Public Justice Comments
to Centers for Medicare & Medicaid Services
on Proposed Rule Amending 42 CFR § 483.70(n):
Binding Arbitration Agreements Between
Long-Term Care Facilities and Residents

October 14, 2015

I. Introduction

Incapacitated by dementia, Mary Brinson was admitted to a nursing home run by Mariner Health Care, Inc. by her sister, Ann Coleman. The nursing home staff presented Ann a stack of papers to sign, telling her only that the papers were required for admission. Included in this stack was an arbitration contract. Nobody explained to Ann what arbitration was or that the contract was optional—Ann was told only that her very ill sister would not receive care until she had signed all of the paperwork. Once admitted, Mary suffered egregious neglect: She developed severe bed sores and pressure ulcers, which became dangerously infected; she contracted pneumonia and a urinary tract infection; and ultimately she developed sepsis and died. When Ann sued the nursing home, Mariner moved to compel arbitration, arguing that Ann had agreed to pre-dispute arbitration on her sister's behalf—despite the fact that Ann had authority under state law to make only "health care" decisions for her sister, not to waive her constitutional rights.[1]

John Mitchell, only 69 years old, was recovering from a stroke at a nursing home in Dennis, Massachusetts when—one week after he was admitted—staff dropped him while moving him from his bed to a chair. A call to an ambulance was made, but then cancelled when his vital signs seemed to stabilize. Later that night, John became unresponsive. After he was rushed to the hospital, doctors discovered that the fall had caused extensive bleeding in his brain; he died a few days later. It was only after his sons hired an attorney to investigate the circumstances surrounding their father's death that they found—among dozens of pages in the admission contract signed by John's guardian—a pre-dispute arbitration agreement.[2]

Stories like these are common. According to a government study, at least one out of every three residents is harmed by the treatment they receive in nursing

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[1] *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (S.C.), *cert. denied*, 135 S. Ct. 477 (2014). Fortunately, the courts recognized that arbitration is not health care.

[2] Michelle Andrews, *Often Overlooked in Nursing Home Paperwork is an Arbitration Agreement*, Kaiser Health News, Sept. 17, 2012.

homes—and most of that harm is preventable.[3] Often, it is only after such grave harm has occurred that many people discover that they waived their constitutional right to sue the nursing home in court for every possible dispute that could ever arise—even sexual abuse, beating, and death—in favor of a secret process in which the nursing home chooses the judge, the judge is paid by the hour, very little fact-gathering is allowed, and the decision is almost impossible to appeal.

Fortunately for the families of Mary Brinson and John Mitchell, courts ruled the arbitration clauses in their contracts unenforceable. But the majority of arbitration agreements are never challenged, and many of those that are are enforced by courts—despite glaring evidence that very few residents understand the contract terms and despite abusive terms designed to skew the arbitration process even further in favor of the nursing home.

Nursing homes want pre-dispute arbitration clauses in their contracts with residents for many reasons. First and foremost, they know arbitration clauses reduce their liability. The Wall Street Journal has reported that as more and more nursing homes began including pre-dispute arbitration clauses in their contracts, the average cost to settle claims began to drop—even as claims of mistreatment were rising.[4] Each year, industry consultants report that where an enforceable arbitration agreement prevents families from suing facilities in court, claims are settled for far less.[5] In other words, arbitration clauses practically guarantee that when people are neglected, abused or worse by nursing home staff, their families will be forced to accept lower monetary compensation for their losses—even when the loss is death.

While nursing homes frequently claim that doing away with costly lawsuits will enable them to invest more dollars in patient care, the opposite has been proven to be true. Studies have shown that staffing levels at for-profit facilities fell below minimum requirements at the same time that incomes and executive salaries were soaring. Likewise, recent analysis by the New York Times and Pro Publica has shown that when nursing homes are able to insulate themselves from liability,

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[3] Ina Jaffee, *A Third Of Nursing Home Patients Harmed By Their Treatment*, NPR (Mar. 5, 2014) (discussing findings of national report on nursing homes released by the Office of the Inspector General of the U.S. Department of Health and Human Services).

[4] Nathan Koppel, Nursing Homes, in Bid to Cut Costs, Prod Patients to Forgo Lawsuits, Wall St. J. (Apr. 11, 2008).

[5] Aon Risk Solutions, *2013 Long Term Care General Liability & Professional Liability Actuarial Analysis* at 10 ("Average total cost for claims resolved with arbitration agreements in place is 16% lower than for claims resolved without arbitration agreements in place."); Aon Risk Solutions, *2012 Long Term Care General Liability & Professional Liability Actuarial Analysis* at 12 ("Claims settled under valid [arbitration] agreements are 21% less costly than other claims."); Aon Global Risk Consulting, *The American Health Care Association Special Study on Arbitration in the Long Term Care Industry* at 4, June 16, 2009 ("Average provider expenses for outcomes subject to [arbitration] agreements tend to be 41% lower than outcomes that are not subject to [arbitration] agreements.").

they put profits ahead of care by decreasing staffing. Indeed, a prominent nursing home advisor openly recommend adopting arbitration clauses as a means of addressing low staffing rates.

In addition to reducing the costs of liability, arbitration clauses offer nursing homes other advantages. As an industry consultant pointed out, arbitration clauses give facilities "significant control over the arbitrator" who "decides the fate of the facility."[6] This makes sense: arbitration providers are typically for-profit entities with an incentive to earn repeat business from the party that drafts the contract and chooses the provider—in this case, the nursing home. If a nursing home is dissatisfied with the results of a particular arbitration, it can simply make sure that the arbitrator never handles another claim brought against it, or even re-write its contracts to choose a different arbitration provider altogether.

Arbitration clauses also benefit nursing homes by enabling them to keep everything—the claims, the proceedings, and the results—secret.[7] Unlike proceedings in civil court, which are presumptively open to the public, arbitrations can be kept confidential in order to ensure that the public, press, regulators, and residents and their families never learn of the conduct that led to the dispute.

Furthermore, arbitrators are not bound by the law and are not constrained by prior decisions made by courts or other arbitrators—so even if the nursing home loses one arbitration, that won't impact future cases. In addition, arbitration clauses can also be used to bar class actions, ensuring that nursing homes that cut corners can do so without the risk of systemic reform through litigation. Nursing homes also commonly insert terms into their arbitration clauses that further skew the process in their favor, including damages limitations, reduced statutes of limitation, terms requiring arbitration in distant venues. While some courts have struck down particularly egregious terms, it is increasingly difficult for plaintiffs to fight arbitration clauses in court. Meanwhile, even if a claim never goes to arbitration, nursing homes benefit: the mere presence of an arbitration clause in a contract has been proven to deter victims from bringing valid claims—meaning more violations of law will simply go unchallenged.

The Centers for Medicare and Medicaid Services (CMS) has an opportunity to have a profound impact on the quality of care received at nursing homes with a single action. By restricting federal funding to facilities that eliminate pre-dispute arbitration clauses from their contracts, CMS will return to the nation's most vulnerable population their basic constitutional rights and enable them to hold nursing homes accountable in cases of abuse and neglect. Restoring access to the courts will also deter future mistreatment and make it more difficult for nursing

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[6] Omnisure, *Reducing Risk Through Arbitration Agreements in Long Term Care* 3 (Aug. 2014), at www.omnisure.com/wp-content/uploads/2014/08/ArbitrationAgreementsWhitePaper-for-LTC.pdf ("Reducing Risk Through Arbitration Agreements").

[7] *Id.* (listing secrecy as an advantage).

homes to keep egregious conduct secret. All of this will help CMS fulfill its mission of protecting nursing home residents.

Finally, banning pre-dispute arbitration clauses will not unduly burden the nursing home industry. Nursing home advocates frequently argue that arbitration provides benefits to both parties. If that is true, both residents and facilities will be free to agree to arbitrate any and all disputes they choose, after those disputes arise.[8] And to the extent lawsuits in court are still filed, and being subject to the civil justice system costs nursing homes more than the regime of predispute arbitration clauses, those costs can be avoided by investing in measures that make lawsuits unnecessary: adequate staffing and proper care.

For these reasons, and as explained in more detail below, Public Justice strongly urges CMS to restrict funding to nursing homes that eliminate pre-dispute arbitration clauses from their contracts with residents and their families.

II. Statement of Interest of Public Justice

Public Justice is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation and is dedicated to pursuing justice for the victims of corporate and government abuse.[9] Public Justice prosecutes cases designed to advance consumers' and victims' rights, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless. To further its goal of preserving access to justice for consumers, employees, and other persons harmed by corporate misconduct, Public Justice has initiated a special project devoted to fighting abusive pre-dispute arbitration clauses.

In connection with our project, Public Justice has litigated, investigated, researched, written and advocated about pre-dispute arbitration issues far more extensively than any other consumer law firm or advocacy organization in the U.S.

Public Justice has represented individuals in a large number of cases challenging abusive pre-dispute arbitration clauses, in state and federal courts, for

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[8] CMS's proposed rule appears to be based on the mistaken assumption that "prohibiting binding arbitration agreements . . . would remove the choice to agree to binding arbitration from the resident." 80 Fed. Reg. 42211. But the Agency could (and should) prohibit only *predispute* arbitration agreements—those that residents must sign before they know whether they will have any legal dispute with the facility—while preserving the existing rights of both residents and facilities to mutually agree to arbitrate disputes *after* they arise.

