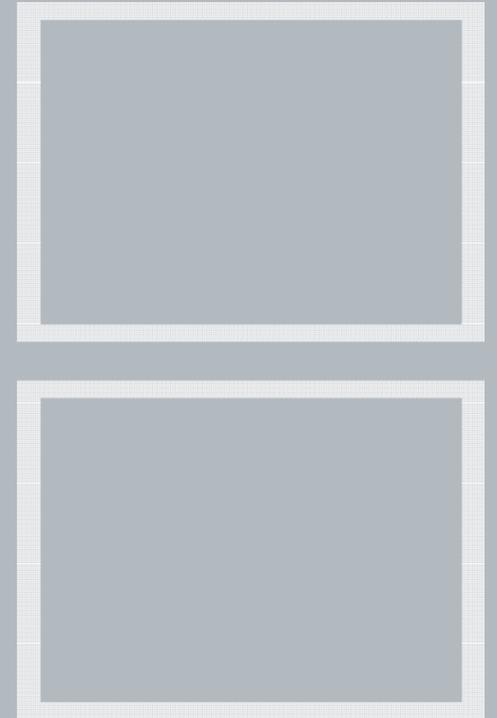


# Understanding Arbitration Provisions in Long Term Care: Latest Developments & Best Practices

The New England Alliance Winter Meeting  
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# Roadmap of Today's Presentation

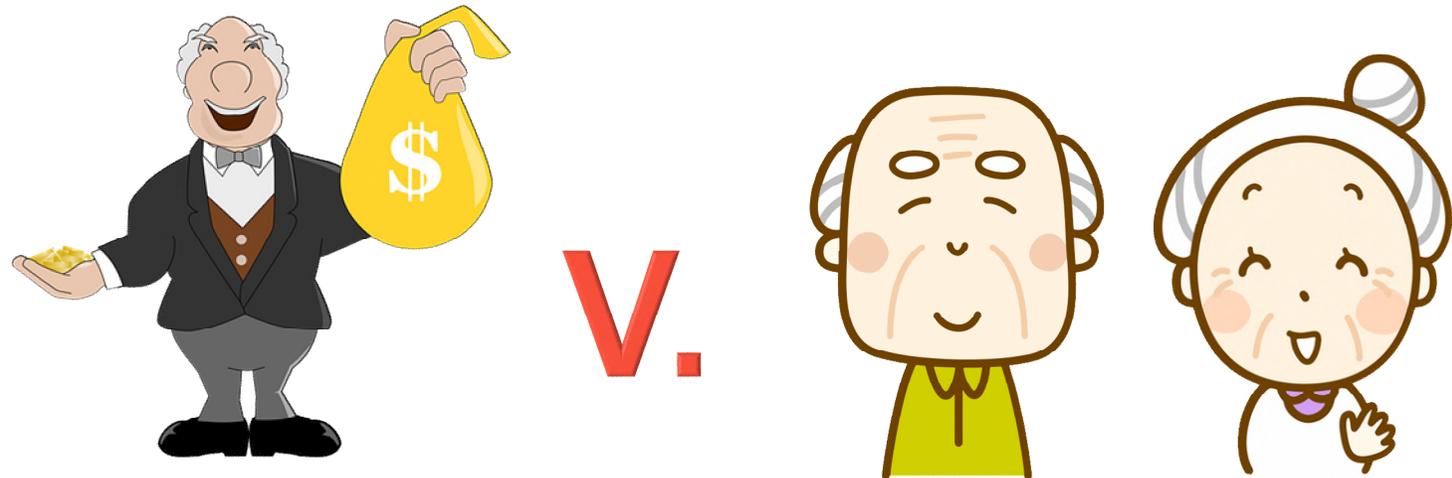
- What is arbitration?
- Benefits and criticisms of arbitration
- Regulatory structure governing arbitration
- How to comply with regulation while maximizing the benefits of arbitration

# What is Arbitration?

- Arbitration is an alternative dispute resolution process involving a neutral third party who makes binding decisions to resolve the dispute.
- Arbitration agreements can be used between LTC facilities and
  - Residents
  - Employees
  - Vendors
  - Others

# Benefits of Arbitration for LTC Facilities

- Less expensive (maybe)
- Less time consuming
- Private and confidential
- Final
- Flexible
- Jury appeal



# Criticisms of Arbitration

- Lack of transparency
- Unequal bargaining power
- Expense
- Limited appellate review

# Regulatory Structure Governing Arbitration

- Federal:
  - Federal Arbitration Act
  - Regulations
- State:
  - State arbitration acts and regulations

# Legal “Grey” Areas

- Statute of limitations
- Limitation of damages
- Anti-injunction clauses
- Fee shifting
- Forum selection
- Non-coordination clauses

# Recent Developments



# Recent Developments

- Federal regulation (42 CFR 483.70 (n)):
  - Medicare requires, as a condition of participation, that LTC facilities **may not condition a resident's admission or continued care on a resident's agreement to binding arbitration.** The agreement must explicitly state this right.
  - Arbitration provisions must provide for selection of a neutral arbitrator and a venue convenient to both parties.
  - The agreement may not contain language prohibiting or discouraging a resident's communication with federal, state or local officials.
  - The agreement must grant residents the ability to rescind the agreement within thirty days of signing.
  - A LTC facility must retain signed arbitration agreements and arbitrators' final decisions for five years after resolution of all disputes. These records must be made available for inspection upon request by CMS.
  - The agreement must be explained in a manner and form the resident understands, and the resident must acknowledge understanding.

# How to Maximize Benefits of Arbitration

- Provide the terms of arbitration in the provision or agreement.
- These terms may include:
  - Mediation
  - Cost-saving procedures:
    - No depositions, interrogatories or requests for admission
    - Limited document discovery
    - Limited briefings, expeditious hearings
    - One arbitrator instead of a panel of three

# How to Comply with Federal Regulation

- Review arbitration provisions entered since September 16, 2019.
- Amend any arbitration provision template.
- Review facility record retention policy to ensure compliance with COP.
- Review policies and procedures regarding discussion of arbitration agreements with residents.
- Train staff on the updated policies and procedures.

# Thank You



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