

MAYER • BROWN

Mayer Brown LLP
1999 K Street, N.W.
Washington, D.C. 20006-1101

Main Tel +1 202 263 3000
Main Fax +1 202 263 3300
www.mayerbrown.com

Andrew J. Pincus
Direct Tel +1 202 263 3220
Direct Fax +1 202 263 5220
apincus@mayerbrown.com

October 14, 2015

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attn: CMS-3260-P
Room 445-G
Hubert H. Humphrey Building
200 Independence Avenue SW
Washington, DC 20201

Re: Medicare and Medicaid Programs; Reform of
Requirements for Long-Term Care Facilities
(CMS-3260-P)

To Whom It May Concern:

I represent the Chamber of Commerce of the United States of America (the “Chamber”) and the U.S. Chamber Institute for Legal Reform (“ILR”), and I am submitting these comments on their behalf. The U.S. Chamber of Commerce (the “Chamber”) is the world’s largest business federation, representing the interests of more than three million companies of every size, sector, and region. ILR is an affiliate of the Chamber dedicated to making our nation’s overall civil legal system simpler, faster, and fairer for all participants.

The Chamber and ILR appreciate the opportunity to comment on the rule on long-term care facilities proposed by the Centers for Medicare and Medicaid Services (“CMS”) published in the *Federal Register* on July 16, 2015 (the “Proposed Rule”).¹ The Proposed Rule would impose significant restrictions on the use of arbitration agreements in connection with the services provided by long-term care facilities. Most notably, it would provide that an arbitration agreement is invalid if a facility makes the agreement a condition of admission, and it would require that arbitration agreements be presented separately from other agreements and forms.² In addition, while the Proposed Rule would not ban the use of arbitration agreements, CMS requested comments on whether contractual arbitration agreements should be prohibited.³

¹ Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 80 Fed. Reg. 42168 (July 16, 2015).

² *Id.* at 42211.

³ *Id.* at 42242.

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In this submission, we comment on (1) whether arbitration should be prohibited, and (2) the specific restrictions that CMS is contemplating to impose on long-term care facilities' use of arbitration agreements. We strongly urge CMS not to adopt regulations prohibiting or restricting arbitration as a matter of policy and also demonstrate that CMS lacks the legal authority to impose such restrictions.

First, CMS should not adopt any regulation that prohibits the use of arbitration agreements. For many injured persons, arbitration is an easier and less costly means of seeking redress than the complex and slow-moving court system, where obtaining relief is far more expensive and takes considerably longer. Arbitration also lowers businesses' costs of resolving disputes, which creates savings that they can pass on to their customers and clients. But these benefits can only be realized when parties are free to enter into arbitration agreements *before* disputes arise; despite arbitration's overall systemic benefits, parties almost never agree to arbitration in a particular case after a dispute has arisen. CMS should not eliminate the ability of long-term care facilities and their residents or loved ones to choose this valuable form of dispute resolution.

Second, CMS also should not adopt the Proposed Rule's restrictions on arbitration agreements. These restrictions would raise costs for long-term care facilities and create uncertainty as to whether their arbitration agreements would be enforced, leading to an increase in health care costs for residents and their families. The restrictions are also unnecessary: state contract law already provides numerous protections against unfair arbitration agreements, and long-term care facilities undertake considerable voluntary efforts to provide clear explanations and disclosures about arbitration agreements and make sure that those agreements are substantively fair.

Third, any regulation limiting arbitration agreements would be invalid, because CMS lacks the authority to override the provisions of a federal statute—the Federal Arbitration Act (“FAA”)—that protects the enforceability of arbitration agreements in the absence of an express indication of congressional intent to displace the FAA. Congress has not authorized CMS to supersede the FAA.

I. CMS Should Not Prohibit Binding Arbitration, Which Benefits Injured Persons By Providing A Fair Means Of Resolving Disputes That They Cannot Litigate In Court As A Practical Matter.