[9] The Public Justice Foundation is a 501(c)(3) non-profit charitable public foundation that supports Public Justice, P.C., the law firm. For purposes of these Comments, both organizations are referred to interchangeably as Public Justice.

more than a dozen years. Among the cases that Public Justice has won as lead or co-lead counsel are *Newton v. American Debt Services*, No. 12-155549, 549 Fed. Appx. 692 (9th Cir. 2013) (striking down arbitration clause that (1) required California consumers to arbitrate their claims in Tulsa, Oklahoma; (2) gave the defendant the sole say in choosing the arbitrator; (3) limited the plaintiff's statutory damages; and (4) subjected the plaintiff to the possibility of having to pay for the defendant's attorneys' fees in violation of California law); *Lee v. Intelius, Inc.*, 705 F.3d 1122 (9th Cir. 2013) (consumers did not enter into contract to arbitrate by clicking through a website to purchase a product); *Murphy v. DirecTV*, 724 F.3d 1216 (9th Cir. 2013) (non-party could not enforce co-defendant's arbitration clause against consumers); *Nagrampa v. Mailcoups, Inc.,* 469 F.3d 1257 (9th Cir. 2006) (en banc) (unconscionable to require California resident to arbitrate in Boston, court may consider fact that contract is adhesive even though that applies to the entire contract); *Lewallen v. Green Tree Servicing, LLC*, 487 F.3d 1085 (8th Cir. 2007) (finding waiver of right to compel arbitration by a lender); *Larkin v. New Century Auto Sales Inc.,* No. 12-13917, 2014 WL 29119 (E.D. Mich. Jan. 3, 2014) (stand-alone arbitration clause in car dealer's contract not validly formed under Michigan law); *Sgouros v. TransUnion Corp.*, No. 14 C 1850, 2015 WL 507584 (N.D. Ill. Feb. 5, 2015) (consumers did not agree to Service Agreement containing arbitration clause by clicking button to accept different terms on web page); *Carideo v. Dell, Inc.*, 2009 WL 3485933 (W.D. Wash. 2009) (where selection of National Arbitration Forum was an integral term of an arbitration clause, the court struck the entire clause, rather than appoint a substitute arbitrator); *FIA Card Services, N.A. v. Weaver,* 62 So.3d 709 (La. 2011) (debt collector could not confirm arbitration award against consumer without proving consumer agreed to arbitration); *Rivera v. American Gen. Fin. Servs., Inc.*, 150 N.M. 398 (2011) (where selection of National Arbitration Forum was an integral term of an arbitration clause, the court struck the entire clause, rather than appoint a substitute arbitrator); *Gibson v. Nye Frontier Ford, Inc.*, 205 P.3d 1091 (Ak. 2009) (selective appeal provision unconscionable; case would only be sent to arbitration if employer would pay all substantial costs of arbitration); *Cordova v. World Fin. Corp.*, 208 P.3d 901 (N.M. 2009) (one-sided arbitration provision unconscionable); *Raymond James Fin. Servs., Inc. v. Saldukas*, 896 So.2d 707 (Fl. 2005) (broker waived right to compel arbitration, even though investor proved no prejudice); *Toppings v. Meritech Mortgage*, 569 S.E.2d 149 (W.Va. 2002) (where a lender's arbitration clause designates an arbitration forum that is paid through a case volume fee system, and the arbitration forum's income is dependent on continued referrals from the creditor, this so impinges on neutrality and fundamental fairness that the clause is unconscionable and unenforceable); *Wells v. Chevy Chase Bank, F.S.B*, 768 A.2d 620 (Md. 2001) (credit card issuer's arbitration clause not binding on consumer, FAA did not preempt state procedural law of appealability); *Betts v. Fastfunding Co.*, 60 So.3d 1079 (Fla. Dist. Ct. App. 2011) (where National Arbitration Forum dismissed case based upon its own rules, without considering applicable substantive law, the arbitrators' decision was vacated).

We have been counsel in two cases in the U.S. Supreme Court involving challenges to pre-dispute arbitration clauses: *Rent-A-Center West v. Jackson*, 130 S. Ct. 2772 (2010); and *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006). We were counsel in at least half a dozen cases where the U.S. Supreme court denied petitions for *certiorari* where the lower court had struck down abusive arbitration clauses.

Public Justice has also successfully fought enforcement of arbitration clauses in the nursing home context. In *Mariner Health Corp. v. Coleman*, 755 S.E.2d 450 (S.C.), *cert. denied*, 135 S. Ct. 477 (2014), we defeated a petition for *certiorari*, preserving a decision by the South Carolina Supreme Court that the authority conferred on a nursing home resident's relative under the state health care act did not extend to agreeing to arbitration. In *Addison v. Lochearn Nursing Home LLC*, 983 A.2d 138 (Md. 2009), we represented an elderly, ill woman against a nursing home that had set in motion a predatory real estate transaction designed to strip her of all the equity in her home; when the nursing home tried to compel arbitration of her claims, the trial court held that the woman's claims did not fall within the scope of the arbitration clause, and we defended that decision on appeal. Public Justice attorneys have also written articles on how to challenge abusive arbitration clauses in nursing home contracts. Leslie Bailey and F. Paul Bland, Jr., *Combating Abusive Arbitration Clauses in Nursing Home Contracts,* Trial Briefs (Aug. 2008).

Public Justice has also been counsel in a number of cases where courts struck down class action bans in arbitration clauses. A number of these cases have been overturned or held to at least partly be abrogated as a result of the U.S. Supreme Court's decision in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), and others are the subject of ongoing litigation. As evidence of Public Justice's depth of experience and expertise, though, cases where we were counsel include: *Homa v. Am. Express Co.*, 558 F.3d 225 (3d Cir. 2009); *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003); *Masters v. DirecTV, Inc.*, No. 08-55825, 2009 WL 4885132 (9th Cir. Nov. 19, 2009); *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003); *Picardi v. Dist. Ct.*, 251 P.3d 723 (Nev. 2011); *Schnuerle v. Insight Commc'ns.*, 2010 WL 5129850 (Ky. 2010), *op. withdrawn and superseded on reh'g*, 376 S.W.3d 561 (2012); *Scott v. Cingular Wireless*, 161 P.3d 1000 (Wash. 2007); *Fiser v. Dell Computer Corp.*,188 P.3d 1215 (N.M. 2008); *Muhammad v. County Bank of Rehoboth Beach, Del.*, 912 A.2d 88 (N.J. 2006); *Discover Bank v. Super. Ct.*, 36 Cal. 4th 148 (2005); *McKenzie v. Betts*, 55 So.3d 615 (Fla. Dist. Ct. App.), *decision quashed*, 112 So.3d 1176 (Fl. 2013); *Felts v. CLK Mgmt, Inc.*, 254 P.3d 124 (N.M. Ct. App.), *aff'd on alternative grounds*, No. 33,011 (N.M. Aug. 23, 2012).

In addition to representing consumers directly, Public Justice has also assisted a large number of consumer attorneys, state government attorneys, and consumers with advice and input on how and whether to fight forced arbitration clauses. Our attorneys have responded to several thousand such requests for assistance over more than a dozen years. We have also presented on issues

involving pre-dispute arbitration at more than 150 educational programs in over 30 states, always talking to participants about what they are seeing in their practices.

Public Justice does not lobby and generally takes no position in favor of or against specific proposed legislation. We do, however, respond to informational requests concerning legislation. On a number of occasions, we have been invited to testify before legislative and administrative bodies on issues related to pre-dispute arbitration, because of our extensive expertise in that issue. Accordingly, Public Justice attorneys have testified at a number of Congressional hearings about pre-dispute arbitration clauses. *E.g.,* "S.1782, The Arbitration Fairness Act of 2007," Subcom. on the Constitution of the U.S. Senate Judiciary Committee, Dec. 12, 2007; "Arbitration: Is It Fair When Forced," U.S. Senate Judiciary Committee Oct. 13, 2011; "Arbitration or 'Arbitrary': The Misuse of Arbitration to Collect Consumer Debts," Subcommittee on Domestic Policy of the U.S. House Committee on Oversight and Government Reform; "Mandatory Binding Arbitration Agreements: Are They Fair to Consumers?," Subcom. on Commercial And Administrative Law of the U.S. House Judiciary Committee. Public Justice attorneys have also testified in a number of state legislatures on these issues. *E.g.,* Testimony on Assembly Bill No. 381, Nevada Legislature, March 27, 2009; Hearing on House Bill No. 322, The Fairness in Arbitration Act, Montana Legislature, February 11, 2009; Hearing on B-17-0050, "Arbitration Amendments Act of 2007," D.C. Council, March 23, 2007. Public Justice attorneys have also testified before administrative agencies at both the federal and state level. *E.g.,* Public Hearing, *Arbitration Clauses in Insurance Contracts*, National Association of Insurance Commissioners Consumer Protection Working Group, New York City, June 21, 2003; Roundtable, *Debt Collection: Protecting Consumers*, Federal Trade Commission, Chicago (Aug. 6, 2009); Joint Workshop on Alternative Dispute Resolution for Online Consumer Transactions, Federal Trade Commission (Spring 2000). Public Justice also submitted comments in 2012 and 2013 to the Consumer Financial Protection Bureau in response to the agency's request for information for its study of pre-dispute arbitration agreements.

