SPECIAL ISSUE

brief

Pre-dispute Arbitration Agreements –

An imperfect solution, but effective nonetheless

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I. INTRODUCTION

To arbitrate or not arbitrate, that is the question. By and large, arbitration agreements have become standard practice across the spectrum of seniors housing. Arbitration provides potential benefits to both plaintiffs and defendants. Studies have shown that arbitration is typically less costly than litigation. Arbitration usually allows the parties to reach a resolution more quickly than litigation, as the parties avoid backlogs in the judicial system, and an arbitrator's award is seldom vulnerable to drawn out appeal processes. For example, a 1998 study of employment arbitrations found that the average case resolved through arbitration took 8.6 months compared to 2.5 years in the courts.[1]

Arbitration is a less formal process and therefore may be less intimidating for the parties involved. They are free to negotiate the ground rules governing the arbitration, such as whether formal rules of evidence will apply. Court proceedings are open to the public and the press—arbitration is private and confidential.

From a provider's perspective, arbitrators are generally viewed as being less susceptible than juries to emotionally charged verdicts and unreasonable judgments. Nevertheless, it is important to understand that arbitration is not a panacea. Where there are complex factual or legal issues involved, arbitration can be time consuming and expensive. Some critics believe that arbitrators tend to act more like mediators and have a tendency to "split the baby" rather than render decisions in favor of the defense. Indeed, a 2003 study demonstrated that consumers prevailed 20% more often in arbitration than in court.[2]

A 1999 study showed that individuals receive a greater percentage of the relief they ask for in arbitration (18%) versus lawsuits (10.4%).[3] And a 2003 study showed that the median monetary relief for individuals is slightly higher in arbitration ($100,000) than in lawsuits ($95,554).[4] Moreover, because arbitration is binding, there generally are no appeal rights. Thus, whereas an unfair jury verdict or court ruling is susceptible to being overturned on appeal, if an arbitrator missteps, there is typically no remedy.

[1] See the Case for Pre-Dispute Arbitration Agreements: Effective and Affordable Access to Justice for Consumers: Empirical Studies & Survey Results (2004), available at http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2004EmpiricalStudies.pdf., which summarizes ten different studies on arbitration and litigation.

[2] Id.

[3] Id.

[4] Id.

Despite these potential downsides, the fact that personal injury lawyers have attacked arbitration with such vigor underscores the potential benefits of arbitration to seniors housing providers. Indeed, seminars are offered to trial lawyers on how to defeat arbitration provisions in consumer contracts. And to add insult to injury, trial lawyers have been the major force behind federal legislation pending in both houses of Congress that would invalidate every pre-dispute contractual arbitration agreement that is part of a consumer, financial or franchise dispute—in effect, dismantling the arbitration system. In 2008, trial lawyers sponsored legislation in California that would have made it difficult, if not impossible, for an assisted living community to enter into a voluntary pre-dispute arbitration agreement with a resident.[5] The bill passed through both houses of the legislature, and was defeated only through a veto by the Governor.

Most recently, the National Arbitration Forum (NAF), a major arbitration firm, announced that it will no longer administer consumer arbitrations, including nursing home cases, as part of a legal settlement with the Attorney General of Minnesota. Also, the American Arbitration Association, another major arbitration firm, announced that it has placed a moratorium on the administration of any consumer debt collection arbitration programs until fairness and due process concerns are addressed and resolved. While these are disturbing developments, there is not sufficient evidence to show that litigation is better for consumers, and the best evidence available indicates that litigation is far more costly and time consuming than arbitration. Nevertheless, it is certain that arbitration will continue to come under fire and that senior care providers, by virtue of the age and frailty of their clientele, will be a key target in these attacks. Therefore, it is important for senior housing providers to consider the broader implications of their arbitration provisions. If providers engage in practices that are unfair to consumers (or even that appear to be unfair), there is an increased likelihood of draconian legislation that outlaws not only unfair practices, but all pre-dispute arbitration agreements.

II. COURTS HAVE INVALIDATED UNFAIR ARBITRATION AGREEMENTS

While courts generally have tended to uphold the validity of arbitration provisions in consumer contracts, numerous courts across this nation have not hesitated to invalidate arbitration agreements when they have found that a representative lacked authority to act for the resident, a resident lacked the capacity to enter the agreement, or that an arbitration agreement was otherwise unconscionable, either in the substance of its terms or in the way it was presented and signed by the resident or the resident's representative.