Prohibiting the use of arbitration agreements by long-term care facilities would harm the residents of long-term care facilities and their families—the very persons whom CMS seeks to protect. Arbitration enables people who have injuries (including residents of long-term care facilities or their families) to obtain redress in a wide variety of situations for which litigation in court is impractical. Arbitration is quicker and less costly, and it is at least as likely to result in positive outcomes for claimants. Indeed, the empirical evidence demonstrates that individuals in arbitration fare *at least as well as – if not better than –* they would have in court. *Arbitration thus offers benefits by providing a fair means of adjudicating claims that would never have an*

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opportunity to be resolved in the absence of arbitration. Prohibiting pre-dispute arbitration agreements between long-term care facilities and their residents would mean, as a practical matter, that facilities and their residents or family members would be unable to use arbitration to settle any disputes, thereby harming all of the parties involved.

A. The judicial system is not a realistic or efficient means of obtaining redress for many injured plaintiffs.

For many individual disputes, litigation in court is simply impractical. Litigation in court is procedurally complex, which means that non-lawyers need legal representation to have any hope of successfully navigating the system. But many plaintiffs' claims are too small to justify paying a lawyer to handle the matter and, in any event, most people do not have the resources to do so.

Thus, as Supreme Court Justice Stephen Breyer has recognized, without arbitration, "the typical [plaintiff] who has only a small damages claim" would be left "without any remedy but a court remedy, *the costs and delays of which could eat up the value of an eventual small recovery.*"⁴

Moreover, even when a plaintiff's claim is large enough to make it feasible to bring a lawsuit, the complexity of the court system makes litigation time-consuming and costly, which reduces any recovery that the plaintiff may eventually obtain. State and federal courts are also badly overburdened due to high caseloads and budget cuts, and this leads to extreme delays before plaintiffs' cases can be heard.

Indeed, forty states had to cut funding to their courts in 2010, according to a report by the American Bar Association's "Task Force on the Preservation of the Justice System," which was co-chaired by David Boies and Theodore B. Olson.⁵ The effects of these funding cuts on state court administration have been devastating: as the *Los Angeles Times* has reported, in California, "[a]t least 53 courthouses have closed," and "[c]ourts in 20 counties are closed for at least one day a month." These and other "court closures have forced some San Bernardino [County]

⁴ *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995) (emphasis added).

⁵ Am. Bar. Ass'n ("ABA"), *The Growing Crisis of Underfunding State Courts*, Mar. 16, 2011 ("ABA Report"); see also G. Alan Tarr, *No Exit: The Financial Crisis Facing State Courts*, 100 Ky. L.J. 786, 787 (2011-2012).

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residents to drive up to 175 miles one way to attend to a legal matter.”⁶ In New York City, the wait for a court date is now four times as long as it was before recent budget cuts.⁷

Although the vast majority of civil claims are filed in state courts,⁸ the federal courts also have extraordinarily high caseloads, especially at the trial-court level, where the backlogs are particularly severe.⁹ The Brennan Center for Justice has found that “the number of pending cases per sitting judge reached an all-time high in 2009 and was higher in 2012 than at any point from 1992-2007. A judge in 1992 had an average of 388 pending cases on his or her docket. By 2012, the average caseload had jumped to 464 cases—a 20 percent increase.”¹⁰

Simply put, it is becoming increasingly difficult for individual litigants to navigate the court system and to endure the high costs and lengthy delays that a lawsuit frequently entails.

⁶ Maura Dolan, *Budget cuts force California courts to delay trials, ax services*, L.A. Times, Apr. 9, 2013, <http://articles.latimes.com/2013/apr/09/local/la-me-court-cutbacks-20130410>.

⁷ See William Glaberson, *Despite Cutbacks, Night Court’s Small Dramas Go On*, N.Y. TIMES, June 2, 2011, available at <http://www.nytimes.com/2011/06/03/nyregion/despite-cutbacks-new-york-small-claims-courts-trudge-on.html>; see also Jennifer Golson, *Budget Cuts have ‘Widespread’ Impact on NY State Courts-Report*, Reuters, Aug. 16, 2011 (quoting Michael Miller of the New York County Lawyers’ Association).

