A Brief History of Mandatory Arbitration Clauses in Nursing Homes and the Current State of Law

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Industry Background

In 2016 there were 15,452 certified nursing facilities in the United States.[1] These facilities accounted for nearly 1.6 million residents across the nation.[2] According to Linda Breytspraak from the Center on Aging Studies, University of Missouri-Kansas City, approximately 5 percent of those 65 years of age or older occupy a bed in a nursing home.[3] The same study estimates that 50 percent of those over the age of 95 occupy some type of long term care facility.

As with any industry that caters to consumers, lawsuits over dissatisfaction and negligence claims are inevitable. In the context of health care providers, malpractice suits are often factored into the cost

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[1] Harrington, Charlene, Ph.D. August 2015. *Nursing Facilities, Staffing, Residents, and Facility Deficiencies, 2009 -2014*. Retrieved Sept 14, 2018. https://www.kff.org/medicaid/report/nursing-facilities-staffing-residents-and-facility-deficiencies -2009-through-2016/.
[2] Id.
[3]Breytspraak, Linda. January 6, 2016 *How Many Seniors End Up In Nursing Homes?* https://nursinghomediaries.com/howmany/ (Retrieved October 2, 2018).

of doing business. Prior to the adoption of the Omnibus Budget Reconciliation Act of 1987 (or OBRA), nursing homes were largely unregulated and the care residents received often subpar. Residents had no standard bills of rights and abuse, neglect, and inadequate care were rampant.[4]

OBRA instituted a Residents' Bill of Rights, along with requirements for certifications, survey, and federal guidelines setting the standard of care for long term care facilities. For the first time the federal government set expectations on the quality of care and resident assessments.

Despite advancements in the quality of care and resident rights, negligence actions against nursing homes began rapidly increasing in the late 90's and early 2000's.[5] In an effort to turn the tide of increasing consumer lawsuits many facilities began inserting pre-dispute arbitration clauses in their admission contracts.[6] [7]

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[4] Klauber, Martin. February 2001. *The 1987 Nursing Home Reform Act*. https://www.aarp.org/home-garden/livable-communities/info-2001/the_1987_nursing_home_Reform_act.html (Retrieved September 22, 2018).

[5] Koppel, Nathan. April 2008. *To Sign or Not: How to Size Up Arbitration Clauses* https://www.wsj.com/articles/SB120787667979206829. Retrieved Sept 5, 2018.

[6] Id.

[7] This paper only addresses "pre-dispute" arbitration agreements. Those being agreements entered into before any actual claim arises. Arbitration agreements entered after a claim arises have not formed the basis of much controversy, if any.

The 7th Amendment to the United States Constitution guarantees citizens the right to bring civil controversies to a jury trial.[8] All state constitutions mirror this Amendment. If consumers agree to arbitrate, they are waiving a fundamental federal and state right to a public civil jury trial. Unlike civil litigation where a plaintiff seeks a verdict decided by a jury of local citizens, arbitration takes place in a much less public setting and the end result is decided by either an arbitration panel or a single arbitrator. Many times these arbitrators are used are picked by the nursing home and there is little, if any, right to appeal their decisions.[9] The use of arbitration in nursing home contracts is not without an obvious benefit to the long term care (LTC) industry. Not only does it stack the deck in their favor by limiting appeals and giving them control over the arbitrator, but it spares the facility from having their failing and misdeeds made public and lowers their overall costs. A 2009 study commissioned by the American Health Care Association (AHCA), which represents most nursing homes, found the average awards after arbitration were 35 percent lower than if the plaintiff had

[8] U.S. Const. amend. VII.
[9] Sackett, Victoria. August 15, 2017. *Nursing Home Residents Could Lose Their Day in Court*.https://www.aarp.org/caregiving/health/info-2017/trump-nursing-home-arbitration-fd.html. (Retrieved Sept 8, 2018).

