

ADOPTED AS REVISED**AMERICAN BAR ASSOCIATION****ADOPTED BY THE HOUSE OF DELEGATES****FEBRUARY 16, 2009****RECOMMENDATION**

1 RESOLVED, That the American Bar Association opposes the use of mandatory, binding, pre-
2 dispute arbitration agreements between a long-term care facility and a resident of such facility or
3 person acting on behalf of such resident.

4 FURTHER RESOLVED, That the American Bar Association supports enactment of federal,
5 state, and territorial legislation and regulations that would invalidate such arbitration agreements
6 and opposes federal, state, and territorial legislation and regulations that would authorize,
7 encourage, or enforce such agreements.

8 FURTHER RESOLVED, That the American Bar Association supports additional refinements to
9 such legislation and regulations that would accomplish these objectives through a method other
10 than amendment to Chapter 1 of the Federal Arbitration Act; and if practicable, would narrow
11 the scope of the arbitration prohibition to disputes relating to the resident's health care and
12 supportive services.

REPORT

This recommendation supports a ban on the use of mandatory, binding, pre-dispute arbitration agreements between long-term care facilities and residents of such facilities. While the ABA recognizes the benefits of arbitration and supports its use in other contexts, the circumstances of individuals entering and residing in long-term care facilities make such agreements inappropriate.

1. Introduction

With the aging of the population, many frail individuals and their families turn to nursing homes and assisted living facilities to provide 24-hour care in a safe and secure environment. They often are faced with signing facility admissions agreements at a time of crisis and while under severe stress. Increasingly, these contracts include an arbitration clause specifying that any dispute that arises must be resolved out of court, by a private arbitrator often selected by the facility. Arbitration has significant benefits in timeliness and cost and could well be used to address some of the problems in long-term care settings. However, because of the unique circumstances surrounding the admission to long-term care facilities, the use of mandatory, binding pre-dispute arbitration clauses is inappropriate. In addition, current pending federal legislation would invalidate such clauses.

2. Use and Growth of Arbitration

“Arbitration” is a private process in which a neutral third-party decision-maker is selected by the parties to resolve a dispute (see ABA Standing Committee on Dispute Resolution, currently the Section on Dispute Resolution, *Alternative Dispute Resolution: An ADR Primer*, 3d ed. 1989). Agreements to arbitrate disputes are customarily binding and can be either pre-dispute—entered into before the nature of any future problem is known—or post-dispute, after the problem has arisen.

Arbitration clauses are now a common feature of banking, credit card, financial, insurance, computer, and communication service agreements, and consumer contracts for the sale of goods. For example, arbitration clauses appear in 69 percent of contracts in the financial services industry (Ward, S., “They Dun Them Wrong: Suits Challenge Use of Mandatory Arbitration Clauses to Pursue Debtors,” *ABA Journal*, July 2008). Arbitration can offer important advantages over litigation, including lower costs, faster decisions, and decreased stress. Therefore, arbitration enjoys widespread support.

While Americans are guaranteed the right to a jury trial by the Seventh Amendment to the U.S. Constitution, parties may waive their right to seek redress in court by voluntarily agreeing to use arbitration instead. At first, courts tended to be hostile toward such agreements and often refused to enforce them. In response, Congress in 1925 enacted the Federal Arbitration Act (9 U.S.C. §2.) to make written agreements to arbitrate enforceable, as long as the conditions in the Act are met. Court decisions have affirmed the broad reach of the Act. Additionally, the Act pre-empts state legislation that limits binding arbitration. Thus, written agreements to arbitrate, so long as they are not unconscionable or otherwise unenforceable under applicable provisions of state law, are generally found to be binding, and parties can be required to arbitrate their disputes.

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3. Arbitration Agreements in Long-Term Care Contracts

Long-term care contracts frequently include binding, pre-dispute arbitration clauses. Indeed, “nursing homes have been among the biggest converts to the practice [of using arbitration] Attorneys litigating nursing home cases on both sides say arbitration has quickly become the rule rather than the exception” (Koppel, N., “Nursing Homes, in Bid to Cut Costs, Prod Patients to Forgo Lawsuits,” *Wall Street Journal*, April 11, 2008).