⁸ State courts reported around 19 million new civil cases filed in 2010, while federal courts reported over 280,000 new civil cases filed that same year. Compare National Center for State Courts, Court Statistics Project, *Examining the Work of State Courts: An Analysis of 2010 State Court Caseloads* 3, Dec. 2012, http://www.courtstatistics.org/Other-Pages/~media/Microsites/Files/CSP/-DATA%20PDF/CSP_DEC.ashx (state courts in 2010), with Administrative Office of the U.S. Courts, *Judicial Business of the U.S. Courts 2012*, <http://www.uscourts.gov/-Statistics/JudicialBusiness/2012/us-district-courts.aspx> (federal courts in 2010).

⁹ Ruben Castillo, the Chief Judge of the Northern District of Illinois, said that budget constraints have created “a crisis” for U.S. district courts, and that he is essentially being asked: “Which limb do you want amputated?” Michael Tarm, *New Hispanic Chief Judge: Need More Jury Diversity*, Associated Press, July 2, 2013; see also Michelle R. Smith & Jesse J. Holland, *Budget cuts cause delays, concern in federal court*, Associated Press, April 25, 2013, <http://bigstory.ap.org/article/budget-cuts-cause-delays-concern-federal-court> (“Federal budget cuts have caused delays in at least one terror-related court case in New York and prompted a federal judge in Nebraska to say he is ‘seriously contemplating’ dismissing some criminal cases.”).

¹⁰ Alicia Bannon, *Federal Judicial Vacancies: The Trial Courts* 5, Brennan Ctr. for Justice, 2013, <http://www.brennancenter.org/publication/federal-judicial-vacancies-trial-courts>.

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B. Arbitration provides a fair and effective remedy for the many injured persons for whom the judicial system is not a realistic option.

1. *It is far easier for most plaintiffs to pursue their claims in arbitration.*

In comparison to litigation in the court system, arbitration is faster, simpler, more flexible, and less costly. As the Supreme Court has observed, arbitration is “usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regard to scheduling of times and places of hearings and discovery devices.”¹¹

Studies have long found, for example, that in practice, a large percentage of individuals who bring claims in arbitration pay exactly *nothing* in fees to pursue their claim—no filing fees, no attorneys’ fees.¹² The practical costs of presenting a claim in arbitration, moreover, are typically far lower than litigating in court. Arbitration does not require a personal appearance to secure a judgment; claims can be adjudicated on the papers or on the basis of a telephone conference.¹³ There is no need for a claimant to go to court, only to be forced to return another day if the court is unable to get through its docket. Arbitration plaintiffs, moreover, need only submit the relevant documents and a common-sense statement of why they are entitled to relief, which they can often do without a lawyer. Indeed, as two prominent law professors noted in a recent study, in arbitration, “hiring an attorney offers little value to a [plaintiff] and is often unnecessary.”¹⁴

¹¹ *Allied-Bruce Terminix*, 513 U.S. at 280 (quoting H.R. Rep. No.97-542, at 13 (1982), reprinted in 1982 U.S.C.C.A.N. 765, 777); see also, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011) (“[T]he informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.”).

¹² Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 Ohio St. J. on Disp. Resol. 777, 802 (2003) (lower-income employees “paid no forum fees” in 61% of the cases studied; employees also paid no attorneys’ fees in 32% of the cases).

¹³ See, for example, AAA, *Consumer Arbitration Rules* 22, Sept. 1, 2014, at <https://www.adr.org/aaa/-ShowProperty?nodeId=/UCM/ADRSTAGE2021425&>.

¹⁴ Jason Scott Johnson & Todd Zywicki, *The Consumer Financial Protection Bureau’s Arbitration Study: A Summary and Critique* 25-26 (Mercatus Ctr., George Mason Univ., Working Paper, Aug. 2015) (observing that “self-represented plaintiffs were seven times more likely than represented plaintiffs to get an AAA arbitrator’s decision in their favor” (emphasis added)).

