

TO:  
Centers for Medicare & Medicaid Services  
Department of Health and Human Services\  
Attn: CMS-3260-P  
P.O. Box 8010  
Baltimore, MD 21244

COMMENTS TO THE CENTER FOR MEDICARE AND MEDICAID SERVICES

By

New Yorkers for Patient & Family Empowerment  
New York Public Interest Research Group  
Bronx Independent Living Services  
Brooklyn Center for Independence of the Disabled  
Center for Independence of the Disabled in New York  
Citizen Action of New York  
Disabilities Network of New York City  
Empire State Consumer Project  
Gray Panthers, New York City Network  
MFY Legal Services  
New York Statewide Senior Action Council  
Peggy Lillis Foundation  
PULSE of New York

RE: REFORM OF REQUIREMENTS FOR LONG-TERM CARE FACILITIES (CMS-3260-P)

WHY THE CMS SHOULD PROHIBIT MANDATORY ARBITRATION  
IN NURSING HOME CONTRACTS

September 14, 2015 (updated September 22, 2015)

The Center for Medicare and Medicaid Services (“CMS”) has requested comments on “whether agreements for binding arbitration should be prohibited” – *i.e.*, the advisability of prohibiting pre-dispute, blanket mandatory arbitration clauses in nursing home contracts, rather than regulating provisions and disclosures within such clauses.

The 13 above-named nonprofit public interest organizations strongly feel that CMS should prohibit mandatory arbitration clauses in nursing home contracts for the following reasons:

**A. Mandatory Arbitration Clauses in Nursing Home Contracts are Fundamentally Unfair**

Nearly all nursing home contracts are “adhesion contracts.” An adhesion contract is a standardized contract that is drafted and imposed by the party of superior bargaining strength to cover transactions with many people rather than with an individual, which relegates to the subscribing party only the opportunity to adhere to the contract or reject it. (These are sometimes referred to as “take it or leave it” contracts.)<sup>1</sup> As the United States District Court for the Eastern District of New York recently stated:

A contract on a printed standardized form that is offered on a take-it or leave-it basis – usually by a merchant that monopolizes a particular market, or whose bargaining power significantly outweighs that of the consumer – is a contract of adhesion. Such a contract exists where a party of superior bargaining strength, *i.e.*, a vendor, provide a subscribing party only with the opportunity to adhere to the contract or forfeit use, ownership or access to the vendor’s services and goods.

*Berkson v. GOGO LLC*, 14-CV-1199 (E.D.N.Y. 2015), slip op., p. 40 (accessed at [http://www.gpo.gov/fdsys/granule/USCOURTS-nyed-1\\_14-cv-01199/USCOURTS-nyed-1\\_14-cv-01199-0](http://www.gpo.gov/fdsys/granule/USCOURTS-nyed-1_14-cv-01199/USCOURTS-nyed-1_14-cv-01199-0)). The result is often that the stronger party is able to dictate the terms of the contract to the weaker party. Under an adhesion contract:

The form is presented to the adhering party with the representation that, except perhaps for a few identified items (such as the price term), the drafting party will enter into the transaction only on the terms contained in the document. This representation may be explicit or may be implicit in the situation, but it is understood by the adherent. (*Berkson*, slip op., 41)

Also,

The adhering party enters into few transactions of the type represented by the form – few, at least, in comparison with the drafting party. (*Berkson*, slip op., 41)

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<sup>1</sup> For example, adhesion contracts are commonly used for matters involving insurance, leases, deeds, mortgages, automobile purchases, and other forms of consumer credit.

Such is the situation in most nursing home contracts. There is generally no contract “process” to speak of. The prospective nursing home resident is not offered proposed terms, but rather is presented with a complete, standardized, boiler-plate contract (often with many attachments) to sign or not sign.

If a good or service being sold using a contract of adhesion is essential for the purchaser to buy – which is certainly the situation in nursing home contracts -- then the purchaser may well feel that she or he has no choice but to accept the terms. While this problem may be mitigated if there are many suppliers of a service who can potentially offer different terms, the supply of nursing homes is by its very nature limited. Many people do not live in a community with a large number of nursing homes nearby, and even the existence of another nursing home facility nearby does not mean that it will have “room” to accept a new resident. Family members should not have to weigh their ability to travel to a nursing home frequently, to ensure the well-being of their loved one, against a requirement to waive their loved one’s most basic right to access the court if harmed.

