

ARBITRATION AGREEMENTS AND NURSING HOMES: A REGULATORY COMPROMISE

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INTRODUCTION

Early one Monday morning, nursing home staff found seventy-nine-year-old Lucille Devers sitting in her room with fire ants crawling out of her mouth, nose, and ears.¹ After a staffer placed Lucille in the shower to re-

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1. See CTR. FOR MEDICARE ADVOCACY, INC., TORT REFORM AND NURSING HOMES,

move the ants from her body cavities, Lucille developed a staph infection due to the numerous ant bites.² Another nursing home resident, Clifford Quick, was emotionally and verbally abused by a licensed practical nurse.³ Co-workers overheard the nurse call Clifford “a silly old son of a bitch,” and threaten to tie him to his bed if he refused to be quiet.⁴ While in her nursing home, Almeda Holmes suffered from dehydration, malnutrition, and bedsores as staff members left her to lay in her own excrement for extended periods of time.⁵ Doris Hendrickson was strangled to death by improper physical restraint techniques employed by her nursing home.⁶ In another nursing home, a nursing assistant sexually exploited a ninety-year-old resident, E.M., who suffered from depression.⁷ Not only did the assistant make sexually suggestive comments to E.M., she also positioned herself in a chair in a way that encouraged E.M., a resident dependent on her care, to stroke her inner thigh while E.M. was seated in his wheelchair.⁸ Unfortunately, these examples provide just a glimpse of the larger problem of nursing home abuse, neglect, and substandard care perpetuated by such facilities in the United States today.⁹

Despite the pervasiveness and significance of this problem, public records of these cases only exist because these individuals and their family members utilized the judicial system to hold the nursing homes accountable for their egregious conduct.¹⁰ Recently, however, nursing home residents and their loved ones have been barred from using Article III courts as a result of the nursing home industry’s increased utilization of mandatory pre-dispute arbitration agreements in facility admission contracts.¹¹

app. at 1 (2003) [hereinafter TORT REFORM]; *Alabama Nursing Home Hit with \$5.35 Million Ant-Bite Verdict*, in 5 No. 1 ANDREWS NURSING HOME LITIG. REP. 3 (2002) [hereinafter *Ant-Bite Verdict*].

2. See TORT REFORM, *supra* note 1; *Ant-Bite Verdict*, *supra* note 1.

3. See Ky. Bd. of Nursing v. Ward, 890 S.W.2d 641, 642 (Ky. Ct. App. 1994).

4. *Id.*

5. See Rogers v. Hickory Manor Nursing & Rehab., L.L.C., 902 So.2d 1150, 1151–52 (La. Ct. App. 2005).

6. See Hendrickson v. Genesis Health Venture, 565 S.E.2d 254, 258 (N.C. Ct. App. 2002).

7. See Smith v. Iowa Dep’t of Human Servs., 755 N.W.2d 135, 136 (Iowa 2008).

8. See *id.*

9. See Jennifer N. Phan, *The Graying of America: Protecting Nursing Home Residents by Allowing Regulatory and Criminal Statutes to Establish Standards of Care in Private Negligence Actions*, 2 HOUS. J. HEALTH L. & POL. 297, 305 (2002) (tracing the prevalence of elder abuse).

10. See, e.g., *Ant-Bite Verdict*, *supra* note 1 (explaining that an Alabama jury awarded Lucille and her daughter \$5.35 million in damages in response to their negligence claims against the nursing home).

11. See Nathan Koppel, *Nursing Homes, in Bid to Cut Costs, Prod Patients to Forgo Lawsuits*,

This Comment discusses the ways in which mandatory pre-dispute arbitration agreements in admission contracts shield many nursing homes from meaningful liability and public accountability following claims of abuse, negligence, sexual assault, and even wrongful death.¹² It bolsters existing arguments against the use of arbitration in nursing homes and offers a recommendation that attempts to resolve the contentious debate surrounding its use.

While privately-funded nursing homes also enforce arbitration agreements, this Comment focuses solely on their use in federally-funded facilities. Part I provides background on the federal regulation of nursing homes by the Centers for Medicare and Medicaid Services (CMS). Part II discusses the rise in arbitration agreements in the nursing home industry and the difficulties residents and their families face in holding nursing homes accountable for neglect and abuse. Part III outlines attempts by the Legislative, Judicial, and Executive Branches of the federal government to address the issue of nursing home arbitration agreements with a focus on CMS' efforts to regulate arbitration under different Executive Administrations. Finally, Part IV recommends ways in which CMS can incorporate the public elements of the civil justice system into nursing home arbitration resolutions.

I. REGULATING NURSING HOMES

As of 2014, 1.4 million individuals live in federally-funded nursing homes in the United States, making up almost 3% of the overall age 65 or older population and almost 10% of the age 85 and older population.¹³ The Census Bureau predicts that by the year 2060, one in four Americans will be aged 65 or older.¹⁴ Millions of these Americans will seek out nursing

WALL STREET J. (Apr. 11, 2008, 11:59 PM), <https://www.wsj.com/articles/SB120786025242805879> (explaining how the nursing home industry, in reaction to several high jury awards against negligent nursing homes, turned to mandatory arbitration to decrease litigation awards).

12. See, e.g., Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> (asserting that the confidential nature of arbitration keeps nursing home abuse and neglect out of the public consciousness).

13. See CTRS. FOR MEDICARE & MEDICAID SERVS., NURSING HOME DATA COMPENDIUM 2 (2015).

14. This amount equates to 98.2 million people who will be aged 65 and older, of which 19.7 million will be 85 or older by the year 2060. U.S. CENSUS BUREAU, CB17-FF.08, OLDER AMERICANS MONTH: MAY 2017 (2017).

homes for care, increasing the total nursing home resident population.¹⁵ This anticipated increase in the elder population will likely exacerbate current issues of abuse and substandard care in these facilities.¹⁶ Understanding how the federal government regulates these entities is critical to addressing the challenges nursing home residents continue to face.

A nursing home is a long-term residential health care facility that provides care to individuals who are aged or physically or mentally incapacitated to the extent that they can no longer care for themselves.¹⁷ Both state and federal entities regulate nursing homes.¹⁸ For a nursing home to operate within any state, it must be licensed and comply with the regulations of that particular state.¹⁹ Provisions of the Social Security Act dictate the requirements that nursing homes must meet to receive Medicare²⁰ and Medicaid²¹ funding.²² The Omnibus Reconciliation Act of 1987 (OBRA '87) originally enacted the requirements that nursing homes must abide by to receive federal funding.²³ Congress passed OBRA '87 in response to a report on the prevalence of elder abuse, neglect, and substandard care in the facilities tasked with caring for vulnerable elder Americans.²⁴ The reforms

15. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-61, NURSING HOMES: CONSUMERS COULD BENEFIT FROM IMPROVEMENTS TO THE NURSING HOME COMPARE WEBSITE AND FIVE-STAR QUALITY RATING SYSTEM 1 (2016) [hereinafter GAO NURSING HOME COMPARE REPORT] (predicting that as the estimated 76 million baby boomers born between 1946 and 1964 age, the number of nursing home residents may increase).

