

August 4, 2017

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attn: CMS-3342-P
P.O. Box 8010
Baltimore, MD 21244-1850

Re: Comment from Texas Appleseed on Department of Health and Human Services Proposed Rule (CMS-3342-P) for Medicare and Medicaid Programs: Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements

To Whom It May Concern,

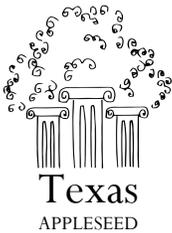
Texas Appleseed appreciates the opportunity to respond to the Department of Health and Human Services' request for comments regarding the proposal to revise the final rule entitled "Reform of Requirements for Long-Term Care Facilities" (81 FR 68688), which would amend 42 CFR 482.70(n).

Introduction

Texas Appleseed is a public interest justice center working to change unjust laws and policies that prevent Texans from realizing their full potential. Working with pro bono partners and collaborators, Texas Appleseed develops and advocates for innovative and practical solutions to complex issues. As part of its work, Texas Appleseed also conducts data-driven research to better understand inequities and identify solutions for concrete, lasting change. Texas Appleseed is part of a non-profit network of 17 justice centers in the United States and Mexico.

Through its Fair Financial Services project, Texas Appleseed is a leader in advocating for reform of the payday and auto title lending industry in Texas, debt collection, and reform around elder financial abuse. Texas Appleseed's work is built on a commitment to transparency for consumers so they know the true cost and terms of the services they are receiving upfront.

This comment focuses on the need to ensure long-term care patients can preserve their access to the court system, the effect of allowing pre-dispute arbitration agreements in the context of long-term care facilities, and the flaws inherent to the current private arbitration system.



Importance of Ensuring Consumer Access to Courts

Arbitration agreements were historically used to settle commercial disputes between companies, often similarly positioned entities.¹ These companies negotiated arbitration agreements as a mutually preferable alternative to litigation. During the last two decades of the 20th century, companies have expanded their use of arbitration agreements, using them in contracts with consumers, employees, investors, and franchisees. Often these contracts are form contracts that are not negotiated. This tactic allows companies to block litigation—both individual and class action lawsuits—from a wide range of parties. A majority of contracts between nursing homes and potential patients have an arbitration clause that the potential patient is required to sign to receive care. Contracts may also include a ban on class actions as well as limits on available damages or waivers to jury trials.

The ways in which some nursing homes fail patients is well documented. And with the federal government’s budget cuts, the effect of oversight to curb harmful practices may be dwindling.² Nursing homes with a significant number of problems may be designated as a special focus facility.³ This program is designed to ensure facilities with a “yo-yo” or “in and out” compliance history address “underlying systemic problems that . . . giv[e] rise to repeated cycles of serious deficiencies.”⁴ “While special focus status is one of the federal government’s strictest forms of oversight, nursing homes that were forced to undergo such scrutiny often slide back into providing dangerous care, according to an analysis of federal health inspection data.”⁵ In fact, most of the nursing homes that shed the special focus designation before 2014 and are still, “slightly more than half — 52 percent — have since harmed patients or put patients in serious jeopardy within the past three years.”

Given the reality of subpar care at nursing homes across the country, a decreasing enforcement budget, the flaws inherent to the arbitration system outlined in this comment, and the ability of lawsuits, including class actions, to remedy harms and incentivize better practices, Texas Appleseed supports ensuring access to the court system is available to

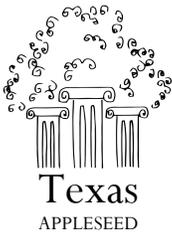
¹ 81 Fed. Reg. 32830-01 (May 24, 2016) at 21-23.

² “More than 900 facilities have been placed on the [special focus] watch list since 2005. But the number of nursing homes under special focus at any given time has dropped by nearly half since 2012, because of federal budget cuts. This year, the \$2.6 million budget allows only 88 nursing homes to receive the designation, though regulators identified 435 as warranting scrutiny.” Rau, Jordan, *Poor Patient Care at Many Nursing Homes Despite Stricter Oversight*, The New York Times (Jul. 5, 2017).

³ Centers for Medicare & Medicaid Services, *Special Focus Facility (“SFF”) Initiative*, (July 2017), available at <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandCompliance/Downloads/SFFList.pdf>.

⁴ *Id.*

⁵ *Supra* at Note 2.



consumers by preventing pre-dispute arbitration agreements in the context of nursing homes.

