# BINDING ARBITRATION IN SKILLED NURSING FACILITIES: WHERE TO DRAW THE LINE

## I. INTRODUCTION: WHAT WOULD YOU DO?

Imagine facing the following scenario: your loved one has fallen ill and needs care from a skilled nursing facility. You have little time to investigate your options or to become an informed consumer. You arrive at the nursing home and are handed an admissions packet containing several documents, including an adhesion contract containing a pre-dispute binding arbitration agreement. You are not informed about the arbitration agreement and sign the document without realizing that you have done so. You do not know that, by signing this document, you are foregoing the ability to bring claims against the nursing facility in court. Your loved one is admitted to the facility and is subsequently injured. You are told that you must go to arbitration where your complaint will be decided by a private arbitrator. The arbitrator's decision is generally binding and cannot be appealed in court. Your relative receives a small settlement amount from the arbitration, but nowhere near enough to pay for the various costs associated with your loved one's future medical care. You and your family have done nothing wrong, yet you must pay for the injuries that your loved one suffered due to the gross negligence of the staff at the skilled nursing facility.

## II. BINDING ARBITRATION AGREEMENTS

This troubling hypothetical is a harsh reality for many families throughout the United States who have elderly family members in need of long-term residential nursing care. Regrettably, this trend is likely to continue given that binding arbitration agreements are now ubiquitous in nursing home admission contracts throughout the country. Originally intended for arm's length transactions between parties in relatively equal bargaining positions,[1] arbitration agreements have long been a staple in consumer contracts. They have been endorsed by the Supreme Court,[2] and are often relied on by businesses, the banking industry, and, most recently, health care providers.[3] While mandatory pre-dispute arbitration agreements have

1. Ann. E. Krasuski, *Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents*, 8 DEPAUL J. HEALTH CARE L., 263, 263 (2004).

2. See, e.g., Elizabeth K. Stanley, *Parties' Defenses to Binding Arbitration Agreements in the Health Care Field & The Operation of the McCarran-Ferguson Act*, 38 ST. MARY'S L.J. 591, 599 (2007) (discussing how the Supreme Court has recently reversed the long standing judicial hostility to arbitration agreements and placed binding arbitration contracts on the same footing as other contracts. The Court added that questions regarding the enforceability of the arbitration agreement should be resolved in favor of the arbitration).

3. *See* Krasuski, *supra* note 1.

been widely viewed as unfair to consumers in a variety of contexts,[4] they are particularly unreasonable in a health care setting where personal care needs arise unexpectedly and the focus at admission is on obtaining treatment.[5] It is especially difficult for families in these circumstances to anticipate that their loved ones will be harmed or abused while residing at the nursing facility since nursing home residency agreements are typically presented on a "take-it-or-leave-it basis."[6].

Mandatory arbitration agreements in health care settings that include wrongful death claims raise even more significant concerns due to the considerable disparity of power between the parties and the possibility that gross negligence, which cannot be anticipated by either the patient or the patient's family, may be involved.[7] This issue has been notably controversial and is largely responsible for the tripling of cases challenging mandatory arbitration agreements in nursing home contracts with wrongful death arbitration provisions.[8] With the absence of clear guidance from Congress[9] or further clarification from the courts on their jurisprudence,[10] the use of controversial mandatory arbitration agreements in nursing homes contracts will likely remain a contentious topic in the coming years.

## III. MANDATORY BINDING ARBITRATION IN NURSING HOMES IS FUNDAMENTALLY UNFAIR BECAUSE OF THE IMBALANCE OF BARGAINING POWER

Intrinsically, contracting for placement in a nursing home suggests that the future resident seeking care is generally of progressed age, possibly diminished capacity, and lacking the business acumen to adequately comprehend the rights that are extinguished by the arbitration agreement.[11] Frequently, new nursing residents sign arbitration agreements as a precondition of admission, only to later realize that the contract provisions preclude the use of courts to resolve a wide range of disputes, including abuse,