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Meanwhile, in contrast to the extreme delays that are typical of our overburdened state and federal courts, arbitrations can be resolved quickly, providing plaintiffs relief much sooner. For example, consumer arbitrations administered by the American Arbitration Association are typically resolved in four to six months—a huge improvement over the *25.7 months* that pass before the average civil lawsuit in federal court first reaches trial (in those rare cases that make it to trial).¹⁵ The long delays that are typical of the court system considerably increase the costs of dispute resolution for plaintiffs.

2. *Plaintiffs prevail in arbitration at least as frequently as—and often more frequently than—they do in court.*

Arbitration is at least as likely, and often more likely, than litigation in court to result in positive outcomes for plaintiffs, as empirical studies repeatedly have shown. Data on win rates reveal that plaintiffs obtain relief to their satisfaction in a significant proportion of arbitrations. A recent study by scholars Christopher Drahozal and Samantha Zyontz of claims filed with the American Arbitration Association found that consumers win relief 53.3% of the time.¹⁶ This success rate compares favorably with the success rate of plaintiffs in state and federal court, who studies have shown prevail roughly 50% of the time.¹⁷ And just as in court, plaintiffs who win in

¹⁵ AAA, *Analysis of the AAA's Consumer Arbitration Caseload*, 2007, at http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004325 (“AAA Caseload Analysis”); see also David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 *Stan. L. Rev.* 1557, 1572-73 (2005) (“few dispute the assertion that arbitration is faster than litigation”); *U.S. District Court—Judicial Caseload Profile* (2012), <http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics.aspx>. See also, e.g., Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where do Plaintiffs Better Vindicate Their Rights?*, 58 *Disp. Resol. J.* 56, 58 (Nov. 2003 - Jan. 2004); reporting findings that arbitration was 33% faster than analogous litigation); see also 23-9 *Insurance Times*, Apr. 29, 2003, http://www.insurancejournal.com/pdf/InsuranceTimes_20030429_39125.pdf; GAO Report to Congressional Requesters, *Securities Arbitration: Actions Needed to Address Problem of Unpaid Awards* 32 (June 2000), <http://www.gao.gov/archive/2000/gg00115.pdf> (reporting that the few securities claims to reach a judgment in court took 1,151 days—or over 3 years—on average); FINRA, *Dispute Resolution Statistics, Summary Arbitration Statistics October 2013* <http://www.finra.org/arbitrationandmediation/finradisputeresolution/additionalresources/statistics> (“FINRA Statistics”) (arbitration claims closed in 2013 through October were pending only 14.2 months on average).

¹⁶ Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 *Ohio St. J. on Disp. Resol.* 843, 896-904 (2010).

¹⁷ See, e.g., Theodore Eisenberg et al., *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 *Seattle U. L. Rev.* 433, 437 (1996) (observing that in 1991-92, plaintiffs

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arbitration are able to recover not only compensatory damages but also “other types of damages, including attorneys’ fees, punitive damages, and interest.”¹⁸ In particular, Drahozal and Zyontz found that 63.1% of prevailing claimants who sought attorneys’ fees were awarded them.

3. *“Post-dispute” arbitration is not a feasible alternative to pre-dispute binding arbitration agreements.*

Some critics of arbitration recognize the benefits of arbitration but maintain that parties would be better served if they were precluded from committing to arbitration until *after* a dispute arises.¹⁹ CMS may have had this critique in mind when it asked for comments on whether arbitration agreements should be prohibited.

But permitting only “post-dispute arbitration agreements” is an illusory option that actually would have the effect of eliminating arbitration. As scholars have recognized, without arbitration agreements that commit both sides to a potential dispute to arbitrate *before the dispute arises*, arbitration in fact will be rare indeed – and the result will be that plaintiffs are relegated to the judicial system in precisely those cases where burdensome court procedures and overcrowded courts are likely to stymie their claims.

Empirical evidence has shown, and the consensus among academics confirms, that *once a particular dispute arises, the opposing parties will rarely if ever agree to arbitration*. This unwillingness has nothing whatsoever to do with the relative benefits or burdens of arbitration or litigation in court, and instead has everything to do with the practical burdens of administering dual systems and the tactical choices of lawyers in the context of particular cases.

