

## ARBITRATION IN NURSING HOME ADMISSION AGREEMENTS

**GERALD B. TAYLOR, JR.**

**BEASLEY, ALLEN, CROW, METHVIN, PORTIS & MILES, P.C.  
218 COMMERCE STREET  
POST OFFICE BOX 4160  
MONTGOMERY, ALABAMA 36103-4160  
800-898-2034**

Today when a potential nursing home resident or his or her family seeks a nursing facility to provide the resident 24-hour nursing care, the resident or family is sometimes faced with more than the question of which facility to choose or how the resident will pay; the resident or family must also make the choice to waive the resident's right to a jury trial arising from any future negligent acts of the nursing home. Faced with the choice between immediate medical care and retaining the resident's right to a jury trial, of course the resident and family are more than eager to do everything necessary to ensure that the resident receives immediate medical care. However, once a resident has been injured by the negligent conduct of a nursing facility, the resident and his or her family are often astonished to find that a clause buried within the resident's admission agreement will forever prevent the resident from seeking redress in a court of law for any claims against the nursing home, including the wrongful death of a resident.

Nursing homes and other healthcare organizations and professionals have begun a nationwide campaign to limit a resident's right to sue nursing facilities through both tort reform legislation and arbitration agreements.

### **Federal and state law enforcement of arbitration agreements.**

Both federal and state law governs the question of whether an arbitration agreement is enforceable. Congress enacted the Federal Arbitration Act (FAA) in 1925 to address the

perceived disparity in treatment of arbitration agreements 9 U.S.C. § 2. Prior to 1925 courts were very hostile toward arbitration agreements, and rarely enforced them. According to the United States Supreme Court, the FAA was intended to “overcome courts’ refusals to enforce agreements to arbitrate” and to “place such agreements upon the same footing as other contracts.” *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 270-71 (1995).

The FAA was enacted pursuant to the power of Congress to regulate interstate commerce. Although the FAA compels the enforcement of arbitration agreements in the same fashion that other agreements are enforced, the FAA also provides a method to invalidate or rescind an arbitration agreement. Under the FAA, arbitration agreements may be invalidated upon any ground that exists at law or in equity for the revocation of any contract. In determining whether to enforce an arbitration agreement, state and federal courts are free to invalidate an arbitration agreement on any state law ground that exists for the revocation of a contract. The basic premise of the FAA is that courts are not allowed to treat arbitration agreements differently than other contracts when determining whether the agreement is enforceable.

### **Upon What Grounds May An Arbitration Clause In A Nursing Home Contract Be Invalidated?**

#### A. Non-signatory

A basic principle of contract law is that in order for a valid agreement to exist there must have been mutual assent between the parties to enter into that agreement. If there is no proof that parties assented to be bound by an agreement, including an arbitration agreement, courts will not enforce that agreement. Assent is manifested by some act or behavior of the parties. Generally, assent to enter into a contract is

manifested through a party's signature on the contract. When there is a written contract and one person who is alleged to be a party to that contract fails to sign the contract, assent is harder to prove. The party who fails to sign the contract is called a non-signatory.

In the nursing home context, the non-signatory argument is a very good argument against enforcement of an arbitration agreement. Often when a resident is admitted to a nursing facility, a family member signs the resident's admission agreement. Rarely does the resident sign his or her own admission agreement. If the nursing home intends to bind the resident to an arbitration agreement, that arbitration provision will generally be contained within the admission agreement. The person who signs the agreement admitting the resident to the nursing home also signs the arbitration agreement, waiving the resident's right to a jury trial. Thus, the question arises whether the resident has assented to the arbitration clause when the resident has not in fact signed the agreement.

Courts have generally agreed that a non-signatory to a contract may be bound to that contract if an agent signed the contract on the non-signatory's behalf or if the non-signatory was a third-party beneficiary of the contract. Under the agency theory, a nursing home resident's best argument is that the individual who signed the agreement was not the resident's agent because the resident was incapacitated due to his or her illness, and lacked the ability to control the alleged agent's actions. In order for an agency relationship to exist, the principal, the nursing home resident, must be in control of the agent. If the nursing home resident is incapacitated due to his or her medical condition, the resident is unlikely to have control over the individual signing the agreement.

