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Trends in LTC Litigation: Arbitration Agreements in Long-Term Care

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Healthcare and Long-Term Care Group

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For more information, please contact:

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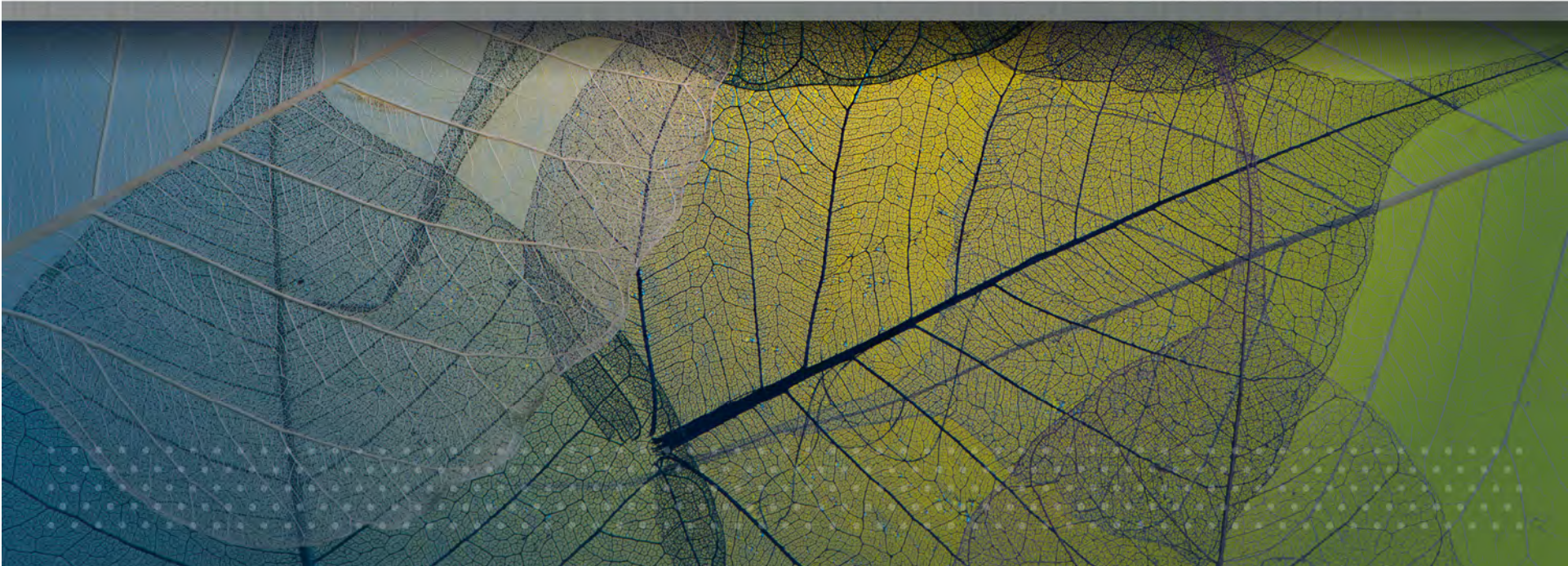
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Arbitration Agreements in Pennsylvania *What you need to know*



Today's Topic

Arbitration Agreements –

- What are they and why do we use them?
- Enforceability Issues
- Litigation Trends – Current Law
- Best Practices
- Regulatory Update – New CMS Rule

What is an Arbitration Agreement?

- A written contract between two parties determining how they will resolve disputes
- ADR: Alternative Dispute Resolution – any method of resolving a dispute outside of a courtroom



Why do we Use “arb” Agreements or ADR?

Generally, agreeing to arbitration is a more cost-effective alternative to litigation in the court system.

It was designed to provide a means for the resident/family and facility to resolve disagreements without subjecting themselves to an expensive, slow, and drawn-out jury trial process.

HOWEVER...

Why do we Use “arb” Agreements or ADR?



Why do we Use “arb” Agreements or ADR?

The use of arbitration agreements has become one of the most hotly debated topics in nursing home admissions.