16. See JENNIFER M. ORTMAN ET AL., U.S. CENSUS BUREAU, AN AGING NATION: THE OLDER POPULATION IN THE UNITED STATES 1 (2014) (explaining that the growth of the elder population will create challenges for businesses, health care providers, and policymakers).

17. See Daniel J. Penofsky, *Litigating Nursing Home Negligence and Wrongful Death Cases*, 110 AM. JUR. TRIALS 1, 26 (2017).

18. See *id.* at 30.

19. *Id.*

20. Medicare is the federal health insurance program for individuals age sixty-five years or older, certain younger disabled individuals, and individuals with end-stage renal disease. See GAO NURSING HOME COMPARE REPORT, *supra* note 15, at 1.

21. Medicaid is the joint federal and state health care financing program for certain categories of low-income individuals. *Id.*

22. These provisions and the relevant regulations use the terms “skilled nursing facility” under the Medicare provisions and “nursing facility” under the Medicaid provisions. This Comment uses the term “nursing home” to refer to both categories of facilities. See 42 U.S.C. §§ 1395i-3, 1395i-3a, 1396r (Supp. II 2012).

23. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330.

24. See *The Nursing Home Reform Act Turns Twenty: What Has Been Accomplished, and What Challenges Remain: Hearing Before the S. Special Comm. on Aging*, 110th Cong. 7–8 (2007) [hereinafter *NHRA Turns Twenty*] (statement of Kathryn G. Allen, Director, Health Care, U.S. Government Accountability Office).

directed CMS, a sub-agency of the U.S. Department of Health and Human Services (HHS), to improve its certification process and oversight of nursing homes participating in Medicare and Medicaid.²⁵ CMS oversight of nursing homes is conducted at both the federal and state level, with state survey agencies investigating the quality of nursing homes through standard surveys and complaint investigations.²⁶

CMS currently mandates that state survey agencies conduct unannounced surveys of nursing homes at least every fifteen months to certify that the facilities are abiding by federal regulations.²⁷ These surveys assess the facilities' compliance with federal requirements such as nursing home residents' rights,²⁸ abuse and neglect,²⁹ the facilities' care plans for residents,³⁰ the quality of life,³¹ the quality of care provided,³² the physical environment,³³ and the staff training.³⁴ If a survey team finds that a nursing home is not in compliance with federal requirements, CMS can sanction the facility.³⁵

In determining the appropriate sanctions, CMS and the state surveyor

25. *Id.*

26. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-33, NURSING HOME QUALITY: CMS SHOULD CONTINUE TO IMPROVE DATA AND OVERSIGHT 6 (2015) [hereinafter GAO CMS OVERSIGHT REPORT] (detailing the roles of various federal and state entities that have oversight authority over nursing homes).

27. See 42 C.F.R. §§ 488.300–335 (2017); see also GAO CMS OVERSIGHT REPORT, *supra* note 26, at 8 (complaint investigations of nursing homes are conducted on an as-needed basis).

28. The nursing home residents' bill of rights includes, but is not limited to, the residents' rights to a dignified existence, to exercise rights as citizens or residents of the United States, and to be informed of the planning and implementation of their care. See 42 C.F.R. § 483.10.

29. See *id.* § 483.12 (mandating that the facility not abuse its residents or employ individuals previously found guilty of abuse or neglect, and requiring the development of written policies to respond to such harm).

30. See *id.* § 483.21 (requiring the facility to develop and implement a baseline care plan for each resident).

31. See *id.* § 483.24 (defining quality of life as a fundamental principle that applies to all care and services provided to facility residents).

32. See *id.* § 483.25 (ensuring that the facility provides treatment and care to all residents based on their comprehensive person-centered care plan and the residents' choices).

33. See *id.* § 483.90 (listing the requirements for the ways facilities must be designed, constructed, equipped, and maintained to protect the health and safety of the residents, including requirements for fire safety, bedroom accommodations, and bathroom facilities).

34. See *id.* § 483.95 (compelling facilities to develop and implement training programs for staff, including education on activities that constitute abuse, neglect, and exploitation).

35. See generally *id.* §§ 488.400–456 (detailing various remedies to ensure prompt compliance with federal program requirements).

first examine the seriousness of the deficiencies within the facility, which range from a “potential for minimal harm” to “immediate jeopardy to the health or safety” of nursing home residents.³⁶ Some potential sanctions for nursing home facilities in violation of the federal regulations include: a denial of all Medicare and Medicaid payments,³⁷ a denial of Medicare and Medicaid payments for new resident admissions until the facility is in compliance,³⁸ and civil money penalties up to \$10,000 for every day the facility is in noncompliance.³⁹ In addition to imposing these sanctions, CMS publishes the results of its surveys on its website so Americans can assess the quality of care provided in each facility.⁴⁰

Congress enacted the aforementioned federal regulations to rectify specific issues plaguing nursing homes, such as neglect and abuse.⁴¹ Neglect in nursing homes is described as the facility’s or its employees’ failure to provide goods and services to a resident that are necessary to avoid physical harm, pain, mental anguish, or emotional distress.⁴² Abuse, on the other hand, is the willful infliction of injury, unreasonable confinement, intimidation, or punishment resulting in physical harm, pain, or mental anguish.⁴³ CMS requirements for participation in Medicare and Medicaid are meant to prevent abuse and neglect by ensuring nursing home facilities provide quality care to their residents, hire skilled staff members, and quickly address violations of the regulations.⁴⁴ Yet, the facilities entrusted to care for the most vulnerable members of our society are riddled with deficiencies throughout the nation.⁴⁵ Not only do abuse and neglect occur, but millions

36. See *id.* § 488.404 (listing factors considered for sanctions for noncompliance).

37. See *id.* § 488.418; see, e.g., *Sunshine Haven Nursing Operations, L.L.C. v. Dep’t of Health & Human Servs.*, 742 F.3d 1243, 1245 (10th Cir. 2014).

38. See 42 C.F.R. § 488.417.

39. See *id.* §§ 488.430–444.

40. See 42 U.S.C. §§ 1396r(g)(5)(E), (h)(9)(i) (2018) (mandating the Secretary of the U.S. Department of Health and Human Services (HHS) to update the Medicare website’s *Nursing Home Compare* tool with information about certification and survey results); 42 C.F.R. § 488.325 (requiring the information regarding nursing home deficiencies to be provided to the public); see also *Nursing Home Compare*, MEDICARE.GOV, <https://www.medicare.gov/nursinghomecompare/search.html> (last visited Oct. 28, 2018).

