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8th Circuit Affirms the Use of Pre-Dispute Arbitration Provisions Between Long-Term Care Facilities and Residents

In a recent decision by the U.S. Court of Appeals for the 8th Circuit, [a rule promulgated by the Centers for Medicare & Medicaid Services \(CMS\) in 2019](#) that permitted, with certain limitations, the use of pre-dispute arbitration agreements for long-term care (LTC) residents was upheld, as the court decided that the rule does not conflict with federal laws surrounding arbitration agreements.

The rule in question, which became effective on September 6, 2019, was a revised version of a 2016 CMS rule that prohibited LTC facilities from entering into binding pre-dispute arbitration agreements with residents or their representatives.

The revised [CMS rule](#) removes the ban on pre-dispute arbitration agreements but still prevents a nursing home from requiring residents to sign a binding pre-dispute arbitration agreement as a precondition for admission to the facility. In addition, the revised rule sets forth a number of requirements that LTC facilities must adhere to when entering into pre-dispute arbitration agreements with their residents, including the following:

- The arbitration agreement must be written in an understandable manner, form, and language for the resident or his or her representative. The resident or his or her representative must acknowledge that they understand the agreement.
- The arbitration agreement must allow for the selection of a neutral arbitrator agreed upon by the parties as well as a convenient venue for both parties.
- The arbitration agreement must grant the resident or his or her representative the right to rescind the agreement within 30 days of signing it.

- The arbitration agreement cannot contain language that discourages the resident from communicating with federal, state, or local officials, including federal or state surveyors, other federal or state health department employees, or representatives of the [Office of the State Long-Term Care Ombudsman](#).

If there is a resolution through arbitration, the LTC facility must retain a copy of the signed arbitration agreement and the arbitrator's final decision for five years. The 2019 CMS rule was never enforced because a group of nursing homes, led by Northport Health Services of Arkansas LLC, filed a lawsuit in district court against the U.S. Department of Health and Human Services (HHS) and CMS on the grounds that the rule conflicts with the Federal Arbitration Act (FAA) and exceeds HHS's statutory authority. The parties agreed to stay the enforcement of the rule while the action was pending.

On April 7, 2020, the district court denied Northport's motion for summary judgment and granted the government's motion for summary judgment, upholding the revised rule. The case was appealed to the 8th Circuit where the court granted a further stay of enforcement.

In affirming the summary judgment in favor of the government, the appellate court reasoned that the revised rule does not violate the FAA because "it does not limit or frustrate the enforceability of valid arbitration agreements." The court noted that the U.S. Supreme Court has never applied the FAA to prohibit a federal agency from generally regulating the use of arbitration agreements as CMS does here. Rather, it has construed the FAA simply to limit the circumstances in which arbitration agreements can be rendered invalid or unenforceable. The appellate court pointed out that absent a showing of generally applicable contract defenses, an arbitration agreement entered into by an LTC facility and its resident in violation of the rule is still enforceable. The potential consequence is that the LTC facility will be subject to civil monetary penalties and denial of payment as enforced by CMS.

Moreover, the appeals court found that CMS and HHS have authority to regulate the administrative aspect of nursing homes,

rejecting the homes' argument that the Medicare and Medicaid statutes only allow the agencies to regulate actual health care services. "Congress gave HHS the power to develop standards for the qualification of LTC facility administrators, to establish criteria for the administration of LTC facilities, and to specify data to be collected by LTC facilities," the judges wrote. "These provisions, though not themselves the statutory bases of the [revised rule removing the ban on pre-dispute arbitration agreements], demonstrate that HHS is not restricted to regulating only matters concerning residents' standard of medical care."

Although the CMS rule imposes limits on its use, a properly drafted pre-dispute arbitration agreement still goes a long way toward cost-saving for LTC facilities. LTC facilities should be careful to craft their pre-dispute arbitration agreements to make them consistent with the revised CMS rule and with the U.S. Supreme Court precedent, as well as considerable other caselaw guidance that has developed in local jurisdictions, to assure the agreement is likely to be enforced. If you would like to learn more about this ruling or how to properly draft a pre-dispute arbitration agreement, reach out to one of the authors of this article. You can also visit our [Health Law Matters blog](#) for more insight into legal issues impacting the health care industry.

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