Analysis of CMS Arbitration "Protocols" & Case Examples

The Reform of Requirements for Long-Term Care Facilities Rule (CMS-2015-0083) presents an opportunity for CMS to fully protect nursing home residents from forced arbitration; but, if implemented improperly—including with the arbitration "protocols" CMS delineates in its proposed rule—nursing home residents will not only continue to suffer under forced arbitration, they will be left in a worse position than that which they are in today.

This is true for two reasons: **1)** Mandating protocols concerning *how* residents are forced to enter into pre-dispute arbitration agreements will have no practical protective effect because of their real-world use; and **2)** Imposing CMS-sanctioned arbitration protocols will actually lead to worse outcomes for residents and their families because such protocols could preempt the already limited opportunities for a resident or her family to challenge a forced arbitration clause or the circumstances surrounding its execution.

The only way for CMS to meaningfully protect residents from forced arbitration is to restrict the use of *pre-dispute* arbitration clauses.

1. Mandating Arbitration "Protocols" Will Have No Meaningful Impact

When a family makes the decision to use a nursing home for a loved one's care, the process is often rushed, in an emergency situation, and without any real choice concerning which facility to use. Families complete the admissions process without an attorney or any understanding of their legal rights and, are desperate to get their loved ones into any facility that can provide adequate care. They give little if any thought to the possibility of a horrific or tragic event occurring, much less to how they want the legal system to be used to resolve such an event. These factors are only magnified when a resident checks herself into a facility. Collectively, these factors preclude residents and their families from appreciably understanding the legal rights they are surrendering by "agreeing" to forced arbitration before an adverse event or dispute has arisen.

Further, even if CMS institutes new arbitration protocols, there is no way to ensure compliance or enforcement of these protocols under recent Supreme Court jurisprudence. In *Rent-A-Center, West, Inc. v. Jackson*,[1] the Court held that when an arbitration clause delegates questions of fairness or arbitrability (i.e., whether or not a clause is enforceable in the first place), it is the *arbitrator*—not a judge—who ultimately decides. This means challenges to the validity or basic fairness of an arbitration clause, as well as challenges to the circumstances surrounding the signing of an agreement, will be determined by arbitrators with an obvious interest in upholding such clauses. Because of this, absent CMS regulations restricting the use of *pre-dispute arbitration clauses*, forced arbitration becomes entirely unavoidable for residents, and CMS' well-intentioned protocols become meaningless and unenforceable.

2. Proposed CMS Protocols Lead to Worse Outcomes for Residents and Their Families

In many instances, state judges have expressed hostility to enforcing arbitration clauses against nursing home residents and their families and, in cases involving especially horrific circumstances, will apply their state law to invalidate a forced arbitration clause. For example, state contract laws can deem certain contracts "unconscionable," rendering fundamentally unfair contracts unenforceable. Other state laws guarantee certain rights and protections to nursing home patients and their families, recognizing the unique vulnerabilities they often face. When these state laws are violated, state courts will sometimes allow cases to proceed in court *despite* the existence of a forced arbitration clause. However, if CMS mandates protocols or model arbitration language, nursing homes facilities will argue that because their clauses meet the requirements of CMS' mandate, such clauses are inherently fair, regardless of the contrary and often more protective state laws.

Case Examples

New Jersey – Unconscionability

Ida Azzaro and Marie Mizerak signed nursing home residency agreements on behalf of Pasquale Azzaro and Anna Ruszala, respectively. Each resident suffered significant injuries at a nursing facility and later died as a result. When their families sought to hold the nursing home accountable, the facility relied on forced arbitration agreements included in their residency agreements and attempted to dismiss each case. The trial court denied the nursing home's motion, relying on a New Jersey state law which voids clauses that waive or limit a patient's

right to sue for negligence or malpractice. On appeal, the Superior Court of New Jersey clarified the lower court's ruling, also holding limits on discovery, punitive damages, attorney fees, or clauses requiring strict confidentiality procedurally unconscionable under New Jersey law.[2] Importantly, the court directly addressed the tension between federal policy and state law: "*this question pits our State's laws protecting the elderly and infirm against a national policy favoring arbitration as an alternative forum for resolving civil disputes…we diffuse this tension by both respecting the supremacy of federal law while relying on well-established principles of contract law to declare certain provisions of the arbitration agreements unenforceable under the doctrine of substantive unconscionability*."[3] Substantive and procedural outcomes such as this would be effectively eliminated under CMS' proposed arbitration protocols.

