

First Opinion

A Publication from the Marsh SeniorCare Practice



Arbitration Agreements in Senior Housing and Long Term Care Contracts

In an attempt to curtail the rapid growth of litigation and unpredictable jury verdicts, arbitration agreements in long-term care (LTC) and senior housing admission contracts first appeared in Florida in the late 1990s. Subsequently, the use and effectiveness of arbitration agreements have become widespread and case law has developed. These agreements are advantageous to both parties because they provide a rapid, more cost effective, and fair method by which the parties can resolve their disputes. Additionally, a recent survey found that over 90% of the individuals who used arbitration found it to be fair.

Most recently, the Alabama Supreme Court has upheld the usage of LTC arbitration agreements as have courts in Florida, Tennessee, Kentucky, and California. However, the overall enforceability of these agreements has varied throughout the country.

Following are some of the essential parts of an arbitration agreement and observations for creating a clear and unambiguous arbitration agreement.

1. **Get a Good Admissions Coordinator.** Hire a qualified person to be your Admissions Coordinator and make sure that person has a routine by which they explain the exact same information to each and every resident. This Admissions Coordinator should be ready and able to testify to the same via affidavit or deposition.
2. **Stand-Alone Agreement.** Make the arbitration provision a stand-alone agreement rather than burying it in the middle or at the end of a multi-page admission agreement.
3. **Use Large Bold Font.** Consider using a larger font with bolded text for easier reading by an elderly resident. Consider placing the arbitration provision in a different colored ink to further draw attention to it.
4. **Explain What Arbitration Is.** Tell the resident what arbitration is - it is a means to resolve any future disputes between the parties - without a

judge or a jury. Also, have the agreement explain how the arbitration process works and who makes the ultimate decision.

5. Explain Waiver of Jury Trial. The document must clearly, and repeatedly, explain that the parties are waiving the right to have their dispute decided by a judge or via a jury trial. Put this language in bold and consider using red ink. Moreover, your Admissions Coordinator should orally explain to each and every resident that binding arbitration means the waiver of resolution by judge or jury. Immediately above the resident's signature, in bold red ink, remind the resident that by signing the arbitration agreement, he/she is giving up the right to have any disputes resolved by a judge or jury trial.
6. Explain Advantages of Arbitration. Explain that arbitration is generally a quicker, less expensive means to resolve disputes and that because of its non-public forum, it can help protect privacy and dignity concerning sensitive, personal issues such as mental disease and physical impairments (e.g. incontinence) that sometimes arise in disputes between a nursing home/ALF and its residents. Stress that because most residents are elderly, they may not have years to waste in the civil court system waiting for their dispute to be resolved.
7. Cover All Possible Disputes. Make sure the arbitration provision covers all disputes-disputes arising under tort, contract, statutory, etc.-whether brought by the resident (e.g. negligence claim) or the facility (e.g. collection or eviction).
8. Cover All Possible Parties - Bind Heirs and Successors. State that the arbitration provision binds not only the resident and the facility but also binds all future claims brought by the resident's spouse, children, heirs, personal representatives, etc. whether those claims are brought on the resident's behalf (i.e. the resident's pain and suffering) or the claimant's own behalf (i.e. claim by spouse for spouse's own pain and suffering as a survivor). Also, state that the arbitration agreement (separate and apart from the underlying admission agreement which should only bind the facility named on the agreement) binds not only the facility, but the facility's employees, management company, parent company, subsidiaries, or other entities in the facility's corporate chain.
9. Not "Take it or Leave it." Avoid making your arbitration provision a "take it or leave it" provision-consider allowing residents to move into your facility even if they refuse to sign the arbitration provision. (Please note that some courts, in Tennessee for example, have refused to enforce "take it or leave it" arbitration agreements contained within nursing home admission contracts.)
10. Resident Has a Choice. If you have a "take it or leave it" mandatory arbitration agreement that makes execution of the agreement a pre-condition to admission, then remind the resident that he/she has a choice to move into a different local nursing home/ALF. Such a reminder will help to later defeat the argument that the agreement was unconscionable because the resident had no alternative and was thereby forced to accept the agreement.
11. Give 30 Days to Revoke. Inform the resident via the written arbitration provision, and orally from the Admissions Coordinator, that he/she has a right to revoke the agreement to arbitrate within the next 30 days (or whatever time period you chose or state law requires).
12. Opportunity to Ask Questions. Give the resident an opportunity to ask questions of your Admissions Coordinator before making a decision to execute the agreement.
13. Opportunity to Consult an Attorney. Explain via the written arbitration provision, and orally via the Admission Coordinator, that the resident has the opportunity and right to consult an attorney regarding execution of the agreement, and that he/she is encouraged to do so if they have questions.
14. Ensure that the Resident is Competent Before Signing.
 - a. Competent: If the resident is competent but physically incapable of signing his/her