41. See *NHRA Turns Twenty*, *supra* note 24.

42. See 42 C.F.R. § 483.5; see, e.g., Penofsky, *supra* note 17, at 47–48 (listing examples of neglect, such as failure to provide the resident with a safe, secure, and sanitary environment).

43. See, e.g., 42 C.F.R. § 483.5; Penofsky, *supra* note 17, at 47 (providing examples of abuse, such as improperly physically restraining and threatening the resident).

44. See 42 C.F.R. § 483.12; *id.* at § 483.95.

45. See GAO CMS OVERSIGHT REPORT, *supra* note 26, at 10, 11 (reporting that from 2005–2014, the average consumer complaints, reported per nursing home increased by 21%, and that in 2014 about 20% of nursing homes surveyed were cited with serious deficiencies).

of nursing home residents are also denied the right to complain or seek redress for violations of federal regulations.⁴⁶ With the rapidly increasing elder population in America, it is highly likely that these issues will persist and present new challenges until CMS reforms this system.⁴⁷

II. MANDATORY ARBITRATION IN THE NURSING HOME SETTING

When CMS' regulations fail to adequately protect nursing home residents from harm, residents and their families turn to the civil justice system to tell their stories, obtain meaningful remedies, and demand action to prevent repetition of their tragedies.⁴⁸ The increased use of mandatory pre-dispute arbitration clauses in nursing home admission contracts bars residents and their families from utilizing Article III courts, which precludes them from seeking justice.⁴⁹

A. Arbitration Generally

Mandatory arbitration is a dispute resolution process required by contractual agreement in which the disputing parties choose a neutral third party to make a final and binding decision to resolve their dispute.⁵⁰ These

Since 2013, four out of every ten federally-funded nursing homes were cited at least once for a serious violation of the federal requirements. Common citations included failing to protect residents from avoidable accidents, neglect, mistreatment, and bedsores. See Jordan Rau, *Trump Administration Eases Nursing Home Fines in Victory for Industry*, N.Y. TIMES (Dec. 24, 2017), <https://www.nytimes.com/2017/12/24/business/trump-administration-nursing-home-penalties.html>.

46. See Phan, *supra* note 9, at 305 (referring to a congressional report which found that close to 2.6 million nursing home residents are denied the right to complain about violations).

47. See Ortman, *supra* note 16 (anticipating that the elder population growth will produce challenges for federal programs like Social Security and Medicare).

48. See Andrew F. Popper, *In Defense of Deterrence*, 75 ALB. L. REV. 181, 183 (2012) (arguing that when individuals are harmed, the civil justice system presents an opportunity for recognition of that harm and prevention of future harm); Letter from the Am. Ass'n for Justice, to Dr. Kate Goodrich, Dir., Office of Clinical Standards & Quality (Aug. 7, 2017), <https://www.regulations.gov/document?D=CMS-2017-0076-0744> (asserting that when regulations do not adequately protect nursing home residents, the civil justice system serves as the last opportunity for redress).

49. See *Fairness in Nursing Home Arbitration Act: Hearing on S. 2838 Before the S. Comm. on the Judiciary, Subcomm. on Antitrust, Competition and Consumer Rights, and the Special Comm. on Aging*, 110th Cong. 7 (2008) [hereinafter *FLNHA Hearing*] (statement of David W. Kurth) (testifying about his inability to seek justice for the neglect his father suffered in a nursing home due to the facility "hiding behind" a secretive arbitration agreement).

50. *Arbitration*, BLACK'S LAW DICTIONARY (10th ed. 2014).

arbitration agreements predominantly exist in consumer contracts, such as agreements with credit card companies, banks, and cell phone companies.⁵¹ Generally, arbitration agreements give each party subject to the contract the ability to file claims against the other in arbitration and obtain a decision from the arbitrator.⁵² Either side can compel arbitration in response to a dispute filed in court.⁵³ Usually, an agreement specifies an arbitration administrator, which can be a for-profit or non-profit organization.⁵⁴ The administrator “facilitate[s] the selection of the arbitrator to decide the dispute, provide[s] . . . the basic rules of procedure and operations support, and generally administer[s] the arbitration.”⁵⁵ Most arbitration proceedings permit limited or streamlined discovery processes compared to typical court proceedings.⁵⁶ Finally, rights to appeal an arbitration decision are typically limited.⁵⁷

Arbitration agreements are enforced under the Federal Arbitration Act (FAA).⁵⁸ The Supreme Court interpreted the FAA as a congressional declaration of a “liberal federal policy favoring arbitration agreements.”⁵⁹ The Court has not specifically issued a decision regarding the fairness of mandatory arbitration clauses in nursing homes, but it has suggested that the FAA would preempt any state law or policy that attempts to prohibit the use of arbitration agreements in nursing home facilities.⁶⁰ Most recently, the Court enforced an arbitration agreement after nursing home residents died in their facilities, holding that the FAA preempted nursing home residents’ state constitutional rights to access the court system.⁶¹

51. See Wayne P. Fuller, *Arbitration: Its Use and Abuse*, 60 *ADVOC.* 23, 23 (2017). Mandatory arbitration presents numerous hurdles for the consumer: the consumer rarely chooses arbitration; the informal rules of the process generally favor the business; and unlike the judicial system where judges are bound by precedent and statutory law, arbitration is a privately-funded dispute resolution mechanism that operates at the discretion of the arbitrator—who is generally hired by one of the disputing parties. See Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 *HOUS. L. REV.* 1237, 1240–63 (2001).

52. See Arbitration Agreements, 82 *Fed. Reg.* 33,210, 33,215 (July 19, 2017).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. See 9 U.S.C. §§ 1–16 (2012).

59. See *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

60. See *Marmet Health Care Ctr. v. Brown*, 565 U.S. 530, 532 (2012) (per curiam).

61. See *Kindred Nursing Ctrs. v. Clark*, 137 S. Ct. 1421, 1427 (2017).

B. *Arbitration Agreements in Nursing Home Contracts*

To avoid high litigation costs,⁶² increasing insurance premiums,⁶³ and negative publicity,⁶⁴ nursing homes frequently incorporate mandatory pre-dispute arbitration agreements in their admission contracts.⁶⁵ Proponents of these agreements in nursing home admission contracts argue that such provisions benefit the residents and their families due to inherent expediency in providing a resolution.⁶⁶ Advocates for the nursing home industry claim that arbitration is cost-efficient because its streamlined procedure and limited discovery process lowers attorney's fees.⁶⁷ This reduction of attorney's fees potentially enables residents and family members to keep a larger portion of their financial settlement award.⁶⁸ Proponents also assert that the private process contributes to the less adversarial nature and even "coziness" of arbitration proceedings should residents decide to reenter their nursing home facility following the dispute resolution.⁶⁹

On the other hand, opponents of arbitration agreements assert that the

62. See Charles Duhigg, *At Many Homes, More Profit and Less Nursing*, N.Y. TIMES (Sept. 23, 2007), <http://www.nytimes.com/2007/09/23/business/23nursing.html?mtrref=undefined&gwh=AA74B3C323E338C47275F39E881DA51F&gwt=pay> (pointing out that corporate structures like arbitration were employed to insulate companies from costly lawsuits).