A number of current and former Public Justice attorneys are the principal authors of *Consumer Arbitration Agreements: Enforceability and Other Issues* (7th Ed. 2014), co-published by the Public Justice Foundation and the National Consumer Law Center. This treatise collects and discusses nearly every case in which any court has ever refused to enforce an arbitration cause for any reason. In addition to this book, Public Justice attorneys have also published a number of articles on the topic. *E.g.*, Leslie A. Bailey and F. Paul Bland, Jr., *A choice-of-law sleight of hand*, TRIAL (Jan. 2010); F. Paul Bland, Jr. and Claire Prestel, *Challenging Class Action Bans in Mandatory Arbitration Clauses*, 10 Cardozo J. of Conflict Reg. 369 (2009); F. Paul Bland and Tami Alpert, *Banning class action bans*, TRIAL (Sept. 2008); James Sturdevant and F. Paul Bland, *Arbitration Clauses in Mortgage Contracts*, VERDICT (National Coalition of Concerned Legal Professionals (April 2008); F. Paul Bland, Jr., *Hash and Re-Hash: Why Courts Should Not Re-Write Legally Defective Arbitration Clauses*, Consumer Advocate

(National Association of Consumer Advocates) (Nov.-Dec. 2002); F. Paul Bland, *Is That Arbitration Clause Unconscionable? PROVE IT!*, The Consumer Advocate (National Association of Consumer Advocates) (July-Aug. 2002); F. Paul Bland, *Taking Courts Out of the Equation: The Push for Mandatory Arbitration*, CAOC Forum (Sept. 2001); F. Paul Bland, *Resisting Corporate Efforts to Impose Mandatory Arbitration on Consumers*, Journal of Texas Consumer Law (Spring 1999).

III. Pre-dispute Arbitration Clauses Reduce Nursing Homes' Liability for wrongdoing, Which Leads to Reduced Levels of Resident Care.

Nursing homes want arbitration clauses because they lower liability costs. And research shows that when the risk of liability decreases, the quality of care also goes down. Lawsuits, in addition to providing justice for victims, can uncover patterns of misconduct, force facilities to change harmful practices, deter future wrongdoing, and ultimately create an incentive for facilities to improve care. Private lawsuits also fill important gaps in government enforcement schemes. By permitting victims to have access to the civil courts when harm occurs, CMS would be furthering its mandate of protecting vulnerable residents.

A. Arbitration clauses reduce nursing homes' liability.

Nursing home industry insiders freely admit that the number one reason they want pre-dispute arbitration clauses is to reduce their legal liability. The Wall Street Journal reported in 2008 that as more and more nursing homes began including pre-dispute arbitration clauses in their contracts, the average cost to settle claims began to drop—even as claims of mistreatment were rising.[10] Industry consultants report that the cost to a nursing home of settling a claim brought by a resident drops by 20 to 40 percent when the contract has an arbitration clause.[11] This means that families whose loved ones are neglected, abused, or worse by nursing home staff are now forced to accept lower monetary compensation for their losses—even when that loss is a death.

Industry consultants have even touted arbitration as a solution to understaffing issues. As one advisor explains, "it's not surprising that nursing homes sometimes find themselves targeted in lawsuits. . . . Blame staffing levels.

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[10] Koppel, *supra* n. 4.

[11] Aon Risk Solutions, *2013 Long Term Care General Liability & Professional Liability Actuarial Analysis* at 10 ("Average total cost for claims resolved with arbitration agreements in place is 16% lower than for claims resolved without arbitration agreements in place."); Aon Risk Solutions, *2012 Long Term Care General Liability & Professional Liability Actuarial Analysis* at 12 ("Claims settled under valid [arbitration] agreements are 21% less costly than other claims."); Aon Global Risk Consulting, *The American Health Care Association Special Study on Arbitration in the Long Term Care Industry* at 4, June 16, 2009 ("Average provider expenses for outcomes subject to [arbitration] agreements tend to be 41% lower than outcomes that are not subject to [arbitration] agreements.").

Or more accurately, blame the lack of them. Put another way, the meager staffing levels seen at many facilities practically invite lawsuits. And it hardly helps that more and more data exposing such levels is becoming available by the day." Among the top "common sense practices" recommended to nursing homes facing potential lawsuits: "Include an arbitration agreement in your admission packet."[12]

Other risk management consultants openly advise nursing homes to adopt arbitration clauses to "limit exposure and manage risk when defending claims" and argue that "[b]y lowering defense costs and damage awards, the facility stands a better chance of keeping money that was originally intended for other purposes."[13] What other purposes? Nursing homes would like us to believe that when they can avoid legal accountability, they invest the money they save into improving resident care—and that, by the same token, if they are prevented from imposing pre-dispute arbitration clauses, they will have no choice but to reduce access to and quality of care. For example, the president of the American Health Care Association, the primary industry trade group, said that, "Rising liability costs drive up the cost of doing business and not only threaten access to care but could ultimately cost jobs. . . . We will continue to look for solutions, such as arbitration agreements . . . ."[14]

According to a recent analysis by Families for Better Care, however, increased profits do not always correlate with increased access to quality care—in fact, the opposite was found to be true. The study examined the incomes of several for-profit, publicly traded nursing homes in 2012, and found that during the same time that their operational incomes surged by as much as 398%, and executive salaries "ballooned," staffing levels at facilities were falling "dangerously low."[15] For example, at national chain Kindred Healthcare, consolidated revenues rose 19% in the second quarter of 2012, to $1.5 billion; and CEO compensation jumped 15%, to almost $6.5 million. The company boasted that its "short-term Medicare rate outlook is much better," referring to the rate at which facilities are reimbursed for caring for Medicare-eligible residents. But during the same time period, 39% of Kindred facilities were rated "below" or "well below" minimum staffing requirements. Skilled Healthcare—the defendant in the *Lavender* case described below—posted revenues of $217.4 million in the same quarter, with CEO compensation clocking in at $2.1 million. But still 16% of its facilities were rated below minimum staffing requirements.

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[12] O'Connor, *The lawsuits are coming!*, McKnight's Long Term Care News (July 24, 2015).

[13] Reducing Risk Through Arbitration Agreements, *supra* n. 6, at 2-3.

[14] Elizabeth Leis Newman, *Liability costs climb for long-term care, analysis finds*, McKnight's Long-Term Care News (Nov. 22, 2013).

[15] Business Wire, Q2 2012: Nursing Home Profits 'Bountiful'; Executive Salaries Balloon 15%; Staffing Levels 'Dangerously Low', Sept. 12, 2012.

Nursing homes are extremely profitable. According to industry research, the nursing home business is a $130 billion industry that is set to pull in $10.4 billion in profit in 2015.[16] Its annual growth from 2015 to 2020 is estimated to be 5.9%, with industry revenue projected to grow 4.9% in 2015 alone.[17] Even while the rest of the economy has been stagnant, nursing home profits continue to rise as the country ages, with the number of adults age 65 and older expected to grow 3.4% per year on average.[18]

Medicaid and Medicare payments account for about three-quarters of industry revenue.[19] Over 92% of nursing homes are certified to provide services under both Medicare and Medicaid.[20] Meanwhile, 60% of the market is now occupied by for-profit entities, with facilities increasingly being purchased by private equity groups.[21] This represents a remarkable funneling of public dollars into private wealth—even more reason it is essential to retain public oversight of the industry via the civil courts.

B. When nursing homes are insulated from liability, they prioritize profits over quality of care.

A New York Times investigation demonstrates that when nursing homes can insulate themselves from liability, resident care suffers. The Times analyzed 1,200 nursing homes purchased by large private investment groups and 14,000 other homes. It found that when a group of large investment firms bought 49 nursing homes in Florida, they took two key steps to increase their profits: First, the investors reduced expenses by cutting the number of clinical registered nurses on staff in half, slashing nursing supply budgets, cancelling resident activities and other services, and increasing occupancy. And second, the investors set up a web of shell companies designed to insulate the new owners from liability by making it impossible for regulators or residents to figure out who was actually controlling the facilities.[22]

In the first three years after the acquisition, 15 people in a single home in Tampa, the Habana nursing home, died as a result of allegedly negligent care. Regulators cited the home for dangerous conditions and warned that staffing had fallen dangerously below what was required by law, but they were unable to levy

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[16] IBISWorld Industry Report 62311: Nursing Care Facilities in the US, at 4 (June 2015) ("IBISWorld Report on Nursing Care Facilities").

[17] *Id.* at 5.

[18] IBISWorld Report on Nursing Care Facilities, *supra* n. 8, at 5.

[19] *Id.* at 8.

[20] *Id.* at 19.

[21] *Id.*

[22] Charles Duhigg, *At Many Homes, More Profit and Less Nursing*, N.Y. TIMES, Sept. 23, 2007.

"chainwide fines" because the complex corporate structure made it impossible to tell whether multiple facilities were owned by a single company. The ownership and management of Habana, for example, was spread "among 15 companies and five layers of firms," and on paper each facility appeared to be owned by a separate company.

