The Future of Binding Arbitration in Long Term Care

Robert W. Patterson
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What I Will Cover

- Growth of mandatory arbitration agreements in the long term care industry (and the result)
- How arbitration agreements were challenged by residents before 2016
- HHS’ 2015 proposed rule and 2016 final rule prohibiting mandatory pre-dispute arbitration agreements
- The subsequent litigation and injunction
- Where do we go from here?
Background – Nursing Home Litigation

- Huge increase in nursing home litigation over past 20 years
- Annual increase was esp. dramatic (~25%/year) from ~ 1995-2000, then slowed (Aon study)
- Average payouts per claim also increased greatly in late 90s, then much more slowly
- Reason (in large part) – growing use of mandatory binding arbitration
Background – Nursing Home Litigation

Advantages of arbitration agreements

- Faster & more flexible as to scheduling
- → Less expensive to conduct
- Confidential
- Tends to reduce the amount of damage awards
  - 1999 - $226,000
  - 2006 - $146,000

Decrease of 55% in 7 years (Aon Study of Nursing Home Claims, 2003-2011)
Agreements to arbitrate contractual disputes are “valid, irrevocable, and enforceable”.

Savings clause: Except on legal grounds “for the revocation of any contract”.

Because grounds must apply to any contract, laws aimed at particular class of claim are preempted.
Arbitration Agreements Pre-2016 (cont’d)

**FAA Preemption**

- Since policy applied to specific class of contract (LTC admission agmt.) it was preempted
- Residents can only challenge arbitr’n agmts. on general contractual grounds
General Contractual Defenses

Lack of Authorization

- Admissions contracts often signed by spouses, family members, etc.
- Issue: Whether signer had authority to waive resident’s right to litigate in court

Actual authority

- Terms of the POA are critical
- Clear contractual language needed
General Contractual Defenses (cont’d)

Lack of Authorization (cont’d)

Apparent authority

- **Issue:** Whether resident induced home to believe that signer had authority
- Resident cannot be then incapacitated
- Actions of the *signer* are also relevant
  - Did admission form include represent’n of auth’y?
- Different courts take different approaches
General Contractual Defenses (cont’d)

Unconscionability – Gen’llly must show both

- **Substantive unconscionability**
  - Terms of contract include warnings of consequences?
  - Revocable? Limitation on damages?
  - Stand-alone contract or buried w/in admissions agmt.?

- **Procedural unconscionability**
  - Condition of resident at time of signing
  - Were the terms explained?
  - Language issues
General Contractual Defenses (cont’d)

Other general defenses

- Competency
- Tort claims cannot be waived by contract
- Arbitr’n agmt. is prohibited “additional consideration” under Medicaid law

Protecting Against General Defenses

- Avoid unreasonable contract terms (e.g. low damage cap)
- Admission process must determine authority
- Clear understandable agreement
HHS Decides to Act

THE WALL STREET JOURNAL.

LEADER (U.S.)

Nursing Homes, in Bid to Cut Costs, Prod Patients to Forgo Lawsuits
Big Payouts Fade As Arbitration Rises; Ms. Hight Falls Ill

By NATHAN KOPPEL
Updated April 11, 2008 11:59 p.m., ET

Nursing-home patients and their families are increasingly giving up their right to sue over disputes about care, including those involving deaths, as the homes write binding arbitration into their standard contracts.

The clause can have profound implications. Nursing homes’ average costs to settle cases have begun dropping, according to an industry study, even as claims of poor treatment are on the rise. The industry notes arbitration is slicing the number of patients winning big punitive judgments, the added penalties for severe negligence that can pump up the size of jury awards. Meanwhile consumer advocates, plaintiffs lawyers and even some arbitrators are decrying the practice. Two U.S. senators on Wednesday introduced legislation to effectively ban nursing homes from using agreements that compel arbitration in advance.
HHS’ 2015 Proposed Rule

- Did not prohibit arbitration agreements
- Instead tried to mandate substantive and procedural fairness in use of arb. agreements
  - Must explain agreement to resident, including that resident is waiving right to court
  - Resident must acknowledge explanation
  - Neutral arbitrator & convenient venue
  - Cannot discourage resident from communicating with Medicaid surveyors or others
- Solicited comments on outright prohibition
HHS’ 2016 Final Rule (Oct. 4, 2016)

- LTC facility cannot enter into binding pre-dispute arbitration agreement, eff. Nov. 28, 2016
  - Huge change from pre-2016 law
  - Even substantively and procedurally fair agreements are prohibited

- Post-dispute agreements are permitted, subject to compliance with new requirements
  - Rules for pre-dispute agmts. under Prop. Regs.
  - Explanation, acknowledgment, neutral arbitrator, convenient forum, etc.
AHCA v. Burwell

- Filed by AHCA in Federal court in Mississippi
- Primary issue: FAA preemption / *Marmet Health Care*
  - “Emphatic federal policy in favor of arbitration”
- No specific statutory authority in Medicare or Medicaid law to override FAA
  - General statements re: protecting residents, etc.
  - Compare specific authority in Dodd Frank, Exchange Act
- Congressional history (2008, 2009, and 2012 proposals)
- Agency history (2003 Nationwide Memorandum)
AHCA v. Burwell (continued)

- FAA preemption argument is very strong (IMO)
- Sup. Ct. has upheld FAA “in every case the court has considered” (where clear statutory authority not shown)
- FAA has been upheld in cases under:
  - ADEA
  - NLRA
  - NLRA
  - NLRA
  - RICO
  - RICO
  - Truth in Lending Act
- Nov. 7, 2016 – Court preliminarily enjoined the pre-dispute arbitration rule nationwide
What Happens Now?

- Note: Final rule was only one of several Obama administration initiatives against mandatory arbitration
  - 2009 Defense Approp’n Act – Title VII
  - Dodd Frank (2010)
  - 2012 NLRB order, 2016 CFPB order

- Now Trump administration (Tom Price) regulates nursing homes

- Health care industry vs. trial lawyers and consumer groups

- Back to the Future? (pre-2015 rules, w/ some changes)
What Happens Now? (continued)

Practice Pointers

- Signing an arb. agmt. cannot be an admission condition
- Use a checklist of items to be covered with resident or family
  - POA / other auth’y
  - Who was present?
- Separate agreement or part of residency agreement?
  - If part of agmt., may support argument for agent’s auth’y
  - But: Beware of unconscionably “burying” the arb. clause
What Happens Now? (continued)

Practice Pointers (continued)

- Parties
  - Facility itself, affiliates, providers, medical director, EEs
  - Resident, next of kin, heirs, administrators, etc.

- Covered disputes and damages
  - Contract, tort, wrongful death, statutory
  - Compensatory, punitive, attorney’s fees

- Agreement itself
  - Explain what the agreement is in plain English (at the beginning)
What Happens Now? (continued)

Practice Pointers (continued)

Other suggested clauses

- Decision of arbitrator binding
- Selection of arbitrator
- Fees
- Federal law governs arb. agmt. (state law governs the claim)
- Severability
- Right of rescission?
Questions?
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