The judicial system provides a neutral and transparent setting in which patients can pursue their claims, a system that stands in contrast to secretive and often biased arbitration proceedings. In addition, class actions can be a valuable tool for consumers in motivating companies to admit their misdeeds and change their practices. Even the possibility of class actions can go far in policing companies' behavior because of the potential cost to companies. Patients who have grievances with a smaller dollar figure attached could benefit from the ability to pursue a class action lawsuit, because on their own the dollar value of the associated individual claims is often insufficient to justify the potential costs of individual arbitration or litigation.

Arbitration: A Flawed System for Resolving Consumers' Disputes

Proponents of arbitration claim it gives individuals an easier way to handle disputes, but the evidence reviewed by Texas Appleseed indicates the opposite is true. Because it can be difficult to evaluate some aspects of arbitration given the secretive nature of the process, Texas Appleseed spoke with lawyers who have arbitrated cases and/or struggled to bring a case in court due to arbitration provisions.

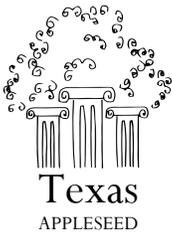
It is common for consumers to approach interactions with a nursing home in the midst of a crisis and/or with an assumption that the business is operating legally.⁶ Only after it is too late, after harmful practices have occurred, do many people even think about possible legal remedies. When they are enrolling themselves or their loved one in care, they are not often aware of all of the fine print and what it means.⁷ In many cases, the resident is physically and possibly mentally impaired; further, their choices for care might be limited by geographic and financial considerations.⁸ Therefore, they might not have the ability to contest arbitration clauses. Some opponents to the original proposed rule claim that patients can always opt out, but this is not usually a realistic option. Most people do not see, notice, or recognize the opt-out provision in the agreement.⁹ There is also a significant disparity in bargaining power and knowledge regarding arbitration waivers between the parties.

⁶ Ann E. Krasuski, *Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents*, 8 DePaul J. Health Care L. 263, 263–64 (2004) (noting that the need for nursing care often arises unexpectedly and that admission is often time of extreme stress for patients and their families, during which they sign arbitration agreements along with a number of other documents).

⁷ 81 FR 68688, 68792 (Oct. 10, 2016).

⁸ *Id.*

⁹ National Public Radio, [Nursing Homes' Arbitration Agreements Can Contain Hidden Risks](#) (Sept. 18, 2012).



So, consumers sign on the dotted line not realizing that they are signing away their right to an impartial judge or jury with certain procedural and evidentiary standards. Not only do they lose the practical ability to appeal an adverse decision as described below, but they also cannot join other consumers to bring a class action suit or often even a class arbitration against a nursing home for unfair practices. Nursing home patients and their families are left without access to courts. Because of the many challenges of arbitration detailed in this section, lawyers who try to bring a patient's claims in court may spend a lot of time trying to get around arbitration clauses, without getting to the merits of the case, something that increases the cost for consumers.¹⁰ For consumers, this process and the arbitration process can mean delayed or denied access to justice.

The following evaluation of the arbitration system and how well it serves consumers is drawn from Texas Appleseed's research and interviews with attorneys. The deficiencies highlighted below tilt the scales of justice towards nursing homes, which are not only more familiar with arbitration clauses (often hiring sophisticated lawyers to design them) than nursing home patients and their families, but also function as repeat players in arbitration proceedings, giving them increased familiarity with individual arbitrators.

1. Secretive System Limits Accountability

Arbitration decisions are not public; in fact, the outcome of cases and the reasons behind those outcomes are considered confidential.¹¹ This lack of even the most basic information keeps arbitration shrouded from any public scrutiny or accountability. Given real concerns over inherent bias within arbitration proceedings, this secrecy is even more troubling. The federal government does not currently require cases that go to arbitration to be reported in any manner.¹² Because of this lack of public scrutiny, the rule to prohibit pre-dispute arbitration agreements in nursing home contracts came after 16 states and the District of Columbia “urged the government to cut off funding to nursing homes that use the clauses, arguing that arbitration kept patterns of wrongdoing hidden from prospective residents and their families.”¹³

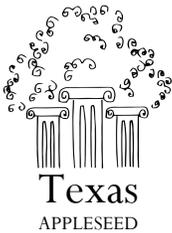
It is worth mentioning that California and Maryland require online, quarterly publication of arbitration outcomes by arbitration companies with

¹⁰ Interview with Tracey Whitley, lawyer with Texas Rio Grande Legal Aid (Jul. 6, 2016).

¹¹ National Consumer Law Center, *Forced Arbitration: Consumers Need Permanent Relief*, 6 (2010).

¹² Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System'*, N.Y. TIMES, Nov. 1, 2015.