---

4. *Id.* at 291.
5. *Id.* at 265.
6. *Id.*
7. Suzanne M. Scheller, *Arbitrating Wrongful Death Claims For Nursing Home Patients: What Is Wrong With This Picture and How To Make It "More" Right*, 113 PENN ST. L. REV. 527, 529 (2008).
8. *Id.*
9. CPR Staff, *Arbitration Fairness Act of 2015 (AFA): An Overly Simplistic Approach?* CPR Speaks (Aug. 4, 2017), https://blog.cpradr.org/2015/05/27/arbitration-fairness-act-of-2015-afa-an-overly-simplistic-approach/.
10. There is a split of court opinion regarding mandatary arbitration agreements in nursing home wrongful death actions. For cases upholding arbitration agreements, *See* Miller v. Cotter, 863 N.E. 2d 537, 537 (Mass. 2007); Covenant Health Rehab of Picayune, L.P. v. Brown, 949 So. 2d 196, 196 (Fla. 2007). For cases invalidating arbitration agreements, *See* Texas Cityview Care Ctr., L.P. v. Fryer, 227 S.W. 3d 345, 345 (Tex. App. 2007); Ashburn Health Care Ctr., Inc. v. Poole, 648 S.E.2d 430, 430 (Ga. App. 2007).
11. Kelly Bagby and Samantha Souza, *Ending Unfair Arbitration: Fighting Against The Enforcement of Arbitration Agreements in Long-Term Care Contracts*, 29 J. CONTEMP. HEALTH L. & POLICY, 183, 184 (2013).

assault, malnutrition, neglect, and even death.[12] Considering that the typical nursing home resident is aged eighty-five or older and that many times the admission process occurs in stressful, emergency-type situations, it is difficult to see how mandatory, binding arbitration provisions in nursing home admission agreements are not unconscionable *ab initio*.[13]

Consider, for example, *Small v. HCF of Perrysburg*.[14] In *Small*, Mrs. Small unknowingly signed an admission agreement containing a binding arbitration clause while in the midst of a frantic admissions process.[15] Her husband had arrived at the facility unconscious and had to be immediately transferred to the hospital.[16] Subsequent to his admission to the nursing facility, Mr. Small fell and sustained injuries while being transported while unrestrained in a wheel chair.[17] Mr. Small died nine days later from the injuries he sustained in the fall and Mrs. Small filed a complaint against HCF of Perrysburg days later.[18] Mrs. Small's complaint subsequently led to the discovery of the binding arbitration agreement that she had signed during her husband's emergency admission to the facility.[19] After lengthy court proceedings, Ms. Small was eventually able to obtain legal redress for Mr. Small's injuries and subsequent death after the Sixth District Court of Appeals held the arbitration clause to be unconscionable and the contract void.[20]

While Mrs. Small's situation is a fortunate example of judicial intervention by state courts, there are many families in jurisdictions throughout the United States that would have been unable to obtain such favorable results.[21]Moreover, families that have been required to arbitrate their disputes with a skilled nursing facility have recently begun to see a decrease in restitution amounts and an increase in the number of reported abuses.[22] Nursing homes' average costs to settle complaints have steadily declined while claims of poor treatment have continued to increase.[23] As one court put it:

> [T]he reality is that, for many individuals, their admission to a nursing home is the final step in the road to life. As such, this is an extremely stressful time for elderly persons of diminished health. In most circumstances, it will be difficult to conclude that such an individual has equal

---

12. *Id.*
13. Jana Pavlic, *Reverse Pre-Empting The Federal Arbitration Act: Alleviating Arbitration Crisis in Nursing Homes*, 22 J. L. & HEALTH 375, 383 (2009).
14. *See* Small v. HCF of Perrysburg, 823 N.E. 2d 19, 19 (Ohio Ct. App. 2004).
15. *Id.*
16. *Id.*
17. *Id.* at 21.
18. *See* Palvic, *supra* note 13, at 386.
19. *Id.*
20. *Id.*
21. *Id.* at 387.
22. Nathan Koppel, *Nursing Homes, in Bid to Cut Costs, Prod Patients to Forgo Lawsuits--Big Payouts Fade As Arbitration Rises; Ms. Hight Falls Ill*, WALL ST. J., Apr. 11, 2008, at Al.
23. *See* Bagby, *supra* note 11, at 186.

