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Arbitration and Other Contractual Provisions Designed to Decrease Provider Liability

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Assisted living providers are all too aware of the fact that the industry is undergoing an insurance crisis. Liability insurance premiums have gone through the roof in recent months (as have worker's compensation insurance rates) and many providers have been forced to drastically reduce their coverage.

The liability insurance crisis is due in large part to factors beyond the control of assisted living operators, including the vast reduction in investment returns for carriers and their tendency to lump assisted living together with skilled nursing. Nevertheless, there is also a trend toward larger damages awards and out of court settlements in assisted living personal injury lawsuits and attorneys have begun to target assisted living providers. In fact, assisted living providers are an attractive target because MICRA (California's limited tort reform that caps damages for non-economic injuries in medical malpractice cases) does not apply to RCFEs.

Arbitration

Reducing provider liability entails a multi-faceted risk management approach. One component of effective risk management may be the inclusion of a binding arbitration clause and other contractual provisions in your admissions agreement. The principal advantage of a binding arbitration clause is that the parties give up their right to a jury trial, where there is likely a higher risk of a larger award of compensatory and/or punitive damages against an assisted living provider. Arbitration is not, however, a panacea. Generally, arbitration is less expensive and faster than court proceedings, so it may favor the economically disadvantaged party by making it easier for someone to pursue a claim. (Of course if insurance rates keep increasing at the pace they have, the provider may be the "economically disadvantaged party".) Moreover, the rules of evidence may be relaxed (such as the hearsay rule), which makes it easier for the plaintiff, who normally has the burden of proof, to support his or her claim. Nevertheless, full discovery proceedings (such as depositions of parties and witnesses and written interrogatories and document production requests) are generally available in arbitration. Examination and cross-examination of witnesses is permitted.

Some commentators believe that arbitrators have a reputation for "splitting the baby," that is, compromising so as to give some credence to each party's position. Judges, on the other hand, have a reputation for being more likely to summarily dismiss a marginal claim or to otherwise rule more decisively for one side or the other. In arbitration, however, the parties can select their arbitrator from a list of available candidates, with each side eliminating those who they think are more likely to be biased against them. In contrast, court litigation is generally assigned to judges on a random basis, and it is more difficult to disqualify a judge who you think may be biased.

Although the use of mandatory arbitration clauses in consumer contracts has come under attack lately, California courts have had a tendency to uphold the validity of such provisions. Ultimately, whether to use an arbitration clause is a matter of judgment as to what kinds of claims are likely to occur, and of personal preference for arbitration over the court process.

Even if arbitration is deemed preferable, providers may wish to exclude certain issues from arbitration, such as unlawful detainer actions (evictions), where expedited court proceedings are available.

Waiver of Jury Trial

Resident admission agreements may contain a "waiver of jury trial" clause rather than an arbitration provision, if the formality of the court setting and stricter evidentiary standards are considered more desirable. As mentioned above, courts may be more likely to hold claimants to stricter standards of proof and to dismiss legally meritless claims. By avoiding a jury, the threat of outlandish verdicts may be substantially reduced. However, while California courts have a long history of upholding arbitration clauses, it is uncertain whether or not they will be willing to enforce a provision in an assisted living admission agreement that waives a jury trial. Nevertheless, there does not appear to be a downside to including such a provision. In fact, some providers that have included arbitration clauses have also included a waiver of jury trial clause for those actions (such as unlawful detainer) that are not subject to arbitration.

Waivers of Liability

Contractual waivers of liability for possible future damages that have not yet occurred are often considered unenforceable by the courts on the theory that only known claims can be settled or compromised. One innovative approach has been to give residents a choice of paying a lower fee for limited liability coverage (i.e., a cap on damages) and a higher fee for unlimited coverage, but whether this will prove to cap exposure in reality remains to be seen.

Attorneys' Fees

It is common to see attorneys' fees provisions in assisted living admission agreements, requiring that if there is a dispute regarding the terms or performance of the contract or a dispute otherwise arising under the contract, the prevailing party is entitled to have its attorneys' fees paid by the other party. We strongly urge providers not to include a general attorneys fees clause of this type. The likelihood of a provider ever actually recovering attorneys' fees from a resident is remote and we do not believe that the existence of an attorneys' fees clause will significantly deter frivolous litigation. Therefore, an attorneys' fees clause offers a provider little upside potential. On the other hand, by including an attorneys' fees clause, a provider makes a minor personal injury claim much more attractive to a personal injury lawyer who is working on a contingency fee basis. Even if

the amount of damages awarded is small, if the plaintiff can recover his or her attorneys' fees, the case may be lucrative for the attorney, if not the resident. It is also important to note that your liability insurance will not cover you for attorneys fees that you are required to pay pursuant to a provision in your admission agreement.

Disclosure of Liability
Providers can potentially reduce their liability through adequate disclosure of risks. In the past, assisted living providers have had a tendency to include in their written documents (including marketing materials) statements such as "we provide a safe and secure environment." These statements can come back to haunt a provider in the event an injury occurs. Some providers are now starting to utilize a contrary approach and clearly disclose that the community is not a health care facility, does not provide constant monitoring of residents, is not permitted to utilize restraints, and encourages residents to engage in activities that may sometimes lead to falls or other injuries.

While the Department of Social Services has taken a position against negotiated risk agreements and will not permit providers to disclaim responsibility for providing appropriate care and supervision, having residents and their responsible persons acknowledge that they understand the level of care that is to be provided and that they agree that that level is appropriate, may prove useful in both deterring lawsuits and in defending those that nevertheless occur.