In the case of ***Manley v. Personacare of Ohio***,[6] the court determined that the resident's bargaining power was substantially outweighed by the relative bargaining power of the community and thus found that the arbitration agreement was procedurally unconscionable and unenforceable. The court noted that while the resident was alert when signing the agreement, asked questions,

[5] A.B. 2947

[6] (2007) Ohio 343 (Ct. App. Ohio 2007)

appeared to understand and received the pamphlet on, and an example of, arbitration, the resident was under stress. She came to the community from the hospital, and had been assaulted prior to entering the hospital. She was 66 years old, suffered from numerous ailments, bouts of confusion, had mild cognitive impairment, had no legal expertise, and placed her signatures in various places on the agreement, but never on the designated line.

Similarly, in ***Prieto v Healthcare and Retirement Corp***.[7], the court found procedural unconscionability and voided the agreement because the arbitration agreement was presented as just another admissions document. The resident's daughter was advised to sign all of the documents before her father, who was enroute, arrived and the terms of the agreement were never explained to her.

In ***Woebse v. Healthcare and Retirement Corp***.[8], the court determined an arbitration agreement to be procedurally unconscionable and thus void because the resident was required to agree to arbitration, given five minutes to sign a thirty-seven page document, never supplied with a copy of the agreement or given a chance to ask questions, and the arbitration clause was not explained to her.

In some cases, courts have enforced arbitration agreements, but have voided certain provisions that they deemed to be "substantively unconscionable." For example, in ***Trinity Mission of Clinton, LLC v. Barber***[9], the court declared invalid provisions which placed a limitation on damages and a waiver of punitive damages. Similarly, in ***Altera Healthcare Corp v. Estate of Jeanette Kelley Linton***[10], the court found a provision limiting damages to be against public policy and void, while upholding the remainder of the agreement.

In ***Covenant Health Rehab of Picayune, LP v. Brown***[11], the court held the following provisions to be substantively unconscionable and hence void:

(1) A damages limitation;

(2) Waiver of liability for the criminal acts of individuals;

(3) Required forfeiture by the resident of all claims except those for willful acts;

(4) A cap on punitive damages;

(5) An exemption allowing the nursing home to bring suit for non-payment in court, but never allowing the resident to bring suit on any dispute in court;

(6) A provision requiring the resident to pay all costs for enforcement of the agreement if the resident challenges the agreement or an award therefrom; and

(7) A one year statute of limitations on claims.

A number of other cases have thrown out arbitration provisions because the resident, him or herself, had not agreed to arbitration and the person signing the arbitration provision was deemed

7 919 So. 2nd 531 (Ct. App. Fla. 2005)

8 977 So. 2nd 630 (Ct. App. Fla. 2008)

9 988 So. 2nd 910 (Ct. App. Miss. 2007)

10 953 So. 2nd 574 (Ct. App. Fla. 2007)

11 949 S. 2nd 732 (Sup. Ct. Miss. 2007)

not to have the right to sign away the resident's rights. For example, in the case of ***Warfield v. Summerville Senior Living, Inc***[12]., the plaintiff, who suffered from dementia, did not sign the admissions documents. Rather, her husband signed above his name and left the line above her name blank. The court upheld the trial court's denial of a motion to compel arbitration, determining that the trial court correctly held that a spousal relationship alone does not give agency authority.

III. MANDATORY VS. VOLUNTARY AGREEMENTS

Perhaps the most critical question facing providers who wish to arbitrate disputes is whether to make arbitration provisions mandatory or voluntary. Obviously, if an arbitration provision is part of a residency agreement that a resident must sign as a condition of admission, every resident will ostensibly be subject to arbitration. This may serve as a potential bar to plaintiff's attorneys who, if they wish to avoid arbitration, would first have to prove to a court that the arbitration agreement was procedurally or substantively unconscionable (or both). This hurdle could conceivably dissuade some attorneys from taking on cases on a contingency fee basis.

However, mandatory arbitration provisions also have a downside. First, by making arbitration mandatory, a provider significantly increases the likelihood that the arbitration provision will be challenged. Thus, even if the provider is successful in defending the enforceability of the arbitration provision, it will first go through the time and expense of defending arbitration. Second, it is much easier for a plaintiff to attack a mandatory arbitration provision on the grounds of procedural unconscionability than it is to attack a voluntary arbitration agreement. This is particularly true when moving into assisted living, as decisions are often made hurriedly and under stress, following a traumatic event such as a fall or a hospitalization.