While some families have a lot of time to search and inquire about nursing homes in their area, others must make a choice very quickly. As CMS itself has noted, when a vulnerable person is being discharged from the hospital, there is intense pressure to find a nursing home quickly, and the hospital might only provide one or two choices to the family. Hospital policies typically require that patients with significant continuing nursing needs be discharged to nursing home settings soon after surgery and/or after critical stages of their care.

Under the time pressure of the pending discharge, patients and families cannot be expected to negotiate or haggle over legal/technical nursing home contract language – even if they can identify and understand the full ramifications of a mandatory arbitration clause. It cannot reasonably be argued such individuals have the opportunity to investigate and visit other nursing homes before making a carefully considered “choice.” In this context, taking away a nursing home resident’s right to choose to press a claim in court – before she or he even know what that claim will be – is grossly unfair.

Nursing home residents and their families, when asked to sign mandatory arbitration agreements upon admission, are doing so with a substantial lack of knowledge about the safety of the nursing home. Even if they do have time to check internet information on nursing homes, that information is incomplete and challenging to interpret and evaluate. It is very likely that most people do not want to believe they are entering, or putting their parents into, an unsafe place. But regardless of what they may wish for, unless they have experienced this particular facility before, they have not – at the time of admission – experienced the nursing home firsthand to know how well it lives up to its promises of care.

Nursing home residents and their families also likely suffer from a substantial lack of knowledge and understanding about the many significant differences between arbitration and civil actions. Simply telling a prospective nursing home resident and family that agreeing to arbitration means giving up the right to a jury trial, for example, is very misleading.

Arbitration fees. Such agreements often require the resident to pay the defendant's arbitration fees in the event of a loss, which is different than in court, where a resident would not have had to pay a judge.

A decision by an arbitrator often can only be appealed to court on certain types of grounds. Justice denied is certainly “faster,” but not better. A resident may not understand that there may be no recourse to court for appeal of a bad decision after an arbitration “trial.” In New York, for example, as one court explained, the limitation on review is substantial:

As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, a court's conviction that the arbitrator has committed serious error in resolving the disputed issue does not suffice to overturn his decision.”

*ReliaStar Life Ins. Co. of N.Y. v. EMC Nat'l Life Co.*, 564 F.3d 81, 86 (2d Cir. 2009).

The resident may not even be able to afford arbitration. Because the plaintiff in an arbitration proceeding is less likely to be able to obtain an attorney on a contingent fee basis for an arbitration, the

plaintiff may have to pay an attorney up front to take the case. One of the most important difference between arbitration and bringing a claim in civil court is the contingent fee system that exists in personal injury claims but is less available in arbitration. Under the contingent fee system in personal injury civil actions, the attorney representing the plaintiff is only paid attorney fees if the claim is successful. A plaintiff, who has already been injured, does not have to take financial risks to pursue justice. This system has long been seen as a public benefit, as it allows wrongdoing to come to light and helps promote a society in which people will be held accountable if they cause someone harm.

Investigation is likely to suffer. The arbitration agreement puts the injured nursing home resident at a severe disadvantage with regard to information. The less information the injured resident can get, the less evidence he or she can present to the arbitration panel. Here, the contingent fee is particularly important because a plaintiff's trial attorney is not only a litigator, but also an investigator – and this can make the critical difference for justice.

Because the plaintiff's trial attorney only gets paid for his or her time if successful, each potential case must be "screened" for its merit and strength. Each potential case presents a risk that the trial attorney, based on his or her experience, must calculate prior to devoting time to investigative action. Upon taking such investigative action, the trial attorney must then recalculate the risk of bringing the case forward. While in the civil justice system the resident would not have to pay up front for the ability to get documents through discovery, subpoena witnesses for a deposition and make them testify about what happened under oath, the resident in an arbitration proceeding would be less likely to have the advantage of a contingent fee arrangement and would constantly have to consider his or her ability to afford to investigate his or her own case. Without the contingent fee, a nursing home resident may well find it challenging to fund a thorough investigation of his or her own case.

Awards under arbitration tend to be fewer and lower than under court agreements. In this regard, even the application of arbitration clauses to consumer-based rather than business-to-business

transactions is being called into question. In the recent case of *Berkson v. GOGO*, No. 14-CV-1199 (E.D.N.Y. April 9, 2015), the court took notice of a Consumer Financial Protection Bureau report, *Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act §1028(a)* (March 2015), which the court noted found that “arbitration clauses used by companies to avoid lawsuits take away consumers’ rights to sue in court and offer little, if any, benefit to consumers.” The study found, for example, that companies prevailed in 93% of cases resolved by arbitrators. (See *Arbitration Study* at 12 (§ 1: Introduction and Executive Summary). The report is available at [http://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf).