Providers point out that arbitration of long-term care concerns can hold down the steep cost of litigation and allow a speedier settlement for residents and families. However, such clauses can be problematic in that: (a) the resident and family may not understand the agreement because of the special circumstances surrounding the admission to a long-term care facility; (b) the agreement may not be voluntary, as it is signed under duress; (c) the agreement may provide for unfair limitations and can result in proceedings that lack critical procedural protections; and (d) the agreement may conflict with federal nursing home requirements. While arbitration clauses in many circumstances can be advantageous, long-term care consumers may face a “take it or leave it” contract under circumstances where truly “informed consent” may be lacking. Moreover, the use of arbitration in long-term care may tend to shield providers who give poor care and even engage in abusive practices, to the ultimate detriment of the industry overall and to providers with high standards of quality. For all of these reasons, according to a recent U.S. Senate panel investigating the growing use of binding arbitration in long-term care, a growing number of lawsuits have been filed in the past five years challenging such agreements (Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition and Consumer Rights, and Special Committee on Aging, June 18, 2008).

a. Lack of Understanding. While arbitration agreements may be stand-alone documents, generally they are included in a much longer admissions contract, frequently buried among other significant provisions. The clause may not be bolded or underlined, and can be easy to miss. Individuals who need nursing care are frail and have chronic health conditions, generally several at once. They may lack the ability to understand the clause, even if they have capacity to understand the general nature and purpose of the contract. A relative or other representative signing on behalf of the resident may fail to understand the clause, as well, and is usually under extreme pressure to sign in order to facilitate a speedy admission.

For example, in *Howell v. HNC Healthcare-Fort Sanders, Inc.*, 109 S.W. 3d 731 (Tenn. Ct. App. 2003), a Tennessee court of appeals found a nursing home arbitration clause unenforceable based on several factors, including that the admissions agreement was 11-pages long and the arbitration clause was “buried” within the larger document, that the clause was in the same size font as the rest of the agreement, that the nursing home representative failed to explain the provision, and that the resident had to be placed expeditiously. In *Adkins v Laurel Healthcare of Clovis, LLC* (No. 26759, N.M. Ct. App. Dec. 19, 2007), a New Mexico appellate court found that a resident’s condition at the time she was admitted to a nursing home rendered her unable to understand the meaning and consequences of an arbitration clause that was buried more than halfway into a long and complicated contract.

b. Duress Factor. Nursing home admission is inherently a time of enormous stress for residents and families. The trigger for admission may be a frightening health crisis, abrupt

hospital discharge, or sudden loss of a family caregiver. The need for speedy hospital discharge and/or immediate care means the contract frequently is signed in a rush and without the opportunity for an informed and deliberative process. There may not be time for the consumer to seek the advice of a lawyer. There may not be other beds available with the same level of care, payment source, and/or within the same geographic area. There may not be other facilities in the area that do not include an arbitration clause in the contract or require the signing of such a provision. Indeed, “typically, admissions agreements are presented on a take-it-or-leave-it basis. Residents have few choices because they require immediate admission or because there are no other facilities in the area . . . [and thus families] often feel compelled to sign in order to ensure that their loved one will be admitted” (Sen. Kohl, U.S. Committee on the Judiciary & Committee on Aging, June 18, 2008).

Even if the resident and family understands the arbitration clause, they may be reluctant to challenge it, as they need the care and do not want to be thought of as troublemakers. Finally, when entering the facility, the family and resident are not thinking of litigating poor care and are, in fact, anticipating that things will go well. They are focused on finding the best care, not on technical legal clauses. “They enter a long-term care facility for care and compassion, not litigation or arbitration” (Hirschel, A., Senate Hearing, June 18, 2008).

c. Arbitration Agreement Limitations and Lack of Protections. Some long-term care facility arbitration agreements include significant limitations that disadvantage the resident and family. Clauses frequently specify that the provider can select the arbitration service and the location of the arbitration. Some include caps on damages, even for tragic and possibly preventable deaths. Moreover, some clauses or arbitration procedures restrict the discovery process—limiting the number of investigative interviews or the exchange of documents. “This could prevent an aggrieved consumer’s lawyer from deposing all possible employees who might have witnessed an incident at a nursing home and gaining access to relevant records,” whereas the facility has the records and personnel at its disposal (Sturgeon, J., “Nursing Homes Use Arbitration As a Shield,” *The Roanoke Times*, Aug. 24, 2006). The resident may have to pay substantial fees for the arbitration. Finally, because most arbitration agreements and awards are confidential, long-term care facilities may be shielded from damaging media reports that otherwise might bolster accountability.

