

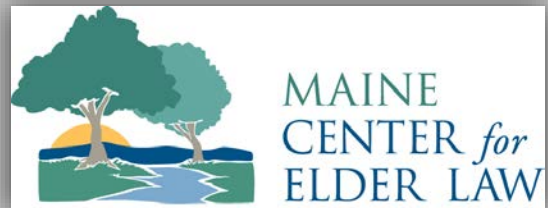
Arbitration Agreements and Long-term Care Facilities

Volume 10, Issue 5 – August, 2019

When a loved one enters a long-term care facility, it is often a tumultuous time. Maybe there was a catastrophic medical event. Or, the resident is feeling overwhelmed with the move. Whatever the circumstances leading up to the transition, families are often stressed out.

Then, families must deal with the inundation of paperwork from the facility. What are the terms of the arrangement? What kind of care will the resident receive? Who will pay for care? It is during this time that families are often presented with an arbitration agreement. In this issue of the ElderCounselor™, we will discuss what an arbitration agreement is, how one can impact the signor at a later date and some new rules that will soon be emerging regarding their use by long-term care facilities.

**From Martin C. Womer, Esq. and
Barbara S. Schlichtman, Esq.**



**Maine Center for Elder Law,
A practice of Perkins Thompson, P.A.**

Phone: 207-467-3301 | Fax: 207-467-3305

Offices in Kennebunk and Portland, Maine

www.mainecenterforelderlaw.com

What are Arbitration Agreements and Why are They Controversial?

Arbitration is similar to mediation. In both instances, disputing parties use a third-party (an arbiter or mediator) to settle their dispute. When mediating parties are not happy with the result, they can pursue other remedies, including a lawsuit and court proceeding. However, in arbitration, the result is binding. If arbitration is sought, then a judge or jury cannot be later availed to redress the grievances of the injured party. An Arbitration Agreement makes arbitration mandatory. The injured party does not have a choice in how they seek to remedy their harm.

There are some benefits of arbitration – the result is usually obtained much faster than through a court proceeding, and it is kept private. However, in cases of arbitration with nursing homes, this privacy could shield the facility from public scrutiny regarding the facility's practices. The

facility may have less motivation to correct a problem if it can keep the problem in the shadows. Facilities may be more motivated to take greater care of residents when civil lawsuits risk repercussions on reputations and licensing.

Rules of evidence and procedure don't apply to arbitration. These rules were adopted by courts because they better facilitate justice. If these rules don't apply to arbitration, a nursing home can present hearsay as evidence, for example. The protections that our legal system have adopted through rules of evidence could be thwarted in arbitration. Also, it is almost impossible to appeal an arbitration decision. Our court system permits appeals in the interest of justice, and this right is lost through arbitration.

Signing a mandatory arbitration agreement should be something that one considers thoroughly. When a new patient is being admitted into a nursing home, do they contemplate the document in detail? Usually not; it is just another piece of paper in a stack that requires a signature for admission. So does the resident understand if the arbitration agreement is optional or mandatory? Probably not.

Advocates for nursing home residents became concerned that residents were being taken advantage of through the use of arbitration agreements. Not only were residents not likely fully grasp the meaning of the arbitration agreement, but sometimes, these agreements were mandatory for admission into the nursing home. So the resident really didn't have a choice – if they didn't sign the agreement, they could not receive needed care. This didn't seem equitable, or, the nursing home didn't make it clear that signing the agreement was voluntary. Because of these concerns, the use of arbitration agreements by long-term care facilities became a hot topic in the senior advocate community.

CMS Issues New Proposed Final Rule

The use of arbitration agreements by long-term care facilities was banned by The Centers for Medicare & Medicaid Services (CMS) in October 2016. A few days later, the American Health Care Association and a collection of nursing homes filed suit. They were awarded an injunction.

In response, in June 2017, CMS published a new proposed final rule regarding the use of arbitration agreements by nursing homes. CMS opened the requisite comment period and collected thoughts and suggestions from the public. As of July 2019, CMS has revised the rule, based on the consideration of those public comments, and has issued a new proposed final rule regarding the use of pre-dispute, binding arbitration agreements by long-term care facilities. The new rule takes effect on September 16, 2019. While arbitration agreements are now allowed, there are several restrictions on them.