Finally, even if mandatory arbitration provisions are enforced by the courts, to the extent that mandatory arbitration is a prevalent industry practice, it provides the perfect backdrop for trial lawyers and other opponents of arbitration to argue their case for limiting or banning pre-dispute arbitration agreements.

Some providers have expressed concern that if arbitration is voluntary, most residents will choose not to arbitrate disputes. However, the experience of providers that utilize voluntary arbitration agreements suggests otherwise. This is particularly true for providers that take the time to train their staff to explain arbitration and its benefits. For example, one major national assisted living provider utilizes an arbitration agreement that is separate from the residency agreement itself and which clearly states right above the signature line that admission to the community is not contingent on signing the arbitration agreement. The agreement also provides that the resident may revoke the arbitration agreement within 15 days after signing it. In addition, they have developed materials and a training program to educate their marketing staff so that they can explain arbitration to prospective residents. As a result, more than 90% of their residents elect to arbitrate disputes.

Importantly, the fact that some residents do not opt for arbitration strengthens the argument that those who do opt for it were not coerced to do so.

[12] 158 Cal. App. 4th 443 (Ct. App. 2007)

IV. USE OF A SEPARATE ARBITRATION AGREEMENT

Providers must decide whether to include an arbitration provision within the body of the residency agreement (and require a separate signature) or to have a separate arbitration agreement. While either method is acceptable and less likely to be challenged by a plaintiff and overturned by a court than a mandatory provision, a separate agreement offers a stronger line of defense for a provider. That is because it is more difficult for a resident to claim that he or she did not realize what he or she was signing when it is a stand alone document.

A few providers have included a provision within the residency agreement itself that provides for arbitration of all disputes but then allows the resident to opt out of arbitration by signing or initialing an opt out clause. Because this approach requires the resident to affirmatively opt out of arbitration, it reduces the likelihood that a resident will choose to opt out. The downside to this approach is that it increases the likelihood that an arbitration provision will be deemed not to be enforceable. A plaintiff will argue that the resident was either not aware of the provision or did not understand that he or she had the option to decline the arbitration provision.

V. PROVIDE RESIDENTS WITH AN ARBITRATION AGREEMENT EARLY IN THE ADMISSIONS PROCESS

Stated simply, the earlier in the admission process that residents are provided with a copy of an admission agreement that contains an arbitration provision or a copy of a separate arbitration agreement, the better. California's assisted living law was revised several years ago to mandate that assisted living facilities "make blank complete copies of its admission agreement available to the public immediately… upon request "[13]. This law was added in response to consumer complaints that residents were having admission agreements foisted upon them at the last minute and thus were deprived of the opportunity to undertake a thorough review or consult with advisors. Providers who spring an arbitration agreement on their residents or family members at the 11th hour increase the likelihood of legal challenges and adverse legislation.

VI. SPECIFIC ARBITRATION PROVISIONS

Providers should be careful not to include arbitration provisions that are one-sided and unfair to consumers. First, even if the arbitration agreement contains a severance clause (which states that if any portion is found to be invalid, the remainder continues to be in full force and effect), if an arbitration agreement contains provisions that are obviously contrary to the best interests of the consumer, it makes it easier for a resident to argue that he or she was coerced into signing the agreement or did not understand it. Second, and perhaps more importantly, the inclusion of unfair, one-sided provisions, plays into the hands of those who seek to limit or ban the use of arbitration. Aggressive practices by a few providers can thus have a deleterious impact on the entire industry.

[13] Health & Safety Code § 1569.881

Provisions that are likely to be thrown out by a court include the following:

(1) Limitations on compensatory damages;

(2) Limitations on or exclusions of punitive damages;

(3) Statutes of limitations that are shorter than those provided for under the law;

(4) Severe limitations on discovery;[14]

(5) Provisions that allow the provider to choose the arbitrator; and

(6) Provisions that require arbitration of actions brought by residents but which allow courts to hear actions brought by the provider.