After her mother died at Habana from a large bedsore that had become infected with feces, one woman filed a lawsuit against the facility. But her attorney said that even if she won her case, she would probably never be able to hold the investors accountable. The investment group, Formation, has successfully argued in other lawsuits that it is not a nursing home operator and thus not legally responsible for what happens to residents.

Meanwhile, Formation and the other investors profited handsomely from their acquisitions, taking in millions a year from the facilities and $3.5 million the first year from the Habana nursing home alone. On average, the Times reported, nursing homes owned by large investment companies were 41 percent more profitable than the average facility—but the typical number of serious health deficiencies for this group of investor-owned homes was almost 19 percent higher than the national average.

This is not an isolated problem; thousands of nursing homes across the country have been snapped up by large Wall Street companies in search of profits. The Times reported that as of 2007, private investment groups had agreed to buy 6 of the 10 largest nursing home chains in the country. And in 60 percent of homes purchased, managers cut the nursing staff to the point where they were providing only one clinical registered nurse for every 20 residents. Predictably, between 2000 and 2006, quality-of-care deficiencies rose at every large nursing home chain after it was acquired by a private investment group.

One Formation executive boasted that before the investors saved the day, "[l]egal and regulatory costs were killing this industry." Rather than improve the quality of care and address the underlying problems that lead to lawsuits and fines, the response of the nursing home management was to look for ways to make themselves judgment proof so that they could continue to provide the bare minimum in care and get away with it.

C. Lawsuits provide justice for nursing home residents and their families, help address systemic problems, and ultimately improve standards of care.

1. Case study: the *Skilled Healthcare* class action.

In 2011, a group of attorneys won a landmark $677 million jury verdict against Skilled Healthcare Group, Inc., a for-profit corporation that owns and operates nursing homes throughout the U.S. The lawyers represented a class of approximately 32,000 current and former nursing home residents and their families in *Lavender v. Skilled Healthcare Group*. It was the first class-wide understaffing case to be tried to verdict—and the largest ever verdict against a nursing home

chain. Skilled Healthcare was the fifth-largest nursing home chain in the country, and since going public in 2007 it had reported an average annual profit of more than $120 million.

But even with such hefty assets, for years the company wasn't employing enough staff to provide the care needed by its elder residents: overstretched employees working double and triple shifts simply could not get to all the residents. Some residents weren't given their medications or pain killers in a timely manner; others weren't provided a shower or food; and some incontinent patients were left to lie in their own waste.

The attorneys filed the class action lawsuit in May 2006, contending that 22 California nursing homes owned by Skilled Healthcare had failed to provide adequate staffing for its residents over a period from 2003 to 2010, in violation of California health and safety laws. The class sought damages of up to $500 per violation per patient day, as well as injunctive relief requiring the nursing home chain to improve its staffing levels. The lawyers gathered evidence showing that Skilled Healthcare had violated adequate staffing requirements for 9,617 days, translating to 1,178,090 patient days.

More than three years elapsed before the case went to trial in 2009. The lawyers had to slog through numerous procedural fights as the defense did all it could to slow the case to a crawl. Over 120 motions were filed; the plaintiffs' lawyers prevailed on all of them. The team defeated a motion to decertify the class, motions to change venue, and motions to disqualify the trial judge on alleged bias, among others.

The six-attorney team also prevailed on a dozen appellate writs and two appeals filed by the defendant. By the end of the case, they had logged nearly 29,000 hours and had incurred more than $1.7 million in out-of-pocket expenses.

At the trial, which took seven months, 150 witnesses testified and over 5,000 exhibits were introduced. Many nursing home residents and their family members testified. The attorneys demonstrated that when the state's Department of Public Health (DPH) issued staffing deficiency warnings against Skilled Healthcare, the company ignored them. Indeed, internal e-mails showed that the DPH warnings were treated as a running joke among Skilled Healthcare's corporate executives.

The trial team demonstrated that Skilled Healthcare's decision to understaff its facilities was made at the highest levels of its corporate ladder. The strategy paid off: In July 2011, a Humboldt County jury awarded the class a historic $677 million, finding that Skilled Healthcare had failed to maintain the state-mandated 3.2 nursing hours of "direct patient care" per patient per day at *all* 22 of its facilities over more than six years.

Because the amount of the jury's award far exceeded the defendant's net worth, the parties entered into mediation after trial. Ultimately, the court approved a settlement requiring the defendant to pay $50 million to the class and to spend

$12.8 million over a two-year period to improve staffing levels in its nursing homes, which includes paying for a court-appointed monitor to ensure compliance.

The *Lavender* verdict had a major impact on the nursing home industry, prompting homes to increase the level of care they provide and re-evaluate their staffing levels. The case also filled an important void for thousands of citizens that the government lacked the resources to protect. There is no doubt that the case could never have been brought in arbitration.

While class actions like the *Lavender* case are not common, a significant jury verdict in a single injury or death case can also have a big impact on the industry. One need only search "nursing home jury verdict" online to find numerous examples of nursing homes being held accountable in the civil justice system for all kinds of heart-wrenching negligence and abuse, from failing to respond to an 87-year-old woman's calls for help, after which she fell and broke her hip;[23] to failing to protect an 81-year-old man from being viciously beaten by his nursing home roommate, who had been involved in 30 assaults prior to moving in with the victim;[24] letting a 90-year-old woman languish with a festering pressure sore on her back, acute appendicitis, and a urinary tract infection so severe it had entered her blood;[25] and causing the death of a 73-year-old man, succumbed after being bitten by hundreds of fire ants while recuperating from surgery, bedridden, in a Florida nursing home that had had previous ant infestations.[26] In each of these cases, a civil jury heard the evidence and decided what amount of money it was appropriate to make the nursing home pay.

As these cases show, sometimes a lawsuit—or an award of punitive damages—is the only way to force a nursing home to change its ways. By making it more costly to break the law than it would be to cut corners, the legal system can create incentives for companies to do the right thing and impose penalties to deter future misconduct.

2. Private enforcement is an essential counterpart to government regulation.

Although the nursing home industry is subject to significant federal and state regulation, government agencies alone cannot adequately protect residents and deter mistreatment, nor can they fully compensate families for their losses. Therefore, residents and their families must have access to the civil justice system. Private lawsuits compliment rather than interfere with agency authority.

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[23] Michael Gibson, *$4,000,000 Nursing Home Jury Verdict.*

[24] Charles B. Roberts & Associates, *Recent Jury Verdicts/Settlements in Nursing Home Cases Around the Country.*

[25] Assoc. Press, *Jury Awards $14M in Death of Nursing Home Resident*, July 24, 2014.

[26] William Vitka, *Nursing Home Ant-Bite Death Payout*, CBS News, March 12, 2005.

CMS has extremely broad oversight responsibilities, and at least 92 percent of all nursing homes are certified by CMS to provide Medicare and Medicaid care.[27] However, it is simply not possible for CMS to keep an eye on every nursing home all the time. For most facilities, enforcement of minimum standards of care consists of a visit by a state agent just once every 12 months. During the rest of the year, there very little oversight at all.

Despite CMS' broad authority, the agency has not always responded to egregious lapses in care with sufficient measures. For example, after one Texas nursing home resident died from choking on a cookie right next to the nurse's station, CMS levied a mere $9,500 fine.[28] And according to an examination of CMS enforcement data by state, there is no correlation between the number of serious deficiencies per nursing home and penalties such as fines and payment suspensions.[29]

A recent General Accounting Office report found that existing CMS enforcement efforts had not succeeded in preventing some nursing homes from repeatedly harming their residents.[30] The GAO focused on homes that had repeatedly been cited for failing to adequately protect the safety and health of—and in some cases, abusing—their residents. Deficiencies noted included "failure to provide necessary services for daily living," "inadequate treatment or prevention of pressure sores," and "employing convicted abusers." The GAO found that despite fines and citations by CMS, many homes continued to cycle in and out of compliance without any indication that the sanctions imposed by CMS deterred wrongful conduct. Thus, homes continued to operate despite patterns of terrible abuses. In one home, a resident was found to have bruises on the inner thighs and arms and appeared to be a victim of abuse; not only did staff not report this to the local police, but they bathed the resident prior to her assessment for sexual abuse, removing critical evidence.[31] The home was not shut down by CMS, but was closed voluntarily, apparently as a result of a merger. The GAO report concluded that due to "systemic weaknesses," CMS sanctions were failing to protect the "safety and security of vulnerable residents."[32] In its response, CMS noted that some of the

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[27] IBISWorld Report on Nursing Care Facilities, *supra* n. 8, at 19.

[28] Charles Ornstein & Lena Groeger, *Two Deaths, Wildly Different Penalties: The Big Disparities in Nursing Home Oversight*, ProPublica (Dec. 17, 2012).

[29] See ProPublica, Nursing Home Inspect: State-By-State Breakdown (last updated July 2015).

[30] GAO-07-241, Nursing Homes: Efforts to Strengthen Federal Enforcement Have Not Deterred Some Homes from Repeatedly Harming Residents (March 2007).

[31] *Id.* at 38.

[32] *Id.* at 52.

GAO's recommendations could not be implemented without endangering other programs due to lack of resources and budget cuts.[33]

Meanwhile, the state-level agencies CMS relies on are too often failing to investigate and pursue claims of abuse and misconduct. According to a recent report released by the Center for Investigative Reporting, the failure of California regulators to adequately investigate and pursue claims of abuse and misconduct by nursing assistants and health aids is "putting the elderly, sick, and disabled at risk."[34] The regulators that are charged with protecting vulnerable patients in nursing homes and assisted living facilities are either conducting "cursory and indifferent" investigations, or simply closing cases without taking any action at all.