Primary criticisms:

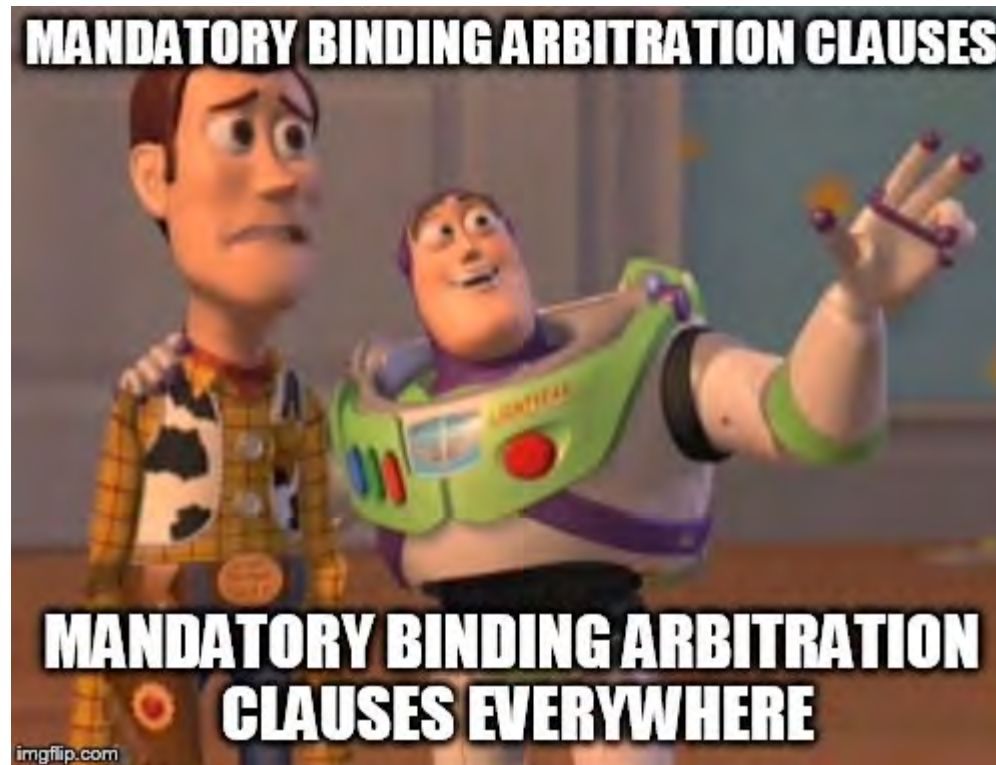
- One-sided in favor of nursing home (drafter)
- Arbitration negatively impacts quality of care
- Agreements to arbitrate are buried in mounds of admissions paperwork (separate document versus provision or clause)

Scope of Arbitration Agreements

- General allegations of professional medical negligence
- Collections for payment

Litigation Trends

Pennsylvania Courts will favor arbitration agreements if the contract is validly executed.



Evolution of Enforcement

MacPherson v. Magee Memorial Hospital for Convalescence (November 2015)

- Analyzed capacity of decedent to execute arbitration agreement and whether agreement was unenforceable based on alleged unconscionability.
- Agreement was enforced with following terms noted in agreement:
 - (1) parties shall pay their own fees and costs;
 - (2) conspicuous, large, bolded notification that the parties are waiving the right to jury trial;

Evolution of Enforcement - continued

- (3) body and obvious typeface that agreement is voluntary and patient may refuse to sign with no consequences;
- (4) facility will pay arbitrator's fees and costs;
- (5) statement included that there are no caps or limits on damages other than those imposed by law; and
- (6) the resident/patient could rescind within 30 days.

Evolution of Enforcement - continued

Taylor v. Extendicare Health Facilities, Inc.

- Defendant executed an arbitration agreement with plaintiffs' decedent requiring arbitration of claims.
- Plaintiffs filed suit on behalf of themselves as wrongful death beneficiaries.
- Federal Arbitration Act ("FAA") analyzed by Court; the Court determined FAA preempts Rule 213(e).
- Court required arbitration as to survivor claim, but not wrongful death.