Further, an agent's authority is usually based upon the conduct of the alleged principal, not that of the agent *Brannan & Guy, P.C. v. City of Montgomery*, 828 So. 2d 914 (Ala. 2002). Where the potential resident is incompetent, nursing home administrators may not observe or talk with the potential resident prior to the signing of an admission agreement. More often than not, the potential resident is not present when the family member signs the admission agreement on her behalf; thus, it is impossible for the resident to have exhibited any conduct which would lead the nursing home to believe that the resident consented to an agency relationship.

In *Pagarigan v. Libby Care Center*, 99 Cal.App.4<sup>th</sup> 298, 120 Cal.Rptr.2d 892 the heirs of a deceased woman sued the woman's former nursing home alleging that the facility wrongfully caused her death. The defendant nursing moved to compel arbitration based on two arbitration agreements signed by the resident's daughters after the woman was admitted to the nursing facility. The resident was mentally incompetent at the time she was admitted to the nursing facility, and there was no evidence that she had signed a durable power of attorney. Based upon those facts, the court found that the resident lacked the capacity to authorize either daughter to enter into the arbitration agreements on her behalf. According to the court, "[a] person cannot become the agent of another merely by representing herself as such. To be an agent she must actually be so employed by the principal or the principal intentionally, or by want of ordinary care, caused a third person to believe another to be his agent who is not really employed by him." 99 Cal.App.4<sup>th</sup> at 301-02, 120 Cal.Rptr.2d at 894-95.

Although arbitration agreements may be invalidated when the resident did not sign the agreement and showed no assent to arbitrate his or her claims, arguments based

upon the theory that the nursing home did not manifest assent to be bound by the agreement, because the facility representative failed to sign the agreement, have not fared as well. In *Integrated Health Services of Green Briar, Inc. v. Lopez-Silvero* 827 So.2d 338 (Fla. Dist. Ct. App. 2002) the court upheld an arbitration agreement that the nursing facility had either failed to sign or signed on an improper line, opining that a contract is binding, despite the fact that one party did not sign the contract, where both parties have performed under the contract. According to the court in both cases, the resident and the nursing facility acted as if they had a valid contract. The nursing facilities performed under the contracts by admitting the resident and providing the resident with nursing home care. In both cases the courts held that the nursing facilities' performance of the contract indicated a clear intent to be bound by the admission contract, which included the arbitration clause.

#### B. Unconscionability

Another contract defense that may be used to invalidate an arbitration provision in a nursing home admission agreement is the theory of unconscionability. Unconscionability can be in the form of substantive unconscionability, which pertains to contract terms that are unreasonably favorable to one side, or procedural unconscionability that pertains to the process of contract formation, the use of fine print and convoluted language, lack of understanding, and inequality of bargaining power.

In the nursing home setting procedural unconscionability is almost always a good argument. Often when a family admits a resident to a nursing home, the resident is in need of immediate placement. Sometimes families have little choice of placement in a

particular facility because either there is no other nursing facility for miles or other nursing facilities have no available bed for the resident.

Moreover, even if a family member sought out other nursing homes for possible placement, it may have been difficult to find one that did not require the resident or that resident's sponsor to sign an arbitration agreement. Thus, families are faced with the choice of retaining the resident's right to a jury trial versus getting the resident the necessary nursing care that he or she needs. The choice is not really a choice at all for the resident in need of immediate care.

Further, the actual process of admitting a resident to a nursing home often does not provide the kind of informative setting necessary for the resident or the resident's sponsor to consider the pros and cons of arbitration. Arbitration agreements may be in a stand-alone document that the resident or the resident's sponsor is asked to sign. But, more likely than not, the agreement is buried in the middle of the admission contract, making the arbitration clause inconspicuous. Moreover, the arbitration clause may not have bold or italicized language, thus failing to draw the signor's attention to the provision. Nursing home representatives have even been known to hold the agreement in their hand explaining sections of the nursing home admission agreement without mentioning the arbitration clause. Each of these factors makes the case that the arbitration clause is unconscionable and therefore unenforceable.

