Arbitration Agreements in Long-term Care Facilities

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In the response to rising long-term care (LTC) litigation across the country over the past decade, some LTC facilities have begun to include arbitration agreements in their admission documents. These documents, signed by residents or their families at or soon after admission, require all future legal disputes between the resident or their family and the LTC facility to be resolved through binding arbitration. If enforced, these agreements prevent legal suits from being heard in a traditional judicial forum. However, recent legislation proposed in the United States Senate threatens to prohibit the adoption of such agreements prior to such time as an actual dispute arises. This legislation would vastly change the quickly evolving legal landscape in LTC settings.

Overview of Arbitration Agreements in LTC Settings

In the broadest sense, an arbitration agreement is a contract entered into between 2 consenting parties that governs the forum in which future disputes between those parties may be resolved. Agreements of this type first became popular between businesses. More recently, arbitration agreements have been introduced into business–consumer contexts such as LTC settings. Proponents of mandatory binding arbitration point to several advantages that it potentially offers over conventional litigation. Arbitration, proponents argue, saves time and money in court litigation, which is frequently very expensive and lasts for years. In addition, the parties may select an arbitrator to hear their case who has expertise in the subject matter of the dispute. This aids in the litigator's fact-finding abilities. Finally, binding arbitration with limited or no right to appeal offers finality when compared to a multistage appeals process.

Courts assert nearly universally that arbitration is a favored means of dispute resolution, for the benefit of both the parties and overwhelmed court dockets. Therefore, courts seek to enforce arbitration agreements whenever possible. However, courts often cast a skeptical eye on arbitration agreements entered into between parties with a perceived disparity in sophistication or bargaining power—for example, a LTC facility and a resident or his or her family.

Arbitration agreements are most often challenged on the grounds that they are unconscionable, a traditional contract defense in the common law. Courts in most states have adopted a 2-pronged approach to this analysis, considering both whether an agreement is procedurally unconscionable and whether an agreement is substantively unconscionable. *Procedural unconscionability* exists when the manner in which an agreement was entered into was unfair; an agreement is *substantively unconscionable* when its terms unreasonably favor 1 party, in this case the LTC facility, over another, the resident. When a court finds that an arbitration agreement is unconscionable, it may refuse to enforce the entire arbitration agreement, or it may only strike the specific portions of the agreement that are unconscionable. Usually, a court's ability to review an arbitration award is extremely limited unless the agreement itself provides otherwise.

Specific State Court Responses to Arbitration Agreements

Numerous state courts throughout the United States have considered the enforceability of arbitration agreements in LTC settings in recent years. While these courts have employed very similar analyses, their holdings are often starkly different and run the range of possible outcomes.

In a thorough exploration of the issue, the Supreme Judicial Court of Massachusetts considered many factors before deciding to enforce an arbitration agreement in whole in *Miller v Cotter*, 863 N.E.2d 537 (Mass. 2007). The plaintiff, who had signed an arbitration agreement on behalf of his father, argued that the agreement was unenforceable. The court disagreed, determining that the agreement was not unconscionable. The court relied on factors including the high level of education of the plaintiff, the fact that the arbitration agreement was a separate document apart from other admissions documents, and that it was clear that the agreement was not a condition of admission. In addition, the agreement contained a provision wherein it could be rescinded unilaterally by either party within 30 days. Finally, the actual terms of the agreement did not favor either party; instead, it offered the resident the opportunity to obtain a full recovery at an arbitration proceeding. Therefore, the agreement was neither procedurally nor substantively unconscionable.

A similar outcome was reached in *Gainesville Health Care Ctr, Inc v Weston*, 857 So. 2d 278 (Fla. Dist. Ct. App. 2003). The plaintiff in that case argued that the nursing home had not explained the arbitration clause to her and that she did not understand it. The court held that simply claiming to have not understood an element of a contract is not grounds for procedural un-

conscionability. The plaintiff had ample chance to read the documents and ask questions before she signed them. There was also no evidence that the facility had presented the arbitration agreement on a take-it-or-leave-it basis.

The *Miller* and *Weston* decisions are just 2 examples of cases in which the courts have enforced arbitration agreements in whole. In both cases, the resident or family member willingly signed an arbitration agreement after having the opportunity to read the agreement and ask questions. There was also no evidence that they were coerced into signing the agreements.

Other courts have been more aggressive in voiding arbitration agreements in their entirety. For example, in *Bishop v Medical Facilities of America XLVII Ltd Partnership*, 65 Va. Cir. 187 (2004), the court determined that a small miscalculation in the format of the agreement completely nullified the agreement. The plaintiff, a family member of the resident, signed the line of the agreement labeled "Responsible Party." Another line, labeled "Resident," was left blank because the resident herself did not have the capacity to sign the document. The court held that because the agreement by its terms applied to the resident only, and because the resident herself did not sign the agreement, the agreement did not compel arbitration of the wrongful death suit that was brought by the family on behalf of the resident.

Finally, *Small v HCF Perrysburg, Inc*, 823 N.E.2d 19 (Ohio Ct. App. 2004) represents an example in which courts have refused to enforce an arbitration agreement based on an unconscionability analysis. The court found that the agreement was substantively unconscionable because the resident had no practical choice but to accept the agreement as a condition of admission, and the prevailing party at arbitration would be entitled to attorney fees. The court found that the agreement was procedurally unconscionable because the spouse who signed the agreement was under stress at the time she signed the agreement, she did not have an attorney present, she had no particular legal expertise, and she was 69 years old. The court rejected the agreement in whole and remanded the case to continue with judicial proceedings.

