GUEST ARTICLE

"It's Time for an Arbitration Check-Up."

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If you read *CAHSA NewsFront*, attend liability crisis seminars, or talk to your insurance broker, chances are that you have arbitration clauses in one or more of your residency agreements. Our firm has recommended such clauses to our senior care and housing clients for more than three years, for three primary reasons: your insurance broker may require them (but not necessarily discount your liability insurance premiums if you include them); they may help you reduce the size of resident verdicts or settlements; and they may reduce residents' and their families' incentives to sue you. We have advocated for arbitration because it removes the wild card of having resident claims against you decided by juries – unpredictable bodies with a tendency to award elderly residents excessive awards – and entrusts this process to a neutral arbitrator whom we feel is likelier to rule on the facts alone.

We have never felt that arbitration clauses were a panacea, and we have always placed equal or greater emphasis on sound risk management and communication with residents. Having said this, it is becoming increasingly apparent that arbitration clauses are under attack in the senior care field. In the past three years, plaintiffs' attorneys and consumer organizations have waged a war against such clauses, attempting to defeat them at every turn in the courts and legislature. Some organizations offer full-day seminars devoted to invalidating such clauses. Why? Because they understand the same jury dynamic that you do, and they depend on juries to rely on emotion to maximize awards to elderly plaintiffs (as well as contingency fees to plaintiffs' lawyers).

Based on the litigation we have seen in this area, we suggest reviewing both the arbitration clause itself and the surrounding procedures to avoid any obvious pitfalls.

Are some of these arbitration clauses faulty? Undoubtedly. Could your clause be vulnerable? Possibly, which is why we suggest reviewing your arbitration clauses and procedures with fresh eyes. If they can be strengthened, now is the time to do it, not after the plaintiff's attorney attempts to invalidate this essential provision.

Based on the litigation we have seen in this area, we suggest reviewing both the arbitration clause itself and the surrounding procedures to avoid any obvious pitfalls. You may ultimately reject some of the recommendations below for philosophical or practical reasons, and some do carry some attendant risk. At the end, however, you may find you have enhanced your chances of arbitrating disputes without challenge.

Form of Arbitration Agreement. Let us start with the premise that arbitration is allowed in your residency agreement. In unlicensed housing, assisted living and continuing care, that is still the case in California (although there have been legislative attempts to invalidate arbitration clauses in assisted living). Skilled nursing admission agreements are subject to their own rules, which can be simplified as follows: arbitration cannot be mandated, the content of arbitration clauses is largely prescribed by law (at least in malpractice cases), and residents cannot be compelled to arbitrate residents' rights claims or certain issues governed by the Medicare/Medicaid laws, such as transfers and discharges. Assuming the clause is allowed, you may wish to compare your clause against the following checklist:

- Is the clause in plain English? It should avoid legalese and be understandable by someone with minimal education.
- Does it cover successors, assignees, legal representatives and heirs? If it does not, an adult child suing on behalf of Mom or Dad may be able to invalidate the clause.
- Is the clause mutual? That is, are both parties bound to arbitrate the dispute? A non-reciprocal obligation to arbitrate is bound to be overthrown.
- Is the clause balanced? Avoid clauses that allow you to select the arbitrator unilaterally or otherwise give you a clear advantage over the resident.
- Are all types of claims covered? You need not provide an exhaustive list, which is an exercise in futility; however, you should identify all covered categories of claims (e.g., personal injury, death, contract breach, etc.). You may wish to carve out unlawful detainer actions and small claims, which may be more efficiently dispensed with in court.
- Does the clause require the resident to waive liability or alter the legal standard of care? This type of provision is especially vulnerable to attack.

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- Is the waiver of the right to a jury trial prominently set forth, using capital letters, boldface, or some other means of drawing attention to this key provision?
- Does the clause comply with applicable law, down to the font size and rules regarding boldface or ink color? There is no point forfeiting your right to arbitrate over such details.
- Does the organization that provides the arbitrator or sets the arbitration rules honor mandatory arbitration clauses? The American Arbitration Association will not honor a mandatory arbitration clause in a "health care context," a term fraught with ambiguity. As a result, we have urged clients to consider other arbitration panels (such as JAMS) or to employ the rules contained in the Code of Civil Procedure.
- Is the arbitration clause buried in the agreement or is it prominently located? In all but skilled nursing agreements, which require a separate arbitration form, we have historically recommended including the clause in the body of the agreement but inserting it before the signature line where the resident and his attorney will notice it. However, some people recommend including the clause in a separate form or appendix to set it off even further. Doing so may enhance your argument that the clause was fully disclosed.
- Does the clause require the resident to "opt in" by signing or initialing it, or is the clause a "take-it-or leave-it" provision that applies to all who sign the admission agreement? Many practitioners recommend an express acknowledgment to enhance the provider's argument that the resident read and voluntarily agreed to the clause. Often, this approach is recommended in tandem with the separate form described above. The countervailing argument is that both options invite residents to opt out, and that those who do opt out may be the very residents who are most inclined to sue. Then again, if this strategy produces a clause that is less vulnerable to attack, it may be worth the trade-off.
- Does the clause allow the resident to reverse his agreement to arbitrate within the first 30 or 60 days (without terminating the entire admission agreement)? This "cooling off" provision may buttress your arguments that the clause is both reasonable and consumer-friendly; however, be prepared for some residents to act on this right.
- Do the parties share the arbitrator's fees, or do you pay them? Arbitrators' fees are not insubstantial and often range between $300 and $500 per hour. At least one client pays the arbitrator's fee to dispel the argument that arbitration unfairly burdens individuals. Some may argue that this approach lowers the resident's barriers to bringing the claim in the first instance; however, the resident may instead opt for litigation because judges are not paid by the litigants and contingency fee cases involve only minimal cash outlay by the plaintiff.

Arbitration Procedures. Challenges brought against arbitration clauses have extended beyond mere form. Another area of vulnerability is your procedure for explaining arbitration to applicants and new residents, as well as your procedure once a dispute arises. Consider whether you could improve your practices in any of the following areas:

- Are applicants routinely told (verbally or in writing) about the arbitration clause before signing the residency agreement?
- Is this provision explained to new residents when they sign the admission agreement?
- Is the resident's competency to sign the agreement carefully evaluated? The importance of this precaution obviously extends beyond the arbitration clause. In a rush to improve their census, some facilities may not devote proper attention to this issue.
- If the resident's competency to contract is called into question (e.g., his physician reports occasional bouts of mild confusion), is a legal representative required to sign the agreement instead? Alternatively, are witnesses who can attest to the resident's clarity of mind present at the signing?
- Is staff (particularly marketing staff) continually trained to understand the contract, including the arbitration clause, and to recognize basic competency issues?
- After the dispute has arisen, do you comply with any procedural requirements contained in the clause, such as notifying your opponent in writing of your request to arbitrate?
- After the dispute has arisen, do you notify your insurer of the claim and your arbitration clause?
- Do you refrain from terminating a skilled nursing resident who refuses to arbitrate in contravention of the arbitration clause she previously signed? CMS does not recognize such refusal as a ground for transferring or discharging a SNF resident.

Conclusion. Arbitration continues to be a sound risk containment strategy and should, along with risk management and other tools, remain one of your key strategies for contending with the litigation crisis. However, rather than assume that your current arbitration clause fully protects you, I recommend using the above checklists to perform an "arbitration check-up."

Members with questions are welcome to contact me at 415-995-5043 or pkaufmann@hansonbridgett.com.