



New Rule Would Ban Required Arbitration in Nursing Home Disputes

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New regulations from the Centers for Medicare and Medicaid Services (CMS), scheduled to become effective November 28, 2016, prohibit federally funded nursing homes from requiring applicants to agree to binding arbitration in the event of future disputes. The regulations, however, are currently on hold due to an injunction entered by a federal district court in Mississippi. The court concluded that CMS is overreaching its authority.

The rule would grant the following protections:

- Agreeing to binding arbitration cannot be a prerequisite for nursing home admission.
- To avoid confusion during the application process, arbitration agreements must be presented separately from paperwork that addresses other issues.
- Such agreements must be explained to applicants, who must acknowledge that they understand what they are signing.
- Agreement to arbitration must be voluntary.
- Agreements cannot discourage residents or their representatives from contacting government officials about complaints.

While binding arbitration has long been required in various circumstances—bank account agreements and employee contracts come to mind—nursing home complaints are fundamentally different. Nursing home grievances seldom involve *contractual disputes* and are far more likely to center on charges of abuse. Indeed, CMS and certain court findings have termed mandatory arbitration provisions “unconscionable,” meaning that they’re one-sided and exploitative.

Individuals and their families often turn to nursing homes during times of crisis, when emotions run high. Arbitration agreements are frequently presented along with other forms, without any explanation. The individual seeking admission may not have the capacity to understand what is being signed, and the possible future consequences of arbitration are far from the minds of family members faced with immediate concerns. Given the urgency of their situation, consulting an attorney is impractical, and they may feel that there is no acceptable alternative to signing.

Some consumer advocates claim the new regulations don't go far enough. They worry that nursing homes will present a slanted explanation of arbitration and that, given the vulnerability of families seeking admission, they may continue to feel pressured.

Signing divests individuals of their right to trial by jury, and because arbitration is not open to public view, patterns of misconduct or safety violations can remain hidden. It's noteworthy that families are usually far less interested in monetary awards than in preventing others from suffering as they and their loved ones have.

Nursing Homes Object

The American Healthcare Association, a nonprofit that represents nursing homes and assisted living facilities, and several other entities filed suit against CMS in the United States Northern District of Mississippi, Oxford Division, contending that the regulations conflict with the Federal Arbitration Act.

Nursing homes have long argued that, because trials are expensive, the additional cost of fighting lawsuits would put them out of business. This is hard to believe. A responsible nursing home should have insurance or sufficient funds set aside to handle liability claims. New Jersey, where I practice law, has had a statute banning such arbitration for some time, and there have been no resulting bankruptcies.

In addition, while arbitration may be quicker and less expensive than filing a lawsuit, that's not always the case. There may also be significant fees involved in arbitration, for an arbitrator or panel, as well as the American Arbitration Association.

Existing Contracts

If the new rules are ultimately upheld, families should plan to check their documents. If your contract contains a pre-dispute arbitration clause, you may want to ask an attorney if it's enforceable. Did the signing party have authority? Is the clause "unconscionable"? You may also want to try renegotiating the contract. Even if the nursing home declines to do so, if enough families ask, they may change their mind.

The author is a trained mediator and arbitrator in New Jersey and the immediate past president of the National Academy of Elder Law attorneys.

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