

## **Alert** | Health Care & FDA Practice



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### **Colorado Court Invalidates Arbitration Agreement Between Long-Term Care Facility and Resident: What Facilities Should Know**

In early 2021, the Colorado Court of Appeals issued an opinion concerning the validity of an arbitration agreement under the Colorado Health Care Availability Act (HCAA) that permits binding pre-dispute arbitration between patients and their health care providers if the agreement is executed in accordance with the HCAA's specified requirements. Under the HCAA, an arbitration agreement between a health care provider and a patient is valid if, among other things, the agreement contains certain statutorily required disclosures, and a written copy of the agreement is provided to the patient or the patient's representative.

In *Johnson v. Rowan Inc.*, \_\_\_ P.3d \_\_\_, 2021 WL 280523 (Colo. App. 2021), plaintiffs argued that a long-term care facility's arbitration agreement violated the HCAA and thus was unenforceable because (1) a written copy was not provided to them and (2) a facility representative failed to sign the agreement. The Court of Appeals agreed with the plaintiffs and found that these failures invalidated the arbitration agreement, making it unenforceable. In so holding, the court also referenced unfavorably the "stack of papers" containing the arbitration agreement that was provided to the plaintiffs upon admission and the fact that those papers were required to be signed in a relatively short amount of time.

In light of this holding, and given that much of the admission process is done electronically, facilities should consider the following additional steps, which may increase the likelihood that their arbitration agreements are upheld and enforced by a Colorado court:

- Separate the arbitration agreement from other admissions paperwork and separately in a focused manner, present it to the resident or the resident's representative(s);
- Always countersign the agreement at the time the agreement is signed by the resident or the resident's representative(s);
- Provide the resident or the resident's representative(s) with a written hard copy of the fully executed agreement at the time it is signed; and
- Have the resident or the resident's representative(s) sign an acknowledgment stating that they have received a written hard copy of the arbitration agreement.

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