



**Congress of the United States
House of Representatives**

October 14, 2015

Andy Slavitt
Acting Administrator
Centers for Medicare and Medicaid Services
Department of Health and Human Services
Room 445-G, Hubert H. Humphrey Building
200 Independence Ave., S.W.
Washington, DC 20201

Docket No.: CMS-3260-P

Re: Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities

Dear Administrator Slavitt:

We write in regard to the Centers for Medicare and Medicaid's (CMS) proposed rule to reform requirements for long-term care facilities.¹ We applaud CMS' attention to the process for pre-dispute arbitration, or forced arbitration, in long-term care facilities. However, we have serious concerns that the proposed rule as currently drafted will not adequately protect residents in these facilities. We therefore call on CMS to issue a final rule that will ensure that residents in these facilities enter into arbitration agreements only on a voluntary and informed basis after a dispute arises. This vital distinction would preserve arbitration as a useful tool for alternative dispute resolution among willing residents rather than one that forces parties into arbitration before disputes arise.

Forced arbitration is a private system that is fundamentally inferior to the American justice system. Unlike America's civil justice system that was developed through centuries of jurisprudence, forced arbitration does not provide important procedural guarantees of fairness and due process that are the hallmarks of courts of law. The practice often takes place behind closed doors rather than in a public forum, enabling parties to keep their wrongdoing confidential and hidden from public scrutiny. Absent the rigorous opportunity for review of errors afforded in litigation through published decisions and appellate procedures, forced arbitration lacks public accountability and transparency.² Courts have limited authority to vacate an arbitrator's decision, which typically is final and binding.³

¹ Medicare and Medicaid Programs; Reform of Requirements for LongTerm Care Facilities, 80 Fed. Reg. 42,168 (proposed July 16, 2015) (to be codified at 42 C.F.R. Parts 405, 431, 447, 482, 483, 485, and 488) [hereinafter "CMS Notice"], <http://www.gpo.gov/fdsys/pkg/FR-2015-07-16/pdf/2015-17207.pdf>.

² See *Porreca v. Rose Group*, No. 13-1674, 2013 U.S. Dist. LEXIS 173587, *41-42 (E.D. Pa. 2013) ("There is a reason that arbitration is the favored venue of many businesses for deciding employment disputes, and it is not to

Forced arbitration also lacks an impartial judge, jury, or meaningful review.⁴ Unlike judges, arbitrators are not required to have legal training, issue written opinions, or faithfully apply the law.⁵ There is also overwhelming evidence that forced arbitration creates an unaccountable system of winners and losers. Forced arbitration creates a “repeat player advantage,” which favors corporations over one-time participants such as individual employees and consumers.⁶ Indeed, as the Center for Responsible Lending reported in 2012, “Companies that have more cases before arbitrators get consistently better results from these same arbitrators,” while arbitrators “who favor firms over consumers receive more cases in the future.”⁷

We therefore have profound concerns with any rule that allows nursing-home operators to foreclose judicial relief to nursing-home residents, a highly vulnerable population, through forced arbitration. In many instances, nursing-home residents are over seventy-five years of age and admitted to the nursing home directly from a hospital.⁸ In addition to the emotional strain often associated with their admission to a nursing home, residents’ existing cognitive or physical health conditions make it unlikely that they will meaningfully comprehend arbitration agreements.⁹ As you have observed, hospitalized residents who seek a quick admission to a facility “may feel more pressure to accept such an agreement.”¹⁰

ensure that employees are afforded the best chance to have their claims adjudicated by a judge or jury picked from the community.”).

³ The Federal Arbitration Act provides narrow statutory grounds upon which a court may vacate an arbitrator’s award such that vacatur or modification of an arbitral award must involve “corruption,” “fraud,” or “undue means” by the arbitrator. See *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 583 n.4, 586-87 (2008) (interpreting the limits of sections 10 and 11 of the FAA); Carmen Comsti, *A Metamorphosis: How Forced Arbitration Arrived In The Workplace*, 35 BERKELEY J. EMP. & LAB. L. 5, 15-17 (2014) (discussing the limited scope of judicial review of arbitration awards).

⁴ *Id.*

⁵ The U.S. Supreme Court has narrowly limited the scope of judicial review of arbitrators’ decisions. See *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2070 (2013) (“[C]onvincing a court of an arbitrator’s error—even his grave error—is not enough”); see Imre Stephen Szalai, *More Than Class Action Killers: The Impact of Concepcion and American Express on Employment Arbitration*, 35 BERKELEY J. EMP. & LAB. L. 31 (2014) (exploring the changing standard for judicial review of arbitration awards and its impact on the fairness of forced arbitration); Pat K. Chew, *Arbitral and Judicial Proceedings: Indistinguishable Justice or Justice Denied?* 46 WAKE FOREST L. REV. 185, 208 (2011) (“[F]ederal judges are selected through a carefully crafted public vetting process, whereas arbitrators are selected in much more idiosyncratic and less transparent ways.”).

