

THE NUTS AND BOLTS OF NURSING HOME ARBITRATION AGREEMENTS

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Imagine finding yourself in the position of responding to a substantial litigation judgment or spending limited resources on patient care. Nursing home administrators have increasingly been forced into that conundrum, making the impossible choice between meeting legal obligations and judgments and providing for those entrusted to their care. During the decade of the 90's and beyond, nursing home operators were too often forced to divert precious operating capital to satisfy judgments which sometimes seem to be detached from reality. Stories of jury manipulation are legendary and frequently based on reality. During one 12-month period in 2003 and 2004, one Florida firm that calls itself a pioneer in nursing home litigation racked up \$64 million in jury verdicts. This litigious climate has caused operators and industry representatives to call for legislative change and, in some cases, those calls have been answered. But too often, nursing home operators feel the proverbial target on their backs compounded by an inability to secure meaningful liability insurance.

This gloomy climate has caused the nursing home industry to look for relief outside of the state capitols as well. One approach is to limit access by aggrieved residents and their survivors to overly sympathetic juries with no knowledge of the challenges faced by facilities in balancing care needs and budgetary constraints. In Florida, the most successful approach to allowing resident claims to be handled in a reasonable businesslike forum is the use of arbitration.

This article focuses on the use of arbitration by Florida nursing homes and, in particular, the arbitration clauses which facilitate the arbitration alternative to traditional jury trial litigation. Because your authors practice in Florida, the focus of this article will be Florida law. However,

if you are operating in another state, we are hopeful that the general principles discussed here will at least give you some food for thought and perhaps stimulate some discussion of arbitration as a viable alternative to address what the industry has identified as its most immediate crisis.

Let us begin by discussing what we know and what we do not know. We know that awards in nursing home negligence cases have risen dramatically. In 1987, the mean award in a nursing home negligence case was \$238,285. By 1998 that number was up to \$1.3 million. A 2003 study conducted by researchers at Harvard University's School of Public Health estimated that compensation settlements and judgments against Florida nursing homes amounted to \$1.1 billion in 2001. Another Florida study by Aon Risk Consultants estimated that the annual cost per occupied bed related to litigation costs and payments was \$10,480.

Since legislative reform effective in late 2001, the news is not quite so bad. Studies have shown that lawsuits in 2003 were down 17% compared to 2000, and in five studied central Florida counties, lawsuits in 2003 were at a four-year low. None of this is to suggest that the cases brought did not have merit or were frivolous. President Bush speaks of "junk lawsuits" but the empirical data to support that charge in the nursing home context is lacking. However, just as highly specialized and skilled plaintiff's lawyers use the legal resources available to them, the adversary system requires their targets, the nursing home facilities and their operators, to use all the legal clubs in their bag as well. One such club is arbitration.

All of the evidence supporting the use of arbitration as an alternative to traditional litigation in the nursing home context is anecdotal. As a general proposition, attorneys frequently representing facilities prefer arbitration to jury trials. We can also draw a similar conclusion from the fact that the same highly specialized plaintiff's lawyers fight arbitration tooth and nail. One of the well known advantages of arbitration, confidentiality of the

proceedings and results, also makes it impossible to track statistical results so that studies such as the Harvard School of Public Health described above are difficult, if not impossible. But until someone proves the proposition, operators are better off in arbitration, and defendants can and probably should look to routing claims out of court and to arbitration.

The genesis of arbitration is the agreement to arbitrate. The arbitration agreement may be incorporated into a more general residency agreement or may be a stand-alone contract. But in either event the agreement to arbitrate must be conspicuous. Burying an arbitration provision in the small print like the excess mileage charge in an auto lease is a sure way to end up in a courthouse and not in arbitration. We recommend to our clients that the arbitration provision be in a bold-faced type, at least two font sizes greater than the language before and after the section on arbitration.