A business, such as a long-term care provider, that sets up an arbitration program incurs significant administrative costs in connection with carrying out arbitrations—costs that it does not incur in connection with judicial litigation. For that reason, businesses will be unwilling to expend the effort and resources involved in setting up an effective, plaintiff-friendly arbitration system unless they know it will save them the cost of litigating in court. If a business is faced with the prospect of running an arbitration system and simultaneously having to deal with judicial litigation, the rational response is for that business to reduce transaction costs by not having an arbitration system at all.

(... cont’d)

won 51% of jury trials in state court and 56% of jury trials in federal court, while in 1979-1993 plaintiffs won 50% of jury trials).

¹⁸ Drahozal & Zyontz, 25 Ohio St. J. on Disp. Resol. at 902.

¹⁹ Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 Ohio St. J. on Disp. Resol. 559, 567 (2001) (describing detractors’ position with respect to employment arbitration, and then explaining why it is incorrect).

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Less rational factors also contribute to the unwillingness of parties to enter into even mutually beneficial post-dispute agreements to arbitrate. Once a dispute has arisen, the parties “often have an emotional investment in their respective positions” that skews their preference in favor of vindication in court.²⁰ The lawyers for one or both sides may also be enticed by the fee-generating possibilities of prolonged in-court litigation and may therefore advise clients to choose a forum that is really in the lawyers’ own best interest rather than in that of their clients.

All relevant facts, therefore, point to only one conclusion: post-dispute arbitration agreements “amount to nothing more than a beguiling mirage.”²¹ *They simply do not—and would not—happen.* “[P]re-dispute agreements to arbitrate,” which preserve a plaintiff’s right to an affordable forum, accordingly represent the only real-world option for addressing the very significant gap in access to justice under the court system.²²

In short, arbitration provides many plaintiffs who could not obtain effectual relief in court with an affordable and accessible means of seeking redress. Any rational assessment of the benefits and costs of arbitration must conclude that a prohibition on the use of arbitration agreements by long-term care facilities would harm residents much more than it would benefit them.

II. The Requirements CMS Seeks To Impose On Arbitration Agreements Are Unnecessary To Protect The Rights of Long-Term Care Facility Residents

ILR also strongly urges CMS not to impose the restrictions on arbitration agreements contained in the Proposed Rule. These restrictions are not necessary, given that long-term care residents and their families are already protected from unfair arbitration agreements by judicial policing and by voluntary efforts on the part of long-term care facilities. CMS’s new requirements will only reduce the flexibility that long-term care facilities have in drafting arbitration agreements to suit their needs; raise those facilities’ costs, and increase prices paid by residents or their families.

A. The proposed restrictions would raise costs for long-term care providers and therefore raise the prices charged by long-term care facilities.

The requirements in the Proposed Rule would make it more difficult for long-term care facilities to rely on arbitration as a means of resolving disputes with residents efficiently and in

²⁰ Steven C. Bennett, *The Proposed Arbitration Fairness Act: Problems And Alternatives*, 67 *Disp. Resol. J.* 32, 37 (2012).

²¹ Theodore J. St. Antoine, *Mandatory Arbitration: Why It’s Better than It Looks*, 41 *U. Mich. J.L. Reform* 783, 790 (2008).

²² Theodore J. St. Antoine, *Mandatory Employment Arbitration: Keeping It Fair, Keeping it Lawful*, 60 *Case W. Res. L. Rev.* 629, 636 (2010).

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an accessible way. Thus, they would raise the costs of care at those facilities—costs that ultimately would be borne by the residents and families CMS seeks to protect.

Arbitration is valuable to businesses because it provides a mechanism for resolving disputes more cheaply and efficiently than in the court system. Businesses can, and do, pass the savings they achieve through the use of arbitration on to their customers and clients in the form of lower prices.²³ These savings can only be attained, however, when businesses have the assurance that they will be able to resolve disputes through arbitration rather than through costly litigation.

