

PRE-DISPUTE BINDING ARBITRATION IN THE LONG-TERM CARE CONTEXT

I. INTRODUCTION

While binding arbitration provisions are commonplace in many of the contracts we encounter as both consumers and legal professionals, their use is not necessarily condoned or even permitted in all circumstances. Though the Federal Arbitration Act (FAA)¹ and the principle of freedom of contract protect the concept of pre-dispute, mandatory arbitration provisions, governmental regulators sometime intervene in order to address certain public policy concerns. Such is the case in the context of long-term care facility² contracts. Courts and regulators alike have voiced concern over the “unconscionability,” or “manifest[] unfair[ness]” of arbitration provisions in long-term care residency agreements.³ Because residents often sign the agreements while suffering from physical and mental ailments, and because arbitration provisions are often hidden in the lengthy admissions paperwork, long-term care residency agreements are ripe for legal challenges and higher-level regulation.⁴ This Article will examine the current regulatory environment for arbitration provisions in the long-term care context at both the federal and Colorado state level.

II. AT THE FEDERAL LEVEL

In the fall of 2016, the Centers for Medicare and Medicaid Services (CMS) promulgated a new regulation that “prohibit[s] the use of pre-dispute binding arbitration agreements” by long-term care facilities that receive payments from CMS.⁵ Post-dispute agreements are permitted, but are still subject to regulatory requirements, including that the arbitration provision is clearly explained to the resident and is presented in language the resident can understand.⁶

The new CMS arbitration provision was swiftly challenged by the American Health Care Association (AHCA), which filed suit in federal court on October 17, 2016.⁷ AHCA claims that the regulation both violates

1. 9 U.S.C. §§ 1–16 (1947).

2. Long-term care facilities generally include nursing homes, skilled nursing facilities, and assisted living facilities.

3. Robert W. Patterson, *The Future of Binding Arbitration Agreements in Long Term Care*, A.B.A. HEALTH L. SEC. (Nov. 2016), http://www.americanbar.org/publications/aba_health_resource/2016-2017/november2016/bindingarbitration.html.

4. *Id.*

5. Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 FR 68688-01 (Oct. 4, 2016).

6. *Id.* See also Patterson, *supra* note 3.

7. AMERICAN SENIORS HOUSING ASS’N, FEDERAL POLICY UPDATE 2 (Nov. 9, 2016).

the FAA and exceeds CMS's statutory authority, among other claims.⁸ The AHCA requested that the court block enforcement of the ban before it was scheduled to become effective on November 28, 2016.⁹ While the Mississippi district court was not unsympathetic to CMS's contention that "the practice of executing arbitration contracts during the nursing home admissions process raises valid concerns, on a public policy level, since many residents and their relatives are 'at wit's end' and prepared to sign anything to gain admission," it ultimately granted the preliminary injunction in favor of AHCA.¹⁰ This legal battle is still on-going.

In May of 2017, the United States Supreme Court also weighed in on the issue of arbitration agreements in its decision in *Kindred Nursing Centers Ltd. Partnership v. Clark*.¹¹ The Kentucky Supreme Court ruled that the arbitration agreements at issue were invalid because Kentucky law "protects the rights of access to the courts and trial by jury" above all.¹² The Supreme Court disagreed, saying that under the FAA courts must "put arbitration agreements on an equal plane with other contracts" when it comes to enforceability.¹³ Though not a complete surprise, the Supreme Court's ruling sets an important precedent in favor of arbitration clauses in long-term care facilities that will likely begin to trickle down to state courts.

III. IN COLORADO

In 2016, the state of Colorado also addressed arbitration provisions in long-term care agreements when it passed updates to the Health Care Availability Act (HCAA).¹⁴ Section 13-64-403 states that "[i]t is the intent of the general assembly that an arbitration agreement be a voluntary agreement between a patient and a health care provider."¹⁵ As such, the statute lays out exactly how an arbitration provision must be presented in order to remain enforceable. Applicable rules include specific wording and formatting; the required notices must be present "[i]mmediately preceding the signature lines . . . printed in at least ten-point, bold-faced type."¹⁶ While the statute seems primarily concerned with physician medical malpractice issues,¹⁷ it also applies to "health care institutions," which include "hospital[s], health care facility[ies], dispensar[ies], . . . [and] laborator[ies]."¹⁸

(. a)⁸ Am. Health Care Ass'n v. Burwell, 217 F.Supp.3d 921, 930, 933 (N.D. Miss. 2016).

