

August 9, 2017

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

**Comments of Consumers Union –
Medicare and Medicaid Programs;
Long-Term Care Facilities; Arbitration Agreements
CMS-2017-0076-0001**

Consumers Union, the policy and mobilization arm of Consumer Reports, submits these comments in the above-referenced matter. As our October 2015 comments reflect,¹ we supported the Department’s proposal to strengthen and clarify the standards and protections for residents of nursing homes and other long-term care facilities, to better ensure safe, attentive, supportive, and effective care, and we were pleased with the final rule.

In our view, the prohibition against federally-licensed nursing homes including forced arbitration in their residency contracts is a key linchpin for ensuring that residents and their families can hold nursing home owners and managers accountable for complying with these standards and protections. We strongly believe the prohibition as included in the rule is appropriate, and appropriately measured.

Whatever potential benefits to consumers there might be in having a private arbitration system available as an *alternative* to court proceedings, those benefits are undermined if arbitration is *forced* on consumers as a precondition for receiving a product or service. With the consumer having no choice, the seller has little or no incentive to make the process fair, and every incentive to take unfair advantage. Furthermore, any purported contractual “consent” by an ordinary consumer, before the problem arises – before the consumer appreciates the extent of what might go wrong, and the need for legal action – is illusory.

This is particularly true for nursing home admissions. The circumstances are typically urgent and emotional for the new residents and their families, with many logistical details to contend with. They are particularly vulnerable to signing off on what is presented as “routine

¹ www.regulations.gov/document?D=CMS-2015-0083-8879.

paperwork” required to “process” the admission. As documented in comments to the 2015 proposed rule, there have been many instances of gross neglect and abuse of nursing home residents, sometimes even fatal. Residents are utterly dependent on the nursing home maintaining and enforcing appropriate care and protection; and when the nursing home fails to meet its duty, it can take weeks or months before that failure, and the neglect and abuse, come to the family’s attention. Removing the prospect of effective legal accountability increases those dangers, and leaves residents even more vulnerable and powerless. The rule gives nursing homes the appropriately strong incentive to ensure that residents are provided the care and protection that they deserve and that the law requires.

We also believe the conditions set forth in the rule for post-dispute arbitration are appropriate for ensuring that the affected nursing home resident is not unfairly taken advantage of even when the extent of the harm and the need for legal action may now be clear.

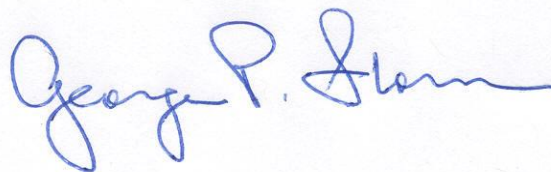
Finally, we believe the Department acted fully within its authority to condition participation in federally-licensed Medicare and Medicaid programs on the nursing home not requiring residents to sign mandatory pre-dispute arbitration agreements as a precondition for admission, and on its complying with the specified post-dispute arbitration protections.

Importantly, under the rule, nursing homes remain fully at liberty to agree with residents to arbitrate any dispute that arises, *after* it has arisen, subject to reasonable conditions. The fact that at that point, under the rule, the choice by the resident and his or her family will be truly voluntary provides further incentive for the nursing home to ensure that the arbitration process is truly consumer-friendly – affordable, efficient, and fair.

In contrast, as the Department now proposes to rewrite the rule, these fundamental protections would be lost.

For the forgoing reasons, and as further explained in our earlier comments, we strongly support the current rule, and urge the Department to maintain it. Nursing home residents are more likely to be cared for properly if they retain their legal rights.

Respectfully submitted,



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