August 7, 2017

Seema Verma
Administrator
Centers for Medicare & Medicaid Services
7500 Security Boulevard
Baltimore, MD 21244

Re: CMS-3342-P Revision Requirements for Long-Term Care Facilities' Arbitration Agreements

Dear Administrator Verma,

Thank you for the opportunity to comment on the Center for Medicare and Medicaid Services's (CMS) proposed rule CMS-3342-P, *Medicare and Medicaid Programs; Revision Requirements for Long-Term Care Facilities: Arbitration Agreements.* NAELA supports the arguments put forward in the forthcoming letter led by Consumer Voice and adds its additional comments below.[1]

Given earlier findings by CMS about the gross inadequacies of mandatory pre-dispute arbitration provisions in nursing home contracts, we urge CMS to maintain that policy absent factual findings that the reverse is in the best interests of the American public.

The National Academy of Elder Law Attorneys (NAELA) is a national, non-profit association comprised of 4,500 attorneys, who concentrate on legal issues affecting seniors, people with disabilities, and their families. The mission of NAELA is to establish NAELA members as the premier providers of legal advocacy, guidance, and services to enhance the lives of individuals with disabilities and people as they age. NAELA attorneys, as a general rule, do not litigate nursing home abuse causes, but do counsel clients on admission.

As CMS previously recognized, pre-dispute arbitration provisions in nursing home contracts are "unconscionable."[2] That these provisions are unfair to beneficiaries is well known. For instance, a New York Times investigation of arbitration including those utilized by nursing homes found that the "rules tend to favor businesses, and judges and juries have been replaced by arbitrators who commonly consider the companies their clients."[3]

---

[1] Forthcoming letter available at: http://theconsumervoice.org/uploads/files/general/Sign-on_letter_to_CMS_re_arbitration_final_(003).pdf

[2] Centers for Medicare & Medicaid Services (CMS), HHS, Final Rule, *Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities*, 81 FR 68688, at 68792 (Oct. 4, 2016)

[3] New York Times, "In Arbitration, a 'Privatization of the Justice System'" by Jessica Silver-Greenberg and Michael Corkerynov. Nov. 1, 2015. Available at: https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html?_r=0

The rule CMS seeks to reverse was based on lengthy administrative proceedings that developed an extensive and thorough record. Those factual findings were not overturned in the injunction action that stopped their enforcement. To the contrary, the court generally agreed with the CMS analysis and provided confirmation from its own experience and the experience of its state courts.[4] The issues postponing compliance were legal issues, not the merits or policy of prior action by CMS.

The present proposal seeks to change the facts previously found by CMS, but there is no basis for doing so.

First, the change purports to eliminate the possibility of a nursing home being a defendant in a lawsuit, stating that it is an "unnecessary burden on providers." However, CMS has not provided cost-benefit analysis in support of the so-called "burden" of unmeritorious suits – those dismissed, or with judgments for defendants, or settled only as strike suits versus meritorious personal injury lawsuits foregone and future misconduct undeterred. There is no way that CMS can say the burden of being a defendant in a lawsuit was unnecessary or not. There is a palpable lack of data to support the position taken by CMS.

CMS now says it seeks a "better balance" in the advantages and disadvantages for residents and providers for pre-dispute mandatory arbitration. This phrase provides no substantive guidance as to what is "better" about any particular balance.

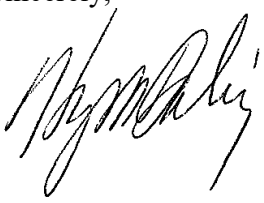
Prior findings by CMS were that residents receive no benefit that they could not get from post-dispute use of arbitration, while providers got effective immunity from liability for causing death or severe disability.

If CMS cannot elucidate a precise reason as to why residents would now be better off giving up their rights before they might fully realize what they have lost, it cannot categorize this reversal as an improvement over anything.

****

Thank you for your consideration. If you have any questions, please contact David Goldfarb, NAELA's Sr. Public Policy Manager (dgoldfarb@naela.org/ 703-942- 5711 #232).

Sincerely,



Hyman G. Darling, Esq.
President
National Academy of Elder Law Attorneys

[4] American Health Care Association v. Burwell, 3:16-cv-00233, U.S Dist. Court, N.D. MS, Nov. 7, 2016. Link to order: https://docs.justia.com/cases/federal/district-courts/mississippi/msndce/3:2016cv00233/38801/44