It is not enough that an agreement to arbitrate be conspicuous if it is not clear and unambiguous. In other words, no matter how conspicuous, a poorly written provision, which despite its size and bold-faced presentation, does not adequately communicate the significance of the resident's waiver of his or her right to jury trial, and is going to be unenforceable. To be clear and unambiguous, the arbitration provision must communicate that the signing resident is giving up or waiving the right to trial by jury and the right to institute a case for damages in the appropriate court. Rather, any action for damages relating to care or treatment or any other matter relating to the residency agreement or the residents' residency at the facility will be resolved by arbitration. The agreement should also emphasize that the results of arbitration are binding. These concepts are key to an enforceable arbitration provision.

The presentation of the arbitration concept and this particular provision is also important. The conspicuous, clear and unambiguous arbitration provision should be pointed out by the

intake person supervising the execution of the residency agreement. She or he should be prepared to answer questions regarding the arbitration provision, perhaps using a Frequently Asked Questions script or FAQ. As an alternative, we have suggested to clients that they create a videotape or DVD explaining the various subparts of the residency agreement, including the arbitration provision. We believe this would be effective evidence against a claim that the provision was buried in the text or that the executing resident or guardian was told not to worry about the arbitration clause. We have all heard, “You can lead a horse to water but you can’t make him drink,” and it is true. None of our clients have done as we suggested and made the tape or DVD so we do not have any hard evidence but that does not diminish our enthusiasm for this suggestion. It is also crucial that the executing individual be given time and a reasonable opportunity to read, study and consider the residency agreement and arbitration provision.¹

Absence of duress or coercion is of tantamount importance as well. If it is the policy of the facility that arbitration is non-negotiable, then while that may be communicated to the prospective resident, the suggestion of duress and coercion is muted by providing a list of comparable, alternative facilities in the area. Thus, some of the pressure to agree “or else” is eliminated when the contracting individual is presented with potential options. It is less “take it or leave it” than “you have a choice.”

As for the arbitration provision itself, if it is found to be unconscionable or unreasonable it will not be enforced. For example, if the arbitration clause calls for the arbitration hearing to take place in a foreign jurisdiction it will be deemed unenforceable.² Courts will not enforce a contract that is so difficult or frustrating that it effectively eliminates a plaintiff’s ability to seek a legal remedy.

Courts are likewise wary of agreements that, by the designation of a specific arbitrator or very limited pool of potential arbitrators, appear to create a stacked deck. In Florida, the American Health Lawyers Association (AHLA), a commonly designated pool for arbitrators has come under criticism as a “puppet for the health care and long term care industries,” more likely than not to rule in favor of the nursing home.³ Although it is not necessarily unreasonable for a facility to designate in its arbitration provision a limited pool of potential arbitrators, it must do so carefully because the larger the pool, the less likely that the agreement will be deemed unconscionable.

Some arbitration provisions define a different standard of proof than is required by state law. For example, while the general law of the state may provide for proof of fault by a preponderance of the evidence, the agreement could call for proof by clear and convincing evidence. This is dangerous and not recommended. Arbitration provisions should not attempt to abrogate existing state law or risk being deemed unenforceable.⁴

Also dangerous territory is any effort to limit damages otherwise provided by law. Clauses purporting to limit non-economic damages, waive the right to exemplary or punitive damages, or even disallow claims for attorney’s fees otherwise provided for by statute have all been found to be unenforceable.^{5 6} Because the limiting language of arbitration provisions has so often been found to void the entire agreement to arbitrate and waiver of jury trial, it is advisable to provide for severability. Simply put, this means that by the contractual language, in the event some provision of the agreement is rendered unenforceable for any reason, the balance of the agreement survives.⁷ In practical terms, a nursing home facility or its attorney would be wise to number or bullet the provisions of the arbitration agreement, and separate different elements of the contract into easy to read and understandable sections. If a court is to find that some part of

the contract is null and void, it will do so while leaving the balance of the arbitration provision intact.