While the courts in each of the above cases either enforced or rejected the arbitration agreement in whole, some courts have stricken only those terms of the agreement that are substantively unconscionable and then have proceeded with an arbitration that would be fair to both parties. Courts have thus allowed LTC facilities to reap the benefits of arbitration. A minority of courts have followed this course, and some arbitration agreements specifically provide for the "severability" of unconscionable terms. Overall, it is clear that courts across the county examine LTC arbitration agreements with different levels of scrutiny and sometimes reach disparate outcomes on similar sets of facts.

The Proposed Legislation

Although there are advocates of mandatory arbitration, there are also strong opponents to pre-dispute arbitration agreements of any kind in LTC settings. On April 9, 2008, Senator Mel Martinez (R-FL) and Senator Herb Kohl (D-WI) introduced legislation to preserve dispute resolution options for residents of LTC facilities. The legislation, the Fairness in Nursing Home Arbitration Act of 2008, would give residents the right to choose whether to litigate or arbitrate a dispute after the dispute arises—residents would not be forced to arbitrate their dispute based on a document they signed long before the dispute materialized, and usually before they consulted legal counsel.

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Senators Martinez and Kohl believe that their legislation reflects the original intent of the Federal Arbitration Act by requiring that arbitration agreements be made only after a dispute has developed. The sponsors of the bill argue that pre-dispute arbitration agreements unduly favor corporations and place vulnerable residents in an unfair position. They argue that when residents enter a LTC facility, they are often under a lot of stress and, to be admitted, are required to fill out and sign large amounts of paperwork that they may not understand. Opponents of arbitration agreements state that these agreements are sometimes presented to residents as a requirement for admission or that residents do not understand that they may refuse to sign the agreement. According to Senator Martinez, "Forcing a family to choose between quality care and foregoing their rights within the judicial system is unfair and beyond the scope of the intent of arbitration laws.... This effort restores the original intent and tells families that they don't have to sign away their rights in order to access quality care."[1]

The bill has attracted much attention; interested groups are lining up both in support of and in opposition to the legislation. On May 22, 2008, a letter signed by 19 organizations was sent to the United States Senate urging senators to support the Act.[2] Organizations that signed the letter included the American Association of Retired Persons (AARP), the American Association for Justice, and the National Senior Citizens Law Center.

The letter stressed that residents are often pressured to accept the first bed available and oftentimes do not have an opportunity to assess the care provided at that facility or to consider other options. The letter also points out that there have been cases in which arbitration agreements signed by illiterate residents were enforced. Proponents of the legislation also point to the vast number of LTC arbitration agreements that are challenged in court—more than 100 cases have been filed in the past 5 years challenging arbitration agreement—as evidence of their fundamental unfairness.[3]

Opponents of the proposed legislation have also begun their own lobbying effort aimed at defeating the legislation. Twenty organizations signed a letter urging members of Congress to oppose the Fairness in Nursing Home Arbitration Act.[4] In this letter, groups such as the National Center for Assisted Living (NCAL), the American Health Care Association (AHCA), and the US Chamber of Commerce highlighted the positive points of mandatory arbitration. They noted that studies have shown that consumers prevail more than 70% of the time in arbitration and that these disputes are resolved on average in less than 100 days, significantly less than the average 2-year litigation process.

At this point, the future of the Fairness in Nursing Home Arbitration Act of 2008 is unclear. Passage of the Act would drastically cut the number of LTC disputes that are resolved through arbitration. If the Act is defeated, state courts will have to continue to examine the enforceability of arbitration agreements on a case-by-case basis. Either way, this is an important issue for the LTC industry to follow closely going forward. ALC

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Clinical Practice Guidelines

(continued from page 15)

Adjusting Medication

- Combining methotrexate with a biologic is a better strategy than combining 2 synthetic DMARDs or 2 biologics.
- When monotherapy with a synthetic DMARD isn't working well enough, consider a triple combination of hydroxychloroquine, methotrexate, and sulfasalazine. It works better than a 2-drug combination (methotrexate with either drug).
- Adding prednisone to a synthetic DMARD can reduce inflammation and pain, but long-term use of prednisone can cause adverse effects.
- Combination therapy (except with 2 biologics) does not increase the likelihood of discontinuation due to adverse effects.

Cost

The cost of RA drugs may be a barrier (Table 2). Intravenous drugs incur additional expense. The oral agents are all available as generics, but biologics are not. If your patients need help paying for RA drugs, consider a prescription assistance program. The Partnership for Prescription Assistance provides information on 475 public and private programs. (See www.pparx.org or call 1-888-477-2669.)

Resource for Patients

Rheumatoid Arthritis Medicines: A Guide for Consumers is a companion to this Clinician's Guide.

Still Unknown

- It is not known whether the benefits or harms of DMARDs vary by a person's age, gender, race, ethnicity, disease severity, comorbidities, or concomitant therapies.
- Because biologics are relatively new, evidence is insufficient to determine their long-term benefits and risks, including the risk of lymphoma.
- Evidence is insufficient to determine whether people with more severe RA respond better when started on a biologic or combination therapy instead of a synthetic DMARD. ALC

The source material for this guide is a systematic review of 156 research publications reporting on 103 studies. The review, *Comparative Effectiveness of Drug Therapy for Rheumatoid Arthritis and Psoriatic Arthritis in Adults* (2007), was prepared by the RTI-University of North Carolina Evidence-based Practice Center. The Agency for Healthcare Research and Quality (AHRQ) funded the systematic review and this guide. The guide was developed using feedback from clinicians who reviewed preliminary drafts. For free print copies call: The AHRQ Publications Clearinghouse, (800) 358-9295. Clinician's Guide, AHRQ Pub. No. 08-EHC004-3; Consumer's Guide, AHRQ Pub. No. 08-EHC004-2A