¹³ Jessica Silver-Greenberg & Michael Corkery, *U.S. Just Made it a Lot More Difficult to Sue Nursing Homes*, N.Y. TIMES, Sept. 28, 2016.



information about the dispute and its outcome.¹⁴ Texas Appleseed examined this data from the American Arbitration Association (AAA) and JAMS, but found the inconsistencies and incomplete fields make it difficult to use the data as a meaningful tool to assess case outcomes.

The procedure by which an arbitrator arrives at a decision is also usually secret—this secretive aspect is in direct contrast to courts, where the public record of the proceeding, such as which evidence is admissible, as well as myriad other trial decisions, can be challenged in court. Also, unlike court cases, where decisions could be reported on in a local newspaper or on the radio, arbitration decisions are entirely out of the public eye. Public scrutiny can have a real deterrent effect; without it, companies might not be as concerned with skirting the rules. And some government officials and elder care lawyers reason that for corporations, “arbitration also potentially keeps embarrassing practices under wraps.”¹⁵

In addition to the secrecy of the process, arbitration outcomes do not set precedent. Precedent is the underpinning of our legal system in that it ensures that similar facts produce similar outcomes. Judges are bound to follow precedent under *stare decisis*; however, in arbitration, arbitrators are not held to follow precedent. Decisions in arbitration are left to arbitrators themselves.

2. Appealing an Adverse Arbitration Decision is Almost Impossible

The Federal Arbitration Act (FAA) significantly limits the ability to appeal an arbitration decision.¹⁶ Reversing an arbitration award under the FAA is restricted to instances where there is serious fraud or misconduct by arbitrators.¹⁷ Even assuming the parties can afford to appeal a decision, to consider an appeal of an arbitration decision, a court must have a record to examine.¹⁸ Unless the parties are willing to pay for it, most arbitration proceedings do not have a transcript taken by a court reporter.¹⁹ To have a record costs more money, which may not be feasible.

In addition, arbitrators also often only issue a “standard award” which simply recites which party won along with any damages and costs.²⁰ In

¹⁴ Cal. Code of Civil Procedure §1281.96 (2015); MD Comm. L. Code §§14.3901-3905 (2013).

¹⁵ *Supra* at Note 13.

¹⁶ *See* 9 U.S.C. §10(a).

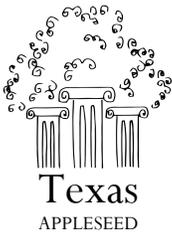
¹⁷ *Id.*

¹⁸ *Physicians Insurance Capital v. Praesidium Alliance Group*, 562 F. App’x 421 (6th Cir. 2014).

¹⁹ American Bar Association, *Appealing Arbitration Decisions: Practice Tips for Young Lawyers* (Sept. 5, 2014), available at

<http://apps.americanbar.org/litigation/committees/adr/articles/summer2014-0914-appealing-arbitration-decisions-practice-tips-young-lawyers.html>.

²⁰ *Id.*



contrast, a “reasoned award” requires arbitrators to spend more time issuing their decision, thereby adding to the parties’ expense. In addition, at least under the AAA’s rules, the arbitrator cannot be called as a witness in litigation for any proceeding related to the arbitration of the parties.²¹

Most of the time parties in arbitration are “stuck with whatever comes out of arbitration” and “often the arbitrator will split the baby. . . give a little bit to each side.”²² This situation can be especially frustrating for plaintiffs when the arbitrator does not follow the law, something that appellate courts have said is not in itself grounds for reversal.²³

3. Bias within the System

While the extent of bias of arbitrators can be difficult to assess given the secretive aspects of the system, a 2015 investigation of arbitration by the New York Times found evidence of bias. In addition, there is significant anecdotal evidence that arbitration favors defendants.

The investigation by the New York Times was based on thousands of court records and interviews with hundreds of lawyers, corporate executives, judges, arbitrators and plaintiffs in 35 states. The paper found the scales of justice were slanted towards defendants at least in keeping class actions out of court.²⁴ The Times evaluated this issue by examining federal cases filed from 2010 until 2014 and found that of the 1,179 class actions that companies sought to push into arbitration, judges ruled in their favor in four out of every five cases. Once blocked from going to court as a group, most people dropped their claims entirely. This last finding speaks to the facts explored in this comment that pursuing a claim in arbitration is expensive and finding a lawyer is extremely difficult, leaving many potential plaintiffs with legitimate claims stranded.