The proposed final rule includes:

- A nursing home may not, as a condition of admission to the nursing home (or as a condition to continued care), require a resident to sign a binding arbitration agreement.
- A nursing home must explicitly notify the resident of their right not to sign the agreement, and the agreement must explicitly state that the resident is not required to sign it.

- The agreement must explicitly provide that the resident has the right to rescind the agreement within 30 calendar days of execution of the agreement.
- The arbitration agreement must be explained to the resident in a language in which they understand.
- If a resident chooses to sign the pre-dispute, binding arbitration agreement, the nursing home must ensure that the resident acknowledged that he or she understands the agreement.
- The agreement cannot contain any language that dissuades the resident from communicating with state or federal officials regarding any matter.
- The arbitration agreement must specify that if arbitration is entered into, a neutral arbitrator will be agreed upon by both parties.
- If arbitration is sought, the venue must be convenient to both parties.
- If a nursing home facility and a resident enter into arbitration, a copy of the binding decision must be retained by the facility for five years, and make that decision available for inspection by CMS.

Any rule that applies to a resident also applies to his or her legal representative.

A representative of CMS stated, “The overall impact of this final rule is to provide transparency in the arbitration process in nursing homes to the residents, his or her family and representatives, and the government.” The proposed rule is a part of CMS’s five-part plan to overhaul the oversight of nursing homes. Seema Verma, Administrator of CMS, has indicated she intends to strengthen oversight, enhance enforcement, increase transparency, improve quality, and put patients above paperwork.

Should a Resident Sign an Arbitration Agreement?

Under the new rule, a nursing home can ask a resident to sign an arbitration agreement. However, should the resident or their loved one, sign this agreement? While that decision is personal to each individual, careful consideration should be given before signing the agreement. It might be prudent to review the arbitration agreement with an elder law attorney to ensure it conforms to pertinent laws and is in the best interest of the signor. Remember – even in the absence of such agreement the parties can always agree to arbitration at a later date. If a resident hasn’t already committed to mandatory arbitration, then they have more options down the road, should harm occur.

Others Things to Beware of in Nursing Home Admission Agreements

Besides arbitration agreements, what are some other things that new residents should beware of in nursing home admission agreements?

Responsible Party

A nursing home may try to get a loved one to sign an agreement naming him or her as a responsible party. Nursing homes are prohibited from requiring third parties to personally guarantee payment for a loved one’s care. However, the loved one could always agree to this

arrangement of their volition, and a long-term care facility may not make it clear to the third party that this is voluntary.

Waiver of Rights

A nursing home cannot ask a resident to waive certain rights, including waiving the nursing home's liability for lost or stolen property. A nursing home cannot ask a resident to waive the nursing home's liability for the resident's health. If a resident requires extra care, then the nursing home must provide it.

Visitation Hours

A nursing home resident has the right to be visited by friends and family at any time; a nursing home cannot restrict visitation rights. Often, a facility will post visitation hours or contain this language in the nursing home admission agreement. Residents and visitors may not know that they can visit each other at any time.

Resident's Income

A nursing home cannot force a resident to assign their income to the facility. A nursing home cannot require residents to deposit their income into the facility's financial account. For example, an admission agreement cannot state "I authorize Facility to be named Payor on Resident's Social Security checks."

Conclusion

While an outright ban of pre-dispute, binding arbitration agreements was a total win for nursing home residents and their families, it was unable to withstand legal scrutiny and be upheld within the court system. This new rule, while it does allow the use of arbitration agreements, will give a patient the ability to say "no" and not be denied services.

New nursing home residents and their families are understandably strained during the admissions process. But it is paramount that proper attention is given to the admission paperwork presented by the facility, as certain rights are obligations are exchanged. It might be prudent for nursing home residents and their families to seek the guidance of an experienced elder law attorney, to ensure the paperwork they are signing contains legal terms and is in the best interest of the signing parties.

Sources

<https://s3.amazonaws.com/public-inspection.federalregister.gov/2016-23503.pdf>

<https://www.federalregister.gov/public-inspection/current>

<https://www.law.cornell.edu/uscode/text/42/1395i-3>

<https://ltcombudsman.org/issues/residents-rights>

[https://downloads.cms.gov/medicare/Your Resident Rights and Protections section.pdf](https://downloads.cms.gov/medicare/Your_Resident_Rights_and_Protections_section.pdf)