d. Possible Violation of Federal Nursing Home Requirements. In 2003, the Centers for Medicare and Medicaid Services (CMS) released an administrative ruling concerning binding arbitration agreements between nursing homes and prospective or current residents (“Binding Arbitration in Nursing Homes,” Centers for Medicare and Medicaid Services, Ref. SFC-03-10, January 9, 2003). The ruling states that under Medicare, use of a binding arbitration agreement is an issue between the resident and the nursing home, but under Medicaid, CMS will defer to state law. However, the ruling notes that under both programs, “there may be consequences for the facility where facilities attempt to enforce these agreements in a way that violates federal requirements.” Specifically, CMS concluded that a current resident is not obligated to sign a new admission agreement that includes a binding arbitration provision because discharge of such a resident based on failure to comply would directly conflict with federal regulations limiting the circumstances under which a certified facility may discharge a resident (42 C.F.R. 483.12(a)(2)).

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e. Alternative Methods of Ensuring Fairness. Given the unique medical and emotional circumstances of long-term care admission, the preferred option is for facilities to offer residents or their family surrogates binding arbitration only after a dispute has arisen.

4. Currently Pending Legislation

H.R. 6126 (110th Congress, 2d Session), the “Fairness in Nursing Home Arbitration Act,” would invalidate pre-dispute arbitration agreements in long-term care contracts. The bill passed the House Judiciary Committee in July 2008. The Senate companion bill, S. 2838, passed the Senate Judiciary Committee in September. Neither bill reached a floor vote by the end of the 110th Congress. It appears likely that bills will be re-introduced next session. The bills provide that:

“A pre-dispute arbitration agreement between a long-term care facility and a resident of a long-term care facility (or anyone acting on behalf of such a resident, including a person with financial responsibility for that resident) shall not be valid or specifically enforced.”

It is important to note that the bills do not ban the use of arbitration, but only the use of *pre-dispute* binding arbitration—that is, agreements to arbitrate disputes that had not yet arisen at the time of the making of the agreement. The American Arbitration Association has recognized the need to limit arbitration in patient health care disputes and has determined that, effective January 2003, it would “no longer accept the administration of [health care] cases involving individual patients without a post-dispute agreement to arbitrate” (<http://www.adr.org/sp.asp?id=32192>). Also, the American Health Lawyers Association rules of procedure, as of June 2006, state that the Association’s Alternative Dispute Resolution Service will administer a “consumer health liability claim” only if “all parties have agreed in writing to arbitrate the claim after the injury has occurred . . . or if a judge orders the Service to administer an arbitration under a pre-injury agreement” (http://publish.healthlawyers.org/Resources/ADR/Pages/Rules_Amendment.aspx).

Both House and Senate bills apply to a pre-dispute arbitration agreement entered into either during the admission process or at any time after the admission process. However, the House bill applies only prospectively—that is, to agreements made or in any way altered on or after the date of the enactment, while the Senate bill applies with respect to any dispute or claim that arises on or after the date of enactment, thus invalidating any pre-dispute arbitration contract clause entered into before the enactment. The second resolved clause of this recommendation before the ABA supports the Senate’s approach. The Senate approach relies on case law, particularly *Ames v. Merrill Lynch*, 567 F.2d 1174 (2nd dir. 1977), which held that the Commodity Futures Trading Commission has statutory authority to apply a regulation that, *inter alia*, voids involuntary arbitration agreements to preexisting arbitration agreements and to preexisting disputes and that such application is not unconstitutional. On a more practical level, the Senate approach avoids an unequal availability of remedies for nursing home residents depending on the date of their admission to the long-term care facility.

In addition, at the state level, some states have enacted a bar on arbitration agreements in their nursing facility licensure laws (*i.e.*, *Okla. Stat.* tit. 63, §1-1939), while others have similar

provisions barring pre-dispute agreements to arbitrate actions relating to wrongful death or personal injury (*i.e.*, Georgia Arbitration Code, *Ga. Code Ann.* §9-9-2(c)(10)). States may continue to enact such pre-dispute arbitration bars that directly affect long-term care residents and their families.

