Sign Here: Nursing Home Admission Contracts and the Dispute Over Mandatory Arbitration

by Eric Carlson

Many prospective and current nursing home residents are being asked to sign nursing home admission contracts that include a binding arbitration provision. Can facilities force residents to relinquish the right to a trial by jury? Eric Carlson, an attorney at the National Senior Citizens Law Center (NSCLC), argues that mandatory arbitration is forbidden for nursing home residents reimbursed through Medicare or Medicaid.

Federal Medicare and Medicaid law provides a simple but powerful weapon against mandatory nursing facility arbitration agreements. A nursing facility must accept Medicare and Medicaid, plus appropriate co-payments and deductibles, as payment in full. Therefore, it is illegal for a facility to require, as a condition of admission or continued stay, that a resident forgo his or her right to a jury trial, if the resident's care is reimbursed through Medicare or Medicaid.

The relevant Medicare authority is 42 C.F.R. § 489.30, which requires that any Medicare-certified provider accept Medicare (including patient-paid co-payments and deductibles) as payment in full. A similar regulation (42 C.F.R. § 447.15) applies to Medicaid-certified providers providing care to Medicaid-eligible patients. In addition, in relation to Medicaid only, the Nursing Home Reform Law explicitly states that a nursing facility shall "not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the [state's Medicaid plan], any gift, money, donation, or other consideration as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual's continued stay in the facility." 42 U.S.C. §1396r(c)(5)(A)(iii); see 42 C.F.R. § 483.12(d)(3).

The Centers for Medicare & Medicaid Services (CMS) recently issued evasive guidance that takes no position on the central issue. *CMS Survey and Certification Group Memorandum #03-10 (Jan. 9, 2003).* In general, pursuant to the recent memorandum, state surveyors will not address the question. Of course, courts will retain jurisdiction to rule on the issue as it arises in private litigation.

The fairest reading of the memorandum seems to be that surveyors will not cite a facility which requires or accepts binding arbitration at admission, but will cite a facility which retaliates against an existing resident for that resident's refusal to consent to binding arbitration. Significantly, the CMS "no cite" policy at admission is not based on a finding that binding arbitration is allowed at that time, but rather on a belief "that [CMS's] primary focus should be on the quality of care actually received by nursing home residents that may be compromised by such agreements." CMS arguably is taking the justifiable position that its expertise is in resident care rather than the determination of legal consideration, and that courts should determine whether an agreement to arbitrate constitutes consideration under the relevant federal law.

The Arkansas Department of Health Services recently found that a mandatory arbitration agreement was "unconscionable" and noted "residents suffer from a gross disparity of bargaining power."

Prior to the issuance of the CMS memorandum, the Arkansas Department of Health Services found that a mandatory arbitration agreement violated the Medicaid no-additional-consideration law. The order, entitled *In the Matter of Northport Health Services, Inc.*, is available on the NSCLC website, http://nsclc.org

The order also concludes that the arbitration agreement lacked mutuality; the agreement was so one-sided that the facility was "free to seek judicial relief for any claims that it is likely to have against residents, while residents are precluded from bringing any significant tort action that they are likely to have against [the facility.]" *Order, p. 5.* The agreement purported to bind family members, advocates, and ombudsman program representatives.

For similar reasons, the order concludes that the arbitration agreement was unconscionable. The Department noted that residents suffer from a gross disparity of bargaining power, and that residents likely would not understand the arbitration agreement's significance.

The courts likely will address this issue in the relatively near future. Jerry Taylor and Paul Sizemore of Beasley, Allen, Crow, Methvin, Portis & Miles, P.C., of Montgomery, Alabama, report filing a statewide class action lawsuit against Integrated Health Services, alleging that nursing facilities are prohibited by federal law from requiring arbitration from residents whose care is reimbursed through Medicare or Medicaid. The complaint in *Cockrell v. Integrated Health Services* is available on the NSCLC website, http://nsclc.org

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