63. See Koppel, *supra* note 11 (referencing a nursing home company's report that stated arbitration had significantly reduced its liability exposure).

64. See Ann E. Krasuski, Comment, *Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents*, 8 DEPAUL J. HEALTH CARE L. 263, 263 (2004) (utilizing arbitration agreements helps nursing homes avoid "reputation-breaking litigation").

65. See John R. Schleppenbach, *Something Old, Something New: Recent Developments in the Enforceability of Agreements to Arbitrate Disputes Between Nursing Homes and Their Residents*, 22 ELDER L. J. 141, 150 (2014) (discussing how most American nursing home chains have arbitration agreements in their admission contracts); Haley Sweetland Edwards, *An 87-Year-Old Nun Said She Was Raped in Her Nursing Home. Here's Why She Couldn't Sue*, TIME (Nov. 16, 2017), <http://time.com/5027063/87-year-old-nun-said-she-was-raped-in-her-nursing-home/> (estimating that as many as 90% of large nursing home chains in the United States include arbitration agreements in their admission contracts).

66. See Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements, 82 Fed. Reg. 26,649, 26,651 (June 8, 2017); *FINHA Hearing*, *supra* note 49, at 108 (statement of Kelley Rice-Schild, American Health Care Association & National Center for Assisted Living) (noting that timeliness in a dispute resolution can be very important in a nursing home setting as residents are often reaching the ends of their lives).

67. See Christopher J. Marchand, *Arbitration and Long-Term Health Care*, 38 MD. B.J., May-June 2005, at 32, 34; Wesley R. Bulgarella, Comment, *A Better Forum for All: Addressing the Value of Arbitration Clauses in Nursing Home Contracts*, 86 MISS. L.J. 365, 381 (2017).

68. See *FINHA Hearing*, *supra* note 49, at 108 (statement of Kelly Rice-Schild, American Health Care Association & National Center for Assisted Living).

69. See *id.*; Bulgarella, *supra* note 67, at 388.

nursing home admission process and its swirl of admission documents can be traumatizing.⁷⁰ Potential residents often have cognitive or physical impairments that limit their ability to understand the consequences of an arbitration agreement, and family members often can be too emotionally drained to focus on the legal jargon buried in the contract.⁷¹ Even if potential residents or family members are aware of and understand the mandatory arbitration clause, most of these contracts are offered on a take-it-or-leave-it basis and residents do not have the opportunity to negotiate terms, such as the venue of the dispute resolution.⁷² While consumer contract arbitration challenges typically only seek to remedy economic injuries,⁷³ claims made by a nursing home resident or family member usually involve much higher stakes.⁷⁴ Rather than financial loss, the claims raised by nursing home residents and their representatives are often related to the resident's substandard care, neglect, physical abuse, sexual abuse, and even wrongful death.⁷⁵ Yet, residents are precluded from bringing these claims in a civil action because of a dispute resolution mechanism originally designed to settle commercial matters between businesses rather than issues regarding the health and safety of an aging population.⁷⁶

Proponents of arbitration may tout the efficiency and cost-effective nature of the process; however, in practice, these benefits largely favor the nursing home industry.⁷⁷ The process itself is inherently biased in favor of

70. See S. REP. NO. 110-518, at 5 (2008).

71. *Id.*

72. *Id.* at 6.

73. See Silver-Greenberg & Gebeloff, *supra* note 12 (discussing how consumers attempted to sue credit card and communications companies for charges on their accounts without notice only to learn they had signed arbitration agreements).

74. See Suzanne M. Scheller, *Arbitrating Wrongful Death Claims for Nursing Home Patients: What Is Wrong with This Picture and How to Make It "More" Right*, 113 PENN. ST. L. REV. 527, 529 (2008) (arguing that a nursing home's desire to avoid high jury awards does not justify arbitration agreements that waive the right to a jury trial for unanticipated, negligent acts leading to death).

75. See Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System'*, N.Y. TIMES (Nov. 1, 2015), <https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html> (highlighting that arbitration clauses privatize justice and allow nursing homes to force cases involving sexual assault and wrongful death out of the courts).

76. See Arbitration Agreements, 82 Fed. Reg. 33,210, 33,215 (July 19, 2017) (explaining that arbitration was only used in commercial disputes between companies until the 1980s).

77. See *Courting Big Business: The Supreme Court's Recent Decisions on Corporate Misconduct and Laws Regulating Corporations: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 37 (2008) [hereinafter *Courting Big Business*] (statement of Elizabeth Bartholet, Professor of Law, Harvard Law School); see also Krasuski, *supra* note 64, at 263.

the nursing home, and the informal procedural rules of arbitration do not hold the arbitrator to the highest standard of accountability.⁷⁸ In most arbitration agreements, the nursing home specifies which arbitration provider will be used.⁷⁹ Unlike the publicly accessible federal or statutory rules of procedure and evidence a judge must follow, an arbitrator's procedural rules are entirely up to the arbitration administrator's discretion.⁸⁰ While a limited discovery process may reduce expenses, it typically only benefits the nursing home because it permits the facility to limit the number of witness depositions, experts, and subpoenas, which in turn prohibits harmed residents from accessing the evidence necessary to bring successful claims.⁸¹ Arbitrators, unlike judges, are not bound by precedent in their decisions.⁸² Some arbitration agreements cap the amount of damages that residents can receive, further contributing to the notion that arbitration is only cost-efficient for the nursing home.⁸³ As most arbitration agreements already specify which provider will resolve the matter, opponents argue that the system encourages arbitrators to rule in favor of the parties that select them to ensure repeat business.⁸⁴ While judges are compensated regardless of case quantity or types of claims, the salaries of individual arbitrators depend on how often they are hired by arbitration administering organizations.⁸⁵ Thus, arbitrators have an incentive to decide in favor of nursing homes that continue to hire them.⁸⁶ Finally, an arbitrator's decision typically cannot be appealed.⁸⁷ These combined arbitration elements suggest that arbitration agreements in nursing homes were not designed with the protection of the resident in mind and do little to hold nursing homes publicly accountable.

78. See *Courting Big Business*, *supra* note 77, at 37 (statement of Elizabeth Bartholet, Professor of Law, Harvard Law School) (calling arbitration a biased forum); S. REP. NO. 110-518, at 9 (2008).