⁶ See generally Ryan Lamare & David B. Lipsky, *Employment Arbitration in the Securities Industry: Lessons Drawn from Recent Empirical Research*, 35 BERKELEY J. EMP. & LAB. L. 113 (2014). See generally Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223 (1998) (applying the “repeat player advantage” theory to the employment arbitration context).

⁷ Joshua M. Frank, *Stacked Deck: A Statistical Analysis of Forced Arbitration*, CENTER FOR RESPONSIBLE LENDING 1–2 (May 31, 2009), http://www.responsiblelending.org/credit-cards/research-analysis/stacked_deck.pdf.

⁸ Lisa Tripp, *A Senior Moment: The Executive Branch Solution to the Problem of Binding Arbitration Agreements in Nursing Home Admission Contracts*, 31 CAMPBELL L. REV. 157, 181-82 (2009).

⁹ S. REP. NO. 110-518, at 3 (2008), <https://www.congress.gov/110/crpt/srpt518/CRPT-110srpt518.pdf>.

¹⁰ CMS Notice, *supra* note 1, at 42242.

Nursing-home residents often lack access to alternative care options that do not require forced arbitration. As the National Senior Citizens Law Center has noted, many “arbitration agreements are being signed at the time of admission only because the resident or family member does not even notice or understand the arbitration clause, or signs the arbitration clause out of fear that otherwise the admission will be jeopardized.”¹¹ Even where they comprehend the significance of losing the safeguards provided by the public courts,¹² nursing-home residents may still be pressured to sign agreements based on competing interests. As you have observed, there are concerns about “nursing homes either requiring or pressuring nursing-home residents to sign these agreements and, therefore, waiving the right to pursue resolution of a dispute with the nursing home in court.”¹³ Nursing-home operators and staff have likewise been found to condition entry into nursing homes upon a resident’s agreement to forced arbitration clauses, even where nursing home agreements do not require it or specify that the resident’s agreement must be voluntary.¹⁴

Our nation’s nursing-home residents deserve more protection against abuse, not less. The Government Accountability Office (GAO) has issued a series of reports finding “significant weaknesses in federal and state activities designed to detect and correct quality and safety problems at nursing homes.”¹⁵ Furthermore, following a report finding widespread abuse of the quality rating system by nursing homes,¹⁶ as well as substantial congressional attention to this matter,¹⁷ the GAO recently agreed to review transparency and quality assurance in nursing home

¹¹ S. REP. NO. 110-518, at 3 (2008), <https://www.congress.gov/110/crpt/srpt518/CRPT-110srpt518.pdf>.

¹² Lisa Tripp, *Arbitration Agreements Used by Nursing Homes: An Empirical Study and Critique of AT&T Mobility v. Concepcion*, 35 AM. J. TRIAL ADVOC. 87, 88-89 (2011).

¹³ CMS Notice, *supra* note 1, at 42241.

¹⁴ Tripp, *supra* note 12, at 87-89 (2011) (“This study also found evidence of a significant amount of confusion among nursing homes staff members using these agreements about whether their facilities were using them at all and what arbitration agreements really mean.”).

¹⁵ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-117, NURSING HOMES DESPITE INCREASED OVERSIGHT, CHALLENGES REMAIN IN ENSURING HIGH-QUALITY CARE AND RESIDENT SAFETY (2005).

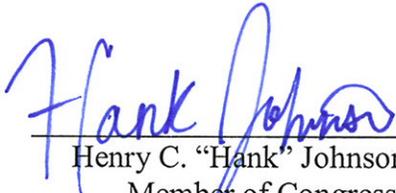
¹⁶ Katie Thomas, *Medicare Star Ratings Allow Nursing Homes to Game the System*, N.Y. TIMES (Aug. 24, 2014), <http://www.nytimes.com/2014/08/25/business/medicare-star-ratings-allow-nursing-homes-to-game-the-system.html> (“The Times analysis shows that even nursing homes with a history of poor care rate highly in the areas that rely on self-reported data. Of more than 50 nursing homes on a federal watch list for quality, nearly two-thirds hold four- or five-star ratings for their staff levels and quality statistics. The same homes do not fare as well on the sole criterion that is based on an independent review. More than 95 percent of the homes on the watch list received one or two stars for the health inspection, which is conducted by state workers.”).