For instance, 95-year old Elsie Fossum was found one morning in July 2006 lying in a pool of blood, her arm broken and her face described by the registered nurse in charge at the nursing home as "beaten to a pulp." Within a few weeks, Elsie died as a result of the wounds she'd suffered. A nurse suspected one of the nursing assistants, and a report was filed with the Department of Health. But according to KQED, the agency shelved the case for 6 ½ years and finally closed it without any investigation.

The CIR report paints a grim picture. There are approximately 160,000 nursing assistants and in-home health aids working at hospitals, nursing homes, and mental health facilities throughout California. As of 2009, the backlog of reported abuse and theft cases was so high that is was deemed a "crisis." But rather than prioritize investigating, according to the report, "the state Department of Public Health quietly ordered investigators to dismiss 1,000 pending cases … often without a single phone call." While the number of cases closed without action is on the rise, the main tool by which the agency is supposed to protect patients from abuse—revoking the licenses of nursing home employees—has plummeted in recent years, leaving the abusers at their jobs, where they can continue to commit more horrific abuse. A former Public Health director warned: "do not count on the government taking care of you."[35]

These facts are cited not to place blame on government agencies, but rather to underscore how crucial it is that victims of abuse and neglect retain the right to seek redress in the civil justice system when loved ones are harmed by nursing home neglect—or worse. If nursing homes are permitted to continue to impose pre-dispute arbitration clauses, private enforcement will ultimately disappear.

In sum, lawsuits have been proven to achieve systemic reform and motivate nursing homes to change harmful practices and maintain minimum levels of

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[33] *See id.* at 74-75.

[34] Ryan Gabrielson, Center for Investigative Reporting, *Quick dismissal of caregiver abuse cases puts Calif. patients at risk* (Sept. 9, 2013).

[35] Center for Investigative Reporting, *supra* n. 34.

resident care. When nursing homes are able to avoid the risk of liability, whether by disguising their corporate identity or by imposing arbitration clauses, the quality of care suffers. Arbitration clauses reduce liability. Thus, if nursing homes are permitted to continue opting out of the civil justice system, we can expect to see lower levels of care, higher numbers of preventable injuries and deaths. By conditioning federal funding on the elimination of these get-out-of-jail-free clauses, CMS can ensure that nursing homes violating the law will face consequences—and that levels of care will increase accordingly.

IV. Pre-Dispute Arbitration Clauses are Detrimental to Residents, Their Families, and the Public.

A. Pre-dispute arbitration clauses imposed by nursing homes on residents are never truly "voluntary."

Nursing home industry representatives often argue that they use only "voluntary" arbitration agreements. For example, Greg Crist, a spokesman for industry trade group the American Health Care Association (AHCA) has claimed that his group encourages nursing homes to use only "voluntary, rather than mandatory" arbitration agreements, which he says "don't carry the same pressure as a mandatory agreement might."[36] Indeed, AHCA has gone so far as to say it "believes that consumers *should not be deprived of their ability to choose the method by which they resolve disputes*, nor should they be denied access to alternative venues to settle claims."[37] AHCA and other industry advocates are using the term "voluntary" to refer to all pre-dispute arbitration agreements imposed by nursing homes on residents where there is some language somewhere indicating that the resident has the option not to agree to arbitration. But even a cursory look at these contracts makes clear that they are anything but "voluntary."

First, the nature of pre-dispute arbitration is that once the agreement is signed, *arbitration is mandatory* for all disputes that are covered by the clause (which usually means every dispute a resident could possibly have)—and, in most cases, even after the contractual relationship ends. As one judge explained:

> The agreement is repeatedly described as 'voluntary,' and the resident or resident's agent is assured that the 'signing' of this agreement is not 'mandatory.' However, if voluntarily signed, it creates mandatory, binding arbitration subject to extremely limited rights of appeal. It is not a voluntary agreement in the sense that the

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[36] Lisa Scheckner, *An end to mandatory arbitration agreements in nursing homes?*, Modern Healthcare, July 17, 2015.

[37] AHCA, *Issue Brief: Oppose Efforts to Limit the Use of Pre-Dispute Arbitration in Long Term Care*, Jan. 1, 2013.

> parties decide whether to use the program only after a claim has arisen; it applies mandatorily to all future disputes.[38]

Second, the circumstances surrounding admission to a nursing home are uniquely stressful. "Admitting a loved one, or being admitted to a nursing home, is often an emotionally devastating experience—something even nursing home industry officials admit."[39] The resident is facing the prospect of being institutionalized—frequently after being released from a hospital—because they are unable to perform basic life activities on their own and family members are unable or unwilling to care for them. "Often these facilities are a last resort for families and residents, and many times these decisions are made under desperate, and sometimes emergency, circumstances."[40] People in that situation are understandably focused on getting the care they or their loved one so urgently need—not on the fine print of the multi-page contract placed before them. And given the disparity in bargaining power, it is all too easy for nursing home managers and staff to take advantage of residents and their families.

Third and relatedly, it is unlikely that most people being admitted to a nursing home are capable of comprehending the significance of the rights they are being asked to give up. Most people entering nursing homes are over 75 years of age, and an increasing number of them suffer from serious mental and physical impairments.[41] Roughly 70% of nursing home residents are reported to have cognitive impairment.[42] "The typical long-stay resident is over age 85 (53.0%), female (76.0%) and widowed (60.0%)."[43] Nearly half of all residents require assistance with four or more activities of daily living, the most common being bathing, dressing, going to the bathroom, and eating. "[A]lmost without exception, residents have more than one diagnosis when they are admitted," which "contribute to functional decline" and make independent living impossible. Nursing home admission contracts are regularly 20 to 30 pages long (and sometimes as long as 70

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[38] *See ManorCare Health Servs., Inc. v. Stiehl*, 22 So. 3d 96, 102 (Fla. Dist. Ct. App. 2009) (Altenbernd, J., concurring).

[39] Lisa Tripp, *A Senior Moment: The Executive Branch, Solution to the Problem of Binding Arbitration Agreements in Nursing Home Admission Contracts*, 31 CAMPBELL L.R. 157, 184 (Symp. 2009) (citing Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, Hearing on S. 2838, The "Fairness in Nursing Home Arbitration Act of 2008," testimony of Kelley Rice-Schild at 7 (June 18, 2008), available at http://www.aging.senate.gov/imo/media/doc/hr196kr.pdf).

[40] Senate Comm. on Aging, Kohl Highlights Disturbing Increase in Nursing Home Arbitration Agreements (June 19, 2008).

[41] *Id.* at 183.

[42] *Id.* at 19.

[43] IBISWorld Report on Nursing Care Facilities, *supra* n. 8, at 18.

pages), with the arbitration clause buried in the middle or back of the packet.[44] Predictably, residents or their family members are unaware there is an arbitration clause unless and until something terrible happens and they consider bringing a lawsuit.[45]

In fact, even without the unique duress of the nursing home admission process, the vast majority of people entering into contracts containing arbitration clauses either are not aware of them or do not understand them. In a groundbreaking empirical study published earlier this year by Professor Jeff Sovern of St. John's School of Law, 668 American consumers were given a typical credit card contract containing an arbitration clause, and then asked about their understanding of the clause and their own personal experiences. Fewer than 9% of those surveyed understood that there was a provision in the credit card contract that would bar them from going to court. Most believed that they could still participate in a class action, despite language in the contract to the contrary. Moreover, most people did not believe they themselves had agreed to arbitration, despite having purchased mobile phones, computers, credit products, and other goods and services that are dominated by companies using arbitration clauses. Prof. Sovern concluded that "almost none of the respondents understood the effect of the arbitration clause and many who thought they did were simply wrong."[46] The three-year, unprecedented study by the Consumer Financial Protection Bureau reached a similar conclusion: consumers were "generally unaware of whether their credit card contracts include arbitration clauses," and those who have agreed to arbitration "generally either do not know whether they can sue in court or wrongly believe that they can do so."[47] Given that many individuals being admitted to a nursing home are in crisis and suffering from mental and physical limitations, and it is clear that this population is even less likely to be entering into an arbitration clause "voluntarily."

Even if a prospective nursing home resident *does* notice that there is a pre-dispute arbitration clause, she is unlikely to challenge it and risk "get[ting] off on the wrong foot with a facility that will hold the fragile resident's very life in its hands. No one wants to be labeled a troublemaker before the resident has even

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[44] Tripp, Senior Moment, *supra* n. 39, at 183.

[45] *Id.*; *see also* Senate Comm. on Aging, *supra* n. 40 ("Individuals and families have little or no opportunity to fully consider and understand the consequences of an arbitration provision buried within and 40 or 50 page admissions document that they are asked to sign during the admissions process. In many cases, individuals are unaware that they had signed an arbitration agreement.").

[46] Jeff Sovern, Elayne Greenberg, et. al, *"Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 4-5, St. John's School of Law 14-009, Feb. 19, 2015.

