking of future litigation for receipt of poor care, and they cannot fathom becoming involved in future disputes about pressure sores, choking, dangerous bedrails, dehydration, sexual assault, or even death. Yet the arbitration provision covers every aspect of care in the facility, jeopardizes the enforcement of federal and state law, and bars access to the courts if something goes wrong. No matter how egregious, facility practices would not be subject to public scrutiny or accountability.

When patients and their families are seeking nursing home care, there is generally no time to seek the advice of a lawyer to address such secondary issues as methods of resolving future disputes. In addition, there may be no other beds available for the same level of care and payment source within the geographic area. Consequently, applicants and their families typically feel compelled to sign the long-term care admissions contracts that are presented to them and agree to all the terms in those contracts, including the pre-dispute arbitration provisions. This would continue to be so even if the arbitration provision is explained.

The Proposed Rule would specifically permit facilities to require pre-dispute arbitration agreements as a condition of admission. This forces potential residents and their families to make very tough decisions because they often must have the care they need immediately, and to get this care, they must give up fundamental legal rights.

On the other hand, post-dispute arbitration in many circumstances can be advantageous, and residents should continue to have the choice to use it to resolve disputes after a dispute has arisen. At that point, options are tangible and understandable, and an informed choice becomes achievable. Indeed, arbitration is often a preferred course for many disputes, and residents and their families may opt for it. In other cases, they may choose not to do so. If the right to resident-centered care means anything, it means maximizing residents’ and families’ opportunities to make informed decisions.

2. The Proposed Rule conflicts with the person-centered framework established by federal law and regulation.

When the Proposed Rule permitting mandatory arbitration is understood within the full sweep of residents’ rights in long-term care facilities, its inconsistency with CMS’ regulatory goals and obligations becomes clearer. For over 30 years, virtually all resident and long-term care facility rights and obligations have been dictated by federal and state nursing home laws and regulations. There is little left to arms-length contractual bargaining, and this is so because of the dependent and vulnerable position of residents.

Existing long-term care facility regulations establish an active, affirmative mandate to promote the full spectrum of resident choice and preferences, the exercise of civil rights, and access to information and assistance in implementing those rights.

As a starting point, the regulations are framed around a mandate for “person-centered care,” defined--

[P]erson-centered care means to focus on the resident as the locus of control and support the resident in making their own choices and having control over their daily lives.⁶

This concept emphasizes a fundamental mandate:

Each resident must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial wellbeing, consistent with the resident’s comprehensive assessment and plan of care.⁷

Specific resident rights expand upon this purpose of supporting residents in making their own choices and having control over their daily lives and include the following:

- a. The facility must protect and promote the rights of the resident.⁸
- b. The resident has the right to exercise his or her rights as a resident of the facility and as a citizen or resident of the United States.
 - (1) The facility must ensure that the resident can exercise his or her rights without interference, coercion, discrimination, or reprisal from the facility.
 - (2) The resident has the right to be free of interference, coercion, discrimination, and reprisal from the facility in exercising his or her rights and to be supported by the facility in the exercise of his or her rights as required under this subpart.⁹
- c. Respect and Dignity. The resident has a right to be treated with respect and dignity, including:
 - (3) The right to reside and receive services in the facility with reasonable accommodation of resident needs and preferences except when to do so would endanger the health or safety of the resident or other residents.”¹⁰

⁶ 42 C.F.R. § 483.5

⁷ 42 C.F.R. § 483.24.

⁸ 42 C.F.R. § 483.10(a)(1).

⁹ 42 C.F.R. § 483.10(b).

¹⁰ 42 C.F.R. § 483.10(e)(3).

- d. Self-determination. The resident has the right to and the facility must promote and facilitate resident self-determination through support of resident choice, including but not limited to the rights specified in paragraphs (f)(1) through (11) of this section.

(2) The resident has the right to make choices about aspects of his or her life in the facility that are significant to the resident.¹¹

- e. The facility must furnish to each resident a written description of legal rights which includes—

(ii) Information and contact information for State and local advocacy organizations, including but not limited to the State Survey Agency, the State Long-Term Care Ombudsman program (established under section 712 of the Older Americans Act of 1965, as amended 2016 (42 U.S.C. 3001 et seq.) and the protection and advocacy system (as designated by the state, and as established under the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (42 U.S.C. 15001 et seq.);

and

(vi) Information and contact information for filing grievances or complaints concerning any suspected violation of state or federal nursing facility regulations, including but not limited to resident abuse, neglect, exploitation, misappropriation of resident property in the facility,¹²

- f. The facility must—

(i) Not request or require residents or potential residents to waive their rights as set forth in this subpart and in applicable state, federal or local licensing or certification laws, including but not limited to their rights to Medicare or Medicaid; and...

(iii) Not request or require residents or potential residents to waive potential facility liability for losses of personal property.¹³

The residents' rights regulations emphasize the principle that facilities have an obligation not only to respect these rights, but an affirmative obligation to “*ensure* that the resident can exercise his or her rights without interference, coercion, discrimination, or reprisal from the facility.” Sec. 483.10(b). Further, the resident has a right “*to be supported by the facility* in the exercise of his or her rights as required under this subpart”¹⁴ (emphasis added).