5. Existing ABA Policy Concerning Mandatory Arbitration

The ABA has consistently promoted the greater use of alternative dispute resolution, including arbitration, to resolve disputes short of litigation, “so long as every disputant’s constitutional and other legal rights and remedies are protected (Report No. 114, approved by the ABA House of Delegates in August 1989). The ABA also has adopted a series of resolutions that, in specified circumstances, endorses the use of voluntary, but not mandatory, arbitration. In the context of court-annexed ADR, the ABA has repeatedly stated that only voluntary arbitration should be used by the courts (*See, e.g.*, Report 10F, approved in Aug. 1994; Report 305 approved in Aug. 1995; and Report 112, approved in Feb. 1997). Also, the ABA has supported the use of arbitration by federal agencies, but only when “all parties to the dispute . . . knowingly consent to use arbitration procedures . . .” (See Report 103A, approved in Aug. 1988).

In the context of health care, the proposed resolution would build and expand on existing ABA policy that limits support for arbitration to voluntary agreements entered into after a dispute has arisen. First, addressing arbitration to resolve medical malpractice disputes, current ABA policy provides that “arbitration should be entered into, if at all, on a voluntary basis with full knowledge that the arbitration panel’s decision is final and binding (See Report 126, approved in Aug. 1976). The following year, at the 1977 Annual Meeting, the House of Delegates further clarified its position by stating that arbitration should be used to resolve medical malpractice disputes only where “the agreement to arbitrate is entered into...after [a] dispute has arisen” (See Report 118, approved in Aug. 1977). According to the record of the proceedings, this resolution was adopted after the sponsoring delegate raised a concern during the debate that *pre-dispute* arbitration agreements signed in the course of obtaining medical services were not truly “voluntary” on the part of the patient because “the agreement to arbitrate may be almost a requirement of receiving the service that you seek” (See ABA Annual Report, August 1977, p. 504).

Second, in the area of managed health care, the Association endorsed the position stated in the *AAA/ABA/AMA Health Care Due Process Protocol* that only voluntary agreements to arbitrate disputes between patients and HMOs should be enforceable (See Report 114, approved in Feb. 1999). In the *Protocol*, the AAA/ABA/AMA Commission on Health Care Disputes concluded that “in disputes involving patients, binding forms of dispute resolution [including arbitration] should be used only where the parties agree to do so *after* a dispute arises” because this is the only way to guarantee that the agreement to arbitrate is both knowing and voluntary, based upon equal bargaining positions and equal power. (See *Protocol*, Principle and Recommendation 3, emphasis added; see also ABA background report related to Recommendation 3 at page 4.)

6. Conclusion

Arbitration can very often help parties to resolve consumer and other disputes faster, and at less cost and with less stress than litigation. Nevertheless, during the extremely emotionally-

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charged process of admission to a long-term care facility, it should only be used when both parties knowingly consent to the process after a dispute has arisen. In the long-term care context, residents and families are faced with arbitration agreements in a crisis, and are at a distinct disadvantage, often without full understanding and under pressure to secure immediate care. The proposed resolution opposing the use of mandatory, binding pre-dispute arbitration agreements in long-term care contracts builds squarely on existing ABA policy. Indeed, “arbitration was not intended as an end run around justice” (Hirschel, A., Senate Testimony, June 18, 2008) for vulnerable long-term care residents.

Respectfully submitted,

Joseph D. O’Connor, Chair
Commission on Law and Aging
February 2009

General Information Form

Submitting Entity: Commission on Law and Aging

Submitted by: Joseph D. O'Connor, Chair

1. Summary of Recommendation.

While recognizing the benefits of arbitration, the proposed policy opposes the use of mandatory, binding, pre-dispute arbitration agreements between a long-term care facility and a resident of such facility (or person acting on behalf of such resident); and supports enactment of legislation and regulations that would invalidate such arbitration agreements.

2. Approval by Submitting Entity.

The Commission on Law and Aging approved the proposed policy on October 18, 2008.