[47] CFPB, Arbitration Study: Report to Congress Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a) at 11 (March 2015).

entered the facility, especially about a legal provision applicants expect never to affect them."[48] And since nursing home care is often needed urgently, there is usually very little time or ability to "shop around"—and to the extent a resident has the opportunity to choose between multiple facilities, she is more likely to focus on cost, quality of care, and convenience than to try to find out what terms each facility has in its admission contract. The industry's own study confirmed that challenges to arbitration agreements are "infrequent."[49] By including a pre-dispute arbitration clause in the admission packet, a nursing home can thus virtually guarantee that residents will unwittingly forfeit their right to sue in the event of a future lapse in care.

Fourth, even where the language of an arbitration clause states that it is optional or not required for admission, this is insufficient to guarantee voluntariness. An empirical study found that some "nursing homes required new residents to sign pre-dispute binding arbitration agreements as a condition of admission," even though the contracts themselves provided that arbitration was optional.[50] Even without staff pressure, a resident or family member may understandably believe agreement is required. For instance, in a Florida case, a court enforced an arbitration clause that was signed by a woman who admitted her husband to a nursing home. The clause had two separate signature lines: one saying "I accept" and another saying "I decline." The wife testified that she believed she had to sign the "I accept" line—she felt "pressure regarding her husband receiving appropriate care at the facility," and "had a subjective feeling that her husband would not get any attention until she signed."[51]

Likewise, while some nursing homes purport to allow residents to change their minds within a certain time period (typically 30 days) and "opt out" of pre-dispute arbitration, it is well-known that residents almost never exercise these rights to rescind. The main reason is that most residents have no idea they are giving up their constitutional right to a day in court when they are admitted to a nursing home—and they don't find out until after harm occurs and a dispute arises, at which point it's too late to rescind.[52]

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[48] Tripp, *supra*, at 183 (quoting Senate Hearing, testimony of Alison Hirschel, available at http://www.aging.senate.gov/imo/media/doc/hr196ah.pdf).

[49] Aon Global Risk Consulting, *The American Health Care Association Special Study on Arbitration in the Long Term Care Industry* at 3, June 16, 2009.

[50] 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, 89 (Summer 2011).

[51] *Spring Lake NC, LLC v. Beloff*, 110 So. 3d 52, 54-55 (Fla. Dist. Ct. App. 2013).

[52] Andrews, *supra* n. 2. *See also* CFPB Arbitration Study, supra n. 47, at 11 (finding that consumers "are generally unaware of any arbitration clause opt-out opportunities they may have been offered by their card issuer").

CMS should not buy into industry claims of "voluntary" pre-dispute arbitration agreements. The only way to make arbitration truly voluntary is simply to allow all parties the option to choose it *after* a dispute has arisen, when the significance of giving up one's constitutional right to a trial in favor of a secret tribunal is more clear. If private arbitration truly offers the benefits the nursing homes claim, then people will not hesitate to choose it.

B. Secrecy clauses in arbitration agreements enable nursing homes to hide wrongdoing from residents, their families, the public, the press, and regulators.

The majority of arbitration clauses in nursing home contracts provide that the entire dispute resolution process, including the resulting award, must be kept secret. Secrecy allows egregious misconduct to flourish and continue. Last year, it was revealed that former American Apparel CEO Dov Charney had been subjecting female employees to extreme sexual harassment and even recording numerous videos of himself engaged in sex acts, in his office, with teenaged female workers at the company's clothing plant. This harassment continued for over a decade despite countless internal complaints and numerous lawsuits. Each time an employee filed a lawsuit, it was dismissed: American Apparel had required all of its employees and models to sign an agreement requiring them to arbitrate any disputes, including sexual harassment claims. The contract also provided that all arbitration proceedings and outcomes were strictly confidential, and that employees who disparaged Mr. Charney or the company would be held liable. As the New York Times explained, "[I]f American Apparel hadn't been able to use arbitration and confidentiality clauses to keep investors and the public in the dark over those accusations, Mr. Charney would most likely have been shown the exit some years earlier."[53] Instead, the abuses continued, and unwary buyers continued to unwittingly purchase the company's wares.

If the nursing homes involved in the lawsuits described above had succeeded in imposing pre-dispute arbitration clauses, we would never have known what happened.[54] Private arbitration enables facilities to keep secret horror stories of abuse and neglect that would otherwise become publicly known. As one risk management consulting firm noted, "[i]n court proceedings, the filings may be public knowledge, and local reporters might print information that damages the reputation of the facility. Through arbitration, settlements and accusations are kept confidential."[55] In addition to protecting the nursing homes' reputation, secrecy

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[53] Steven D. Solomon, *Arbitration Clauses Let American Apparel Hide Misconduct*, N.Y. Times, July 15, 2014.

[54] Tripp, Senior Moment, *supra* n. 39, at 1-2 (describing the horrific suffering of Margaretha Sauer at the Rich Mountain Nursing and Rehabilitation Center and noting that "We know about the Sauer case and the deplorable mistreatment of Mrs. Sauer only because the facility did not include a pre-dispute binding arbitration agreement in its admission contract.").

[55] Reducing Risk Through Arbitration Agreements, *supra* n. 6, at 3.

ensures that only the facility, and not any mistreated residents, will have access to all the information from past arbitrations, including how each potential arbitrator has ruled in the past. Secrecy also prevents residents from knowing how much other victims of abuse or negligence have obtained in settlements or awards; and it prevents prospective residents and their families, regulators, and the public from finding out about the alleged mistreatment that led to the claim.[56]

For these reasons, many courts have stricken secrecy clauses in arbitration agreements as unconscionable, reasoning that they place the company in a "far superior legal posture" relative to aggrieved consumers;[57] allow a defendant "can accumulate experience defending these claims . . . while ensuring that none of [defendant's] potential opponents will have access to precedent";[58] make it nearly impossible to "prove a pattern of discrimination" and so "undermine[]" employees' "confidence in the fairness and honesty of the arbitration process" that it discourages them from pursuing valid claims;[59]and "magnify[y] the effect of [the] advantages" that "repeat arbitration participants enjoy . . . over one-time participants."[60] Despite these concerns, however, some courts enforce confidentiality clauses in arbitration agreements. And of course, most arbitration clauses are never challenged in court.

Tellingly, industry consultants advise nursing home staff to tell residents that the secrecy would actually benefit *them*, and implicitly threaten that residents' personal medical information will be exposed to the world unless they agree to arbitration:

> Explain the Advantage: Explain clearly that arbitration is generally a quicker, less expensive means to resolve disputes and to *retain privacy and dignity concerning personal issues such as health conditions, impairments, or mental disease*. . . . Find the advantages for the resident and include them in the description.[61]

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[56] For example, in a current case pending in state court in New Mexico brought by the Attorney General against a for-profit technical school, the defendant is attempting to block the government from subpoenaing records of arbitrations conducted against the school which purportedly would substantiate the claims of unlawfulness, citing a confidentiality clause in the arbitration agreement the school made all its students sign.

[57] *Ting v. AT&T Corp.*, 319 F.3d 1126, 1152 (9th Cir. 2003)

[58] *Kinkel v. Cingular Wireless*, 857 N.E.2d 250, 275 (Ill. 2006).

[59] *Zuver v. Airtouch Communications, Inc.*, 103 P.3d 753, 765 (Wash. 2004).

[60] *Luna v. Household Fin. Corp. III*, 236 F. Supp. 2d 1166, 1180–81 (W.D. Wash. 2002).

[61] Reducing Risk Through Arbitration Agreements, supra n. 6, at 5 (emphasis added).

Three-quarters of nursing homes' revenue comes from Medicare and Medicaid payments.[62] Meanwhile, 60% of the market is now occupied by for-profit entities, with facilities increasingly being purchased by private equity groups.[63] As nursing home care is increasingly privatized, and public dollars are poured into private wealth, companies are increasingly using arbitration clauses to both increase their profits *and* hide all evidence of their wrongdoing by shifting disputes out of the public courts—and away from the public eye and public oversight.

C. Arbitration clauses in nursing home contracts frequently contain abusive terms that benefit the facilities and disadvantage the residents, and these terms are difficult to fight in court.

As if reducing liability and hiding misconduct were not enough, nursing homes also use arbitration clauses to skew the dispute resolution process even more in their favor. This is not new; even before pre-dispute arbitration became the norm, a 1990 American Bar Association publication warned that nursing home admission contracts could "significantly distort the resident's understanding of his or her legal rights, and subsequently chill the exercise of those rights by both the resident and the family," including through liability waivers.[64]

Should CMS decide not to condition funding on the elimination of pre-dispute arbitration clauses altogether, and decide instead to closely monitor the problem or take on a comprehensive term-by-term review of every covered facility's arbitration clause, the agency should at a minimum require nursing homes to eliminate the specific kinds of terms described in this section.

1. Examples of unfair terms

Below are some kinds of abusive contract terms that can be found in nursing home arbitration clauses:

a. Excessive fees or cost-sharing provisions

While some arbitration agreements provide that the corporation must bear some of the costs (undoubtedly with the knowledge that they will still save money by requiring arbitration), others require the resident to share at least some of the cost. For example, the contracts of many for-profit nursing homes surveyed in Lisa Tripp's empirical study had provisions requiring the resident to share the costs if they exceed a certain amount.[65] One nursing home's contract dictated that not only

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[62] IBISWorld Report on Nursing Care Facilities, *supra* n. 8, at 8.