The Court of Appeals of Tennessee considered the question of whether an arbitration agreement in a nursing home admission contract was unconscionable and therefore unenforceable in *Howell v. NHC Healthcare-Fort Sanders, Inc.* 109 S.W.3d 731 (Tenn.Ct.App.2003). In *Howell*, the estate of a nursing home resident sued the

nursing facility alleging that the facility abused and neglected the resident. The nursing facility moved to compel arbitration based upon an arbitration provision contained within the admission agreement signed by the resident's husband at the time of admission. The trial court conducted an evidentiary hearing on the motion, during which evidence was admitted indicating that the admitting contract signed by the resident's husband was the only one used by the nursing home at the time, that a patient or the patient's legal representative was required to sign the contract before being admitted to the facility, that the facility representative had purported to read the contract to the resident's husband but failed to read the entire agreement; rather, she paraphrased the agreement and then pushed the agreement in front of the resident's husband to sign, and that the resident's husband was unable to read.

The Court of Appeals found that the arbitration agreement was unenforceable based upon the circumstances under which it was signed. The Court found several factors significant in its determination, including: the fact that the admission agreement was eleven pages long and the arbitration provision, rather than being a stand-alone document, was "buried" within the larger document and was written in the same size font as the rest of the agreement; the fact that the resident had to be placed in a nursing home expeditiously and that the admission agreement had to be signed before this could be accomplished; that the agreement was presented to the husband on a "take-it-or-leave-it" basis; the fact that the nursing home representative took it upon herself to explain the admission agreement, rather than asking the husband to read it and that in her explanation of the arbitration provision she failed to mention that the provision meant that the husband was giving up the resident's right to a jury trial.

Substantive unconscionability arguments, with regard to arbitration agreements in the nursing home setting, may be made by arguing that it is unconscionable to require a nursing home resident to give up his right to a jury trial in exchange for nursing services. Substantive unconscionability arguments generally do not fare as well as procedural arguments because courts must enforce arbitration agreements in the same manner as other contractual agreements. For instance, in *Consolidated Resources Healthcare Fund, I, Ltd. v. Fenelus*, 853 So.2d 500 (Fla.App.2003) the court rejected the argument that an arbitration provision in a nursing home admission agreement was substantively unconscionable because the agreement required that in order to retain the resident's right to a jury trial, the resident had to affirmatively indicate so within the admission agreement. The court held that an arbitration clause need not be optional in order to be valid.

### C. Claims of Estate Had Not Arisen

Many state courts have interpreted their wrongful death statutes to create a new and independent cause of action. The injured party's claim after death is an asset of the estate while the wrongful death statute creates a new cause of action for the benefit of designated persons who have suffered the loss of a loved one and provider. *See Crosby v. Glasscock Trucking Co.*, 340 S.C. 626, 628, 532 S.E.2d 856 (2000) (holding that South Carolina's wrongful death statute creates a new cause of action. A wrongful death cause of action does not exist before death and arises only upon the death of the injured person.); *Thompson v. Wing*, 637 N.E.2d 917, 922 (Ohio 1994) (The wrongful death action is an independent cause of action.) *Sullivan v. Carlisle*, 851 S.W.2d 510, 516 (Mo. 1993) (a claim for wrongful death "is neither a transmitted right nor a survival right, but

is created and vests in the survivors at the moment of death.”); *Switzer v. Reynolds*, 606 P.2d 244, 247 (Utah 1980) (holding that the Utah wrongful death statute creates a new cause of action which runs directly to the heirs to compensate each for the individual loss suffered by the death.)

#### D. Arbitration Clauses Contained Within Nursing Home Admission Agreements Are Prohibited by Statute, and Therefore Null, Void, And Unenforceable

A novel argument is that federal and state Medicare and Medicaid regulations prohibit the inclusion of an arbitration clause in an admission agreement. Because most residents in nursing facilities are eligible for Medicare or Medicaid, this argument is applicable to most residents. All licensed nursing facilities in the United States may participate in the Medical Assistance Program, established under Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.*, if the facility meets certain requirements relating to the provision of healthcare services. The Medical Assistance Program provides payments to States for medical assistance furnished by nursing facilities to residents in the facility. Nursing facilities participate in the program by entering into a “Provider Agreement” between the nursing facility and the respective State. The provider agreement generally obligates the nursing facility to comply with all relevant federal and state laws and regulations. Thus, as a participant in the Medical Assistance Program, a nursing facility is subject to the regulations governing the provision of resident services in 42 U.S.C. § 1396r(b).

Within the Social Security Act, resident admission is specifically governed by 42 U.S.C. § 1396r(c)(5). In pertinent part, that section states:

“(5) Admissions policy “

(A) Admission “With respect to admissions practices, a nursing facility must –  
“...