Pennsylvania – Interpretation of Contract Terms

In recent years the Pennsylvania Supreme Court has enunciated situations where forced arbitration clauses in nursing home contracts are invalid under state law. When Evonne Wert sought to hold her mother's nursing home accountable after discovering grim details of severe abuse and neglect, the nursing home relied on the fact that she had signed all of the admission documents on her mother's behalf, including a forced arbitration clause. However, the Pennsylvania Supreme Court ultimately invalidated the arbitration clause under state law because it named the National Arbitration Forum (a corrupt, now-defunct arbitration provider) as the arbitration provider and relied on NAF's "Code of Procedures." The court found these provisions "integral and non-severable, concluding that holding otherwise would require the court to rewrite the agreement under Pennsylvania contract law, which stands independent of arbitration."[4] This result would become impossible under CMS' proposed arbitration protocols.

Massachusetts – Authority of Family Members

Elizabeth Barrow was found strangled and suffocated in her room with a plastic shopping bag over her head. The killer, police said, was her 97-year-old roommate. Months earlier, workers at her nursing home described Elizabeth's roommate as a "risk to harm herself or others." After a police inquiry—despite her age and dementia—Elizabeth's roommate was charged with murder. More than six years later, Elizabeth's only son Scott is still trying to hold the nursing home accountable for her death under Massachusetts law, but the facility has been attempting to hide behind its arbitration clause that forces any dispute, even wrongful death, into private arbitration. Relying on state law, Mr. Barrow argued that although he had his mother's health care proxy when he signed her admission papers year earlier, he lacked the legal authority to bind her to forced arbitration. In 2014, a state judge ruled in his favor. This straightforward argument has caught on in appellate courts across the country, which have been throwing out arbitration agreements signed by family members of nursing home residents where there is no judge or jury and the proceedings are hidden from public scrutiny. Regrettably, CMS' proposed protocols could eliminate these arguments.

South Carolina – Capacity

Mary Brinson, 76, suffered from dementia and required more assistance than her sister Ann could provide. When Mary was admitted to a nursing home, Ann took care of the paperwork. Though in good health at admission, Mary's health deteriorated rapidly. She developed severe contractures, bedsores, dehydration, weight loss, and malnutrition due to severe neglect. After recovering at a local hospital, Mary returned to the nursing home where her health again rapidly declined. She was found unresponsive with a 103.3 temperature three days later and was taken back to hospital, but the damage was already done – her condition worsened and she died soon thereafter. When Ann attempted to hold the nursing home accountable in court the facility sought to force her into arbitration. A South Carolina trial court agreed with Ann, finding that the state's Adult Health Care Consent Act prevented Ann from signing away Mary's right to hold the nursing home accountable in court. The nursing home appealed that decision all the way to the state's highest court and lost every step of the way, denying Mary's family the justice they deserved for more than six years by hiding behind its arbitration clause. The highest court recognized Ann "lacked authority to sign the arbitration agreements (AA), and that she is not equitably estopped to deny their enforceability."[5] Mary's family was only able to access justice because of this state law. Unfortunately, CMS' proposed arbitration protocols could eliminate these protections.

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[1] 561 U.S. 63, (2010).

[2] *See* Estate of Ruszala ex rel. Mizerak v. Brookdale Living Communities, Inc., 415 N.J. Super. 272 (App. Div. 2010); Delta Funding Corp v. Harris, 189 NJ 28 (2006).

[3] *Id.*

[4] Wert v. ManorCare of Carlisle PA, LLC, 124 A.3d 1248 (Pa. 2015).

[5] Coleman v. Mariner Health Care, Inc., 407 S.C. 346 (2014).