The consequences of lack of compensation for an injured nursing home resident can be severe. Lack of compensation for harm means that the injured person has fewer choices for care, and that many needs may go unaddressed. These may include costs for care in a better nursing home or at home. It may include health insurance co-payments or coverage of care not included under the injured person’s health insurance. It may include transportation costs and other non-medical assistance. It may also include simply the amelioration of life stresses, a partial counter-balance to the stresses caused by the incident.

**B. Mandatory Arbitration Clauses Conflict with the Fiduciary Duty that Nursing Homes Must Fulfill Toward Nursing Home Residents.**

When a nursing home accepts a vulnerable adult as a resident and undertakes that person’s care, the nursing home’s duty is more than simply a contractual one. The vulnerable resident is placing her or his trust in the nursing home for the most basic human needs of health and safety. The resident is entering the nursing home because of infirmities and thus is physically vulnerable at the time of admission to the nursing home. These infirmities may well undermine the individual’s sense of agency. The resident reasonably and justifiably relies upon the supposed superior knowledge, skill

and abilities of the nursing home and its staff. The nursing home resident relies upon the nursing home to provide care for the resident who, because of age or physical or mental condition, was not able to provide care for herself.

Because of this special relationship, the nursing home has a common law fiduciary duty to provide safe care. The New York Court of Appeals, in a case involving property transferred to a nursing home by a nursing home resident stated:

It is indisputable that... there existed between the donor and donee a fiduciary Relationship arising from the nursing home' assumption of complete control, care and responsibility too and for its resident... The acceptance of such responsibility with respect to the aged and infirm...resulted in the creation of a fiduciary relationship....

*Gordon v. Bialystoker Center and Bikur Cholim, Inc.*, 45 N.Y.2d 692, 698 (1978). As one federal court put it:

A simple contract does not establish a fiduciary relationship. A fiduciary duty develops out of the nature of the relationship between those involved. One Louisiana court has defined a fiduciary duty as follows:

One is said to act in a “fiduciary capacity” when the business which he transacts, or the money or property he handles, is not his own or for his own benefit, but for the benefit of another person, as to whom he stands in a relation implying and necessitating great confidence and trust on the part and a high degree of good faith on the other part. [*Citation omitted*]

While this Court concedes that fiduciary relationships are most often found in financial dealings, the Court can think of no relationship which better fits the above description than that which exists between a nursing home and its residents. As stated eloquently by the *Schenk* court, “one would hope at least in principle that entrusting a valued family member to the care of a business entity such as a nursing home would carry similar responsibilities” as those created by a business relationship. *Schenk v. Living Centers-East, Inc., et al.*, 917 F. Supp. 432, 437-38 (E.D.La. 1996).

*Petre v. Living Centers-East, Inc.*, 935 F. Supp. 808 (E.D.La. 1996).

Given all the ways in which a mandatory arbitration clause benefits the nursing home, but not the nursing home resident, it is clearly being put forth for the nursing home's benefit and the nursing home resident's detriment. Indeed, one must consider the larger picture of advantage versus

disadvantage. Have nursing home residents and their advocates been clamoring for blanket mandatory arbitration clauses? Have nursing home residents and their advocates been begging nursing homes to add blanket mandatory arbitration clauses to individual contracts? Or, rather, has this simply been an initiative of the nursing homes themselves, to place themselves in a position of advantage and to discourage nursing home residents from holding them accountable for harmful misdeeds?

**C. Eliminating Mandatory Arbitration in Nursing Home Contracts Will Increase Investigations of Nursing Home Neglect and Abuse, Which in Turn Can Reduce Incidents of Harm and Lead to Reimbursement to Insurers of Costs of Healthcare for Insureds from Wrongdoers.**

Despite their many efforts to regulate nursing homes, no state or federal agency can be everywhere at once. States' investigative resources are necessarily limited. In New York State, the legislative history of an important provision in its Public Health Law, §2801-d, prohibiting mandatory arbitration clauses in nursing home contracts indicates that the New York State Legislature adopted this law in part specifically because it recognized the importance of the investigative process of a civil action.

As noted above, the contingent fee is particularly important in this regard because a plaintiff's trial attorney is not only a litigator, but also an investigator. The attorney conducts an investigation to determine the merits of the case and the ability to document the facts. While this is a service for the potential client, it can also be a service to the public because it can help to identify whether or not proper procedures were followed and an appropriate level of care was provided to the patient, or whether wrongdoing has occurred. Even if the attorney determines not to take on a case, the attorney or the family can report any shortcomings in care or wrongful conduct that were uncovered to the State or federal government.