While challenging, an enforceable arbitration agreement can be crafted by a skilled and fair-minded draftsman who resists the temptation to overreach. Otherwise, overreaching or attempting to deny fundamental rights of recovery under any guise will be an exercise fraught with danger and, more than likely, doomed to ultimate futility.

Now that the facility has carefully drafted its arbitration provision and is prepared to explain it during the admission process, another question often arises. Who may sign the agreement - whether the arbitration agreement is incorporated into the larger residency agreement or is a stand alone document? Until there is further clarification by the Courts, this is an uncertain area.

In Florida, an individual may delegate certain care decisions to a healthcare surrogate. It was generally assumed in the industry that the healthcare surrogate had the statutory authority to execute an admission contract which included an arbitration provision. However, at least one Florida intermediate appellate court has held to the contrary. Finding that healthcare decisions and a decision to waive the constitutional right to trial by jury are fundamentally different, the Court held that a properly designated healthcare surrogate does not have the actual or implied authority to agree to an arbitration provision.⁸ In another case exploring a similar issue, the same Florida appellate court held that under the broad language of a power of attorney, a husband has the requisite authority to enter into an arbitration agreement on behalf of his wife. However, the Court was careful to point out that its decision was based on the particular language of the power of attorney which specifically provided for the ability to enter into arbitration agreements.⁹ Whether a spouse acting as a “natural guardian” could effectively enter into an arbitration

agreement for an incapacitated prospective resident seems to be an open question under Florida law, the Courts have held that in some instances, a parent can enter into a binding arbitration agreement on behalf of a child.¹⁰

Thus, the authority of a third party to execute an arbitration provision on behalf of a prospective resident is subject to a case-by-case analysis. On the State of Florida law, as of this writing, it appears that absent specific power of attorney language, appointment of a guardian for the incapacitated prospective resident, while unpleasant and impractical, may be the approach with the highest likelihood of eventual success.

On a related note, it is also important that an otherwise authorized individual signing the contract on behalf of the incapacitated prospective resident sign in his or her representative capacity. For example, a guardian should execute the document “as guardian for” and, when signing under a power of attorney, “as attorney-in-fact.”¹¹ It is also sensible to address this potential in the agreement itself with an express provision warranting that the individual executing the agreement has the capacity to do so. As with everything else in the residency agreement, this provision must be clear and understandable.

Sometimes a question arises about implementing an arbitration provision and whether a facility can effectively bind existing residents. This is a difficult issue because it involves all of the considerations applicable to a new resident - clarity, accurate information, freedom of choice and so forth, but the element of duress is more difficult and there is the added element of new consideration.

As for duress, it would seem that a strong argument could be advanced that an existing resident was coerced into the arbitration agreement when faced with having to move, leaving behind familiar surroundings, known caregivers, friends and acquaintances for the uncertainties

of a new facility. However, until these issues are litigated and appealed, there are no clear cut answers.

It is clear, however, that any new agreement to arbitrate must be accompanied by new consideration. A modification to an existing contract, whether a contract to mow the lawn or to provide nursing home residency and services must be supported by mutual consideration. In non-legal terms, both parties to the new agreement or modification must get something out of it. The facility obviously gets what it wants, the agreement to arbitrate. But what about the consenting resident? Surely an argument can be made that continued residency is a benefit that might be supporting consideration but where exceptions are made, that argument loses its luster.

Finally, what must be done to protect the integrity of an otherwise enforceable arbitration agreement? Like any of the rights and benefits of any contract, they can be waived. The most common path leading to a waiver of arbitration is action by the defendant which is inconsistent with the right to insist on arbitration. Generally speaking, any actions which indicate the defendant's intent to proceed with traditional litigation as opposed to arbitration will foreclose a later motion to move the case to arbitration.¹² Such an inconsistent action can be as simple as filing a defensive motion without addressing arbitration, or serving an answer before moving to compel arbitration. A good rule of thumb is to raise arbitration at the earliest possible opportunity and seek a court order to arbitrate without delay.¹³ Otherwise, all of the efforts to prepare an enforceable agreement, to provide fairness in its execution and uniformity in its application, will be for naught.

