Don’t Sign Pre-Dispute Arbitration Agreements

In an effort to prevent residents from being able to sue for abuse or neglect, nursing homes, residential care facilities and continuing care retirement communities are asking residents to sign admission agreements and contracts that include binding pre-dispute arbitration provisions.

What is Binding Arbitration?

By signing an admission agreement that includes a pre-dispute arbitration provision, the parties are agreeing to give up their constitutional right to have a dispute (before the dispute even arises), including neglect and abuse cases, decided in a court of law in front of a jury, and instead are agreeing to the use of binding arbitration. This means that the decision of the arbitrator is final and there is no appeal. This means that, rather than having the issue decided in public by a jury of their peers in front of a judge, the matter will be decided in private, by a private (and very expensive) arbitrator. Arbitration proceedings are not part of the public record and not subject to judicial review.

What is the Law?

Federal Law: (42 CFR §483.70) Nursing homes that are certified for Medicare or Medicaid are bound by federal rules, including those pertaining to pre-dispute arbitration agreements. After a ban on the use of pre-dispute binding arbitration agreements by nursing homes during the Obama Administration was overturned, the Centers for Medicaid and Medicare Services (CMS) issued a proposed rule that permitted the signing of such agreements as a condition of admission. The subsequent final rules, effective 9/2019, that permits such agreements, but not as a condition of admission, was meant as a compromise. These include:

- The signing of arbitration agreements shall not be used as a condition of admission to, or as a requirement for, a resident to continue to receive care in the facility, and the facility must explicitly inform the resident or their representatives of these rights. The arbitration agreement must also expressly state the same.
- Residents or their representatives have a 30-day right of rescission, i.e., they can cancel the arbitration agreement.
- The agreement must be explained to the resident or their representative in a form, manner and language that they understand, and they acknowledge that they understand the agreement.

California Law: Nursing homes cannot require you to sign an arbitration agreement and cannot present an arbitration agreement as part of the Standard Admission Agreement. (California Health & Safety Code §1599.81, Title 22 California Code of Regulations §72516, 42 CFR §483.70(n)). Any arbitration agreement shall be separate from the Standard Admission Agreement and shall contain the following advisory in large, bold type at the top of the agreement: Residents shall not be required to sign this arbitration agreement as a condition of admission to this facility. Residents and their legal representatives can rescind an arbitration agreement by giving written notice to the facility within 30 days of their signature. (California Code of Civil Procedure §1295, 42 CFR §483.70(n)(3))

If a nursing home asks a resident or resident representative to sign an arbitration agreement, it must explain the agreement in a form, manner and language the resident and representative understand. (42 CFR §483.70(n)(2)).
• **RCFEs, Assisted Living:** While there are no statutes or regulations specifically pertaining to arbitration agreements in these facilities, California law does prohibit RCFE admission agreements, its attachments, and any other document that a resident or representative is required to sign as a condition of admission from requiring the resident to waive benefits or rights to which the resident is entitled under federal or state law or regulation. (HSC 1569.269(c)) One of those rights is the right to file a lawsuit.

• **CCRCs:** A recent court decision, *Harris v. University Village Thousand Oaks, LLC (2020)*, limits CCRCs use of pre-dispute arbitration agreements. The Harris case held that CCRCs may not enforce pre-dispute arbitration clauses affecting “disputes arising from or related to the tenancy provisions of a continuing care contract.” The CCRC Bureau issued a Provider Information Notice (PIN21-02-CCR) cautioning providers to amend their continuing care contracts to ensure that their arbitration clauses comply with the Harris decision. Clearly, most CCRC contracts would be related to the tenancy provisions, so it is likely that most, if not all, CCRC pre-dispute arbitration agreements would be contrary to the Harris decision. [https://www.cdss.ca.gov/Portals/9/CCLD/PINs/2021/CCRC/PIN-21-02-CCR.pdf](https://www.cdss.ca.gov/Portals/9/CCLD/PINs/2021/CCRC/PIN-21-02-CCR.pdf)

**Advocacy Tips**

*Refuse to Sign the Agreement*

While facilities might (illegally) refuse to accept a resident, who won’t sign an arbitration agreement using some pretext or another, they often accept residents who have not yet signed their admission papers. One way to avoid arbitration agreements is to get admitted first and then refuse to sign the arbitration piece. Nursing homes are prohibited from evicting residents unless one of a narrow range of reasons has been satisfied. Failing to sign an arbitration agreement is not one of those reasons – in fact, it is against the law. So once a resident has been admitted, she/he can simply refuse to sign.

