



## **A Federal Ban on Arbitration Agreements in Nursing Homes? Senators' Comment on CMS Proposed Rule Ignores Congressional Intent and Judicial Precedent**

Jason E. Bring and Sean T. Sullivan

In July, the Centers for Medicare & Medicaid Services (CMS) proposed changes to the requirements for long-term care facilities, including implementation of new restrictions on the use of binding arbitration agreements between residents and facilities.<sup>1</sup> Due by October 14, 2015, there have been several noteworthy comments, including one from a group of Senators fronted by Minnesota Senator Al Franken.

While many healthcare companies and nursing home operators submitted comments arguing that the arbitration agreements used in the vast majority of long-term care admissions are fair, voluntary, and already comply with the Proposed Rule, therefore making the changes unnecessary, one group of Senators took the extreme position that arbitration agreements in long-term care facilities should be banned altogether. In a September 23, 2015 letter, 34 Democratic Senators led by Senator Franken urged CMS to prohibit binding, pre-dispute arbitration agreements (the Franken Comment).<sup>2</sup>

While anyone can submit a comment to a proposed rule in the Federal Register, the Proposed Rule and especially the Franken Comment seek to side-step the legislative and judicial processes and the existing “emphatic federal policy in favor of arbitral dispute resolution.”<sup>3</sup> While the Proposed Rule’s arbitration provisions appear to be inconsistent with the Federal Arbitration Act (FAA) and repeated Supreme Court decisions stressing the benefits of arbitration,<sup>4</sup> the Franken Comment is squarely at odds with existing law and urges CMS to use the regulatory process to circumvent Congress and the FAA.

Federal courts have consistently held that, to regulate arbitration, an agency must show evidence of Congressional intent to do so.<sup>5</sup> On several occasions, however, Congress has been presented with the option to grant authority to regulate arbitration agreements to agencies, and it has repeatedly declined.<sup>6</sup>

<sup>1</sup> Reform of Requirements for Long-Term Care Facilities, 80 Fed. Reg. 42168 (proposed July 16, 2015), available at <https://www.federalregister.gov/articles/2015/07/16/2015-17207/medicare-and-medicaid-programs-reform-of-requirements-for-long-term-care-facilities> [hereinafter Proposed Rule].

<sup>2</sup> Letter from Al Franken, United States Senator, to Andy Slavitt, Acting Administrator, Centers for Medicare and Medicaid Services (Sept. 23, 2015) (on file with author), available at <http://www.franken.senate.gov/files/documents/150923CMSArbitration.pdf>.

<sup>3</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985).

<sup>4</sup> See *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. \_\_\_, 132 S. Ct. 1201, 1203 (2012) (per curiam) (unanimously invalidating a state’s public policy against arbitrating personal injury or wrongful death claims against nursing homes); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (“The advantages of arbitration are many: it 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; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices.”).

<sup>5</sup> The courts have held that a federal agency may not prohibit or regulate arbitration unless such regulation is based upon a reasonable interpretation of legislation evincing a congressional intent to bar arbitration. See, e.g., *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002) (declining to enforce FTC regulations that would have prohibited arbitration of Magnuson-Moss Warranty Act claims); *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470, 473 (5th Cir. 2002) (compelling arbitration despite FTC regulations that would have banned arbitration of claims); *Shearson/American Express v. McMahon*, 482 U.S. 220, 226 (1987) (holding that FAA requires arbitration of federal statutory claims unless overridden by clear congressional command).

<sup>6</sup> See Fairness in Nursing Home Arbitration Act of 2012, H.R. 6351, 112th Cong.; Fairness in Nursing Home Arbitration Act of 2009, H.R. 1237, 111th Cong.; Fairness in Nursing Home Arbitration Act, S. 512, 111th Cong. (2009); Fairness in Nursing Home Arbitration Act of 2008, H.R. 6126, 110th Cong.; Fairness in Nursing Home Arbitration Act, S. 2838, 110th Cong. (2008); Arbitration Fairness Act of 2009, S. 931, 111th Cong.; Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong.; and Consumer Fairness Act of 2009, H.R. 991, 111th Cong.

In an apparent effort to tie its arbitration-related proposals to the health and safety requirement imposed by the Medicare Act and the Medicaid Act, the Proposed Rule states that “the increasing prevalence of [arbitration] agreements *could* be detrimental to residents’ health and safety and *may* create barriers for surveyors and other responsible parties to obtain information related to serious quality of care issues.”<sup>7</sup> However, this speculation that the use of arbitration agreements could *theoretically* be detrimental to resident health and safety “simply perpetuates the historical prejudice against arbitration agreements that Congress sought to eradicate when it enacted the FAA some [90] years ago.”<sup>8</sup> Attempting to tie an outright ban on arbitration agreements to Congressional intent or the health and safety of residents would be even more tenuous.

While we await CMS’s decision and announcement of a Final Rule or a Supplemental Proposed Rule, it remains to be seen whether the minority group of Senators opposed to binding arbitration in nursing homes will be able to disrupt the emphatic federal policy in favor of arbitration. Nonetheless, the Proposed Rule and ensuing discussion should remind healthcare and long-term care companies to ensure that they offer balanced, consumer-friendly, voluntary arbitration agreements, handled by trained personnel and guided by sound business practices.

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<sup>7</sup> Proposed Rule at 42,211 (emphasis added).

<sup>8</sup> *Rainbow Health Care Ctr.*, 2008 WL 268321, at \*7 (N.D. Okla. Jan. 29, 2008).

## Authors and Contributors

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**Jason E. Bring**

Partner, Atlanta Office  
404.873.8162  
jason.bring@agg.com

**Sean T. Sullivan**

Associate  
404.873.8510  
sean.sullivan@agg.com

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**Atlanta Office**

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**Washington, DC Office**

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Suite 1000  
Washington, DC 20006

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