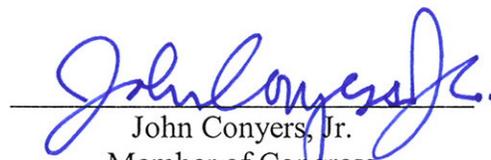
¹⁷ Letter from Sen. Ron Wyden (D-OR) and Sen. Bob Casey (D-PA) to the Honorable Gene Dodaro, Comptroller General of the United States (Aug. 06, 2015), <http://www.finance.senate.gov/newsroom/ranking/release/?id=5a0d83a8-8f1c-4457-a418-0c7ea65078e4>; Letter from Elijah Cummings (D-MD), Ranking Member, House Committee on Oversight and Government Reform, to the Honorable Marilyn Tavenner, Administrator, Centers for Medicare and Medicaid Services (Aug. 26, 2014), <http://democrats.oversight.house.gov/news/press-releases/cummings-requests-briefing-on-nursing-homes-gaming-cms-rating-system>.

ratings.¹⁸ Even advocates for arbitration have recognized the distinct harms associated with forced arbitration in health care settings. Robert Meade, formerly the Senior Vice President of the American Arbitration Association, observed in 2002 that “[n]othing is more emotional or personal or devastating than a health care problem,” making forced arbitration in health care settings unfair because medical problems are “on a higher playing field.”¹⁹ The American Bar Association Section of Dispute Resolution likewise recommended in 1999 that “binding forms of dispute resolution should only be used where the parties agree to do so after a dispute arises” because arbitration “should be voluntary in order to ensure that the parties’ constitutional and other legal rights and remedies are protected.”²⁰

It is critical that CMS rejects the well-documented harms associated with pre-dispute arbitration in favor of a final rule that empowers residents to arbitrate claims *after* they arise. This simple fix would allow a voluntary system of arbitration for nursing-home residents who stand to lose access to the courts for *every* conceivable injury that they could suffer at the hands of unscrupulous care givers and facility operators.

Sincerely,


Henry C. “Hank” Johnson, Jr.
Member of Congress


John Conyers, Jr.
Member of Congress

¹⁸ William Gray, *GAO to Review Accuracy of Nursing Home Ratings*, CENTER FOR PUBLIC INTEGRITY (Aug. 28, 2015), <http://www.publicintegrity.org/2015/08/28/17913/gao-review-accuracy-nursing-home-ratings>.

¹⁹ Charles Ornstein, *Health Care Disputes at Issue*, L.A. TIMES (Mar. 11, 2002), <http://articles.latimes.com/2002/mar/11/local/me-hmo11>.

²⁰ AMERICAN BAR ASSOCIATION SECTION OF DISPUTE RESOLUTION ET AL., *Recommendation on the Health Care Due Process Protocol: A Due Process Protocol for Mediation and Arbitration of Health Care Disputes*, (Feb. 8, 1999), [http://apps.americanbar.org/dch/thedl.cfm?filename=/DR018500/relatedresources/ABA_Resolution_on_the_Health_Care_Due_Process_Protocol_\(1999\).pdf](http://apps.americanbar.org/dch/thedl.cfm?filename=/DR018500/relatedresources/ABA_Resolution_on_the_Health_Care_Due_Process_Protocol_(1999).pdf).


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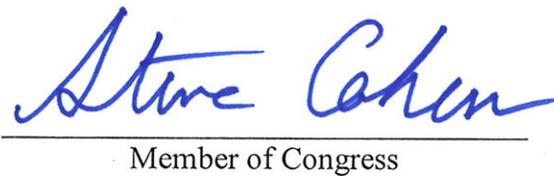

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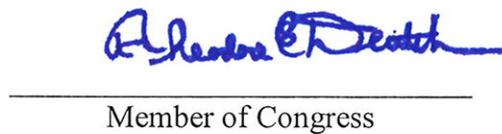

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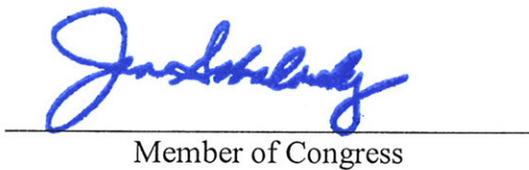

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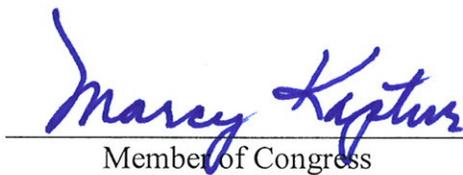

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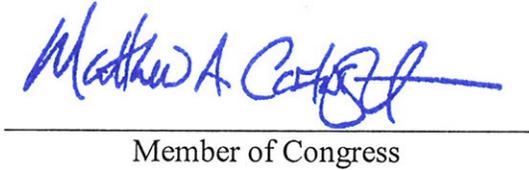

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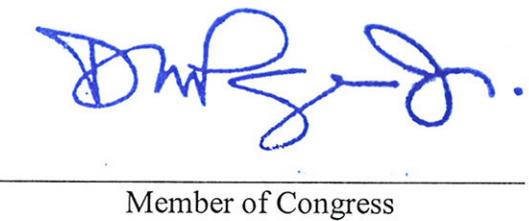

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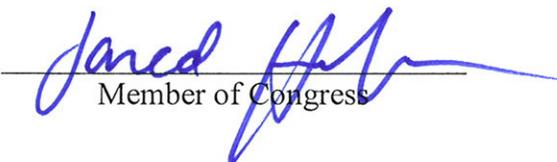

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