CMS's proposal to make arbitration agreements unenforceable when they are a condition of admission to a long-term care facility would deny care providers that assurance. This lack of predictability, in turn, would increase legal costs and liability insurance premiums for long-term care facilities,²⁴ inevitably leading to a rise in prices for residents.

CMS's proposed requirement that arbitration agreements be "explain[ed]" in a form that a resident "understands" would have the same effect. Even a long-term care facility that explained its arbitration agreement carefully—as many facilities do—could face uncertainty as to whether a regulator would decide that its explanation was sufficient.²⁵ That uncertainty would threaten to undermine the efficacy of arbitration agreements, to the detriment of both care facilities and residents.

B. The proposed restrictions are unnecessary in light of the many other protections available to ensure fairness.

The Proposed Rule's requirements are not only sure to be costly; they are also unwarranted. State law already provides ample protection from abusive or unfair arbitration

²³ Amy J. Schmitz, *Building Bridges To Remedies For Consumers In International Econlicts*, 34 U. Ark. Little Rock L. Rev. 779, 779–80 (2012); accord, e.g., Steven C. Bennett, *The Proposed Arbitration Fairness Act: Problems And Alternatives*, 67 Disp. Resol. J. 32, 38 n.55 (2012); Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. Am. Arb. 251, 254–55 (2006).

²⁴ Assisted Living Federation of Am., *Position Paper: Protect Long-Term Care Residents' Right to Pre-Dispute Arbitration Agreements*, available at http://www.alfa.org/images/alfa/PDFs/PublicPolicy/PositionPapers/Arbitration_Position_Paper.pdf.

²⁵ Lisa Schencker, *An end to mandatory arbitration agreements in nursing homes?*, Modern Healthcare, July 17, 2015, available at <http://www.modernhealthcare.com/article/20150717/NEWS/150719913> (quoting law professors and practitioners concerned that the wording of CMS's understandability requirement "leave[s] room for trouble").

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agreements.²⁶ And many facilities have voluntarily adopted practices that ensure that arbitration agreements are fair and adequately explained.

The most important of the state-law protections available is the unconscionability doctrine—the common-law rule that allows courts to invalidate agreements when their terms are substantively unfair or were agreed to under unfair procedures. Courts regularly use the unconscionability doctrine to invalidate arbitration provisions in contracts that are considered unfair to a plaintiff in the ways cited by CMS.²⁷ For example, courts have struck down arbitration agreements that contained biased procedures for selecting an arbitrator,²⁸ or that required that arbitration take place in a location inconvenient to the plaintiff.²⁹

Other general state-law contract defenses, such as fraud and duress, also protect residents against unfair arbitration provisions. For example, courts will apply the duress defense to strike down arbitration agreements when “one party takes unjust advantage of the other party’s

²⁶ See, e.g., *Rent-a-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68 (2010) (“Like other contracts,” arbitration agreements “may be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability.’” (quoting *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996))).

²⁷ See 80 Fed. Reg. at 42211.

²⁸ See, e.g., *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 923-25 (9th Cir. 2013) (holding that an arbitration agreement was unconscionable because it “would always produce an arbitrator proposed by [the company] in employee-initiated arbitration[s]” and barred selection of “institutional arbitration administrators”); *Murray v. United Food & Commercial Workers Int’l Union*, 289 F.3d 297 (4th Cir. 2002) (invalidating an arbitration agreement that gave the employer the sole right to create a list of arbitrators from whom the employee could then pick).