[63] *Id.*

[64] Charles P. Sabatino, *Nursing Home Admission Contracts: Undermining Rights the Old-Fashioned Way*, Clearinghouse Review, Vol. 24, No. 6, October 1990, pp. 553-56.

[65] Tripp, Arbitration Agreements, *supra*, at 99.

would residents have to bear their own arbitration costs, but also: "Costs of arbitration, including our legal costs and attorneys' fees, arbitrators' fees and similar costs, will be borne by all residents of the Village."[66] Some courts have struck down arbitration clauses that impose excessive costs on consumers, finding that high costs would prevent a consumer from pursuing a valid claim in arbitration.

b. One-sided clauses permitting nursing home to go to court.

Some arbitration clauses require the resident or her representative to pursue *their* claims in arbitration, but let the nursing home choose to go to court for any claims *it* might want to bring against the resident. For example, an arbitration clause used by a Florida nursing home preserved the facility's right to a judicial remedy to collect fees for outstanding bills—and even stated that the nursing home could make the resident pay all the costs of the case, including the nursing home's attorneys' fees.[67] Such one-sided clauses have been struck down by courts in some cases, but enforced by others.

c. Class action bans

Many arbitration clauses explicitly or implicitly bar nursing home residents from joining with others to bring a lawsuit seeking systemic reform. These clauses are designed not only to prevent class actions such as *Lavender v. Skilled Nursing*, but to deter claims generally, as many individuals will be unable to take on a major corporation alone unless the underlying claims are quite large. Prior to the U.S. Supreme Court's decision in *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011), many courts across the country had struck down class action bans on grounds that they served to exculpate corporations for unlawful behavior and prevented individuals from obtaining justice, but class action bans are now generally enforceable.

d. Shortened statutes of limitation.

Some arbitration clauses have a term requiring that any claim not filed within a certain number of days after the incident are forever barred. As many courts have recognized, these shortened statutes of limitation—which are sometimes a mere 30 days—make it less likely the nursing home will be held accountable for wrongdoing.

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[66] *Id.* at 102-103.

[67] See Robert Hornstein, *The Fiction of Freedom of Contract—Nursing Home Admissions Contract Arbitration Agreements: A Primer on Preserving the Right of Access to Court Under Florida Law*, 16 St. Thomas L. Rev. 319, 330 & n. 75 (Winter 2003).

e. "Loser pays" provisions.

Some clauses contain "gotcha" terms providing that if the resident brings a claim and the nursing home wins, the resident will be on the hook for the costs of arbitration—including, sometimes, the nursing home's attorneys' fees. Often such terms are directly contrary to state consumer protection laws, which typically provide that only a prevailing plaintiff is entitled to recover costs and fees. Some companies take it even further and include a term saying that if the resident challenges the *arbitration clause* and loses, she will have to pay the nursing home's costs. Such clauses are designed to intimidate residents who might be contemplating opposing an unfair arbitration clause. While they have been held unenforceable by some courts, there are undoubtedly many more instances where the term has its intended effect of discouraging the resident from fighting the arbitration clause at all.

f. Clauses that strip statutory remedies.

Arbitration clauses are sometimes used to force consumers to give up legal remedies to which they would be entitled in court. For example, some courts have struck down clauses that expressly limit the drafting party's liability by, for example, providing that the arbitrator cannot award punitive damages or attorneys' fees.

g. Limitations on discovery

Arbitration agreements frequently limit the amount of pre-trial discovery (fact gathering, witness testimony, etc.) that parties can conduct. This feature is typically touted as a way to streamline the process so that the parties can get a decision faster. This is designed to make it impossible for the nursing home resident to gather the facts she needs to prove the nursing home acted wrongfully. For example, one nursing home's clause limited the number of witness depositions to three (to compare, in the *Lavender* case, 150 witnesses testified). Since the nursing home already has unfettered access to all the relevant documents and witnesses, this limit only affects the resident.

h. Distant forum provisions

Some corporations seek to further skew the dispute resolution in their favor by requiring that the arbitration, if there is a hearing, take place at a location that is most advantageous for them—for instance, the state where their headquarters is located. While courts have struck terms like this down and they are not as common as they used to be, we at continue to see them pop up in contracts from time to time.

i. Selection of biased or corrupt arbitration provider.

As the drafter of the contract, nursing homes are free to choose the arbitration provider they believe will be most beneficial to them. And as for-profit companies, arbitration providers have an incentive to rule in favor of the party that hired them, because they will only be given future business if the client is happy

with the results. This is not a hypothetical problem, as illustrated by recent events involving the National Arbitration Forum. NAF was the largest provider of consumer arbitration services in the country as of 2009. It specialized in handling collection cases, deciding hundreds of thousands of cases brought by credit card issuers, debt buyers, and debt collectors against alleged debtors. An empirical analysis of the outcomes of debt collection arbitrations handled by NAF showed that the forum's corporate clients had a win rate of over 99 percent.

In 2009, the Attorney General of Minnesota—the chief law enforcement officer in NAF's home state—sued NAF and its corporate affiliates for violations of Minnesota's statutory prohibitions against consumer fraud, deceptive trade practices, and false advertising, based on NAF's undisclosed financial relationship with one of the country's largest debt collection law firms.[68] Documents filed in the lawsuit revealed that, despite having held itself out to consumers as a "neutral" forum, NAF has been deciding tens of thousands of cases in which its owners had an immediate and direct financial interest in seeing one side win. *Id.*

NAF was also the target of a Congressional investigation. At a hearing before a House subcommittee, NAF's C.E.O. admitted under oath that $42 million in profits from the debt collection enterprise had been distributed to NAF and selected members of its management.[69] Meanwhile, statistical analysis conducted by the Center for Responsible Lending the report found that NAF arbitrators "appear to favor companies that they expect to give them future business" and that arbitrators receive more cases in the future if they favor firms over consumers.[70]

As of Lisa Tripp's empirical analysis, published in 2011, a majority of large nursing home chains selected NAF as their provider. While some courts have ruled that an arbitration clause naming NAF cannot be enforced at all, others have permitted the selection of a new provider and enforced the clause. Regardless of whether any particular contract is enforceable, the fact that the nursing home industry favored this corrupt, biased provider further confirms the unfairness of pre-dispute arbitration clauses in this sector. And even more importantly, it shows that the risk of corruption in private arbitration is very real; there is no guarantee that another for-profit provider will take NAF's place and become the new go-to provider for the nursing home industry.

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[68] *See* Compl., *State v. Nat'l Arbitration Forum, Inc.* at ¶ 5 (Minn. Dist. Ct. filed July 14, 2009) (Plaintiffs' Notice of Supplemental Authority, Ex. A) (Dkt. # 78).

[69] *Arbitration or 'Arbitrary': The Misuse of Mandatory Arbitration to Collect Consumer Debts: Hearing Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight and Gov't Reform*, July 22, 2009 (oral statements of Michael Kelly, Chief Executive Officer, National Arbitration Forum and Forthright).

[70] Joshua M. Frank, Ctr. for Responsible Lending, *Stacked Deck: A Statistical Analysis of Forced Arbitration* at 7–8 (2009).

2. Difficulty in challenging unfair terms

Unfortunately, several trends in the law have made it more difficult for nursing home residents (and all consumers) to challenge arbitration clauses in court, even when the clauses strip them of their ability to effectively vindicate their rights. First, the Supreme Court's decision in *Rent-A-Center West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010), held that a corporation can draft a contract that gives the *arbitrator*, rather than a court, the power to determine whether the arbitration clause is unfair or invalid. Indeed, a consulting firm openly advises nursing homes that they all they need to do to "completely avoid the court system" and insulate their contract from judicial review is add "a provision that requires 'Any disputes regarding the enforceability or interpretation of this arbitration agreement shall be decided by the arbitrator and not by a judge or jury.'"[71] Arbitrators can never decide whether an arbitration clause was validly formed, because without an agreement to arbitrate, the arbitrator has no power to decide anything. But with that exception, companies are increasingly drafting contracts that require consumers and residents who want to challenge an unlawful or unfair arbitration clause to go through the very arbitration process they allege is unlawful. As one judge noted,

> [I]t is both bad policy and bad law to allow an arbitrator to make case-specific, non-precedential, confidential decisions about the enforceability of clauses in an arbitration agreement when those clauses limit or eliminate rights specially created by the legislature to protect nursing home residents.[72]

Second, the Supreme Court's decision in *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011), held that a corporation is free to use a contract term in an arbitration clause to take away people's rights, so long as the term is "fundamental to arbitration"—in that case, a requirement that arbitration be conducted on a one-on-one basis rather than permitting injured consumers to band together in a class action. While certainly many kinds of abusive contract terms are not inherent to arbitration, some have been held to be. The result is that even where a clause is patently unfair, sometimes courts have no choice but to enforce the clause anyway.

Third, even where the terms of an arbitration clause are "unconscionable" under state law—meaning they are substantively unfair or oppressive—courts in many states will nonetheless enforce the clause unless the consumer can show that there was unfairness in the contracting process. This is known as "procedural unconscionability." In the past, many courts would find an arbitration clause

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[71] Reducing Risk Through Arbitration Agreements, *supra* n. 6, at 7.