In conclusion, we know empirically that nursing home resident claims have been on the rise for the last two decades. Some states, notably Florida, have fashioned legislative relief for overburdened facilities, but the problem of liability suits and, more particularly, the financial

ability to respond continue to challenge and threaten the nursing home industry. There are several approaches that have been tried in efforts to protect facilities and their owners - corporate restructuring and insulation, asset protection schemes and alternative dispute resolution such as arbitration.

Agreements to arbitrate necessarily carry with them a waiver of the rights of generalized access to the courts and trial by jury. Thus, such agreements will receive a high level of scrutiny and may, in some courts, be met with skepticism. However, properly drafted, executed and implemented, an agreement to arbitrate is enforceable under Florida law and the laws of most other states.¹⁴ Designing an arbitration approach to resident dispute resolution requires thoughtful work and diligent implementation but it can be done and, if the anecdotal evidence is a fair indicator, it is worth the effort.

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¹ See *Bland ex rel. Coker v. Healthcare and Retirement Corp. of America*, 927 So.2d 252 (Fla. App. 2 Dist., 2006).

² See *Northport Health Services v. Raidoja*, 851 So.2d 234 (Fla. App. 5 Dist., 2003).

³ See *Briarcliff Nursing Home v. Turcotte*, 2004 WL 1418698 (Ala., 2004)

⁴ See *Place at Vero Beach, Inc. v. Hanson*, 953 So.2d 773 (Fla. App. 4 Dist., 2007) (An arbitration agreement designated arbitration by the AHLA, which requires a "clear and convince evidence" standard. However, the Florida Statutes called for a "preponderance of evidence," and thus the court found the arbitration agreement to be unenforceable.).

⁵ See *Romano v. Manor Care, Inc.*, 861 So.2d 59 (Fla. App. 4 Dist., 2004) ("The agreement would specifically deprive the resident of remedies that the legislature felt were important to the reduction of elder abuse in nursing homes."). See also *Lacey v. Healthcare and Retirement Corp. of America*, 918 So.2d 333 (Fla. App. 4 Dist., 2005). See also *SA-PG-Ocala v. Stokes*, 935 So.2d 1242 (Fla. App. 5 Dist., 2006).

⁶ See *Prieto v. Healthcare and Retirement Corp. of America*, 919 So.2d 531 (Fla. App. 3 Dist., 2005) (An arbitration agreement may not limit discovery by the plaintiffs.).

⁷ See *Alterra Healthcare Corp. v. Linton ex rel. Graham*, 953 So.2d 574 (Fla. App. 4 Dist., 2007) (An arbitration agreement was deemed invalid because the clause limiting damages was indistinguishable from the remainder of the contract, and thus necessitated the dissolution of the entire contract.).

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- ⁸ See *Blankfield v. Richmond Health Care Inc.*, 902 So.2d 296 (Fla. App. 4 Dist., 2005).
- ⁹ See *Alterra Healthcare Corp. v. Bryant ex rel. Bryant*, 937 So.2d 263 (Fla. App. 4 Dist., 2006).
- ¹⁰ See *Global Travel Marketing, Inc. v. Shea*, 908 So.2d 393 (Fla. 2005).
- ¹¹ See *Fletcher v. Huntington Place*, 952 So.2d 1225 (Fla. App. 5 Dist., 2007).
- ¹² See *Williams ex rel. Williams v. Manor Care Inc.*, 923 So.2d 615 (Fla. App. 2 Dist., 2006).
- ¹³ See *Bonati v. Clark*, 2007 WL 865828 (Fla. App. 2 Dist., 2007).
- ¹⁴ See *Binding Arbitration Clauses in Nursing Home Admissions Agreements: Framing the Debate*, 14 *Elder L.J.* 453 (2007).