3. Has this or a similar recommendation been submitted to the ABA House of Delegates or Board of Governors previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The proposed resolution would build and expand on existing ABA policy that limits support for *arbitration in the context of health care* to voluntary agreements entered into after a dispute has arisen. First, addressing arbitration to resolve medical malpractice disputes, current ABA policy provides that “arbitration should be entered into, if at all, on a voluntary basis with full knowledge that the arbitration panel’s decision is final and binding (See Report 126, approved in Aug. 1976). The following year, at the 1977 Annual Meeting, the House of Delegates further clarified its position by stating that arbitration should be used to resolve medical malpractice disputes only where “the agreement to arbitrate is entered into...after [a] dispute has arisen” (See Report 118, approved in Aug. 1977).

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5. What urgency exists which requires action at this meeting of the House?

H.R. 6126 (110th Congress, 2d Session), the “Fairness in Nursing Home Arbitration Act,” would invalidate pre-dispute arbitration agreements in long-term care contracts. The bill passed the House Judiciary Committee in July, 2008. The Senate companion bill, S. 2838, passed the Senate Judiciary Committee in September. Neither bill reached a floor vote by the end of the 110th Congress. It appears likely that bills will be re-introduced next session, and it will be important for the Association to advocate concerning these bills.

6. Status of Legislation.

The Fairness in Nursing Home Arbitration Act passed the House Judiciary Committee and the Senate Judiciary Committee, but did not reach a floor vote in either the House or Senate. It is likely that both bills will be re-introduced.

7. Cost to the Association. (Both direct and indirect costs.)

None.

8. Disclosure of Interest. (If applicable.)

N/A

9. Referrals.

The recommendation was presented to the Section of Dispute Resolution’s Council on November 14, 2008.

In addition, the recommendation is being referred to the following other ABA entities:

Commission on Homelessness and Poverty
Commission on Mental and Physical Disability Law
Section of Administrative Law and Regulatory Practice
Section of Business Law
Section of Family Law
General Practice, Solo and Small Firm Division
Government and Public Sector Lawyers Division
Section of Health Law
Section of Individual Rights and Responsibilities
Judicial Division
Section of Labor and Employment Law
Section of Litigation
Section of Real Property, Trust and Estate Law
Section of Tort, Trial and Insurance Practice
Young Lawyers Division

10. Contact Person (Prior to the meeting.)

Charles Sabatino
Director
ABA Commission on Law and Aging
740 15th Street NW
Washington DC 20005
(202) 662-8686
(202) 662-8698 (FAX)
(202) 390-8447 (cell)
sabatinoc@staff.abanet.org

11. Contact Person. (Who will present to the House)

Joseph D. O'Connor
Chair, Commission on Law and Aging
Bunger & Robertson
226 S. College Sq.
PO Box 910
Bloomington IN 47402-0910
(812) 332-9295
(812) 331-8808 (FAX)
joc@lawbr.com

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Executive Summary

a) Summary of the recommendation.

While recognizing the benefits of arbitration, the proposed policy opposes the use of mandatory, binding, pre-dispute arbitration agreements between a long-term care facility and a resident of such facility (or person acting on behalf of such resident); and supports enactment of legislation and regulations that would invalidate such arbitration agreements.

b) Summary of the issue which the recommendation addresses.

With the aging of the population, many frail individuals and their families turn to nursing homes and assisted living facilities to provide 24-hour care in a safe and secure environment. They often are faced with signing facility admissions agreements at a time of crisis and while under severe stress. Increasingly, these contracts include an arbitration clause specifying that any dispute that arises must be resolved out of court by a private arbitrator. While arbitration has significant benefits in timeliness and cost -- and could well be used to address some of the problems in long-term care settings -- the use of mandatory, binding pre-dispute arbitration clauses appears unconscionable. Such clauses can be problematic in that the resident and family may not understand the agreement; and the agreement may not be voluntary, as it is signed under duress,-- often at a time of health crisis, abrupt hospital discharge or sudden loss of a family caregiver. Moreover, there may not be other nursing home beds available with the same level of care. While arbitration clauses between parties of equal bargaining power can be advantageous, long-term care consumers may face a “take it or leave it” contract.

c) How the proposed policy will address the issue.

The proposed policy would allow the Association to advocate on the pending “Fairness in Nursing Home Arbitration Act” which would invalidate pre-dispute arbitration agreements in long-term care contracts.

d) Summary of any minority views or opposition identified.

None identified.