Evolution of Enforcement - continued

Cardinal v. Kindred Healthcare, Inc. (January 2017)

- Appellate court reversed trial court's decision rejecting enforcement of arbitration agreement.
- Nephew of decedent brought suit.
- Court reinforced concept of arbitration agreements as contracts.
- Resident/decedent signed arbitration agreement at admission when an executed POA was in place.
- Appellate court rejected arguments that decedent lacked capacity.

Evolution of Enforcement - continued

Petersen v. Kindred Healthcare, Inc. (February 2017)

- Court held that nursing home must determine whether agent actually has authority to act under POA.
- Resident's daughter/plaintiff signed arbitration agreement at time of admission. POA listed her sister as the actual POA, and daughter who signed agreement as "successor" agent in event her sister was unwilling or unable to act.
- Facility did not investigate whether the primary agent was unwilling or unable to act and relied on successor sister's representation as having authority to act.

Evolution of Enforcement - continued

- Court believed that facility who had actual notice of this provision as it had copy of POA should have investigated further.
- Facilities must exercise extreme caution when dealing with POAs and who has authority; document all efforts to confirm validity of POA and agent's authority.

Evolution of Enforcement - continued

Del Ciotto v. Kindred (December 2017)

- Decedent's son signed arbitration agreement on decedent's behalf.
- Court analyzed whether a claimant can sign in representative capacity versus individual capacity; Plaintiff bound only as decedent's representative and not his or her individual rights as a plaintiff.

Evolution of Enforcement - continued

Snyder v. Golden Living (January 2019)

- Court enforces arbitration agreement, deceased woman's husband had authority to sign.
- The record left little doubt that the husband had express authority to sign the arbitration contract and it adequately identified the parties.

Best Practices

Upon admission:

- Separate agreements are executed - Point out the agreement for arbitration as dispute resolution and its purpose
- Advise resident and/or family that they can decline and:

EXPLAIN

EXPLAIN AGAIN

EXPLAIN SOME MORE

Best Practices

Capacity

- Does the resident have capacity to enter into this agreement? Admissions and intake staff need to know what to look for in such assessments.
- If a family member is signing the paperwork, does that person have the capacity to bind his or her loved one to the arbitration agreement?
- If they say they have a Power of Attorney (POA), **insist** that they provide a copy – cannot just take their word for it.

Appear Less Like This...



"Just sign here - yes, in blood."

Appear Less Like This...



And More Like This...

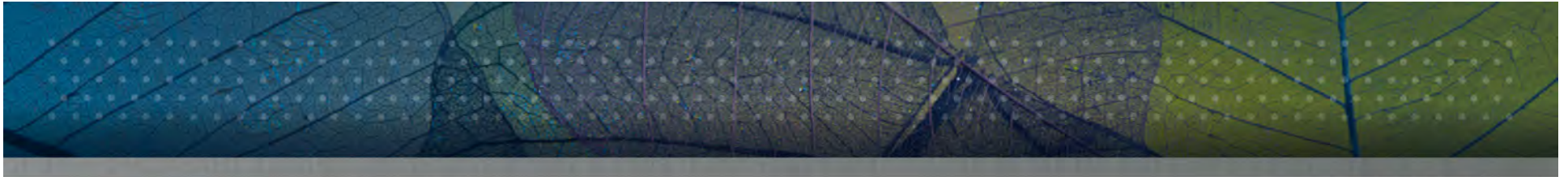
- Show interest in concerns of the resident and family members – person-centered care
- Talk the resident and/or family member through the process