The injured nursing home resident generally is already ailing or otherwise infirm; if not, she or he would not likely be in a nursing home. The injured nursing home resident is also very likely

suffering from physical or emotional limitations due to the harmful incident that has occurred – and this is in addition to the physical or mental limitations that brought the resident to the nursing home in the first place. She or he often has either no experience or very limited experience in either investigation or litigation against nursing homes, which is a very specialized practice.

Because of such factors, the nursing home resident is in a poor position to conduct an investigation to determine what really happened, the regulations or standards of care violated, or the availability and efficacy of the evidence to prove it. If she or he has been in the nursing home for a period of time, moreover, personal resources are likely to have been depleted. The New York State Department of Health reports that the average cost for nursing home care in the state ranges, by region, from \$105,216 to \$148,689 per year, depending on the region.<sup>2</sup>

<b>Region</b>	<b>Daily Rate</b>	<b>Annual Rate</b>
Central	\$288	\$105,216
Long Island	\$407	\$148,680
New York City	\$389	\$142,116
Northeastern	\$310	\$112,968
Northern Metropolitan	\$377	\$137,460
Western - Buffalo	\$310	\$113,304
Western - Rochester	\$350	\$127,920

The nursing home resident’s assets must be spent down until they are low enough such that the resident qualifies for Medicaid. She or he is in a poor position to evaluate the strength of a case, and may fear the arbitration costs would simply add to the burdens that already exist as a result of the harm – in addition to the costs of the nursing home care already borne and to be borne – sapping whatever resources this person has left in the world.

Thus, even if the injured nursing home resident does begin an arbitration action without a contingent fee attorney, investigation is likely to suffer. Without the contingent fee, a nursing home

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<sup>2</sup> Department of Health, “Estimated Average New York State Nursing Home Rates,” [https://www.health.ny.gov/facilities/nursing/estimated\\_average\\_rates.htm](https://www.health.ny.gov/facilities/nursing/estimated_average_rates.htm) (accessed 9/11/15).

resident, as a plaintiff paying an attorney's hourly fees and thus having to "watch the clock," may well find it challenging to fund a thorough investigation of his or her own case.

Even where the nursing home resident is represented by a family member who has a "power of attorney," the arbitration process entails financial risks for a family that may already have been burdened by the costs of care for the vulnerable adult even before the nursing home admission. By the time many vulnerable adults arrive at the door of a nursing home, both their own and their immediate family's resources may have been tapped substantially for healthcare and home care expenses.

The family member bearing the responsibility of "power of attorney" also may be suffering from the emotional strain of the situation. A decision to place a loved one in a nursing home is often fraught with conflicting emotions and fears. Even the preliminary action of obtaining consent for "Power of Attorney" can be fraught with emotional turmoil as a parent may feel that a son or daughter is trying to "switch roles." The step to achieve a nursing home admission may have been preceded by many stressful efforts to care for the vulnerable adult at home while respecting the loved one's dignity and desire for self-determination, as well as the exhaustion that may occur from balancing these efforts with a job and other family responsibilities.

Without an experienced trial attorney taking the matter on at no charge unless successful, as occurs for civil court actions but not generally for arbitrations, the family member may simply not have the wherewithal to figure out what really happened; who, if anyone, was at fault; and whether it will be possible to document the incident strongly enough to make it reasonable to take the financial risk of an arbitration action.

**Under such circumstances, fewer investigations of nursing home neglect and abuse will be conducted, fewer facts will come out about neglectful or abusive care, and fewer nursing homes will be held accountable for the injuries and attendant healthcare costs that occur from neglect**

**or malpractice.** Those wrongful costs instead will be borne by the injured person, the family, and Medicaid/Medicare or private health insurers.

A prohibition on mandatory arbitration agreements would benefit public safety as well. When a nursing home resident or family member undertakes an arbitration action, the public is deprived of information because of the lack of a publicly accessible record of the proceeding. While some civil actions result in settlements that are confidential in terms, others do result in public records of the issues and decisions. In contrast, even though a string of arbitration decisions may have addressed a particular problem, neither regulators, nor legislators, nor policy analysts can review that track record. This means that a course of improper conduct can continue for many years without public light being shed upon it, putting more and more people at risk, while those who are injured, their families, and Medicaid/Medicare or health insurers rather than the wrongdoer bear the wrongful costs.

