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PRE-DISPUTE ARBITRATION AGREEMENTS

Legal Trends and Practical Advice

By Payam Saljoughian, Hanson Bridgett LLP

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I. Introduction

Arbitration is a method of dispute resolution in which a neutral, private third party renders a decision, rather than a judge or jury. In 1925, Congress unanimously passed the Federal Arbitration Act ("FAA") to "reverse the longstanding judicial hostility to arbitration agreements."[1] Until then, many courts had been wary of arbitration, sometimes even refusing to accept arbitration rulings as binding. Under the FAA, arbitration agreements are presumed to be valid, irrevocable, and enforceable, unless invalidated under limited state contract law theories.[2]

Yet despite "a liberal federal policy favoring arbitration,"[3] arbitration agreements are regularly challenged, as plaintiffs and their attorneys find new devices to circumvent them. These challenges often arise in the seniors housing industry, where pre-dispute arbitration agreements have become commonplace, and residents or their families often seek to bring emotionally charged cases before juries. This *Special Issue Brief* identifies common challenges to pre-dispute arbitration agreements and discusses provisions that will help strengthen their enforceability.

II. The Federal Arbitration Act

Many scholars agree that Congress intended the FAA to be purely procedural, as the statute itself contains no express preemption provision.[4] Nevertheless, the Supreme Court has interpreted Section 2 of the FAA as a broad substantive federal commitment to arbitration in both state and federal courts. Section 2 of the FAA requires courts "to put arbitration agreements on an equal plane with other contracts,"[5] meaning that courts may not refuse to enforce arbitration provisions based on rules specific to arbitration.

The FAA applies to arbitration agreements that implicate "interstate commerce." In the context of seniors housing and long-term care, providers will almost always satisfy this requirement. Multistate providers implicate interstate commerce because they conduct

[1] *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002).
[2] 9 U.S.C. §2.
[3] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).
[4] *Christopher R. Drahozal, In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 Notre Dame L. Rev. 101, (2002) (listing scholarly views).
[5] *Kindred Nursing Ctrs. Ltd. Partnership v. Clark*, 137 S. Ct. 1421, 1427 (2017).
[6] *Estate of Ruszala v. Brookdale Living Communities, Inc.* 1 A.3d 806,817-18 (N.J. Super. Ct. 2010).

business across state lines.[6] Even small single-site providers participate in interstate commerce by purchasing supplies, food, medicine, or equipment from out-of-state vendors.[7] In addition, providers that bill Medicare, Medicaid, or other federal programs participate in interstate commerce by accepting federal funds.[8] Nevertheless, in light of the federal policy in favor of arbitration, providers should explicitly invoke the FAA in their arbitration agreements.

III. Benefits of Arbitration

Arbitration offers an expeditious alternative to litigation. Unlike court appearances and trials, which must be fit into backlogged court calendars, arbitrators are often more available and willing to schedule around the needs and availabilities of the parties. A study of employee-plaintiff arbitration cases between 2014 and 2018 found that the average processing time from initiation to completion was 569 days in arbitration compared to 665 in litigation.[9] However, the disparity was greatest at the extreme, as disputes in the longest 10% of processing time lasted 844 days in arbitration, compared to 1,283 days in litigation.[10] Arbitration awards are also less susceptible to drawn out appeals processes.

Parties to an arbitration are also free to negotiate the rules governing the arbitration, such as whether formal rules of evidence and procedure will apply. The more streamlined process limits parties' ability to delay and raise costs through game-playing tactics of litigation. The parties are also free to select an agreed-upon arbitrator with a particular background, which may be mutually beneficial in disputes involving niche areas of law.

In part due to the faster and more streamlined procedure, arbitration is generally less expensive than litigation. In a survey of over 30,000 individuals who participated in voluntary arbitration, 51% of respondents stated that they felt their total costs (including filing fees and attorneys' fees) were cheaper than they would have been litigation, with only 8% stating that they felt it was more expensive. Arbitrators also typically charge for their services per day, incentivizing parties, including those paying their lawyers on a contingency basis, to narrow the issues and resolve matters quickly.[11]

a. Benefits of arbitration for providers.