- name, have the resident verbally confirm in the presence of two (2) facility witnesses that the resident authorizes a family member or friend to sign on the resident's behalf. Then, have these two (2) facility witnesses execute the contract as well.
- b. Not Competent: If the resident is not competent, either get the Durable Power of Attorney or Legal Guardian to sign and put a copy of the Power of Attorney or Guardianship in the resident's file, or better yet, attach it to the arbitration agreement.
 - c. Spouse: To help avoid future competency challenges, always try to get the spouse to sign .
15. Initial Each Page. Have the resident initial each page in the lower right hand corner and fully execute and date the final page of the agreement in the presence of the Admissions Coordinator and at least one witness.
 16. Severability Provision. Add a severability provision that states something like, "If any term or phrase or provision of this Agreement is held to be invalid or unenforceable by reason of law, this Agreement will be deemed amended to conform with such law and will otherwise remain in full force and effect, as it is the parties' intent to ensure that the dispute is resolved solely via arbitration."
 17. Discovery and Hearing. Set forth exactly what discovery will be allowed (e.g. each side allowed 30 interrogatories, 30 requests to produce, 30 requests for admission, 10 depositions, etc.), the deadline for discovery (e.g.. 150 days after demand for arbitration is served), the deadline to disclose witnesses to be used at hearing, the deadline for the hearing (e.g. 180 days after demand for arbitration is served), the maximum number of witnesses at the hearing for each side, the maximum length of the hearing (e.g. 5 days), and the deadline for the arbitrator's written decision (e.g. 20 days after the hearing).
 18. Final and Limited Right of Appeal. Stress that the arbitrator's decision is final and that the right to appeal is very limited.
 19. Confidentiality. Consider a provision that makes the discovery, arbitration hearing, and arbitration award confidential.
 20. Attorneys' Fees and Costs. If your state's nursing home/ALF statute entitles a prevailing plaintiff to an award of attorneys' fees and costs, be careful about requiring each party to bear their own attorneys' fees and costs. Such a provision opens the door to plaintiffs arguing that the remedial purpose of the state statute is destroyed and thereby renders the provision unenforceable as a violation of public policy. Although case law suggests that a nursing home resident can agree to waive entitlement to such statutory attorneys' fees and costs, you may not want to waste money litigating this issue. *Unicare Health Facilities, Inc. v. Mort*, 553 So.2d 159, 161 (Fla. 1989).
 21. Stipulate to FAA or State Law. Have the arbitration agreement contain a stipulation that the parties agree the underlying admission agreement involves interstate commerce and thus the Federal Arbitration Act (FAA) applies - or that the parties desire to have state law apply (provided that, if interstate commerce does apply, the state law is not inconsistent with the FAA).
 22. American Arbitration Association (AAA) and American Health Law Association (AHLA). Please note that AAA and AHLA have recently issued announcements stating, for all practical purposes, these two associations will not serve as the administrator of arbitration agreements contained within long-term care nursing home/ALF admission agreements. Thus, do not reference these associations in your arbitration agreements. Rather, consider referencing an alternative industry association such as the National Arbitration Forum, P. O. Box 50191, Minneapolis, MN 55405, (877) 655-7755 or at www.arbitration-forum.com.
 23. Enforceability and Interpretation Decided by Arbitrator. In an effort to completely avoid the court system, add a provision that requires "Any disputes regarding the enforceability and/or interpretation of this arbitration agreement shall be