[72] *ManorCare Health Servs., Inc. v. Stiehl*, 22 So. 3d 96, 101 (Fla. Dist. Ct. App. 2009) (Altenbernd, J., concurring).

procedurally unconscionable if, for example, it was imposed by the stronger party on a weaker party on a take-it-or-leave-it basis; it was hidden in the fine print, so that a consumer would be surprised to realize it was there; or the consumer was hurried through the process of signing and did not have an opportunity to understand what she was signing. However, some savvy corporations realized that if they added an "opt-out" term—for example, some more fine print indicating that the arbitration clause was only optional, or that the consumer could opt out of pre-dispute arbitration by mailing a certified letter to a certain address within 15 days—courts would hold that the arbitration clause was not adhesive and thus enforce the clauses. (This is why, as explained in part V.A. below, making arbitration clauses in nursing home contracts technically "voluntary" could inadvertently harm residents by making it more difficult for them to successfully challenge unfair terms in court.)

Fourth, courts often enforce arbitration clauses even where the facts make clear the nursing home resident could not possibly have understood what she was supposedly agreeing to. For example, in Florida, after an elderly woman died five months after moving into the Spring Lake nursing home, her family filed a wrongful death suit. The facility moved to compel arbitration. In assessing the arbitration clause, the court noted that the woman had been 92 years hold at the time of admission; she had a fourth-grade education. She "often had to sound out words while reading." In addition, she had "memory problems," and was "increasingly confused." When she entered the nursing home, she had signed all the documents placed before her. She was recognized at the time as being "increasingly confused." But after she died under suspicious circumstances and her family sued, a Florida court of appeal enforced the home's arbitration clause. The court conceded that "the contracts were so complex that she could not possibly have understood what she was signing." But the court reasoned that, "For better or worse, her limited abilities are not a basis to prevent" enforcement of the contract.[73]

Likewise, in a wrongful death case against Palm Garden of Sun City, another Florida court enforced the nursing home's arbitration clause despite the fact that the woman who signed it—the decedent's elderly wife—suffered from macular degeneration so severe that the trial court found she could not have been able to read the arbitration clause, which appeared on page 16 of a 35-page packet. The evidence in the case indicated that the woman had believed she was required to sign all the documents. Nonetheless, because there was no evidence she had been coerced into signing, the appellate court held that the clause was enforceable.[74]

In sum, it is essential that CMS recognize that it will be extremely difficult for nursing home residents to succeed in avoiding enforcement of most arbitration

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[73] *Spring Lake NC, LLC v. Holloway*, 110 So. 3d 916, 917 (Fla. Dist. Ct. App. 2013), *reh'g denied* (Mar. 20, 2013), *review denied sub nom.*, *Estate of Holloway v. Spring Lake NC, LLC*, 134 So. 3d 446 (Fla. 2014).

[74] *SA-PG Sun City Center, LLC v. Kennedy*, 79 So.2d 916 (Fla. Ct. App. 2012).

clauses. While there are numerous well-reasoned decisions from federal and state courts across the country striking down abusive clauses, many more are enforced, and even more go unchallenged. It is therefore up to CMS to act if nursing home residents who suffer harm in long-term-care facilities are to have any hope of obtaining justice through the courts.

V. CMS Should Condition Funding on the Elimination of Pre-Dispute Arbitration Clauses from Nursing Home Contracts, Rather than Adopt Any Lesser Measure.

CMS should require that nursing homes seeking federal funding eliminate pre-dispute arbitration clauses from their contracts with residents, rather than adopting the draft rule set out in the Notice of Proposed Rulemaking. While they may be well-intentioned, the proposed requirements in the current draft rule would not solve the problems with pre-dispute arbitration clauses; would be extremely difficult (if not impossible) to enforce; and could make it more difficult for residents to challenge abusive arbitration clauses.

The current iteration of CMS's proposed rule would impose two kinds of requirements on arbitration agreements: (1) requirements for the contract formation process that happens at admission; and (2) limitations on terms in the contracts themselves. Both are problematic.

A. Proposed requirements for admission process: §§ 483.70(n)(1)(i)-(ii), (n)(2)(i), and (3).

CMS's draft rule would require that a few requirements be met during the admission process. Specifically, the rule would require that a facility entering into an arbitration agreement with its residents "must ensure that . . . the agreement is explained to the resident in a form and manner that he or she understands, including in a language that the resident understands," that the "resident acknowledge[] that he or she understands the agreement," and that the agreement be "entered into by the resident voluntarily." It further provides that "Admission to the facility must not be contingent upon the resident or the resident representative signing a binding arbitration agreement."[75]

But what would constitute sufficient "explanation" or "voluntariness"? These requirements are so vague that most existing arbitration agreements arguably already meet them. For example, a nursing home could simply present an incoming resident with a 30-page admission contract with a pre-dispute arbitration clause on the 28th page, with the following language along with a space for the resident or her legal proxy to initial or sign:

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[75] § 483.70(n)(1).

> "This arbitration agreement was explained to me in a manner that I understand, including in my language. I acknowledge that I understand this agreement and that I am entering into it voluntarily. I understand that my admission to this facility is not contingent on my agreeing to arbitration."

Would this meet the requirements? And notwithstanding this language, what would prevent admissions staff—as was documented in the empirical study discussed in part IV.A above—from instructing residents that they *are* required to sign, or implying that the nursing home would prefer that the resident sign? What would prevent nursing homes from using this "explanation" requirement as an opportunity to try to persuade the resident that arbitration is better than court, as the consultants discussed above advised? Staff could follow the advice of industry consultants, who urge facility staff to "put[] arbitration agreements to work" for them by training staff to explain the arbitration clause to residents and their families "in a nonthreatening manner" and in a way that will make them less likely to object. For instance, consultants advise facilities to "Find the advantages for the resident and include them in the description." For example, it is suggested that the facility rep say, "Our company has found that if we *handle disputes personally*, it is better for our residents and staff."[76] Clearly, protecting their legal rights in the event the nursing home causes them harm is not at the forefront of people's minds when they are being admitted to a nursing home. And even where people are aware that they can be admitted without agreeing to arbitration, they may nonetheless be reluctant to begin their relationship with the place where they will likely live until they die by making trouble.

Even if compliance with these requirements were somehow meaningful, it is hard to imagine how CMS would enforce provisions (n)(1)(i)-(ii), (2)(i), and (3). As explained above, mere contractual language is insufficient to guarantee true voluntariness. Relying on nursing homes to self-report that they had complied would make the rule toothless. And surely it would be too labor-intensive for CMS to require audio or video recordings of each admission, so that agency staff may review the process and determine whether agreement to arbitration was truly voluntary.

Finally, if CMS were to implement these requirements, that could make it easier for facilities to get away with imposing abusive terms in arbitration clauses, because residents would have a harder time challenging them in court. As explained above, the enforceability of arbitration clauses is a matter of state law. And most states require two kinds of unfairness to strike down a contract term: procedural and substantive unconscionability. That means that, even if a clause is substantively unfair—for example, it bars a resident from obtaining punitive

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[76] Reducing Risk Through Arbitration Agreements, supra n. 6, at 4.

damages to which she is entitled under state law—it will still be enforced in most states so long as the arbitration clause was not imposed by the corporation on a take-it-or-leave-it basis. As explained above, terms allowing residents to "opt out" of an arbitration agreement within 30 days of admission offer no benefit whatsoever to residents, given that virtually no one understands the significance of an arbitration clause until after a dispute arises. But an opt-out term, or a similar term providing that admission to the facility is not contingent on agreement to arbitration, would likely be enough to defeat a claim of procedural unconscionability. For this reason, it would not be surprising to see nursing homes embrace this proposed rule.

B. Proposed requirements for "neutrality" and "convenience:" § 483.70(n)(2)(ii)-(iii).

The proposed rule would require that nursing home arbitration clauses "provide for the selection of a neutral arbitrator" and a "convenient" venue. But in order for these terms to have any force, CMS would have to develop (and presumably publish, after another NPRM process) certain minimum standards explaining what exactly would satisfy the requirement that the agreement provide for selection of a "neutral" arbitrator, and a "convenient" venue. CMS would then need to review every page of every nursing home admission contract and compare it to those standards in order to determine whether the contract met them, on an ongoing (perhaps annual) basis.

To get a sense of how challenging it would be to develop a consistent policy regarding enforcement of a rule that allows arbitration clauses but places a series of limits on their terms and how they are included in the admissions process, one need only to read some of the hundreds of published court decisions assessing the validity of nursing home arbitration clauses under state law. Taking on such a role would require that enforcement staff become experts on arbitration clauses.

VI. Conclusion

Nursing home residents are the most vulnerable members of our society, and they are routinely forced to give up their basic constitutional rights at the very point in their lives when they are becoming dependent on institutional care. By forcing residents to agree in advance to resolve all disputes in private, secret arbitration, nursing homes reduce the likelihood that they will be held accountable when they cause grave harm to a person in their care. They also use arbitration clauses to skew the dispute resolution process in their favor in various ways. Based upon our experience leading the fight nationally against abusive arbitration agreements, Public Justice believes that the only way to adequately protect residents is to restore their access to the civil justice system. We therefore strongly urge CMS to do right by nursing home residents and restrict federal funding to facilities that eliminate pre-dispute arbitration clauses from their contracts.

Respectfully Submitted,

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