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Forced Arbitration's Lethal Consequence

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Forced Arbitration's Lethal Consequence

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Journalists examining the eight nursing home deaths at Florida's Rehabilitation Center at Hollywood Hills during Hurricane Irma have begun exploring who's at fault for this entirely preventable tragedy. But actually, we may never understand the full story. As reckless as the owners and operators may have been for the facility's failed cooling system that caused sweltering unlivable temperatures, it is hard to overestimate the role of unremorseful politicians, whose policies over the last 20 years accelerated the likelihood of this happening.

As *Miami Herald* journalists Carol Marbin Miller and Mary Ellen Klass [recently reminded us](#), in 2006 Florida almost passed legislation that would have required all Florida nursing homes to have generators "capable of cooling and running their facilities." The nursing home industry killed the bills. In a recent [column](#) about the state's repeated failure to protect these most vulnerable patients, *Orlando Sentinel* columnist Scott Maxwell tore into state political leaders, including Governor Rick Scott. Scott – the ousted head of healthcare operator Columbia/HCA, who "was at the center of one of the largest cases of Medicare fraud in U.S. history" and was then elected Florida's governor in 2010 – took immediate action to shield and immunize nursing home companies for harm they cause residents. Just 34 days into his term, Scott "quickly ousted the state's lead elder-affairs watchdog," who had served under both prior governors and had exposed grotesque patterns of abuse and neglect at these facilities. In addition, "Legislators began rolling back safety protections, reducing, for instance, the number of hours of direct care nursing homes had to provide to residents." This was all "done in the name of 'deregulation' – a word that sounds swell until you realize the end result can be a World War II veteran left wallowing in his own filth."

In another *Orlando Sentinel* column with the shocking headline "Florida law treats its seniors worse than dogs," attorney Nathan P. Carter described how nearly impossible it is to bring legal cases against reckless Florida nursing home owners, allowing abuse and neglect to continue with impunity. Carter, who works almost entirely on behalf of abused or neglected nursing home patients, [wrote](#),

[S]ince the early 1990s, the Florida Legislature has steadily eroded [a series of statutes designed to protect elderly and vulnerable nursing home residents] under the guise of “tort reform.” While the nursing home industry lobby was pumping literally millions of dollars of campaign contributions to their causes, Florida’s governors and Legislatures weakened punitive damages, lowered staffing levels, weakened safety regulations, and made changes that made it much harder to hold nursing home owners accountable. Over the last 20 years, the Florida Legislature passed pro-industry, anti-resident changes and governors signed them, repeatedly.

Among Florida’s uniquely harmful laws is one that allows a nursing home to operate “with literally no liability insurance at all.” That means even in the extremely rare case where a family wins a court judgment against a responsible company, the family may recover nothing.

And we say “extremely rare” because there’s another even more significant roadblock to justice in Florida (and everywhere in the nation). It is called “forced arbitration” and it exists in the fine print of 99% of Florida nursing home admission contracts today. This legalistic clause, which no one knows about until something terrible happens, requires that neglect and abuse cases be resolved in private, secretive, corporate-designed dispute systems. These clauses first started popping up in nursing home admission contracts years ago, with Florida leading the nation as it often does in nursing home matters. Now they are everywhere.

President Obama tried to end their use, rightly believing that without access to the courts, abused or neglected patients and their families would have little redress, and nursing homes could prolong dangerous conditions. Anti-patient bias infects the forced arbitration process, which is why families recover much less than they would in court. But many families cannot even afford to bring an arbitration and pay hourly arbiter fees. Moreover, in arbitration, everything is confidential and there is no public record to inform industry practice or to notify the public or regulators. That is why, in 2016, Obama’s Centers for Medicare & Medicaid Services (CMS) ordered nursing homes to stop including these clauses in nursing home contracts.

Just as Rick Scott made things worse for nursing home residents when he was elected governor, Donald Trump almost immediately followed suit upon being elected president. Only a few months into this new administration, Trump’s CMS started the process of undoing the rule banning forced arbitration clauses in nursing home contracts. Trump’s

new rule would give nursing homes authority to force families to sign arbitration clauses in violation of their legal rights, and oust residents who won't agree. This is a shocking development for an agency whose mission should be protecting Medicare and Medicaid beneficiaries, not contributing to and condoning their abuse and neglect.

Consumers, patients and many in Congress are [fighting](#) back, although it's a tough battle right now. (There's much activity regarding forced arbitration in many critical contexts, such as the financial services industry and recent scandals like the Equifax data breach. Go [here](#) to help.) But the hypocrisy of current politicians, who [feign concern](#) for the nursing home residents who perished in Florida yet championed efforts to make their abuse and neglect more likely, should not go unnoticed.

As Mr. Carter wrote, "It's unlikely the families of the dead residents will get justice. Florida has the largest elderly population in the nation, yet nursing home residents get horribly mistreated like this not infrequently. In most cases, there is no media coverage, no outrage, and no accountability." Let's hope that even if reckless nursing homes aren't properly held accountable, the blamable politicians are.