When seen in this person-centered framework that aims both to empower residents and protect them, the Proposed Rule clearly contradicts and undermines that purpose. This perception is

¹¹ 42 C.F.R. § 483.10(f).

¹² 42 C.F.R. § 483.10(i).

¹³ 42 C.F.R. § 483.15(a)(2).

¹⁴ 42 C.F.R. § 483.10(b).

reinforced in several statements in the Background for the Proposed Rule noting its importance in “preventing unnecessary or excessive costs on providers” and alleviating “financial burdens placed on providers who are forced to litigate claims in court.” The existing regulation that we urge CMS to retain provides an optimal balance between protecting residents and families when they are at their most vulnerable (by prohibiting pre-dispute arbitration agreements) and permitting the use of arbitration at the time when the nature of a dispute is known and an informed and voluntary weighing of its benefits and limitations can be made (by allowing post-dispute arbitration agreements).

3. The existing arbitration ban, rather than the Proposed Rule, is consistent with recent U.S. Supreme Court interpretations of the Federal Arbitration Act (FAA).

The recent U.S. Supreme Court ruling in *Kindred Nursing Centers v. Clark*¹⁵ may lead some to argue that a ban on mandatory, pre-dispute, binding arbitration clauses in long-term care admissions contracts violates the FAA. This view is mistaken.

In *Kindred*, the Supreme Court examined the legality under the FAA of a rule of interpretation used by a state court that recognized an agent’s authority under a power of attorney to enter an arbitration agreement *only if* there was a clear statement of authority in the document to do so. The Supreme Court held that such a rule illegally discriminated against arbitration agreements under the FAA, which makes arbitration agreements “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”¹⁶

The Court stated that under the FAA,

A court may invalidate an arbitration agreement based on “generally applicable contract defenses” like fraud or unconscionability, but not on legal rules that “apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue (citation omitted).” The FAA thus preempts any state rule discriminating on its face against arbitration—for example, a “law prohibit[ing] outright the arbitration of a particular type of claim (citation omitted).” The Act also displaces any rule that accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements.¹⁷

While *Kindred* clearly prohibits singling out arbitration agreements for disfavored treatment, nothing in the court’s reasoning or under the terms of the Federal Arbitration Act require singling out arbitration agreements for *favored* treatment. Yet, that is exactly what CMS is doing by its proposed total embrace of mandatory pre-dispute arbitration provisions in admissions contract.

To expressly authorize long-term care facilities to include mandatory arbitration in admissions contracts is to make a special exception *in favor* of mandatory arbitration contrary to the scope and purpose of residents’ rights as articulated in the previous section. CMS’s regulatory mandate is to

¹⁵ *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017)

¹⁶ 9 U.S.C. § 2.

¹⁷ *Id.*, at 1426,

protect vulnerable residents in long-term care facilities. That is an entirely different context than in *Kindred*, wherein the court examined presumptive rules used to interpret the intent of private parties under agency law. In the regulatory context, federal law already targets multiple specific contract provisions for more stringent treatment.

For example, a long-term care facility's contract **cannot**:

- request or require residents to waive their rights set forth in the federal regulations or in applicable state, federal or local licensing or certification laws.¹⁸
- request or require oral or written assurance that the resident is not eligible for, or will not apply for, Medicare or Medicaid benefits.¹⁹
- request or require residents to waive potential facility liability for losses of personal property.²⁰
- request or require a third-party guarantee of payment to the facility as a condition of admission or expedited admission, or continued stay in the facility.²¹
- charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State plan, any gift, money, donation, or other consideration as a precondition of admission, expedited admission or continued stay in the facility.²²

Thus, the current rule that permits arbitration agreements only after a dispute arises already treats arbitration on a par with or better than other resident contract rights that are properly regulated by CMS. Far from an absolute ban, the current rule allowing post-dispute but not pre-dispute arbitration of these disputes enables long-term care facilities to offer arbitration in a manner consistent with the person-centered paradigm at the core of the long-term care regulatory framework. The Proposed Rule, on the other hand, would give special deference to arbitration agreements and as a result, it ignores and contradicts the entire regulatory purpose and context of Medicare and Medicaid long-term care law and regulation.

We appreciate your consideration of these comments and look forward to working with you and your colleagues to positively impact the health and long-term care of Americans and their families. If the ABA can provide any additional information, please contact ABA Governmental Affairs Legislative Counsel David Eppstein, at 202-662-1766 or david.eppstein@americanbar.org.

Sincerely,



Thomas M. Susman

¹⁸ U.S.C. §1395i-3(c)(5), 42 U.S.C. §1396r(c)(5), 42 C.F.R. §483.15.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² 42 U.S.C. §1396r(c)(5), 42 C.F.R. §483.15. (Applies only to Medicaid certified facilities.)