

CMS Bans Pre-Dispute Arbitration Agreements for Long-Term Care Facilities

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For years – decades, in some instances – skilled nursing facilities and their residents (or, as is more often the case, the family of a resident) have privately arbitrated disputes arising from the resident's care. For facilities that participate in the Medicare or Medicaid programs, however, a new Center for Medicare & Medicaid Services (CMS) ban means that arbitration can no longer be the presumptive manner of dispute resolution. To the contrary, such facilities now need to investigate potential resident disputes with the expectation that they will be litigated at length through the court system rather than resolved with prompt, inexpensive arbitration. The new Rule places a premium on experienced litigation counsel to help a long-term care facility investigate incidents and preserve evidence that may be necessary in the future. The most effective tactic to avoid undesired litigation is to consult early with a good litigator.

Litigation consumes time, organizational resources, and money. Arbitration provides fast, inexpensive dispute resolution. In the senior housing and care industry, arbitration can reduce or avoid harmful, negative reactions among both the family and the facility. Because some disputes are perceived as having limited financial potential in the eyes of a contingency-fee resident's attorney, the availability of arbitration has allowed smaller disputes to be raised and resolved. Due to the popularity and success of arbitration agreements, many skilled nursing facilities incorporate an arbitration requirement into their base contract with an incoming resident.

In a new Final Rule recently announced by the CMS, long-term care facilities participating in either Medicare and/or Medicaid can no longer require residents to arbitrate disputes. The Final Rule will be published in the Federal Register on October 4, 2016, codified at 42 CFR §483.70(n), and goes into effect on November 28, 2016. The Rule does not affect enforceability of arbitration agreements in contracts that preexist the effective date of November 28, 2016.

The new regulation comes as part of a 713-page set of reforms for Long-Term Care Facilities approved by the U.S. Department of Health and Human Services. In an official blog posting, CMS Acting Administrator Andy Slavitt and CMS Center for Clinical Standards & Quality Director Kate Goodrich described that the voluminous Final Rule is aimed at reducing hospital readmissions, improving quality of care, reducing infections, and enhancing safety measures. Laudable as such goals are, the arbitration ban is a harmful and counterproductive intrusion into the family-facility relationship. For reasonable facilities and families, the new regulation makes it much more expensive and time-consuming to resolve disputes.

The new regulation applies to facilities that participate in Medicare and/or Medicaid programs. By definition, the rule does not apply to assisted living facilities or personal care facilities. Although the rule will not apply to private-pay (or non-Medicare/Medicaid) long-term care providers, the significant shift in federal policy may well encourage resistance to the use of arbitration agreements throughout the remainder of the senior housing and care industry.

CMS now prohibits a Medicare- or Medicaid-participating facility from incorporating an arbitration provision into its residence and care agreement. CMS warns that "facilities that require new residents to agree to pre-dispute arbitration as a condition of admission will not be deemed to be in compliance with our requirements and will be subject to termination." In so writing, CMS flies in the face of courts that have previously required an arbitration agreement to be part of the fundamental consideration for the contract between the facility and its resident. Specifically, CMS noted "that this rule will effectively moot the holding in" a 2008 Mississippi Supreme Court opinion

wherein that Court held that it would not enforce an arbitration clause unless it was part of the original consideration for the resident's residency and care. *Mississippi Care Center of Greenville, LLC. et al. v. Nancy Hinyub*, 975 So.2d 211 (Miss. 2008).

The new rule allows parties to agree to arbitrate a dispute only if the arbitration agreement meets specific requirements. Arbitration cannot be proposed or agreed to until after the occurrence of whatever constitutes the underlying dispute (e.g. financial or care issues). Further, the resident must "acknowledge that she or he understands the agreement." Facilities must retain copies of Arbitration Awards for five years for inspection upon request by CMS. The rule mandates a few other requirements that, for the most part, are already standardized provisions of existing arbitration agreements. Specifically, the regulation demands that any post-dispute arbitration agreement call for joint selection of a neutral arbitrator and a venue convenient to all parties. It also prohibits any restriction on a resident's rights to contact governmental agencies about the dispute.

CMS acknowledges that its Notice of Proposed Rulemaking had triggered abundant formal commentary from both houses of Congress, industry groups, senior-advocacy organizations, personal injury attorneys, and many others. CMS's Final Rule purports to explain why it has the legal authority to issue such a broad ban, but some opponents are already publicizing their intent to challenge the Rule. Still, under federal law, as a general rule, courts initially defer to an agency's construction of a statute with which the agency is charged with implementing. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Likewise, courts initially defer to an agency's reasonable construction of its own regulations. *Auer v. Robbins*, 519 U.S. 452, 461-62, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997). Although there are circumstances in which a court may limit such *Chevron/Auer* deference (see, *Christopher v. SmithKline Beecham Corp.*, 567 US ___, 132 S. Ct. 2156, 2166-67, 183 L. Ed. 2d 153 (2012)), CMS's Final Rule outlines why the agency believes it will overcome any such challenges.

The new regulation reads:

(n) Binding arbitration agreements.

(1) A facility must not enter into a pre-dispute agreement for binding arbitration with any resident or resident's representative nor require that a resident sign an arbitration agreement as a condition of admission to the [long-term care] facility.

(2) If, after a dispute between the facility and a resident arises, and a facility chooses to ask a resident or his or her representative to enter into an agreement for binding arbitration, the facility must comply with all of the requirements in this section.

(i) The facility must ensure that:

(A) The agreement is explained to the resident and their representative in a form and manner that he or she understands, including in a language the resident and their representative understands, and

(B) The resident acknowledges that he or she understands the agreement.

(ii) The agreement must:

(A) Be entered into by the resident voluntarily.

(B) Provide for the selection of a neutral arbitrator agreed upon by both parties.

(C) Provide for selection of a venue convenient to both parties.

(iii) A resident's continuing right to remain in the facility must not be contingent upon the resident or the resident's representative signing a binding arbitration agreement.

(iv) The agreement must not contain any language that prohibits or discourages the resident or anyone else from communicating with federal, state, or local officials, including but not limited to, federal and state surveyors, other federal or state health department employees, and representatives of the Office of the State Long-Term Care Ombudsman, in accordance with [42 CFR] §483.10(k).

(v) The agreement may be signed by another individual if:

(A) Allowed by state law;

(B) All of the requirements in this section are met; and

(C) That individual has no interest in the facility.

(vi) When the facility and a resident resolve a dispute with arbitration, a copy of the signed agreement for binding arbitration and the arbitrator's final decision must be retained by the facility for 5 years and be available for inspection upon request by CMS or its designee.

The full, 713-page Final Rule is available [here](#).

Bill Kennedy offers clients an uncommon combination of backgrounds in both the courtroom and the boardroom. Bill is a litigator who investigates and defends claims in both the professional and general liability contexts. For fifteen years, Bill served on the boards of a national organization that provides a full range of residential and healthcare services to thousands of seniors around the country. If you have questions or would like additional information, please contact Bill Kennedy (kennedyw@whiteandwilliams.com; 215.864.6816) or another member of our Healthcare Group.

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