In the New York Times’ interviews, more than “three dozen arbitrators described how they felt beholden to companies” because with every decision came “the threat of losing business.”²⁵ All of the lawyers interviewed for this comment agreed that too often arbitrators seem inclined to appease the defendants. As one Texas lawyer said, “Arbitrators like to have business and make a lot of money arbitrating cases, if you are chosen by a car

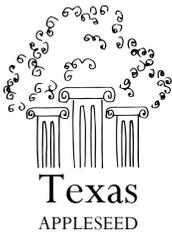
²¹ *Consumer Arbitration Rule R-49(e)*, American Arbitration Association, available at <https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2021425&revision=latestreleased>.

²² Interview with Dugan Kelley of Christman, Kelley & Clarke P.C., Jul. 19, 2016.

²³ *Id.*

²⁴ Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES, Oct. 31, 2015.

²⁵ Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a ‘Privatization of the Justice System’*, N.Y. TIMES, Nov. 1, 2015.



dealership, you want to make the car dealership happy.”²⁶ Also implicit is that arbitrators are used to having multiple cases from the same defendants.

When the process for choosing an arbitrator is not specified in the parties’ contract, JAMS provides each party with three candidates.²⁷ Each party then ranks the names with the ability to strike up to one name from the list. The first one or two that both parties agree on are then appointed as the arbitrators.²⁸ Further, once selected, the choice of the arbitrator cannot be appealed. AAA selects the arbitrator from its list of approved arbitrators; if one side objects to the service of a particular arbitrator, AAA will consider that party’s objections in weighing whether to disqualify the arbitrator.²⁹ The grounds for disqualification include an issue of partiality or lack of independence; inability or refusal of arbitrator in performing his or her duties with diligence and in good faith or any grounds for disqualification provided by applicable law.³⁰ However, the AAA has total discretion in this decision. In a court, if a plaintiff feels that a judge is not impartial or seems inclined to the opposing side, the plaintiff can request a jury trial. In arbitration, there is no right to a jury. This restriction limits the plaintiff and creates an advantage for the defendant.

4. Strict Limits on Discovery

One of the perceived benefits of arbitration to corporations is minimizing the cost of discovery, which can be expensive. The FAA is largely silent on discovery and simply lays out an arbitrator’s ability to summon witnesses.³¹ In arbitration agreements, parties can elect to apply various rules of discovery, such as the arbitration organization’s rules or pre-agreed upon discovery terms. Some arbitration clauses restrict the discovery process by limiting the number of investigative interviews or the exchange of documents.³² Most often, discovery is left up to the arbitrator, who determines the scope and amount of discovery. For example, JAMS gives arbitrators factors to consider when outlining discovery, but ultimately leaves the decision to the “good judgment of the arbitrator.”³³ Similarly, the AAA states in its rules for arbitration that the arbitrator has full discretion on

²⁶ Interview with Daniel Dutko, lawyer with Hanszen Laporte (July 5, 2016).

²⁷ JAMS, *Streamlined Arbitration Rule 12*, available at <https://www.jamsadr.com/rules-streamlined-arbitration/#Rule12>.

²⁸ *Id.*

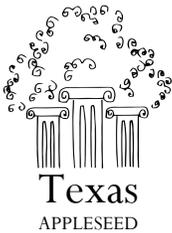
²⁹ AAA, *Consumer Arbitration Rules* 18,19, available at <https://www.adr.org/aaa/ShowProperty?nodeId=UCM/ADRSTAGE2021425&revision=latestreleased>.

³⁰ *Id.*

³¹ 9 USC Section 7.

³² American Bar Association, Commission on Law and Aging, *Policy on LTC Facility Arbitration Agreements 111B*, 4 (Feb. 16, 2009).

³³ JAMS, *JAMS Arbitration Discovery Protocols* 3, available at https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Arbitration_Discovery_Protocols.pdf.



“what evidence will be admitted, what evidence is relevant, and what evidence is material to the case.”

Such uncertainty and discretion can lead to mixed results. One lawyer arbitrating a case against a business in Texas requested a store manager or employee as the witness.³⁴ Instead of bringing someone who interacted with customers regularly, the business brought a regional manager who could not attest to the alleged store level violations. The arbitrator only allowed one witness per side and insisted that the witness was sufficient despite the lawyer’s objections, leaving the borrower without a way to prove the allegations. By overly limiting discovery, the borrower’s ability to argue her case was severely hampered.

Further, as another lawyer pointed out, discovery would help uncover more on how the businesses operate and what additional harms they might be promulgating. Or as one lawyer put it, “without discovery, it is harder to show how bad they really are . . . without discovery, you only have open records requests.”³⁵

5. High Cost

There are two ways that the high cost of arbitration keeps plaintiffs from pursuing their cases in arbitration. First, arbitration can be expensive and many plaintiffs cannot afford to access or take the risk of having to pay for arbitration (depending on the contract and the arbitration provider, the defendant may foot part of the bill for arbitration). Second, given the high cost along with an uncertain chance of success, plaintiffs may have trouble finding attorneys to take cases that have restrictive arbitration clauses.

