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Arbitration Clauses in Long-Term Care Admissions Agreements

Long-term care facilities (particularly skilled nursing facilities) must carefully weigh the benefits and potential costs of including arbitration provisions in admissions agreements. While recent developments in federal and state law favor enforceability of arbitration clauses—even specific to the long-term care context—facilities must note that no sweeping policy will fit every individual case. In the event a dispute between a resident (or estate/personal representative) and a facility were to be litigated, the individual facts and circumstances involving the signing of the agreement itself—and the specific terms of the arbitration provision at issue—will prove decisive in a court's determination of whether to uphold arbitration.

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Benefits to Arbitration Provisions

The rise in popularity of arbitration agreements across a wide array of consumer contexts reflects certain benefits of arbitration when compared with litigation. The potential costs of litigation are manifold; legal fees can skyrocket with each discovery dispute and dispositive pretrial motion practice, retention of expert witnesses and the public disclosure of allegations within a complaint. Arbitration, on the other hand, affords a generally cost-effective, expeditious and relatively informal means of resolving disputes between the parties. Typically, arbitrators selected by both parties will consider the evidence in the absence of formal procedural rules and lengthy, burdensome discovery practices common to civil litigation. A properly conducted arbitration can provide both parties with a full, fair and inexpensive alternative to litigation of disputes that, in some cases, incur attorneys' fees exceeding the amount in controversy. For facilities, inclusion of arbitration provisions also adds a degree of certainty and predictability that can result in more favorable insurance terms; in some cases, insurers will strongly urge or require potential facility insureds to include such provisions in admissions agreements for exactly this reason. Further, acknowledging the benefits of arbitration, courts generally favor and enforce arbitration provisions—subject to the caveats discussed herein. Most recently, the U.S. Supreme Court, in *Marmet Health Care Center v. Brown et al*, reversed a West Virginia Supreme Court ruling holding arbitration clauses in long-term care provider admission agreements facially invalid. The Marmet court held that such clauses may be enforced in cases

of personal injury and wrongful death.

Despite *Marmet*, however, there are still reasons why a facility may not wish to include an arbitration provision in its admission agreement. The provision may cause some potential residents to balk; it also incurs a higher risk of potential conflict with government payers. Finally, a facility seeking to avoid litigation by including an arbitration provision may end up litigating the enforceability of that provision itself, thereby incurring the costs and uncertainty of litigation it had intended to avoid.

Recommended Terms

While inclusion or exclusion of any specific language in an arbitration provision is no guarantee of enforceability, certain basic contract terms could influence a court already predisposed to enforce such a clause in accordance with public policy favoring arbitration of disputes.

1. Consider whether agreement to arbitrate is a mandatory precondition to admission. If the arbitration term is negotiable, or is otherwise indicated within the agreement as optional, a court may be less likely to consider the arbitration provision unenforceable; as adhesive or unconscionable.

2. Consider including a rescission period during which a resident or representative signatory can rescind acceptance of the arbitration provision.

3. Consider the types of disputes covered by the arbitration clause and how it will impact a resident's legal rights and remedies. For instance, is the arbitration binding? Will it be the exclusive remedy for all disputes, or will it apply only to some subset of tort or contract claims a resident may bring against a facility?

Potential Sticking Points

The *Marmet* court did not rule that arbitration clauses are always enforceable in the context of long term care facilities; rather, the arbitration provisions are still subject to enforceability challenges on a case-by-case basis. Such legal challenges can take the form of contract disputes (*e.g.*, the arbitration provision itself is substantively or procedurally unconscionable or lacked adequate consideration) or tort (fraud) and courts look to the specific facts and circumstances attendant to

the signing of the whole agreement.

With respect to contract disputes, selection of forum and/or arbitrators, caps on damages and restriction of rights are all hot-button issues. Procedural unconscionability—generally, the concept that a resident was unable to understand (or personal representative was unable to freely choose)—can be of increased significance in long-term care. In many cases, the facts and circumstances involving a resident's admission may include an urgent, exigent or hurried situation in which the prospective resident requires care and/or housing quickly. Under these circumstances, a resident or personal representative may not be in a position to appreciate the significance of an arbitration provision. Conspicuous lettering and use of a rescission period, as discussed above, may alleviate this concern.

Also related to the resident/personal representative relationship is the contract question of signatory and beneficiary; facilities may wish to pay particular attention to cases in which a personal representative signs on behalf of a resident. In these circumstances, a resident may be unaware or unable to understand the nature of the document being signed; thus, the personal representative may lack the necessary assent of the resident in order to act as the resident's agent for contractual purposes with respect to the arbitration provision. An arrangement of this kind may be subject to attack on common law agency principles.

Finally, in some cases, plaintiffs have argued a lack of consideration; where a resident is a federal or state health care program beneficiary, the argument holds, the resident receives nothing in return for her promise to arbitrate disputes. The cost of the care, paid by the government, flows directly to the facility.

With respect to fraud, facilities should take care to ensure that personnel are absolutely unambiguous, clear and in no respect misleading or evasive on the subject of arbitration clauses. Facilities should work closely with legal counsel to educate service representatives and those dealing with admissions agreement signatories to properly explain the significance of an arbitration clause in any admissions agreement.

In addition, facilities should work closely with legal counsel to monitor rapid developments in state contract and tort law that may influence the enforceability of arbitration clauses.

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Arbitration Provisions: Action Items

1. Examine your relevant insurance policies and consult with your insurance agent/broker to determine whether arbitration clauses are encouraged or required—or could provide you with cost savings.
2. Educate your admissions counselors regarding arbitration clauses, including the need for unambiguous communication with potential residents and personal representatives on the subject.
3. Evaluate your current admissions agreement to determine if a clearly established mechanism exists for dispute resolution—or not.
4. Evaluate your resident population—is a majority, or significant percentage, admitted pursuant to federal and/or state health care programs?

Arbitration Provision Assistance

If your facility wishes to consider the merits of adding an arbitration provision or revising an existing arbitration provision in your admissions agreement, Reinhart is happy to work with you to craft language appropriate for your facility's individualized circumstances. Please contact Rob Heath at 414-298-8205 or rheath@reinhartlaw.com to discuss your specific needs.