9. *Id.* at 925.

10. *Id.* at 937.

11. 137 S.Ct. 1421 (2017).

12. *Id.* at 1426.

13. *Id.* at 1426-27.

14. COLO. REV. STAT. §§ 13-64-101-503 (2017).

15. *Id.* § 13-64-403(1).

16. *Id.* § 13-64-403(4).

17. *Id.* § 13-64-403(1).

18. *Id.* § 13-64-202.

Though not explicit in the HCAA, long-term care facilities are included within the general “health care facility” category.¹⁹

Colorado courts have already had an opportunity to interpret the arbitration rules now codified in the HCAA. In the case of *Fischer v. Colorow Health Care, LLC*,²⁰ the defendant, a nursing home located in Olathe, Colorado, sought to compel arbitration in a wrongful death suit filed by the family members of a deceased resident.²¹ While Colorow’s residency agreement did include an arbitration provision, the notice contained “typographical errors and minor departures from the statutory text,”²² and was printed in “regular—as opposed to bold—typeface.”²³ The appellate court decided that “Section 13-64-403 is a gatekeeper . . . [and] sets out specific language that an arbitration agreement must include to comply with the HCAA.”²⁴ Furthermore, the court determined “that the statute requires strict compliance,” thus invalidating Colorow’s provision for its complete lack of bold-faced type and discrepancies in its language.²⁵ Though the *Colorow* decision is on a petition for rehearing or appeal, the law as it currently stands requires that any pre-dispute binding arbitration provisions maintain strict compliance with the specifications set forth in Section 13-64-403.

IV. PRIVATE PAY FACILITIES

Both the CMS regulation and the HCAA clearly apply to nursing homes and skilled nursing facilities, because these types of long-term care facilities receive Medicare and Medicaid funding and are thus subject to governmental regulation. But what about arbitration agreements in private pay assisted or independent living facilities?

Because CMS has no authority to regulate private pay long-term care facilities, the CMS regulation prohibiting altogether pre-dispute arbitration agreements cannot and will not apply to private pay facilities. As far as federal regulations, then, private pay agreements need only comply with the basic principles of the FAA and other applicable laws, which includes making sure arbitration agreements are conscionable and that the agreeing party has the capacity to be bound.²⁶

Colorado’s HCAA is a different story. As mentioned, the HCAA arbitration rules apply to “health care facilities,” which include “long-term

19. Interestingly, “health care facility” is not defined within the HCAA; rather, a definition of this term exists elsewhere in Title 25. *Id.* § 25-3-103.7(d), (f.3).

20. 2016 WL 4699115, *cert. granted*, No. 16SC814, (Colo. App. 2016).

21. *Id.* at ¶ 3, ¶ 4.

22. *Id.* at ¶ 10.

23. *Id.* at ¶ 11.

24. *Id.* at ¶ 9.

25. *Id.* at ¶ 13.

26. Patterson, *supra* note 3.

care facilities.”²⁷ Furthermore, “long-term care facilities” include both assisted-living residences licensed by the state,²⁸ and independent-living residences that provide daily living assistance to their residents.²⁹ Though *Colorow* interpreted the arbitration rules in the context of nursing homes, the statutory definitions suggest that strict adherence to the arbitration rules is required of private pay facilities as well.

V. CONCLUSION

The introduction of pre-dispute arbitration limitations in the long-term care context is fairly recent, and the jurisprudence on the topic will likely proliferate in the coming years. However, the current status of the regulations at both the federal level and within the state of Colorado suggest that legislators and courts alike will try to prioritize the public policy concerns surrounding the issue despite courts’ general support for arbitration as an extension of freedom of contract.

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27. COLO. REV. STAT. § 25-3-103.7(d) (2017).

28. *Id.* § 25-3-103.7(f.3)(II).

29. *Id.* § 25-3-103.7(f.3)(III).

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