79. See S. REP. NO. 110-518, at 7-9.

80. *Id.* at 8-9.

81. See S. REP. NO. 110-518, at 9; Krasuski, *supra* note 64, at 299.

82. Krasuski, *supra* note 64, at 299.

83. See *id.* at 267-69 (arguing that capping damages in arbitration is akin to private tort reform).

84. See *Courting Big Business*, *supra* note 77, at 7-9 (statement of Elizabeth Bartholet, Professor of Law, Harvard Law School) (testifying that it is in the best interest of arbitrators to rule in favor of the party that hired them, and referencing one instance in which the arbitrator ruled in favor of a consumer against the company and was subsequently no longer employed as an arbitrator for that organization).

85. See Alderman, *supra* note 51, at 1256.

86. See Silver-Greenberg & Corkery, *supra* note 75.

87. See Alderman, *supra* note 51, at 1241 n.15 (citing cases supporting the general rule that the Federal Arbitration Act (FAA) provides limited authority for a court to vacate an arbitrator's award).

C. Arbitration and the Civil Justice System

While the civil justice system can hold nursing homes accountable for poor conditions and egregious employee conduct because of its transparency to the public, arbitration, by its very nature, shields its results from the public. Unlike the civil justice system, arbitration takes place in a private setting and seals all documents and proceedings from the public and the media.⁸⁸ Instead, a judicial proceeding makes this information public, the nursing home is subject to public scrutiny, and it is held responsible for meaningful damages.⁸⁹ Following a judicial decision, the public has a tangible record of wrongdoing and other nursing homes may be deterred from repeating similar conduct.⁹⁰ Public awareness of poor conditions in nursing homes can serve as the driving force for encouraging lawmakers and agencies to implement laws and regulations that curb abuse and misconduct in these facilities.⁹¹ On the other hand, arbitration creates a lack of transparency that denies nursing home applicants the ability to thoroughly review deficiencies with their potential new home, and it denies the public at large from fully assessing the quality of care provided in nursing homes that are funded by taxpayer money.⁹²

Individual nursing home facilities are likely to improve conditions in response to public attention to poor conditions in another facility. The public element of the civil justice system serves as a strong deterrent to improper nursing home conduct in that lawsuits with public jury awards alert society and other facilities about poor internal practices.⁹³ For example, seventy-eight-year-old Margaret Hutcheson died in her nursing home after suffer-

88. See S. REP. NO. 110-518, at 11 (2008).

89. See Popper, *supra* note 48, at 187 (arguing that judicial decisions can foster discussion of social problems, and damages deter the wrongdoer and others from repeating similar conduct).

90. See *id.* at 189 (“[T]he potential for liability influences choices made by those in commerce responsible for the design and delivery of goods and services.”).

91. Following media attention regarding neglect and abuse in Washington nursing homes, new laws and regulations were recommended and implemented. See Beth Davis, *Mandatory Arbitration Agreements in Long-Term Care Contracts: How to Protect the Rights of Seniors in Washington*, 35 SEATTLE U. L. REV. 213, 233 (2011).

92. See *id.* (concluding that “the confidential nature of arbitration decreases public awareness and impedes government oversight” of deficiencies in nursing homes).

93. See Meghan Mulligan, *Lifesavers 2016: CJ&D’s Guide to Lawsuits That Protect Us All*, CTR. FOR JUST. & DEMOCRACY 43–44 (Dec. 12, 2016), <https://www.centerjd.org/content/lifesavers-2016-cjd%E2%80%99s-guide-lawsuits-protect-us-all> (providing a compilation of injury lawsuits that have led to major safety improvements, including nursing home litigation).

ing from severe pressure sores, malnourishment, and dehydration.⁹⁴ Following Margaret's death, her family sued the nursing home company and discovered her death was a result of understaffing and the facility staff's failure to follow internal procedures.⁹⁵ The jury awarded Margaret's family \$25 million, and the nursing home implemented a new patient chart monitoring system in its sixty-five facilities, which ultimately changed the quality of care for over 7,000 residents.⁹⁶ When one facility is publicly held liable for a significant amount of damages for the wrongful death that results from negligent conduct, other facilities are likely to improve policies to prevent future liability.⁹⁷ The private process of arbitration, however, shields nursing homes from meaningful liability.⁹⁸ Without these agreements, a nursing home would have more incentive to hire more qualified staff and conduct better trainings.⁹⁹ New regulations are not adopted every time harm occurs in a nursing home, and the current utilization of arbitration in these settings further ensures the public is ignorant to the need for reform. Rectifying these wrongs through the civil justice system can deter other facilities from harmful practices and facilitate important public dialogue that can lead to policy and regulatory change.¹⁰⁰

III. CHALLENGING ARBITRATION AGREEMENTS

Opponents of arbitration agreements in nursing home contracts have challenged such clauses in the Judicial, Legislative, and Executive Branches. Challenges in the judicial system often begin when nursing home residents or their representatives attempt to sue a facility in an Article III court, but subsequently discover they have already agreed to resolve the dispute via arbitration.¹⁰¹ The nursing home typically responds to the suit by moving

94. *Id.* at 43.

95. *Id.*

96. *Id.* at 43–44.

97. See TORT REFORM, *supra* note 1, at 22–24 (noting that tort litigation serves a public role of identifying dangerous practices in a manner that leads to policy changes in nursing home industries and supplements regulatory action).

98. See Koppel, *supra* note 11.

99. See, e.g., Mulligan, *supra* note 93, at 46 (stating that litigation forced a nursing home facility to improve staff trainings).

100. See Alderman, *supra* note 51, at 1263–64 (proclaiming that consumers generally lack the resources or political clout to effectively lobby Congress for meaningful regulatory reform, but the civil justice system allows for the definition and enforcement of individual rights).

101. See Lisa Tripp, *A Senior Moment: The Executive Branch Solution to the Problem of Binding Arbitration Agreements in Nursing Home Admission Contracts*, 31 CAMPBELL L. REV. 157, 161 (2009).

to dismiss the claim and compel arbitration.¹⁰² A resident then challenges the enforcement of the arbitration agreement using general contract defenses.¹⁰³ A court considers the federal government's policy favoring arbitration, the validity of the contract, whether the person who signed the agreement had the authority to do so, and whether the agreement is unconscionable.¹⁰⁴ If the court finds the agreement is enforceable, the suit is dismissed and the matter is compelled to arbitration.¹⁰⁵ If the court finds the agreement unenforceable, residents and their representatives can further litigate their claim in the justice system.¹⁰⁶

Proponents of arbitration argue that the United States currently has a reasonable system that prevents enforcement of unfair arbitration agreements through a case-by-case analysis of the agreements.¹⁰⁷ Challenging the enforceability of an arbitration agreement in this manner, however, ignores the fact that this method requires residents to spend time and money litigating both the unenforceability of the agreement, as well as the actual harm resulting from a nursing home's inadequate care. Furthermore, challenging arbitration enforcement through individual cases creates a system that produces inconsistent results across the country.¹⁰⁸ This inconsistency along with the Supreme Court's jurisprudence in favor of arbitration suggest that the Judicial Branch will not be the proper forum for resolving the

102. See Rebecca E. Hatch, *Causes of Action for Enforcement of Arbitration Clause in Long-Term Care Agreement*, in 41 CAUSES OF ACTION 2D 1, 16–60 (July 2018).