With the number of Americans aged 65 and older expected to double within the next several decades, the public information gained from skilled investigations of wrongdoing by plaintiffs' attorneys in civil actions that become a matter of public record serves a timely and ever-growing public need. *See*, "Fueled by Aging Baby Boomers, Nation's Older Population to Nearly Double in the Next 20 Years, Census Bureau Reports" (<http://census.gov/newsroom/press-releases/2014/cb14-84.html>). An aging population means more people will require the use of nursing homes and related services. Ferreting out wrongdoing and holding responsible parties accountable is necessary to protect the tens of millions of new, incoming nursing home residents. At the same time, as nursing homes become even more essential and in demand (a situation that has also been affected in recent years by mergers among nursing home companies), their bargaining power will only grow vis a vis the average consumer. The very notion of a nursing home pressing a prospective resident to sign away his or her right to access court if the nursing home physically harms the resident becomes only more unfair in the context of current trends.

**D. Prohibiting Mandatory Arbitration Clauses in Nursing Home Contracts Does Not Conflict with the Fundamental Purposes of the Federal Arbitration Act Because It Does Not Impair the Rights of Nursing Home Residents to Enter into Arbitration Agreements for the Resolution of Specific Claims**

Prohibiting mandatory arbitration clauses in nursing home contracts would not prohibit nursing home residents from submitting a claim to arbitration. It would simply act to ensure that they have the opportunity for the investigative benefits of a private civil action before the court prior to seeking arbitration. On a case by case basis, every nursing home resident would still be free to resolve their dispute with a nursing home on a specific, known claim through arbitration – and such an arbitration contract would still be enforceable under both State and federal law.

We note that New York was the first state to legalize pre-dispute arbitration clauses, and its own arbitration act, adopted in 1920, was the model for the 1925 Federal Arbitration Act.<sup>3</sup> Yet, even though its courts have shown favorability generally toward arbitration as a means for resolving disputes, the State also recognizes areas in which arbitration is undesirable, and, as noted above, its Public Health Law bans mandatory arbitration clauses in nursing home contracts. Specifically, New York's Public Health Law §2801-d states:

(7) Any waiver by a patient or his legal representative of the right to commence an action under this section, whether oral or in writing, shall be null and void and without legal force or effect;

(8) Any party to an action brought under this section shall be entitled to a trial by jury and any waiver of the right to a trial by a jury, whether oral or in writing, prior to the commencement of an action, shall be null and void, and without legal force or effect.

As with a CMS prohibition on pre-dispute mandatory arbitration, under the New York Public Health Law every nursing home resident is free to enter into an arbitration contract with a nursing home on a case by case basis, and such an arbitration contract is enforceable under both State and federal law.

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<sup>3</sup> See Geoffrey Miller & Theodore Eisenberg, *The Market for Contracts*, 30 Cardozo L Rev 2073 (2009).

This approach allows arbitration, which can be very useful in many business disputes, to be promoted in a legal and governmental context without sacrificing fundamental protection of people who are in a vulnerable health condition.

Such a CMS policy, if implemented would preserve the nursing home resident's right of choice. Consider what happens if all nursing homes in a particular state were to adopt mandatory arbitration clauses as conditions of admission. No nursing home resident would have the right to go to court to challenge neglect or abuse. There would be no choice whatsoever. Moreover, the kind of investigation that an experienced trial attorney can conduct would, in many cases, not occur, and many facts that should come to light through a public record would remain in the shadows.

It is important to recognize that wrongdoing in a nursing home setting that results in physical harm to the resident has much greater consequences than in other contractual agreements. Rather than financial loss, wrongdoing in a nursing home setting can more easily lead to severe physical impairment or untimely death, due to the nature of the vulnerable adults at risk. Given that the stakes are so high in this context, nursing home residents should be entitled to full choice of redress when the nursing home's critically important duty to a resident is breached.

### **Conclusion**

If arbitration can ever be good for nursing home residents, then let them choose it freely and with full information, in the context of a specific incident. They should not be forced, without meaningful choice, to sign away their rights before they even know how they will be treated in a particular nursing home. They should not be forced to sign away their rights before they find out that their health and safety needs will not be met. They should not be forced to sign away their rights before they find out – in the most egregious yet not unheard of instances – that when no one is looking they will be beaten, raped, or otherwise abused. Nursing home residents should never have to

exchange their access to civil court justice for admission to a nursing home, nor should they be urged to sign a blanket forced arbitration agreement on a so-called “voluntary” basis prior to the existence of a claim.

For the foregoing reasons, we urge the Center for Medicare and Medicaid Services to prohibit nursing homes from demanding or requesting mandatory arbitration agreements of nursing home residents.