The primary benefit of arbitration for providers is the ability to avoid catastrophic jury verdicts. In recent years, juries in emotionally charged lawsuits have awarded multi-million dollar awards to residents of long-term care facilities or their families. Enforceable pre-dispute arbitration agreements provide the first line of defense against "runaway juries" when adverse incidents occur. Moreover, such jury awards often come with front-page news articles that can have potentially long-lasting public relations consequences. Arbitrations, in contrast, are typically confidential and do not produce a public record. Providers can also include specific language in their pre-dispute arbitration agreements limiting the unilateral disclosure of the existence or result of an arbitration.

[7] Id.

[8] *THI of New Mexico at Hobbs Center, LLC v. Spradlin*, 893 F. Supp. 2d. 1172, 1184 (D.C.N.M. 2012).

[9] *Fairer, Faster, Better: An Empirical Assessment of Employment Arbitration.* U.S. Chamber Institute for Legal Reform (2019), available at: https://instituteforlegalreform.com/wp-content/uploads/2020/11/FINAL-Consumer-Arbitration-Paper.pdf

[10] Id.

[11] *Arbitration: Simpler, Cheaper, and Faster Than Litigation: A Harris Interactive Study.* U.S. Chamber Institute for Legal Reform (2005), available at: https://instituteforlegalreform.com/wp-content/uploads/media/ArbitrationStudyFinal.pdf

IV. Improving the Enforceability of Arbitration Agreements

When adverse incidents occur, residents or their families often want to bring litigation claims in court. These situations can give rise to challenges of pre-dispute arbitration agreements signed years prior. Under the FAA, arbitration agreements can be invalidated under state contract law theories that evaluate the fairness of the written terms of the agreement, or the facts surrounding the formation of the agreement. These issues are highly fact specific, but because the right to a jury trial is fundamental in the United States, courts look to confirm that individuals freely agreed to relinquish that right before compelling arbitration. Below are a few ways providers can maximize the enforceability of their pre-dispute arbitration clauses.

a. Avoid one-sided access to the courts.

Under the "substantive unconscionability" doctrine, courts will evaluate whether the terms of a pre-dispute arbitration agreement are so unjust that they cannot be enforced in good conscience. One of the main factors considered is whether the agreement gives one-sided access to the courts. Agreements that require a resident to arbitrate all or most of their claims, while giving the provider discretion to pursue all or most of their claims in court risk invalidation. A potentially helpful approach is to draft the entire agreement as a mutual agreement, signed by both parties, and where both parties agree to arbitration.

b. Avoid one-sided terms.

The agreement should also avoid one-sided terms that raise questions about the neutrality of the agreement. For example, the agreement should not leave the selection of the arbitrator solely in the hands of the provider. Similarly, terms that may appear neutral on their face may be one-sided in practice. For example, since providers hold most of the evidence and access to witnesses in personal injury disputes, severe discovery limitations may be viewed as giving the provider a decided advantage in arbitration.

c. Make important provisions stand out.

Pre-dispute arbitration agreements can be lengthy and are often one of many documents signed by residents or their representatives at the time of admission. Not surprisingly, a common challenge by residents is that they did not know what they were signing. Providers should preempt such arguments by bolding or otherwise drawing attention to the most important provisions of the arbitration agreement.

d. Give the resident an opportunity to ask questions.

Under the "procedural unconscionability" doctrine, courts will look beyond the written terms of the agreement. Notwithstanding its contents, unfair circumstances during the signing process may render an arbitration agreement unenforceable. For example, residents may claim that they were rushed, that they felt pressured to sign the agreement, or that they didn't understand the significance of what they were signing. Providers can preempt these claims by giving residents an opportunity to ask questions, or allowing residents and their families time to review the document in private or with counsel.

e. Sever unenforceable provisions.

Challenges to arbitration clauses are not necessarily all or nothing. Providers can and should include "severability" clauses, which make clear that if a particular provision of an agreement is unenforceable, the remaining provisions will not be affected. For example, if a resident disputes discovery limitations in an arbitration agreement, a court or arbitrator can decide to strike that portion while enforcing the agreement to arbitrate claims generally. Note, however, that a severability clause is not a cure-all for defects in the arbitration agreement. A court that finds multiple offending provisions or even one egregious provision may simply invalidate the entire agreement as unconscionable. [12]

f. Carve out unarbitrable claims.