gone to court.[10] Another 2015 study by the AHCA and Aon Global Risk Consulting found that claims bound by arbitration resulted in a 7 percent overall lower cost for the facility and are generally finalized three months earlier than typical litigation.[11]

The authority for the use of arbitration clauses is rooted in the Federal Arbitration Act of 1925 (FAA), signed into law by President Calvin Coolidge.[12] Section 2 of the FAA provides:

> [a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[13]

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[10] Hersher, Rebecca. September 29, 2016. *New Rule Preserves Patients' Rights To Sue Nursing Homes In Court* https://www.npr.org/sections/thetwo-way/2016/09/29/495918132/new-rule-preserves-Patients-rights-to-sue-nursing-homes-in-court (Retrieved October 1, 2018).
[11] Aon Media Center. 2015. *Aon/AHCA Report: Liability Costs Expected to Rise for Long Term Care Facilities* http://aon.mediaroom.com/news-releases?item=137344 (Retrieved October 2, 2018).
[12] Pub. L. No. 68-401, 43 Stat. 883 (1925).
[13] 9 U.S.C. § 2.

The U.S. Supreme Court has held that the enactment of this law was aimed at favoring arbitration as a method of resolving disputes. In Southland Corp. v. Keating, the Court held that the act "withdrew the power of the states to require a judicial forum [i.e., public court room] for the resolution of claims which the contracting parties agreed to resolve by arbitration."[14] Although the Act still allowed that state contract law applied to whether an agreement had been formed, the federal power of the Act preempted state considerations of whether arbitration agreements were

per se valid. [15]

Despite the power of the Act and the Supreme Court's ruling in Southland, state courts have attempted to rule against arbitration agreements in consumer contracts. Many state courts express concern about the waiver of such a fundamental right as the right to a public jury trial. In a recent case, the Kentucky Supreme Court noted that the right to trial by jury was a "divine God-given right."[16]

[14] 465 U.S. 1, 10 (1984).
[15] First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995).
[16] Extendicare Homes, Inc. v. Whisman, 478 S.W.3d 306 (Ky. 2015).

However, the final authority on these matters, the Supreme Court of the United States, routinely upholds pre-dispute arbitration agreements under the FAA. In Marmet Health Care Center, Inc. v. Brown 565 U.S. 530 (2012), The nursing home industry won a decisive victory in their use of pre-dispute arbitration agreements.

The case involved three negligence suits against nursing homes in West Virginia. The lawsuits were filed by family members who had signed arbitration agreements on behalf of their resident family member. After each of the residents died, the family-initiated negligence suits against the home in state court. The state court dismissed the cases based on the arbitration clause but the upper court overturned. The Supreme Court of Appeals of West Virginia held that: "as a matter of public policy under West Virginia law, an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforced to compel arbitration of a dispute concerning the negligence." [17]

[17] Brown v. Genesis Healthcare Corp., No. 35494 (W. Va., June 29, 2011).

The Supreme Court of the United States was not persuaded by the West Virginia high court and overturned the decision. In doing so the Court noted that they had already held states cannot place outright prohibitions on arbitration of a particular type. Any such state law attempting this is preempted by the FAA.[18] It appeared at that time that arbitration clauses were here to stay and that nursing home residents would soon find themselves choosing between the home they wanted and their rights under the 7th Amendment.

CMS Enters the Arena

The majority of LTC solutions are paid by the federal and state government. In 2007 $190 billion was spent on nursing homes and home health in the United States. Of that amount Medicare paid 25 percent or around 47 billion dollars. Medicaid paid 42 percent or around 79 billion dollars.[19] In 2016 over 75 percent of nursing home residents received money from the government for nursing home stay.[20] These are

[18] Marmet Health Care Center, Inc. v. Brown 565 U.S. 530 (2012).
[19] Hartman M , Martin A , McDonnell P , Catlin A , *National Health Expenditure Accounts Team . National health spending in 2007: slower drug spending contributes to lowest rate of overall growth since 1998* . Health Aff (Millwood) . 2009 ; 28 (1): 246–61.
[20] The specific figure is 65% for Medicaid and 14% for Medicare. Kaiser Family Foundation. *Distribution of Certified Nursing Facility Residents by Primary Payer Source.* https://www.kff.org /other/state-indicator/distribution-of-certified-nursing-facilities-by-primary-payer-source. Retrieved Sept 15, 2018).

enormous figures and point to the fact that the government essentially bankrolls the LTC industry.

