Reinhart

Binding Arbitrations in Nursing Homes: A Dying Breed?

In the July 16, 2015 edition of the Federal Register, the Centers for Medicare and Medicaid Services ("CMS") proposed a comprehensive rewrite of the regulations governing skilled nursing facilities and nursing facilities (collectively, "Facilities") that participate in the Medicare and Medicaid programs (the "Proposed Rule"). In spite of the objections of 16 state attorneys general,1 26 members of the U.S. House of Representatives2 and 34 members of the U.S. Senate,3 CMS proposes to impose limits on when and how Facilities may employ pre-dispute arbitration agreements. The critical question at this time is whether CMS will continue to permit pre-dispute arbitration agreements after the proposed rule is finalized and, if so, under what circumstances.

The Current Rule

At present, pre-dispute arbitration agreements are generally permissible. Sometimes a court will nullify a pre-dispute arbitration agreement under general contract law principles if it appears the arbitration agreement was executed under duress. One way to maximize the likelihood that a court will enforce a pre-dispute arbitration agreement is to include a rescission period during which a resident can back out. The longer the rescission period—we recommend 3 to 15 days—the stronger a Facility's argument becomes that the resident voluntarily executed the pre-dispute arbitration agreement.

Many facilities choose not to include pre-dispute arbitration provisions in admission agreements for a number of reasons: (1) prospective residents may balk at relinquishing the right to traditional litigation; (2) the existence of potential conflict with government payers; and (3) the execution of a pre-dispute arbitration agreement may actually increase the chances of litigation as the parties seek to determine the arbitration agreement's enforceability. Nevertheless, properly drafted pre-dispute arbitration agreements help to reduce the costs and uncertainty of litigation.

The Proposed Rule

Under the Proposed Rule, if a facility executes a pre-dispute arbitration agreement with a resident, the facility must ensure that: (1) the arbitration

POSTED:

Nov 1, 2015

RELATED PRACTICES:

Health Care
https://www.reinhartlaw.com/practices/health-care

RELATED SERVICES:

Long Term Care, Assisted Living and Senior Independent Housing Services
https://www.reinhartlaw.com/services/long-term-care-assisted-living-senior-independent-housing-services

Tax-Exempt Organizations
https://www.reinhartlaw.com/services/tax-exempt-organizations

RELATED PEOPLE:

Robert J. Heath
https://www.reinhartlaw.com/people/robert-heath

agreement is explained to the resident in a form and manner the resident understands; and (2) the resident acknowledges such in writing. The arbitration agreement must: (1) be voluntarily executed by the resident; (2) provide for the selection of a neutral arbitrator; and (3) provide for the selection of a venue convenient to both the Facility and the resident. Admission to the Facility cannot be contingent upon the resident executing the arbitration agreement. The arbitration agreement must not contain any language that prohibits or otherwise discourages the resident or anyone else from communicating with government officials.

Those who oppose the use of pre-dispute arbitration agreements argue that the Federal Arbitration Act was intended to facilitate the arbitration of disputes between commercial entities of similar situation and bargaining power. But, increasingly, pre-dispute arbitration agreements are included in consumer contracts. They argue that arbitration agreements should only be permitted after a dispute arises. (Note: The Wisconsin Attorney General was not a signatory to the letter.)

Conclusion

There will surely be further discussion regarding pre-dispute binding arbitration agreements before CMS finalizes the Proposed Rule. We will continue to monitor developments related to the Proposed Rule and publish additional e-alerts as necessary to keep our clients informed.

If you have any questions about the Proposed Rule, or if you would like help developing or reviewing your own arbitration agreement, please contact Rob Heath or your Reinhart attorney.

This *Headlines in Long-Term Care Facilities, Assisted Living and Senior Housing Law E-Alert* provides general information and should not be construed as legal advice or a legal opinion. Readers should seek legal counsel concerning specific factual situations confronting them.

---

1. Comments of State Attorneys General on Mandatory Arbitration Provisions in Long-Term Care Facility Contracts, 2015, available here.
2. Reform of Requirements for Long-Term Care Facilities, October 14, 2015, available here.

3. Letter to Andy Slavitt, Acting Administrator of CMS, September 23, 2015, available here.