*What if I Already Signed an Arbitration Agreement?*

Nursing home residents or their legal representatives may rescind an arbitration agreement by giving written notice to the facility within 30 days of their signature. (California Code of Civil Procedure §1295) If more than 30 days have passed since you or a loved one signed an arbitration agreement, there is no harm in revoking the clause after the fact. You could send a letter to the facility explaining that you did not understand the implications of signing an arbitration agreement, and therefore you are revoking your consent. Be sure to keep a copy of the letter and obtain proof of delivery.

*How to Prevent Being Bound to an Arbitration Agreement*

In many cases, nursing home or assisted living residents do not sign their arbitration agreements. A substitute, often a family member or an agent under a power of attorney or health care directive, will sign the admission agreement and the arbitration agreement on behalf of the resident. By not granting your surrogate the power to sign arbitration agreements on your behalf, you can retain your right to consent or refuse arbitration. Tell your attorney to specifically prohibit your agent from signing an arbitration agreement. In addition, a number of recent court decisions have found that a pre-dispute arbitration agreement signed by an agent under a health care directive were void an unenforceable.
Myths & Facts About Arbitration Agreements

Myth: Agreements are “Voluntary”

The providers of care would have you believe that residents and their family members are “voluntarily” signing these agreements. These pre-dispute arbitration provisions are usually part of a host of documents involved in an admission to an RCFE or a nursing home.

They are usually presented in a “take it or leave it” setting. Family members often feel compelled to sign such agreements to ensure that the care of their family member is not compromised. If they don’t sign the agreement, they probably won’t be admitted to the facility in the first place. Few of the residents or their representatives understand the consequences of the agreement, nor are they represented by counsel. Yet they are asked to sign a legal document drafted by the facility’s legal counsel relinquishing their right to a trial by jury. What bargaining power does a Medi-Cal resident or an aged or disabled consumer have in this marketplace?

Myth: Arbitration is Neutral

According to one nursing home industry attorney: “The greatest appeal of arbitration for the provider is that this process takes the case out of the hands of the jury (whose biases we are all too familiar with) and entrusts it to a neutral arbitrator.”

The truth is that this “neutral” arbitrator is a private judge whose services can cost anywhere from $400 to $1,000 an hour or more. The plaintiff bringing a neglect case is a one-time customer for the private arbitrators, while corporate defendants and insurance companies will be involved in cases again. Some judges take this into account: if they want repeat business, they know if they impose a high compensatory award - let alone punitive damages - the corporate defendant or its insurance company won’t use their services again.

Myth: Arbitration is Faster

Requiring arbitration agreements actually denies quick access to justice for the aged and the disabled. Under current California law, a plaintiff who is 70 or older or one in compromised health can ask for a preference, i.e., an expedited hearing. When the Court grants a preference, the trial must be set within 120 days. In arbitration proceedings, where the plaintiff is ill or dying, the defendants can and do drag out the selection of the arbitrator and seek indefinite postponements of the hearing until the plaintiff is dead. The arbitrator also can ignore the requests of dying plaintiffs to a speedy hearing. The victims of such delays have no recourse to a higher court and no right to an independent review of procedural abuses.

Myth: Arbitration is Cheaper

Given a choice, what would you rather have? A public judicial officer who is paid by the taxpayers or a private judge, whose services can add $10,000 to $20,000 in out-of-pocket costs to your lawsuit. Few nursing home residents, 64% of which have their costs paid for by Medi-Cal, can afford a private arbitrator. Indeed, arbitration might be cheaper for the nursing home or RCFE, since the money’s not coming out of their pocket - but the pocket of the insurance company. Victims of neglect and abuse need protection from the public courts and the jury system, not higher costs and added risks.

Pre-Dispute Arbitration Agreements Should be Prohibited

Federal and state policy makers should prohibit pre-dispute arbitration clauses in RCFE and nursing home admission agreements. If the parties choose to enter arbitration after a dispute arises, that is their right. But the process should be voluntary, without coercion, and the resident’s admission or stay in a facility should not be conditioned upon the signing of a one-sided agreement.
Know Your Rights

The multi-billion-dollar nursing home and assisted living industries spend considerable time and money on efforts to deny residents their rights in order to avoid accountability for abuse and neglect of residents. Only by being aware of your rights, by being vigilant, by reading the fine print and by refusing to sign such agreements can residents’ rights prevail.