In order to receive this money, LTC facilities must abide by certain federal rules and regulations (started by the OBRA) and enforced by the Centers for Medicare and Medicaid Services (CMS), or "the Agency".[21] As a federal entity, the Agency is under the authority of the United States Health and Human Services, known colloquially as the Health Department, or HHS, whose highest ranking member is appointed as part of the President's cabinet as the US Secretary of Health and Human Service. The current HHS Secretary is Alex Azar, who was appointed by President Trump in January of 2018.

Prior to the change of administration in 2016, under then Secretary Sylvia Burwell[22], the Agency issued a proposed rule that would have banned pre-dispute arbitration agreements in nursing home admission contracts from facilities which receive federal funding.[23] This ban was part of a larger revision of the rules that begin in July of 2015 under a proposed rule entitled "Medicare and Medicaid Programs;

[21] 42 CFR Part 483, Subpart B - Requirements for Long Term Care Facilities.first published in the Federal Register on February 2, 1989 (54 FR 5316).
[22] Secretary Burwell was appointed by President Obama on June 9, 2014 and served until January 20, 2017.
[23] 80 Fed. Reg. 42,168, 42,169 (July 16, 2015).

Reform of Requirements for Long-Term Care Facilities."[24] These proposals were a first step in updating the federal regulations found in § 483.70 for the first time in over two decades and included a wide array of consumer and resident oriented upgrades set to roll out in three distinct phases.[25] It also marked the first time that CMS started siding more with consumers and residents over arbitration agreements. Over a decade prior, CMS had declared that arbitration was a private matter between nursing home residents and facilities.[26]

The rule on arbitration began as a proposal that merely required certain conditions be met prior to a facilities use of binding arbitration agreements.[27] The initial proposal on arbitration clauses called for greater transparency in a facilities use of binding arbitration agreements. Some of the requirements under the proposed rule included:

- That the facility be required to explain the agreement to the resident in a form, manner and language that he or she understands and have the resident acknowledge that he or she understands the agreement.

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[24] Id.
[25] 81 FR 68688 - Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities. 81 Fed. Reg. 192 (October 4, 2016).
[26] Binding Arbitration in Nursing Homes, Center for Medicare & Medicaid Services, Ref: S&C-03-10, January 9, 2003.
[27] 81 FR 68791 https://federalregister.gov/d2016-23503/page68791. (Retrieved on September 13, 2018).

- The agreement could not contain any language that prohibited or discouraged the resident or any other person from communicating with federal, state, or local officials, including, but not limited to, federal and state surveyors, other federal or state health department employees, or representatives of the Office of the State Long-Term Care Ombudsman, regarding any matter, whether or not subject to arbitration or any other type of judicial or regulatory action, in accordance with proposed § 483.11(i).

- If a facility utilized an arbitration agreement, such facility would be required to inform the resident, at a minimum, that the resident was waiving his or her right to judicial relief for any potential cause of action covered by the agreement.