> bargaining power with a corporation that, through corporate counsel, drafted the form contract at issue.[24]

## IV. BINDING ARBITRATION IN NURSING HOMES IS AGAINST PUBLIC INTEREST

Another principal argument in favor of banning binding arbitration agreements in contracts between residents and nursing homes is that these agreements permit nursing homes, which are largely publicly funded,[25] to deny vulnerable individuals who have been neglected or abused by their caregivers the opportunity to file claims against the nursing home in court.[26] As a result, nursing homes have largely been able to circumvent public policy by attempting to keep instances of substandard care from the public view.[27] It has been widely recognized that government oversight of nursing homes is inadequate[28] and information pertaining to violations of minimum standards of care at Medicaid-funded nursing homes is limited.[29] By providing litigation as an alternative to binding arbitration, nursing homes would be compelled to provide transparent quality care consistent to all nursing home residents.

Arguments in favor of arbitration posit that arbitration is less expensive, more expedient, administered by qualified and neutral decision makers with knowledge of the field subject to dispute, confidential, and less adversarial.[30] Yet these arguments primarily favor health care providers while limiting due process to customers who waive their right to a jury trial and the right to appeal an adverse ruling.[31] Likewise, private arbitration is conducted in a forum closed to the public and produces no formal record of the proceeding.[32] This secrecy inhibits consumers while benefiting health care defendants. It also is detrimental to members of the public, as they will not be able to become informed and empowered consumers.[33]

This lack of information mitigates any opportunity for the public to push for change in public policy, as politicians and government agencies are often moved to act only after public ire has reached a tipping point.

---

24. *See* Lisa Tripp, *A Senior Moment: The Executive Branch Solution to the Problem of Binding Arbitration in Nursing Home Admission Contracts,* 31 CAMPBELL L. REV. 157, 172 (2009), *quoting* Manley v. Personacare, No. 2005-L-174, 2007 WL 210583, at *4 (Ohio Ct. App. Jan. 26, 2007).

25. *See* Sidney D. Watson, *From Almshouses to Nursing Homes and Community Care: Lessons From Medicaid's History*, 26 GA. ST. U. L. REV. 937, 958 (2010).

26. *See* Krasuski, *supra* note 1, at 292.

27. *See* Krasuski, *supra* note 1, at 292–93.

28. *See* U.S. GEN. ACCOUNTING OFFICE, NURSING HOMES: MANY SHORTCOMINGS EXIST IN EFFORTS TO PROTECT RESIDENTS FROM ABUSE (2002), https://www.gao.gov.

29. *See* Krasuski, *supra* note 1, at 301.

30. *See* Krasuski, *supra* note 1, at 292.

31. *Id.*

32. *Id.*

33. Jean R. Sternlight, Panacea or Corporate Tool?: Debunking the Supreme Court's Preference For Binding Arbitration, 74 WASH. U. L. Q. 637, 637 (1996).

While some limited information is available to the public in annual inspection reports and survey data, recent trends in nursing home care have laid bare the need for more checks and balances in the nursing home industry.[34] Skilled nursing facilities, as institutions that accept public funding, ought to be held accountable in public courts for the negligent conduct of their employees and subject to public scrutiny. [35] To allow otherwise is to tacitly endorse egregiously poor care and other significant shortcomings in the nursing home industry.[36]

## V. CONCLUSION

Binding arbitration agreements in skilled nursing facilities have become a standard practice throughout the United States. Admission to a nursing home is often unexpected, stressful, and overwhelming. Frequently, the person signing the admission paperwork is either unaware of the arbitration agreement or has little opportunity to carefully examine its contents. It is unfair to bind residents and their families to agreements that they inadvertently enter at admission, as there is often a significant imbalance of bargaining power between the two parties. Binding arbitration agreements in nursing homes are also against public policy because they allow nursing homes and their corporate owners to obscure instances of egregiously substandard care from view of the public. Binding arbitration agreements that include wrongful death provisions are especially troublesome and have led to a recent surge in lawsuits challenging binding arbitration agreements in nursing home admissions contracts. As future challenges to binding arbitration provisions in nursing home admissions contracts become more commonplace, it is likely that binding arbitration will be severely curtailed or altogether prohibited in long-term residential nursing homes.

*Rudy Schmidt*[*]

34. *See* Krasuski, *supra* note 1, at 302.
35. *Id.*
36. *Id.*

* Rudy Schmidt is an Associate Staff Editor on the *Denver Law Review* and a May 2018 J.D. Candidate at the University of Denver Sturm College of Law.