103. Under § 2 of the FAA, agreements to arbitrate disputes shall be considered “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” See 9 U.S.C. § 2 (2012). These defenses against the validity of the agreement include: lack of capacity to enter the arbitration agreement, lack of agency to sign the agreement on behalf of the resident, fraud inducing a resident to sign, waiver of enforcement, unavailability of the forum, and unconscionability of the contract. See Hatch, *supra* note 102, at 16–60.

104. Scheller, *supra* note 74, at 531–32.

105. *Id.* at 529.

106. *Howell v. NHC Healthcare-Fort Sanders, Inc.*, 109 S.W.3d 731, 735 (Tenn. Ct. App. 2003) (affirming the unenforceability of the arbitration agreement and remanding to the trial court for further resolution).

107. See *FINHA Hearing*, *supra* note 49, at 130–31 (statement of Stephen J. Ware, Professor of Law, University of Kansas).

108. Compare *Manley v. Personcare of Ohio*, No. 2005-L-174, 2007 WL 210583, at *3–4 (Ohio Ct. App. Jan. 26, 2007) (enforcing an arbitration agreement although the resident had cognitive impairments and missed the signature line of the contract), with *Howell*, 109 S.W.3d at 732–35 (finding the arbitration agreement unconscionable because the nursing home did not explain the agreement to a resident who could not read or write and the arbitration provisions were “‘buried’ [in] the larger document”).

issue of arbitration agreements in nursing home contracts anytime soon.¹⁰⁹

Congressional reforms have also largely failed. Congress attempted to resolve this issue by amending the FAA with the Fairness in Nursing Home Arbitration Act (FINHA).¹¹⁰ The Act proposed to amend the FAA to prohibit the enforcement of nursing home arbitration agreements only when the agreement was entered prior to a dispute.¹¹¹ Democratic proponents of the Act stressed that it would not eliminate arbitration altogether, but that the Act was narrowly tailored to prohibit only pre-dispute arbitration agreements in nursing home facilities instead of both pre- and post-dispute arbitration.¹¹² Republican Senators vehemently opposed this legislation and argued that the Democratic majority was pushing “the trial-lawyer agenda” rather than evincing concern for the elder population.¹¹³ As the Republican Party currently controls both the House and the Senate and Congress previously failed to prohibit pre-dispute arbitration agreements in nursing home contracts with a Democratic majority when the Act was initially proposed, Congress is unlikely to reach a solution in the near future.

Finally, three presidents have addressed the issue of arbitration in nursing home contracts: George W. Bush, Barack Obama, and Donald Trump. Under the Bush Administration, CMS issued a short and evasive memorandum maintaining the status quo of arbitration in nursing home agreements.¹¹⁴ Under President Obama, CMS promulgated a final rule regarding arbitration in nursing home contracts in response to over 10,000 comments after a two-year review period.¹¹⁵ This rule explicitly prohibited the use of pre-dispute binding arbitration agreements in nursing home facil-

109. See *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (holding that Congress intended a national policy in favor of arbitration when it passed the FAA); Tripp, *supra* note 101, at 173.

110. See generally Fairness in Nursing Home Arbitration Act, S. 2838, 110th Cong. (2008); Fairness in Nursing Home Arbitration Act of 2008, H.R. 6126, 110th Cong.

111. See S. REP. NO. 110-518, at 2 (2008) (stating that the purpose of the Act is to “protect vulnerable nursing home residents and their families from unwittingly agreeing to pre-dispute mandatory arbitration, thus signing away their right to go to court”).

112. See *FINHA Hearing*, *supra* note 49, at 2 (statement of Senator Herb Kohl).

113. See S. REP. NO. 110-518, at 19 (claiming that the Democratic senators were only pushing this bill due to pressure from special interest organizations like the Association of Trial Lawyers of America).

114. See DEP’T OF HEALTH & HUMAN SERVS., CTRS. FOR MEDICARE & MEDICAID SERVS., S&C: 03–10, BINDING ARBITRATION IN NURSING HOMES (2003) (determining that binding arbitration agreements do not affect the ability of Centers for Medicare & Medicaid Services (CMS) to survey and impose sanctions for violations of federal regulations, including those for quality of care); accord Krasuski, *supra* note 64, at 289.

115. See Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. 68,688 (Oct. 4, 2016).

ities that wished to receive Medicare and Medicaid payments.¹¹⁶ It stressed that these regulations would only affect agreements signed after the implementation of the rule and that it did not prohibit arbitration after a dispute arose.¹¹⁷ The rule deemed pre-dispute arbitration clauses in “their very nature, unconscionable.”¹¹⁸ It further established that a nursing home facility cannot require a resident to agree to post-dispute arbitration as a condition of continued residency.¹¹⁹ Finally, the rule required that a signed copy of a post-dispute arbitration agreement and the arbitrator’s final decision be kept on file by the facility for five years and that these documents be made available for CMS inspection.¹²⁰ Just days following the promulgation of the final rule, representatives of the nursing home industry filed a complaint seeking to enjoin the enforcement of the new rule, and the Northern District Court of Mississippi ultimately granted the injunction.¹²¹ After the injunction, CMS appealed to the Fifth Circuit and issued a memorandum stating that CMS would not enforce the rule unless and until the injunction was lifted.¹²²

On June 2, 2017, CMS, under the Trump Administration, filed a motion to dismiss the appeal without explanation.¹²³ On June 8, 2017, CMS proposed a new rule removing the ban on pre-dispute arbitration agreements in nursing home admission contracts.¹²⁴ The proposed rule retains some of the final rule’s provisions, including: (1) ensuring the arbitration agreement is appropriately and clearly explained to the residents in a way

116. *Id.* at 68,791 (enacting the regulation based on the HHS Secretary’s authority to “meet such other requirements relating to the health, safety, and well-being of residents or relating to the physical facilities thereof as the Secretary may find necessary” under the Social Security Act).

117. *See id.* at 68,792.

118. *Id.*

119. *See id.* at 68,801.

120. *Id.*

121. *See* Am. Health Care Ass’n v. Burwell, 217 F. Supp. 3d 921, 946 (N.D. Miss. 2016).