decided by the arbitrator and not by a judge or jury." However, please note that some states have held that such a provision is unenforceable.

24. Duty to Demand Arbitration is on Claimant. Make it clear that the duty to demand arbitration is on the claimant-not the respondent. By doing this, if the claimant/resident files suit in the courts and the nursing home/ALF responds to the suit without moving to compel arbitration, then the nursing home/ALF may have a better chance of defending the anticipated argument that it has waived the right to arbitrate (this is especially true when the lawsuit itself does not reference the admission agreement/arbitration agreement, thereby not prompting the defense attorney to invoke the right to arbitrate).

25. Avoid the "Waiver Trap." Add a clause that simply says, "If a party overlooks its obligation to arbitrate all disputes and participates in litigating the matter in the court system, such party will not be deemed to have waived the right to compel arbitration assuming the motion to compel arbitration is served before the first day of trial."

In May, 2004 the American Healthcare Association (AHCA) released its most recent Sample Arbitration Agreement (attached) to assist its members and the industry in the uniformity of this document. "As litigation costs continue to skyrocket for both individuals and the LTC profession, it is important to try and bring a more rational means to dispute resolution. We encourage the use of Arbitration Agreements by all providers in the LTC community," advises Raymond Sierpina, Director of Legislative Affairs, AHCA.

An alternative to the various state requirements for the provisions of these documents is to consider invoking the FAA by stating in the agreement, "This agreement shall be governed by and interpreted under the Federal Arbitration Act." The FAA reflects the U.S. Congress' strong policy in favor of enforcing arbitration agreements, and it generally pre-empts state laws that are designed to limit or prohibit arbitration agreements. Courts will apply a three-prong test for FAA enforceability:

- Is the agreement in writing?

- Does the agreement involve interstate commerce?
- Can the agreement withstand scrutiny under traditional defenses to contracts?

Due to the nature of services provided by the LTC industry, and how/where those services are provided, courts have determined the LTC industry to be interstate commerce. Courts have therefore routinely applied the FAA to long-term care arbitration agreements and enforced them.

The FAA also takes into consideration what the relevant state rules are and how they affect the agreements. (Sample FAA arbitration provisions for the LTC industry can be found on the National Arbitration Forum website at www.arbitration-forum.com.)

Critics of arbitration contend that arbitration is somehow unfair to consumers/residents. The data, as provided by the National Arbitration Forum in their 2004 edition, *The Case for Pre-Dispute Arbitration Agreements: Effective and Affordable Access to Justice for Consumers*, show otherwise. Citing numerous studies, this document highlights some of the following:

- 78% of trial attorneys find arbitration faster than lawsuits (ABA, 2003)
- 56% of trial attorneys find arbitration less expensive than lawsuits (ABA, 2003)
- Individuals prevail at least slightly more often in arbitration than through lawsuits (Delikat & Kleiner, 2003)
- Monetary relief for individuals is slightly higher in arbitration than in lawsuits (Delikat & Kleiner, 2003)
- 93% of consumers using arbitration found it to be fair (Perino, 2003)

This document and others may also be found on the National Arbitration Forum website at www.arbitration-forum.com.

Statements concerning legal matters should be understood to be general observations based solely on our experience as insurance brokers and risk consultants and should not be relied upon as legal advice, which we are not authorized to provide. All such matters should be reviewed with the client's own qualified legal advisors in these areas.

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