- The agreement could only be entered into by the resident voluntarily and would have to provide for the selection of a neutral arbitrator and a venue convenient to both parties, the resident and the facility. [28]

In discussing the proposed rule, the Agency also solicited comments on whether they should simply ban such agreements all together. The Agency received over 1,000 comments regarding arbitration. This was almost an astonishing 10% of the overall public comments aimed at the all the proposed rules.[29] Unsurprisingly, the LTC industry was vehemently and unanimously opposed to such an outright ban. However, there was also an outpouring of comments from members of the public and government. These included a letter signed by 34

[28] Id.
[29] Id.

senators, one from the House of Representatives, and a letter signed by 16 state attorneys-general, all pushing for an outright ban on the agreements.[30]

While the industry cited the various legal precedents upholding the authority and power of the FAA and arbitration agreements, the Agency countered that:

> "The plain language of the FAA applies only to existing arbitration agreements voluntarily made between private parties; it does not compel or require the use of arbitration between private parties. Because it does not prescribe circumstances in which arbitration agreements must be used, it does not impinge on federal agencies' rights to issue regulations regulating the conditions of adoption of such agreements, assuming that the Secretary otherwise has proper statutory authority." [31]

Citing the Agency's authority under sections 1102(a) and 1871 of the Social Security Act, et al, the final rule was adopted and it appeared

[30] Id.
[31] Id.

as though no future pre-dispute arbitration agreements would be allowed in the long term care setting. [32]

A Change in Leadership

The final rule was issued September 19, 2016 while Secretary Burwell remained in office and the nation had not yet voted for the new president.[33] The rule provided that LTC facilities that participated in Medicare or Medicaid "must not enter into a pre dispute agreement for binding arbitration with any resident or resident's representative nor require that a resident sign an arbitration agreement as a condition of admission to the LTC facility."[34] It should be noted that this rule still allowed post-dispute arbitration.

The LTC industry responded swiftly to the final rule. Mark Parkinson, the CEO and President of the largest LTC provider, AHCA, complained that the new rule: "[C]learly exceeds CMS's statutory authority and is wholly unnecessary to protect residents' health and

[32] The rule was never meant to apply to pre-existing agreements.
[33] 42 C.F.R. § 483.70(n)(1) (The effective date of the rule was November 28th, 2016).
[34] 81 Fed. Reg. at 68,867.

safety. AHCA is considering the appropriate steps for it to take in light of this unjustified action by CMS." [35]

On October 17, 2016 Mr. Parkinson kept good on his promise and the AHCA and several facilities filed a preliminary injunction in the Northern District of Mississippi seeking to enjoin Secretary Burwell and acting CMS director, Andrew Slavitt, from enforcing the new rule. [36] The suit alleged that the new rule violated the FAA and exceeded both CMS's and HHS's statutory authority under the Medicare and Medicaid Acts. The suit also alleged that even if such authority existed, the ban was arbitrary and capricious and would prevent residents and LTC providers from the benefits of arbitration. The federal court granted the injunction.[37]

The Agency appealed this decision to the U.S. Court of Appeals for the Fifth Circuit on January 5, 2017. However, in two weeks later the Obama administration was replaced by Donald Trump and all agencies experienced a complete change in leadership and focus.

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[35] Hersher, Rebecca. September 29, 2016. New Rule Preserves Patients' Rights To Sue Nursing Homes In Court https://www.npr.org/sections/thetwo-way/2016/09/29/495918132/new-rule-preserves-Patients-rights-to-sue-nursing-homes-in-court (Retrieved October 1, 2018).
[36] AHCA v. Burwell 3:16-CV-00233 (N.D. Miss)(2016).
[37] Id. at Doc # 44.

President Trump appointed Georgia Congressman Tom Price to replace Burwell. On June 2, Secretary Price moved to dismiss the appeal and end the litigation. [38]

At the same time as AHCA v. Burwell, a Kentucky case involving nursing home arbitration agreements made its way to the U.S. Supreme Court. In Kindred Nursing Centers L.P. v. Clark, 581 US _ (2017), the U.S. Supreme Court examined the issue of whether an agent with power of attorney could bind the principal nursing home resident to arbitration.[39] In Kindred, family members of injured nursing home resident had signed pre-dispute arbitration agreements with only simple powers of attorney. The Kentucky Supreme Court noted that the 7th amendment right to a jury trial was too "inviolate" and was a "divine God-given right" and that the "power to waive generally such fundamental constitutional rights must be unambiguously expressed in the text of the power of attorney".[40] The court ruled that attorney-in fact did not have the authority to bind his principal to a pre-dispute"

[38] Overley, Jeff. June 2, 2017. *CMS Abandons Nursing Home Arbitration Appeal.* https://www.law360.com/articles/930890/cms-abandons-nursing-home-arbitration-appeal (Retrieved Sept 29, 2018).

