

JUSTICE IN AGING

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Analysis: Federal Court Upholds Limits on Nursing Facility Arbitration Agreements

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In a [decision](#) issued April 7, 2020, a federal district court in Arkansas upheld a federal regulation that limits a nursing facility's ability to force arbitration on a resident. That is the good news—but the opinion brings with it bad news as well. Although, according to the court, the regulation is enforceable by government agencies, it is not applicable in litigation between a resident (or resident representative) and a facility.

On April 15, 2020, the plaintiff nursing facilities appealed the district court's decision to the Eighth Circuit Court of Appeals. During the appeal, the regulation is in effect.

The federal regulation, 42 C.F.R. § 483.70(n), applies to any nursing facility that accepts reimbursement from Medicare and/or Medicaid. Under the regulation, a nursing facility cannot require arbitration as a condition of admission or continued stay. Nonetheless, a facility and resident can enter into an arbitration agreement if the resident makes this choice voluntarily. The agreement must state explicitly that arbitration is not being required for admission or continued stay. Also, the agreement must be explained to the resident in an understandable manner, and the resident must acknowledge understanding. In addition, the resident has a right of rescission for 30 days after signing the arbitration agreement.

The lawsuit was brought by a coalition of Arkansas nursing facilities against the Centers for Medicare & Medicaid Services (CMS). The facilities argued that the regulation conflicted with the Federal Arbitration Act and exceeded CMS's authority. Also, the facilities argued that CMS had acted arbitrarily in changing its policy, and had not adequately considered the regulation's economic impact.

Much of the troubling language in the court's opinion is attributable to CMS's arguments regarding the Federal Arbitration Act (FAA). Because the FAA declares (with certain important exceptions) that arbitration agreements are valid and enforceable, CMS attempted to sidestep the FAA by arguing that the regulation actually does not limit the enforceability of nursing facility arbitration agreements. Rather, according to CMS, the regulation is a contractual requirement imposed by CMS on those nursing facilities that choose to accept Medicare or Medicaid reimbursement (or both). The court summarized CMS's argument this way:

In other words, a participating nursing home may choose to enter into a pre-dispute binding arbitration agreement without complying with the procedural requirements laid out in the Final Rule, and if a resident were to sue the nursing home, the facility could seek to compel arbitration pursuant to the agreement and expect a court to enforce the agreement. At the same time, however, the nursing home would be exposing itself to the possibility of corrective action by CMS for a violation of the facility's participation agreement. But, as the Government points out, a nursing home "could rationally choose to accept a fine as the price for negotiating an agreement the way it wants."

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In finding that the regulation does not violate the FAA, the court adopted CMS's argument, stating that the regulation "only establishes conditions of the facility's receipt of federal subsidies." Accordingly, the court held that the regulation does not "undermine the validity or enforceability" of arbitration agreements in litigation between residents and facilities.

Overall, the court's decision is decidedly a mixed bag – a consumer "win" heavily overshadowed by its negative consequences. Although CMS and state survey agencies retain the ability to enforce the regulation, CMS's counsel explicitly raised the scenario of a facility simply paying a (presumably nominal) fine as the cost of breaking the law. Also, the ruling endorses the idea that the arbitration regulation is a contractual condition that is irrelevant outside of an enforcement context – for example, in litigation between a resident and a facility. On this point, the court's ruling is contrary to many other court rulings in litigation between residents and facilities, finding that provisions of federal nursing facility law are relevant in setting the standard of care that a nursing facility must honor.

The plaintiff nursing facilities appealed the district court's ruling on April 15 to the Eighth Circuit Court of Appeals. While the appeal proceeds, the regulation remains in effect. Both in the appeal and in day-to-day advocacy, it will be important to push back against the idea that a facility can pay fines to routinely violate the law, or that federal nursing facility law is only enforceable by government agencies. It is nursing facility *residents* who have the most at stake, and they must retain the ability to use federal nursing facility law in disputes with facilities.