Providers may be prohibited from arbitrating certain claims as a matter of state law. For example, California law prohibits lease provisions that waive a tenant's procedural rights in litigation. In 2020, a California Court of Appeal ruled that this law applies to residents of seniors housing providers.[13] Under the new ruling, while arbitration is still permitted for some disputes, such as those involving care, claims involving a senior housing resident's rights and obligations as a tenant are no longer arbitrable.

Pre-dispute arbitration agreements often carve out certain types of claims because of statutory requirements or otherwise. When a dispute arises between parties, a threshold question may be whether the claims at issue are part of the carve out or not. Providers may wish to include, in their arbitration agreements, a delegation of arbitrability— a provision stating that an arbitrator should decide whether a claim is subject to arbitration. Not only are the benefits of expeditiousness and low cost equally applicable to these threshold questions, but where claims are split between litigation and arbitration, an arbitrator will likely want to keep as many claims together as possible. On January 18, 2019, in a unanimous opinion, the U.S. Supreme Court held that valid delegations of arbitrability must be enforced by courts.[14]

g. Identify the benefits of arbitration in the arbitration agreement itself.

A fundamental requirement for the existence of a valid contract is "consideration"— the requirement that both parties to a contract incur a detriment in return for a benefit. By agreeing to arbitration, both parties waive their right to bring claims in court, in return for the other party's reciprocal waiver. Providers may want to spell out the benefits of arbitration in the agreement itself. A few sentences explaining that the parties have agreed to resolve disputes in a timely fashion, in a non-public setting, and in a manner than minimizes legal costs, may be helpful in the event of a challenge to show that the resident considered and understood the benefits of arbitration before signing the agreement.

[12] See, for example, *Hogsett v. Parkwood Nursing & Rehab Center, Inc.*, 997 F. Supp. 2d 1318 (D.C. N.D. Ga. 2014); *Goldman v. Sunbridge Healthcare, LLC*, 220 Cal. App. 4th 1160, 1173 (2013); *Crossman v. Life Care Centers of America, Inc.* 738 S.E.2d 737, 741 (N.C. App. 2013); *Riley v. Extendicare Health Facilities, Inc.*, 826 N.W.2d 398, 411-412; *Estate of Irons v. Arcadia Healthcare, LC*, 66 So. 3d 396, 397 (Fla. App. 2011).

[13] *Harris v. University Village Thousand Oaks, CCRC, LLC*, 49 Cal.App.5th 847 (2020).

[14] *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S.Ct. 524 (2019).

V. Tradeoffs Between Enforceability and Protection

Courts evaluating whether arbitration agreements are subject to invalidation will construe unfair provisions or requirements against providers, as the drafting party. As discussed above, providers should therefore take steps to maximize the enforceability of their arbitration agreements. However, in some cases, maximizing enforceability may be at the expense of maximizing protection. Below are some decisions providers must make when evaluating the tradeoffs between enforceability and protection.

a. Voluntary vs. Mandatory Arbitration Agreements.

Some state laws and regulatory schemes prohibit mandatory arbitration agreements as a condition of admission. However, even where mandatory arbitration agreements are permitted, courts have considered the mandatory nature of an arbitration agreement as one factor in determining whether it is fair and reasonable.[15] A voluntary arbitration agreement is much less subject to attack on the grounds of procedural unconscionability, but presents the possibility that it will not be signed.

b. Using a Separate Pre-Dispute Arbitration Agreement.

Providers must decide whether to include pre-dispute arbitration agreements as a section of their admission agreements or as a separate document entirely. A separate agreement eliminates the argument that the arbitration language was buried in the already lengthy admission agreement. However, the tradeoff is that residents may be more likely to agree to arbitration if it is part of the admission agreement. Independent of enforceability, a benefit of having a signed pre-dispute arbitration agreement is that it may dissuade attorneys, especially those taking cases on a contingency fee basis, from taking on cases in the first place, as they will first have to prove to a court that the arbitration agreement is unenforceable.

c. Permitting Residents to Withdraw their Agreement to Arbitrate.