Provisions that providers should consider incorporating into their arbitration agreements:

(1) Before arbitrating any dispute, the parties agree to meet in an attempt to resolve any issues (and perhaps to submit matters to mediation);

(2) If a provider wishes to specify a particular forum for arbitration, they should include a generic alternative in the event that the arbitration forum is no longer available;

(3) A provision that expressly states that by agreeing to arbitrate disputes, the resident understands that he or she is waiving his or her right to have the matter heard in a court before a judge or a jury and that the decision of the arbitrator will be final;

(4) A provision that expressly provides for selection of a neutral arbitrator with both parties participating in the selection process;

(5) A provision that allows the resident to rescind the agreement within a certain timeframe after signing the arbitration agreement (e.g a 30-day "out clause"). Experience dictates that few, if any, residents will opt out of arbitration and including this provision may be helpful in fending off legal challenges. However, if an opt out right is included, the resident should be required either to hand deliver or send by certified mail a written notice of his or her decision to rescind the arbitration agreement. Otherwise, a dispute may arise as to whether or not the resident actually rescinded it;

(6) A provision that expressly states that declining to sign the form will not have an affect on admission to the community; and

(7) A provision that expressly provides for severability, in the event that any provision in the agreement is deemed to be illegal or unenforceable.

[14] While on it face, this may seem neutral as it affects both parties, the reality is that in most personal injury lawsuits most of the witnesses and documents are in the hands of the provider/defendant. Thus, for example, a provision limiting each party to deposing no more than three people might be viewed as giving a decided advantage to the defendant;

VII. EXCEPTIONS

Arbitration agreements should include an exception for matters which can be brought in small claims court. By definition, small claims courts can only award up to a specified amount of damages. These amounts vary from state to state but tend to be low. For example, California has a maximum of $7,500 for small claims court awards. In addition, the cost of litigating in small claims court is low, as attorneys typically are not needed or even permitted. There is little or no discovery in small claims court and matters are heard expeditiously.

Providers may also wish to exempt eviction proceedings from arbitration. Most states provide for expedited proceedings for eviction matters. Moreover, depending on state law, a provider may find itself unable to enforce an arbitrator's decision that a resident should be evicted without having to go into court to obtain an order that can then be executed on by the authorities. However, by allowing providers to sue in the event of eviction and not allowing residents to sue under any circumstances, one risks having a court deem the agreement to be one-sided.

VIII. WHO SHOULD SIGN THE ARBITRATION AGREEMENT

When a resident is mentally competent, the resident him or herself should sign the arbitration agreement. In addition, if the resident has an authorized representative assisting him or her in the admission process, that person should also sign the arbitration agreement.

Where the resident lacks capacity to sign a legal contract, problems can arise. As noted above, several cases have invalidated arbitration agreements where those agreements were neither signed by the resident nor by someone who had clear legal authority to act for the resident. If an incompetent resident has had a conservator or guardian appointed, that person's consent to arbitrate disputes is almost certainly binding on the resident. However, as a practical matter, very few residents with dementia have a court appointed conservator or guardian. Many incompetent residents have durable powers of attorney whereby they designate a representative to make healthcare decisions and financial decisions for them. Assisted living providers should have the person or persons who hold both healthcare and financial power of attorney sign an arbitration agreement on behalf of an incapacitated resident. The signature of a spouse or other relative without such formal authority may not withstand a challenge. Independent living communities presumably would have fewer incompetent residents moving in. For those who are incompetent, the person holding financial power of attorney should sign on behalf of the resident as a health care power of attorney would seemingly be inapplicable to an independent living setting.

IX. CONCLUSION

Arbitration is not a perfect process, but on the whole, arbitration is faster and cheaper than litigation and is more likely to result in positive outcomes for providers and residents. Unlike the jury system, arbitration has the added advantage of resolving disputes in private where the public and the media are excluded— a significant consideration for seniors housing providers.

Arbitration certainly will continue to come under attack from plaintiffs' personal injury lawyers and their allies. But if done right, arbitration agreements that are fair and non-coercive, can help to stave off these attacks.

American Seniors Housing Association

Leadership. Vision. Excellence.

STATEMENT OF PURPOSE

The American Seniors Housing Association provides leadership for the seniors housing industry on legislative and regulatory matters, advances research, education and the exchange of strategic business information, and promotes the merits of seniors housing.

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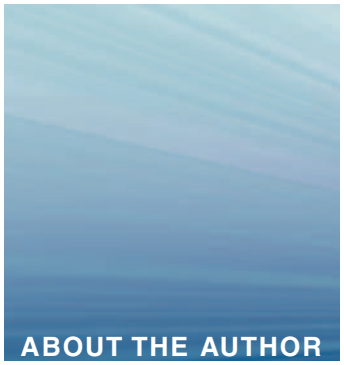

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