122. *See* DEP’T OF HEALTH & HUMAN SERVS., CTRS. FOR MEDICARE & MEDICAID SERVS., S&C: 17-12-NH, LONG-TERM CARE (LTC) REGULATION: ENFORCEMENT OF RULE PROHIBITING USE OF PRE-DISPUTE BINDING ARBITRATION AGREEMENTS IS SUSPENDED SO LONG AS COURT ORDERED INJUNCTION REMAINS IN EFFECT I (2016).

123. *See Reversing Obama Rules, Trump Administration Proposes Allowing Nursing Homes to Require Pre-Dispute Arbitration Clauses as a Condition of Admission*, CTR. FOR MEDICARE ADVOC., <http://www.medicareadvocacy.org/reversing-obama-rules-trump-administration-proposes-allowing-nursing-homes-to-require-pre-dispute-arbitration-clauses-as-a-condition-of-admission/> (last visited Oct. 28, 2018).

124. *See* Medicare and Medicaid Programs; Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements, 82 Fed. Reg. 26,649 (June 8, 2017).

they understand; and (2) retaining a copy of the signed agreement and final decision for five years for CMS inspection.¹²⁵ The proposed rule added the requirements that the arbitration agreement be in plain language and that a notice regarding the use of the agreement be posted in an area visible to residents, their families, and visitors.¹²⁶ As this rule is not yet final, Congress has not been able to enact legislation, and the Supreme Court has not issued a clear decision on the matter, the issue of arbitration agreements in nursing home contracts is ripe for resolution.

IV. RECOMMENDATION

Rather than prohibiting the use of pre-dispute arbitration agreements in nursing home contracts,¹²⁷ or maintaining them to avoid their alleged financial burdens on the nursing home industry,¹²⁸ this Comment recommends a compromise that incorporates the public record element of the civil justice system into the arbitration process.

A. CMS Should Publicly Disclose Nursing Home Arbitration Agreements and Resolutions

Opponents of arbitration agreements in nursing home contracts are chiefly concerned about how these agreements fail to hold nursing homes accountable for their substandard conduct.¹²⁹ Private arbitration proceedings and their results contribute to a lack of public knowledge regarding the prevalence of abuse and substandard conditions in nursing homes as a whole, which fails to put enough pressure on nursing home facilities to provide the highest quality of care.¹³⁰ Conversely, addressing nursing home abuse and neglect claims through the civil justice system serves as a strong deterrent to tortious conduct based on the marketplace idea that companies will implement preventative measures and appropriate standards to avoid the risk of future litigation.¹³¹ The public nature of civil jury awards not on-

125. *See id.* at 26,651.

126. *Id.*

127. *See* Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. 68,688, 68,791 (Oct. 4, 2016).

128. *See* Medicare and Medicaid Programs; Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements, 82 Fed. Reg. at 26,651.

129. *See supra* Section II.B.

130. *See* Anthony P. Torntore, "...And Justice for All": An Analysis of the Fairness in Nursing Home Arbitration Act of 2008 and its Potential Effects on the Long-Term Care Industry, 34 SETON HALL LEGIS. J. 157, 178 (2009) (declaring that if arbitration clauses did not exist, facilities would have more incentive to hire more staff and implement better staff trainings).

131. *See* Brief for AARP et al. as Amici Curiae Supporting Respondents at 19–20, *Kindred Nursing Ctrs. L.P. v. Clark*, 137 S. Ct. 1421 (2017) (No. 16-32) (arguing that lawsuits

ly deters harmful nursing home care, but also allows for public scrutiny of societal problems like deficient nursing home conduct.¹³²

While the civil justice system helps publicize poor nursing home conduct, Americans can also currently utilize the *Nursing Home Compare* tool on the Medicare section of the CMS website to assess the quality of facilities in their area.¹³³ This interactive search tool provides detailed information about every Medicare and Medicaid certified nursing home in the country,¹³⁴ and allows users to access general information about the nursing home and the nursing homes' ratings derived from CMS surveys conducted onsite.¹³⁵ Current titles of the result tabs include: health inspections, fire safety inspections, staffing, quality of resident care, and penalties.¹³⁶ To further inform the public about these facilities, CMS should add an "Arbitration Resolutions" results tab to the *Nursing Home Compare* tool. The tab should note whether the facility in question uses arbitration agreements in its admission contract.¹³⁷ Without revealing any personal identifiable information, the tab would publish the results of previous arbitration pro-

by nursing home facility residents create public consequences for nursing homes that incentivize corrective measures for improper facility practices). *See generally* Mulligan, *supra* note 93, at 4–6 (compiling a list of tort cases that demonstrate the ways in which wrongdoers are held accountable and future lives are saved due to the public disclosure of information relating to internal practices of companies following a lawsuit).

132. *See* Popper, *supra* note 48, at 187 (claiming that tort cases can facilitate public dialogue about social issues).

133. *Nursing Home Compare*, *supra* note 40.

134. *Id.* For example, the Cherrydale Health and Rehabilitation Center located in Arlington, Virginia has an overall rating of "Much Below Average" and was fined \$239,850 in June 2016 for being noncompliant with the federal regulations for long-term care facilities. *See Cherrydale Health and Rehabilitation Center Nursing Home Profile*, MEDICARE.GOV, <https://www.medicare.gov/nursinghomecompare/profile.html#profTab=0&ID=495121&Distn=3.8&loc=20016&lat=38.9374808&lng=-77.0852258> (last visited Oct. 28, 2018).

135. *See Nursing Home Compare*, *supra* note 40. CMS currently uses a Five-Star System to allow potential nursing home residents to compare facilities. The Five-Star System assigns Medicare and Medicaid funded facilities with an overall "star" rating, ranging from one to five, with five meaning above average quality. Rankings are based on information gathered from the standard surveys, staffing reports, and other quality measures. *See* GAO NURSING HOME COMPARE REPORT, *supra* note 15, at 6–7.

136. *See, e.g., Nursing Home Compare Results*, MEDICARE.GOV, <https://www.medicare.gov/nursinghomecompare/results.html#loc=22207&lat=38.9105302&lng=-77.1197521> (last visited Oct. 28, 2018) (providing an example of the results tab in a search of nursing homes in Arlington, Virginia).

137. *See* Kerry Koehler, *Comparative Shopping in Nursing Homes*, 11 J. HEALTH & BIOMEDICAL L. 439, 466 (2016) (commenting that whether arbitration agreements are standard in a specific facility could be information easily provided on the *Nursing Home Compare* tool).

ceedings at the facility. The tab would also specifically feature whether the facility or resident brought the claim, who prevailed, the type of claim, the arbitrator(s) used, the date on which the claim was brought, the date of the resolution, the disposition, and the amount of damages if equitable relief was awarded.¹³⁸ The “Arbitration Resolutions” tab would alert potential residents that the facility they are viewing utilizes arbitration as its primary dispute resolution mechanism should a dispute arise. This knowledge alone could help ensure that future residents make informed decisions when they sign nursing home admission contracts.¹³⁹

Additionally, this feature would provide a record of the commonality of specific types of claims brought against the facility. For example, if multiple claims of sexual abuse were brought against a particular facility and resolved through arbitration, potential residents could consider this information in their decision to enter into a contract with the facility. A potential resident would now know how long it generally takes a facility to resolve a dispute through the arbitration process. Finally, a potential resident could see the instances in which the specific arbitrator ruled in favor of the resident or facility and the type of remedies awarded.