In order to drive home the point that a resident's agreement to arbitrate is truly voluntary, providers may consider adding a provision that allows residents to withdraw their agreement to arbitrate within a period of time, such as fifteen or thirty days. Like most contracts, once they are signed, arbitration agreements are generally not reviewed in detail until a dispute arises. As such, it is unlikely that residents will rescind their agreement to arbitrate within the allotted period of time. However, a withdrawal provision will undermine any argument that the agreement was mandatory, or that the resident did not have an opportunity to read it.

Providers who do allow residents to withdraw their agreement to arbitrate within a period of time should add language that any claims arising prior to the withdrawal are governed by the agreement to arbitrate that was in place at the time the claim arose. If claims for injury or damage arise during the withdrawal period, this language prohibits residents from retroactively withdrawing the requirement to arbitrate those claims.

[15] *Hayes v. Oak Ridge Homes*, 908 N.E.2d 408, 410 (Ohio 2009).

d. Alternative Methods of Dispute Resolution.

A final decision point for providers is whether to require parties to participate in alternative dispute resolution methods before arbitration, such as an internal appeal process or mediation. These alternative methods of dispute resolution may help narrow the issues in a dispute, or obviate the need for arbitration or litigation entirely. They may also help lower cost and avoid the need for a potentially public legal dispute, which is one of the primary purposes of arbitration in the first place. Requiring alternative methods of dispute resolution may also improve enforceability by showing that the purpose of the arbitration agreement is to resolve disputes in an efficient manner, not to rob a resident of their litigation rights. Conversely, such requirements may just create additional mandatory hurdles in disputes that are unlikely to be easily resolved.

VI. Who Should Sign an Arbitration Agreement?

One of the most common challenges to pre-dispute arbitration agreement is that they were improperly signed and are therefore unenforceable. Not surprisingly, this challenge commonly arises in the seniors housing arena, where family members or other representatives often sign admission documents. If a resident is mentally competent, the resident should sign the arbitration agreement. It is a good practice to have an authorized representative, if any, sign an arbitration agreement in addition to but not instead of a mentally competent resident. Most issues arise, however, when the resident's mental competency is lacking. In those situations, if a conservator or guardian has been appointed by a court, the conservator or guardian should sign the arbitration agreement. Providers should make sure the conservatorship or guardianship is in effect at the time of the signing, obtain documents supporting the conservatorship or guardianship, and keep the documents in the resident's file.

Many incompetent residents have durable powers of attorney that designate a representative to make healthcare and financial decisions for them. Assisted living providers should have the person or persons who hold both healthcare and financial power of attorney sign an arbitration agreement on behalf of an incapacitated resident. The signature of a spouse or other relative without formal authority may not withstand a challenge.

It is worth remembering that the right to a jury trial is a constitutionally protected right, and doubts about proper formation of an arbitration agreement will therefore be construed against providers. In 2021, the South Carolina Supreme Court held that the family member of an incompetent assisted living resident did not have authority to bind the resident to arbitration even though she held a valid general durable power of attorney and health care power of attorney.[16] The Court concluded that an agreement to arbitrate was outside the scope of powers conferred under the general power of attorney, and that it was not a health care decision under the language of the healthcare power of attorney.[17] When in doubt about the proper party to sign an arbitration agreement, providers should err on the side of obtaining too many signatures and consider consulting with legal counsel. However, the South Carolina case serves as a warning that no matter how many steps providers take to maximize the enforceability and proper formation of their arbitration agreement, the risk of invalidation still persists.

VII. Who is Bound by an Arbitration Agreement?

The U.S. Supreme Court has held that third parties to an arbitration agreement may be compelled to arbitrate under state law principles that allow enforcement of contracts by or against nonparties, such as assumption, piercing the corporate veil, or alter ego, among others.[18] Some seniors housing providers draft broad-reaching arbitration agreements that seek to bind interested third parties, such as family members, heirs, and agents in claims that they might bring on behalf of the resident or themselves. Such clauses are potentially enforceable under the theory that binding third parties is necessary to avoid eviscerating the underlying arbitration agreement.[19] However, they can be viewed as overreaching, and therefore provide another example of a potential tradeoff between protection and enforceability.