²⁹ See, e.g., *Willis v. Nationwide Debt Settlement Grp.*, 878 F. Supp. 2d 1208 (D. Or. 2012) (refusing to enforce an agreement that would have required an Oregon consumer to travel to California to arbitrate a dispute concerning a debt-relief agreement); *Philyaw v. Platinum Enters., Inc.*, 54 Va. Cir. 364 (Va. Cir. Ct. Spotsylvania Cnty. 2001) (invalidating an arbitration agreement that required consumers who had bought used cars in Virginia to arbitrate their claims in Los Angeles); see also, e.g., *College Park Pentecostal Holiness Church v. Gen. Steel Corp.*, 847 F. Supp. 2d 807 (D. Md. 2012) (travel from Maryland to Colorado); *Hollins v. Debt Relief of Am.*, 479 F. Supp. 2d 1099 (D. Neb. 2007) (travel from Nebraska to Texas); *Dominguez v. Finish Line, Inc.*, 439 F. Supp. 2d 688 (W.D. Tex. 2006) (severing provision that would have required Texas retail store manager to arbitrate in Indianapolis, Indiana); *Swain v. Auto Servs., Inc.*, 128 S.W.3d 103, 108 (Mo. Ct. App. 2003) (severing provision that would have required Missouri consumer to arbitrate in Arkansas); *Pinedo v. Premium Tobacco Stores, Inc.*, 102 Cal. Rptr. 2d 435 (Ct. App. 2000) (refusing to enforce agreement that would have required Los Angeles employee to travel to Oakland for arbitration).

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economic necessity or distress to coerce the other party into making [the] agreement.”³⁰ These doctrines are amply sufficient to prevent long-term care residents or their families from being unduly pressured into signing arbitration agreements or from being misled about the agreements’ content.

Long-term care facilities also make significant voluntary efforts to ensure that the arbitration provisions in their agreements with residents are clear, understandable, and fair. The Assisted Living Federation of America, for example, recommends that facilities offer residents who object to arbitration the ability to opt out of an arbitration agreement within 30 days of signing it,³¹ and many facilities indeed make this robust type of opt-out available to residents. Most facilities also already take care to explain their arbitration agreements to prospective residents or their families.³²

Moreover, it is in the best interests of any business to make its arbitration agreement as plaintiff-friendly as possible, since a plaintiff-friendly arbitration framework is more likely to be upheld by the courts. Thus, businesses of all kinds are increasingly adopting arbitration provisions with plaintiff-friendly features, such as requirements that the business shoulder the costs of arbitration³³ or that the business pay the plaintiff a bonus if the plaintiff wins more in arbitration than the business offered in settlement negotiations.³⁴

The generally-applicable contract defenses found in state law and the significant efforts that long-term care facilities make to ensure that their arbitration agreements are fair are more

³⁰ See *In re RLS Legal Solutions, L.L.C.*, 156 S.W.3d 160, 163 (Tex. App. 2005) (denying mandamus where trial court invalidated arbitration agreement on duress grounds, because employer had induced employee to sign the agreement by withholding her pay from her).

³¹ Assisted Living Federation of Am., *supra* note 24.

³² See Schencker, *supra* note 25 (quoting an attorney familiar with the practices of his long-term care facility clients).

³³ See, e.g., AT&T, *Dispute Resolution by Binding Arbitration*, available at <http://www.att.com/disputeresolution> (“AT&T will pay all AAA filing, administration and arbitrator fees for any arbitration” under \$75,000); Amazon.com, *Terms of Use*, available at <http://www.amazon.com/gp/help/customer/display.html/?nodeId=508088> (“We will reimburse [arbitration] fees for claims totaling less than \$10,000 unless the arbitrator determines the claims are frivolous.”).

³⁴ See, e.g., AT&T, *supra* note 33 (“If, after finding in your favor in any respect on the merits of your claim, the arbitrator issues you an award that is greater than the value of AT&T’s last written settlement offer made before an arbitrator was selected, then AT&T will . . . [p]ay you the amount of the award or \$10,000 (“the alternative payment”), whichever is greater”).

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than sufficient to protect the rights and welfare of facility residents. Thus, there is no need for CMS to inject uncertainty and additional costs into an arbitration system that is currently working quite well for residents and for their caregivers. CMS should abandon the Proposed Rule's unnecessary and potentially harmful restrictions on arbitration.