The “Arbitration Resolutions” tab would provide further insight into the disputes that arise at facilities and whether they were addressed through arbitration in a way that truly benefited a nursing home resident. The requirement to publish arbitration information on the *Nursing Home Compare* tool would serve a similar function to that of the public information made available following a civil suit. As most nursing homes currently use pre-dispute mandatory arbitration clauses in their admission agreements,¹⁴⁰ the majority of nursing home abuse and neglect cases receives less public attention than if there was a civil suit because of the private nature of arbitration.¹⁴¹ Public disclosure of this type of information would likely create greater taxpayer engagement in the discussion of abuse and quality of care provided in nursing homes. This disclosure could increase nursing home

138. California currently requires that private arbitration companies collect this type of information and publish reports on the Internet regarding consumer arbitration agreements. See CAL. CIV. PROC. CODE § 1281.96 (West 2015).

139. As nursing home admission is usually followed by a medical emergency requiring immediate admission, it is possible residents or family members would not have the time to actually utilize the *Nursing Home Compare* tool and the arbitration additions this Comment recommends. See *FINHA Hearing*, *supra* note 49, at 1–2 (statement of Senator Herb Kohl).

140. See Edwards, *supra* note 65 (approximating that roughly half of the 2.5 million Americans in nursing homes or senior living centers are bound by arbitration agreements).

141. See Koehler, *supra* note 135, at 462 (explaining that arbitration agreements can provide some recourse against elder abuse, but most instances of elder abuse are unknown because of these agreements).

accountability and serve a similar deterrent effect for facility misconduct to that of public judicial decisions. Furthermore, the collection and publication of this information could create a source of unbiased, empirical data regarding the advantages and disadvantages of arbitration in the nursing home context for lawmakers to draw from when enacting new legislation. While these additions to the *Nursing Home Compare* tool are unlikely to solve all issues of deficient nursing home conduct, it is a step that could bring about reform.¹⁴²

B. CMS Authority to Publicly Disclose Nursing Home Arbitration Agreements and Resolutions

Pursuant to the rulemaking provisions of the Administrative Procedure Act (APA),¹⁴³ CMS should issue a notice of proposed rulemaking to amend provisions of its “Survey, Certification, and Enforcement Procedures.”¹⁴⁴ CMS should mandate that during the survey, the facility must disclose whether it utilizes arbitration as its dispute resolution mechanism for nursing home residents. If so, the facility must provide copies of all the signed arbitration agreements and the arbitrator’s final decisions from the last five years. Failure to comply with this requirement of the survey could result in fines, or even the denial of Medicare or Medicaid payments.¹⁴⁵ Additionally, under its “Survey, Certification, and Enforcement Procedures,” CMS should amend its disclosure of the survey results provision to include disclosing this arbitration information to the public.¹⁴⁶

CMS’ proposed rule regarding arbitration in nursing home contracts does not preclude this recommendation.¹⁴⁷ The recommendation that the “Arbitration Resolutions” tab alert potential residents to whether the facility they are viewing utilizes arbitration agreements serves a similar purpose to the proposed rule’s requirement that “a notice regarding the use of agreements for binding arbitration must be posted in an area that is visible to residents and visitors.”¹⁴⁸ Both this Comment’s proposed *Nursing Home Compare* tool’s “Arbitration Resolutions” tab and the CMS proposed rule’s requirement of an arbitration notice in the facility inform the potential resident of the facility’s use of arbitration agreements. This new tab would,

142. See *id.* at 466–69 (arguing that moderate changes to the *Nursing Home Compare* tool could improve nursing home care).

143. 5 U.S.C. § 553 (2012).

144. See 42 C.F.R. §§ 488.300–.335 (2017).

145. See *id.* § 488.406.

146. See *id.* § 488.325.

147. See Medicare and Medicaid Programs; Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements, 82 Fed. Reg. 26,649 (June 8, 2017).

148. See *id.* at 26,653.

therefore, not be beyond the scope of the proposed rule.

This Comment's recommendation maintains the proposed rule's requirement that a copy of the signed arbitration agreement and the arbitrator's final decision be retained by the facility for five years and be made available for inspection upon request by CMS.¹⁴⁹ This provision of the proposed rule is a step in the right direction for accountability purposes, but the language of the proposed rule makes it unclear as to how the provision would be implemented and what CMS would do with the requested information.¹⁵⁰ There is no apparent sanction for failing to retain the agreement, and it appears to be completely at the discretion of whoever conducts the survey to ask for the arbitration information.¹⁵¹ This Comment's recommendation addresses these issues by mandating that all CMS surveyors request the information by issuing sanctions for facilities that fail to produce the information and by publishing the results of the survey on its public website.

CONCLUSION

The nursing home industry and nursing home resident advocates have polarized opinions about the advantages and disadvantages of arbitration agreements. In the next forty years, however, millions of Americans and their family members will likely turn to nursing home facilities for care. Unfortunately, many of these Americans will encounter some kind of abuse, neglect, or substandard quality of care in their nursing homes. To prevent the repetition of tragedies like those of Lucille, Clifford, Almeda, Doris, E.M, and Margaret, disclosure of poor facility practices and bad behavior is necessary.¹⁵² Public knowledge about how arbitration agreements in these facilities operate is vitally important to ensure quality care for elder Americans like them and millions more.

This Comment's recommendation for CMS to incorporate arbitration inquiries into its survey process will increase the accountability of nursing home facilities and has the potential to create a consolidated source of information regarding the advantages and disadvantages of arbitration clauses in nursing home contracts. This resource would provide unbiased data about the disadvantages arbitration agreements create for nursing home residents. If those effects prove to be as harmful as many have asserted, lawmakers could use this data to pass further enabling legislation that would give CMS the indisputable authority to completely prohibit manda-

149. *See id.*

150. *Id.*

151. *See id.*

152. *See supra* Part I and Section II.C.

tory pre-dispute binding arbitration agreements in federally-funded nursing home admission contracts.¹⁵³

153. See *Am. Health Care Ass'n v. Burwell*, 217 F. Supp. 3d 921, 926 (N.D. Miss. 2016) (criticizing CMS' conclusion that arbitration agreements harm residents' health based on interested parties, law review articles, and court decisions rather than its own independent study of the issue).