Whether an arbitration clause binds a third party's claim also depends on whether the claim belongs to the resident or to the third parties. For example, in Florida, a wrongful death cause of action is derivative, meaning that a decedent's estate and heirs stand in the shoes of the resident when bringing such a claim. In 2013, when the estate and statutory heirs of a deceased Florida nursing home patient sought to bring a wrongful death lawsuit, the Florida Supreme Court held that they were bound by the patient's arbitration agreement because the patient himself would have been bound.[20] Conversely, a wrongful death claim in California belongs to a decedent's heirs, based on their own injury suffered by the loss of the relative. Thus, also in 2013, the California Court of Appeal held that a California seniors housing provider's broadly drafted arbitration agreement, which sought to cover all claims arising from or related to the care and services received by a resident, did not extend to a wrongful death claim brought by a third party heir.[21] Depending on applicable state laws, provider may well choose to accept the risk of litigation with a resident's family members in order to maximize the enforceability of an arbitration agreement against a resident, with whom they have the most liability.

Many cases discussing the formation of arbitration agreements use the terms "third party" and "non-signatory" interchangeably. In the seniors housing context, these terms may be distinguishable, as it is common for family members or agents to sign pre-dispute arbitration agreements on behalf of incompetent residents. In such situations, these individuals are both third parties and signatories. Some seniors housing providers have taken advantage of this fact and included language that third parties signing arbitration agreements on behalf of a resident also agree to arbitrate their own claims. While this approach is creative, courts may consider it overreaching. Moreover, if there are multiple family members who could bring a claim, the agreement to arbitrate by one family member does not dramatically reduce the likelihood of a jury trial.

[16] *Arredondo v. SNH SE Ashley River Tenant, LLC*, 433 S.C. 69 (2021), cert. denied (U.S. Dec. 6, 2021).
[17] Id.
[18] *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009).
[19] *See, e.g. PRM Energy Systems, Inc. v. Primenergy, L.L.C.*, 592 F.3d 830 (8th Cir. 2010).
[20] *Laizure v. Avante at Leesburg, Inc.*, 109 So. 3d 752 (Fla. 2013).

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VIII. Exceptions to Arbitration

By excluding some claims from mandatory arbitration, providers demonstrate that residents retain some litigation rights. Pre-dispute arbitration agreements should exclude small claims actions from arbitration as the stakes are relatively low and attorneys are not needed or even permitted. Excluding small claims matters is also consistent with the idea that the parties seek the most economic and efficient resolution of disputes.

Providers may also wish to except eviction proceeding from arbitration, which are typically expedited proceedings in court. Arbitration is not efficient for eviction because even if a provider prevails, it will likely still need to go to court anyway obtain an enforceable order for possession of the premises. Providers may also want to except eviction from any required alternative methods of dispute resolution, such as mediation. Evictions often arise in time-sensitive emergency situations, which are not well suited for mediation. However, evictions are lawsuits that only the provider will bring. Thus, allowing providers to sue in the event of eviction and not allowing residents to sue under any circumstances may risk a court finding the agreement to be one-sided.

IX. Conclusion

An enforceable pre-dispute arbitration agreement provides significant value to seniors housing providers, especially in the event of a major adverse incident. Providers should draft their pre-dispute arbitration agreements to maximize the likelihood that they will withstand legal challenges down the road. The agreements should invoke the FAA and be carefully drafted to provide benefits to both the provider and the resident. Providers should also avoid the temptation to overreach. Arbitration agreements will continue to come under attack, so providers should be aware of the potential pitfalls and revise their arbitration agreements accordingly.

[21] *Daniels v. Sunrise Senior Living, Inc.*, 212 Cal.App.4th 674 (2013).

About the Author

Payam Saljoughian is a partner at Hanson Bridgett LLP. For nearly 10 years, Payam has devoted his practice to representation of health care clients in litigation and transactional matters. He works with hospitals, skilled nursing facilities, assisted living facilities, continuing care communities, and other senior care and housing providers. He advises them on a broad range of issues such as state and federal licensure and regulatory compliance, resident disputes, Medicare and Medi-Cal reimbursement and certification, and contract drafting.

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