“(iii) in the case of an individual who is entitled to medical assistance for nursing facility services, not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State plan under this subchapter, any gift, money, donation, or other consideration as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual’s continued stay in the facility.”

Thus, federal law may prohibit a nursing facility from accepting any additional consideration from a Medicare/Medicaid resident, aside from the standard rate paid by Medicare/Medicaid, as a precondition of admission to a nursing facility.

An arbitration agreement, like any other agreement, must have consideration to be enforceable. Generally mutuality of promises can be sufficient consideration for an arbitration agreement. In this respect, the argument goes that if mutual promises to submit to arbitration are consideration for the agreement, then the facility has accepted additional consideration aside from the payment by Medicare or Medicaid, making the arbitration agreement invalid because it violates federal law. This argument was raised in *Howell v. NHC Healthcare-Fort Sanders, Inc., supra* and pretermitted because the arbitration agreement in that case was found invalid on other grounds. At least one administrative agency has released an opinion concluding that federal regulations prohibit any flow of consideration between Medicare/Medicaid program recipients and a nursing home upon admission to the facility for services covered by the Medicare/Medicaid

programs, and that potential residents gain nothing in addition to admission for offering the additional consideration of forfeiture of their rights. *See, In re Northport Health Services, Inc., Arkansas Department of Human Services*, (July, 2002), at [http://www.nslc.org/news/03/03/arkansas\\_mandatory\\_arbitration.htm](http://www.nslc.org/news/03/03/arkansas_mandatory_arbitration.htm)

CMS Administrative Ruling Regarding Arbitration Clauses in Nursing Home Admission Agreements

On January 9, 2003, the Center for Medicare & Medicaid Services (CMS) released an administrative ruling regarding binding arbitration between nursing homes and prospective or current residents *Binding Arbitration in Nursing Homes, Center for Medicare & Medicaid Services*, Ref: S&C-03-10, January 9, 2003.

The CMS memorandum stated that under Medicare, the issue whether to have a binding arbitration agreement is an issue between the resident and the nursing home. However, under Medicaid, CMS stated that it would defer to State law regarding whether such binding arbitration agreements are permitted, subject to its concerns when Federal regulations may be implicated. According to the memorandum, under both programs, there may be consequences for the nursing facility where facilities attempt to enforce arbitration agreements in a way that violates Federal requirements.

CMS further opined that a nursing home's discharge or retaliation against an existing resident for failing to sign or comply with a binding arbitration agreement could result in enforcement action based on a violation of the rules governing resident discharge and transfer. Federal regulations limit the circumstances under which a facility may discharge or transfer a resident 42 C.F.R. § 483.12(a)(2). Because none of the conditions specified in the regulation permit a facility to discharge or transfer a resident

based on his or her failure to comply with the terms of a binding arbitration agreement, CMS concluded that a current resident is not obligated to sign a new admission agreement that contains binding arbitration.

### **ENFORCEABILITY VARIES WIDELY**

Both federal and state law governs the enforceability of arbitration clauses in nursing home admission contracts. Since the U.S. Supreme Court's decision in *Allied-Bruce Terminix*, state courts have become more likely to uphold arbitration agreements.

In order to invalidate an arbitration agreement, nursing home residents must show that there exists some ground for the revocation of the arbitration agreement based upon contract law principles. Enforceability is still largely dependent upon the state in which one brings suit. Some states, such as Tennessee, may be largely open to invalidating an arbitration agreement upon grounds of unconscionability, while other states, like Alabama, very rarely find an arbitration agreement unconscionable. Moreover, the question of whether the arbitration agreement will be enforced is a fact intensive inquiry, and may be dependent upon the moment-to-moment factual circumstances surrounding the signing of the agreement.

**RECENT NURSING HOME ARBITRATION CASES:**

*Phillips v. Crofton Manor Inn* 2003 Cal.App.Unpub. LEXIS 4770 (2<sup>nd</sup> App.Dist., Div.

One, May 15, 2003)

*Bagley v. Castleton Health Care Center, LLC*, 2004 WL 1814036 (Ind.App. 2004)

*Briarcliff Nursing Home v. Turcotte* 2004 LEXIS 171 (Ala. June 25, 2004)

*Owens v. Coosa Valley Health Care, Inc.* 2004 LEXIS 28 (Ala. February 13, 2004)

*Springhill Nursing Homes, Inc. v. McCurdy* 2004 WL 2134652 (Ala.)