CMS Final Rule - 2016

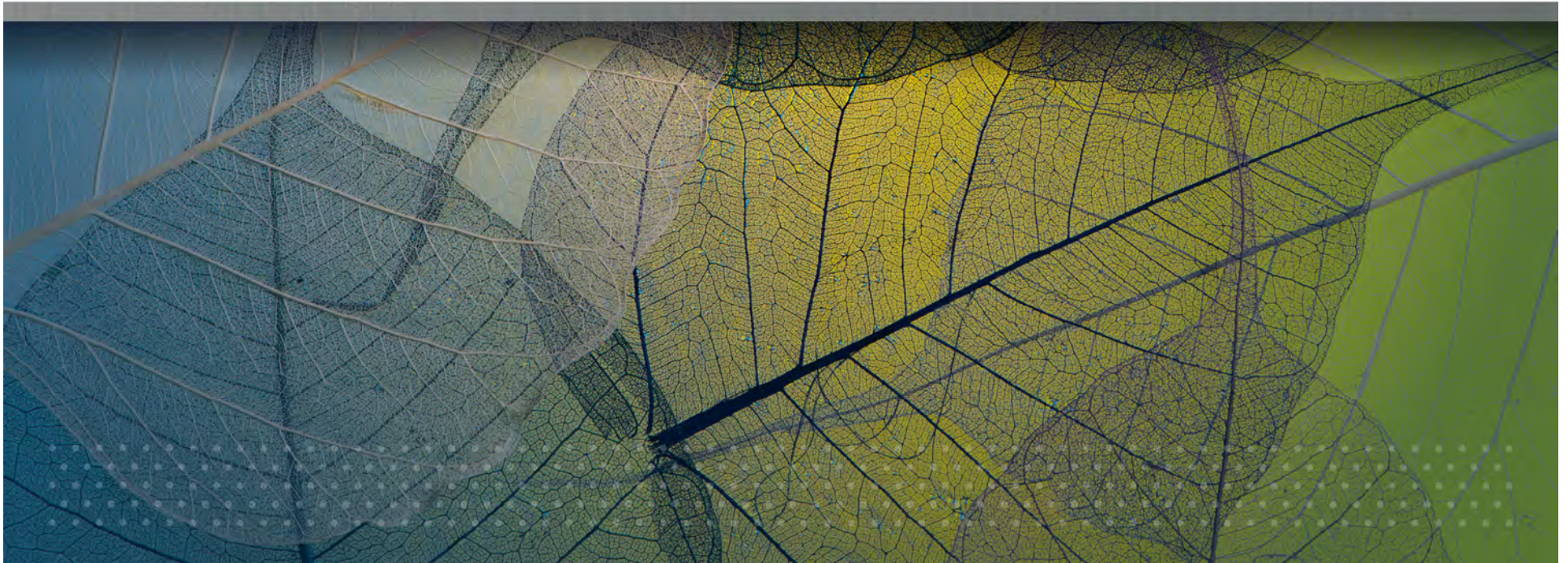
Final Rule --- or is it?

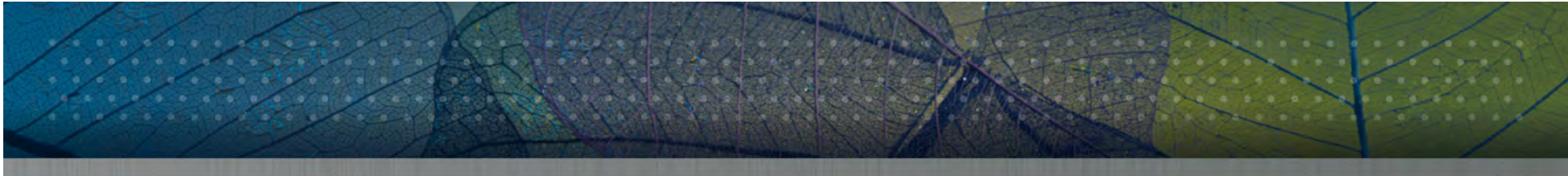
- CMS Regulations initially prohibited mandatory pre-dispute arbitration agreements under 42 CFR § 483.70 (n)
- Federal Court in Mississippi challenged implementation of this provision of this regulation
- <https://www.federalregister.gov/documents/2017/06/08/2017-11883/medicare-and-medicaid-programs-revision-of-requirements-for-long-term-care-facilities-arbitration>
- 82 Fed. Reg. 26649 (June 8, 2017) – reversed prohibition of arb agreements from 2016 rule – Final Rule put on hold



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Questions?





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