III. The Federal Arbitration Act Precludes CMS From Restricting The Use Of Arbitration Agreements.

“The Federal Arbitration Act reflects an ‘emphatic federal policy in favor of arbitral dispute resolution.’”³⁵ Although arbitration agreements remain subject to generally applicable state contract law, the FAA affords contracting parties the freedom to “structure their arbitration agreements as they see fit,” and to “specify by contract the rules under which . . . arbitration will be conducted.”³⁶

That well-settled legal principle precludes CMS from regulating or otherwise restricting the use of arbitration agreements. The Supreme Court has held repeatedly that the rights protected by the FAA may be overridden only by a clear “congressional command,”³⁷ and there is no such congressional command authorizing CMS to override the FAA.

Federal law protects parties' freedom to determine which issues will be arbitrated and who will participate in each arbitration proceeding; to prescribe the procedural rules that will govern the arbitration; and to select the arbitrator who will resolve their disputes.³⁸ In short, the FAA “makes arbitration agreements ‘valid, irrevocable, and enforceable’ as written.”³⁹

The federal policy favoring arbitration is so strong that a clear congressional command is necessary to displace the FAA “even when the claims at issue are federal statutory claims.”⁴⁰ When federal law is “silent” as to whether Congress intended to override the FAA for a particular type of claim, “the FAA requires the arbitration agreement to be enforced according to its terms,” regardless of whether the source of the claim is federal or state law.⁴¹

³⁵ *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011) (per curiam) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985)).

³⁶ *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989).

³⁷ *See Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987).

³⁸ *See, e.g., Concepcion*, 131 S. Ct. at 1748-49; *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1774 (2010).

³⁹ *Concepcion*, 131 S. Ct. at 1748 (quoting FAA, 9 U.S.C. § 2)

⁴⁰ *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012).

⁴¹ *Id.* at 673.

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Nothing in the Social Security Act, the Patient Protection and Affordable Care Act, or any other federal statute supplies the necessary clear command authorizing CMS to regulate arbitration agreements made between long-term care facilities and their residents – indeed, nothing in any statute indicates any intent *whatsoever* to limit the availability of such arbitration. The FAA therefore applies with full force. Because “[i]t is a fundamental precept of administrative law that an agency action, rule, or regulation ‘cannot overcome the plain text enacted by Congress,’”⁴² CMS cannot, without express statutory authority,⁴³ prohibit what the FAA protects.

Certainly Congress knows how to grant the necessary authority when it wants to. In the Dodd-Frank Act, for example, Congress authorized the Securities and Exchange Commission to issue rules “prohibit[ing], or impos[ing] conditions or limitations on the use of” predispute arbitration agreements in agreements between certain broker-dealers and their clients, and between investment advisers and their clients.⁴⁴

Congress used similar language in authorizing the Consumer Financial Protection Bureau to conduct a study and report to Congress regarding the use of arbitration agreements in consumer financial products and services, and to issue a rule prohibiting or effectively eliminating arbitration if it “finds that . . . [it] is in the public interest and for the protection of consumers.”⁴⁵

Congress enacted no similar language that would authorize the arbitration regulations in CMS’s Proposed Rule. CMS therefore lacks the legal authority to regulate, or ban, arbitration agreements.

⁴² *Sierra Club, Inc. v. Sandy Creek Energy Associates, L.P.*, 627 F.3d 134, 141 (5th Cir. 2010).

⁴³ Tellingly, CMS never identifies any statutory provision specifically giving it authority to regulate arbitration in this or any other context. The Proposed Rule is purportedly based solely on CMS’s general authority under the Social Security Act to adopt regulations relating to the “health, safety, and well-being” of long-term care residents. *See* 80 Fed. Reg. at 42173. This vague and general language is patently insufficient to override the FAA.

⁴⁴ 15 U.S.C. §§ 78o(o), 80b-5(f).

⁴⁵ 12 U.S.C. § 5518(b).

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Thank you for your consideration of these comments. We would be happy to discuss these issues further with appropriate members of CMS's staff.

Sincerely,

A handwritten signature in blue ink, appearing to read "AJ Pincus", with a long horizontal flourish extending to the right.

Andrew J. Pincus