Often, the defendant will cover the cost of arbitration upfront. Covering the costs of arbitration is a strategy used by corporations to avoid the invalidation of an arbitration agreement on the grounds of unconscionability.³⁶ However, responsibility for payment of the fees can be conditional on the outcome (the consumer must pay all the fees if she loses) and can be dictated by the contract itself.

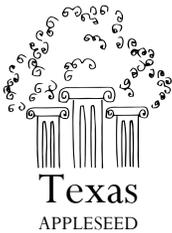
If the arbitration is conducted by JAMS or AAA, there are maximum amounts for which consumers are financially responsible.³⁷ These amounts are similar to what a consumer would pay to file a case in small claims court. Should the parties choose to use a local judge or other party to arbitrate the

³⁴ At the request of the lawyer, her name and identifying information has been withheld.

³⁵ Interview with Daniel Dutko, lawyer with Hanszen Laporte (Jul. 5, 2016).

³⁶ Interview with Rich Tomlinson, lawyer with Lone Star Legal Aid (Jul. 6, 016).

³⁷ See JAMS, *Consumer Minimum Standards* (eff. Jul. 2009), available at <https://www.jamsadr.com/consumer-minimum-standards/>; AAA, *Consumer Arbitration Rules: Costs of Arbitration* (eff. Jan. 2016).



case, there are no rules governing that person's fees. In those instances, arbitration fees can quickly mount. Similar to court, where a party unable to pay to file a case can apply for a fee waiver, at least AAA has a process whereby a consumer can appeal for a waiver.³⁸ However, the fee arrangement is only one part of the expenses in arbitration. Attorney fees, witness expenses, and other costs are all significant. These expenses can be significant and some may not be transparent from the beginning of the process. For example, AAA charges extra fees for use of a hearing room.

Given the unpredictability of the cost of the arbitration process as well as the risks of a biased arbitrator, some plaintiffs' attorneys are unwilling to take cases to arbitration. Without an attorney, patients and their families are at a significant disadvantage. As a result of these barriers, arbitration clauses often stand in the way of justice.

Arbitration can be costly and the costs can be hidden from the consumer both at the signing of the agreement as well as at the initiation of the proceeding. Further, because of the cost and the risk of not having it recouped, many lawyers do not accept arbitration cases. In fact, in arbitration related to financial services and products, only 9% of consumers obtain relief, a figure that stands in stark contrast to the 93% of times in which arbitrators order consumers to pay companies.³⁹

Conclusion

There is no reason to believe that the arbitration process is less adversarial than the court process. As noted above, many patients do not realize they have agreed to arbitrate any disputes. Often, patients or family members do not discover the arbitration requirement until "after a nursing facility's negligence has caused a resident severe injury or death."⁴⁰ Typically, arbitration waivers contained within contracts are a requirement to receive any care and families sign them in a rush, without a real alternative to opt-out, and without understanding what they are waiving. Thus, the fact they have signed the agreement does not necessarily weigh into how they view the arbitration process.

Assuming arbitration is faster is short-sighted, "dispute resolution is not only about efficiency . . . [i]t is about balancing the fairness of the legal

³⁸ Texas does not have a law requiring arbitrators provide fee waivers. Under California law, both JAMS and AAA provide fee waivers for consumers living under 300% of the Federal poverty guideline. Cal. Code of Civ. Pro. Sec. 1284.3.

³⁹ Consumer Financial Protection Bureau, *Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act Sec. 1028(a)* (2015).

⁴⁰ Bagby, K. and Souza, S., *Ending Unfair Arbitration: Fighting Against Enforcement of Arbitration Agreements in Long-Term Care Contracts*, 29 J. Contemp. Health L. & Pol'y 183 (2013).



process with its costs. Arbitration comes up short on both fronts.”⁴¹ In conclusion, arbitration is supposed to function as an alternative forum where plaintiffs can raise all of the claims provided by law, but the effect is that many arbitration agreements simply shave away consumer rights.

Based on the evidence cited in this comment, Texas Appleseed believes keeping the rule eliminating pre-dispute arbitration agreements in the context of long term care facilities will have beneficial impacts for nursing home patients and support legal and conscionable business practices in the market. Texas Appleseed is grateful for the opportunity to comment.

Sincerely,

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⁴¹ Adam J. Levitin, [BankThink: Mandatory Arbitration Offers Bargain-Baseament Justice](#), (May 13, 2014).