[39] The case was originally a consolidation of three cases and styled Extendicare Homes, Inc. v. Whisman, 478 S.W.3d 306 (Ky. 2015). However, Extendicare did not seek review to the U.S. Supreme Court and the resulting case became Kindred Nursing Centers L.P. v. Clark.

[40] Extendicare Homes, Inc. v. Whisman, 478 S. W. 3d, at 328–329 (quoting Ky. Const. §7).

arbitration · agreement unless that authority was clearly stated in the power-of-attorney document.[41]

The highest court, however, rejected this ruling and held that state's cannot put arbitration contracts on unequal footing with the ability to contract other rights, such as property.[42] The case was sent back to the high court of Kentucky after being reversed and vacated. The Kentucky court followed the ruling and ultimately sent the disputes to arbitration.[43]

We Are We Now?

It is important to consider that there is no final Supreme Court ruling prohibiting a ban on mandatory pre-dispute arbitration clauses in the context of long term care facilities. The preliminary injunction from AHCA v. Burwell never made it to the Fifth Circuit Court of Appeals before being voluntarily dismissed by CMS. And **Kindred** merely addressed the narrow issue of whether an attorney in fact could bind the principal to such an agreement without a clear statement of

[41] Id. at, 328-29 (Ky. 2015).
[42] 581 US _ (2017).
[43] Kindred Nursing Centers Limited Partnership v. Wellner, 533 S.W.3d 189 (2017).

intent. The authority of CMS to control facilities that it regulates is still an open debate. However, given the current administration's clear reluctance to enforce the reform regulation of 2016 it is doubtful this issue will come before the courts anytime soon. In fact, CMS has already announced a moratorium on all new 2016 regulations at the behest of the LTC industry.[44]

It is also worthy to note many state high courts are enforcing arbitration agreements. Recently the supreme courts of Alabama, Rhode Island, Texas, and West Virginia have decided in favor of arbitration agreements.[45] Although only the Alabama case involved a long term facility, it is a marked turn around from the typical state resistance to such agreements. There is still some state opposition to arbitration agreements, however. Louisiana recently struck down what it viewed as a contract of adhesion at a children's trampoline park.[46] Though whether this will survive SCOTUS scrutiny is another matter.

CMS does plan to address the issue of arbitration in a new proposed rule that calls for, at the very least, transparency and clear

[44] Dickson, Virgil. December 5th, 2017. Modern Healthcare. *CMS halts enforcement of some Obama-era nursing home standards*. http://www.modernhealthcare.com/article/20171205/NEWS/171209950. (Retrieved October 1, 2018).
[45] Kramer, Liz. March 2, 2018. *State Supreme Courts Falling in Line on Arbitration*. https://www.arbitrationnation.com/tag/adhesion/. (Retrieved Oct 1, 2018).
[46] Duhon v. Activelaf, LLC 192 So. 3d 762 (La. 2016).

communication that a resident or their agent are agreeing to pre-dispute arbitration.[47] The proposals are essentially identical to the original proposed rule before it adopted the proscription of the agreements altogether. [48]

For now, the best course of action for long term care advocates is to ensure that families take time to understand what they are agreeing to in admission packets. With the few exceptions of state contract defenses, nursing home arbitration clauses will not be going anywhere anytime soon and we can expect little, if any, help from CMS.

[47] Proposed Rules, 82 Fed. Reg. 109 (june 8, 2017).
[48] See pages 9-10 above.