Dealing with Arbitration Agreements in Nursing Home Negligence Cases

By Anna Holland Edwards, Esq.

Arbitration in the nursing home context has many downsides for plaintiffs. Arbitration can be extremely expensive for the families of people killed by neglect, often takes away rights to meaningful discovery, deprives them of a jury trial and can be very difficult to meaningfully appeal.[1]

Such procedures can also greatly inhibit full investigation of your case. In a lawsuit, the family of a person neglected or abused has rights to discover information from the facility. Arbitration often takes away or severely limits many of these rights.

Worse, many arbitrations do not even allow the family to access the critical case evidence, and facilities, which are in sole control of that evidence, can much more easily hide what happened.

Many purported agreements also attempt to bind unsuspecting heirs (such as the children or spouse of a resident), although some just are aimed at the resident, and do not make mention of successors or non-resident claims arising out the resident's stay by anyone else, e.g., wrongful death claims. In agreements that are aimed at binding the heirs and survivors, your clients may face serious arguments from the facilities that such agreements bind the children in a wrongful death case even though they did not sign it or know it was signed.

Where arbitration is required, it hides both scandalous care and devastating negligence cases behind closed doors.

The first questions you should ask a potential client in a nursing home or assisted living facility negligence case on intake are 1) whether they or anyone else on their behalf signed an arbitration agreement and 2) when did the facility in question admit the patient?

Their rights to a jury trial could depend on quick action recommended by you, even before they engage you. Advise potential clients with any shot at doing so to rescind arbitration agreements in writing as quickly as possible.

The enforceability of an arbitration agreement in the elder care context depends on several different areas of law. Early identification of these issues can save both rights to discovery and to a jury trial.

A lawyer practicing in this area should therefore be familiar with the Colorado Health Care Availability Act Arbitration provisions, the Federal Arbitration Act (FAA), related case law and the common law of contracts.

Admission to a nursing home almost is invariably a very stressful time for both the patient and the family.

Commonly, a hospital is actively planning to discharge a patient and the family is left to quickly find a facility that will accept their loved one. This creates a situation where family members are upset and scared that they can't take care of the resident at home and need urgently for them to be admitted.

Frequently, a hospital discharge planner recommends the particular facility as a location that will accept the resident and will accept whatever form of payment the resident has to offer.

Usually, the first time the resident or family member sees the admission agreements is after the resident arrives, is just settling in and has had a stressful ambulance or other ride from the hospital. It is not a situation where people feel they can just walk out the door if they do not like the agreements offered. They are under duress.

The admission packets typically contain the arbitration agreements, rather than having the arbitration agreements given in isolation. Surprisingly, admission staff often expressly tell patients or their representatives that they must sign everything as an explicit or implicit condition for admission. It has been our experience many times that family members do not even know they have signed an arbitration agreement because it was part of a packet completed during the flurry of admissions paperwork in a sign here, sign there, sign here type of mantric experience.

The Colorado Health Care Availability Act has several patient protection provisions with respect to arbitration. In order for an Arbitration Agreement to be valid in the context of a Health Facility as defined under the HCAA, it must be voluntary and cannot be a condition of admission to the facility.[2]

Even if the facility does not present an agreement as a condition to admission, it must still comply with the conditions set forth in the HCAA. These conditions include that the signer must be provided with a copy, the font must be a certain size, and specific warning paragraphs about the meaning and legal significance of these agreements including the right to change your mind, as laid out in C.R.S. 13-64-403(4), must be included above the signature line.

Under the HCAA, the parties must be able to rescind arbitration agreements by written notice for 90 days after they sign and they cannot prohibit exemplary damages.[3]

If a potential client contacts your office and has signed an arbitration agreement - or does not know if he or she has signed an arbitration agreement - and the admission was within the last 90 days, you should send an immediate rescission letter. Unless a client has proof that they rejected the arbitration agreement, it is often advisable to send a rescission if the admission was fewer than 90 days ago - just to be sure. Of course, once you send a rescission, the facility knows that your client is contemplating legal action and so, if possible, it is best to get the records in hand first.

Our usual practice is to send, or have a family send, a rescission letter by fax, mail and email with proof of all three methods. We send it to the administrator by all these means, and, if we know who it is, we may additionally send it to the company's lawyer. A rescission letter should state the date that the facility admitted the patient, that the patient or his or her representative signed an agreement (or that the potential clients do not know if one was signed) and that the patient rescinds it pursuant to the HCAA and the terms of the agreement itself.

Nursing homes still desperately fear the courthouse and thus their counsel have become increasingly aggressive in their efforts seeking to enforce these agreements. On occasion, they will contest rescissions depending on who signed them. If possible, it is best to rescind while the patient is living and to have the patient as well as others sign the letters.

The letter and subsequent legal challenge through affirmative declaratory judgment actions or in response to facility motions to compel arbitration should include any problems with the formation of the agreement beyond the HCAA statutory problems, such as fraud, duress, lack of capacity, and procedural or substantive unconscionability. Be clear that it is rescinded on behalf of the patient, if living, and on behalf of all heirs. The patient (if living), any Power of Attorney (as POAs and on their own behalf) and any other available heirs should sign it. A sample of a recission letter is below.

Date

Administrator

Facility

Address

By Fax, Regular Mail and Email to_____

Dear Administrator,

As you know, my mother was admitted to your facility on August 2, 2013. During her admission, which was a very stressful and emotional time, staff handed me a stack of papers and told me that I had to sign them as her Power of Attorney. I did not have time to read them and no one told me what they were. Your staff told me that I had to sign them in order for you to admit my mother. The hospital had discharged my mother, and I do not have the skill level to care for her myself; I had nowhere else to take her.

Your staff did not give me a copy of these agreements at the time, but I have since received them and see that an arbitration agreement was included. I did not know this was in there and did not intend to enter into an arbitration agreement.

I understand that I have 90 days in which to rescind this agreement. I hereby rescind this agreement. I rescind it on behalf of my mother, myself and all of my mother's heirs.

Please be on notice that this agreement is null and void.

Sincerely,

All involved signatures, including if possible the POA, the mother and any available heirs.

Colorado Law and the Federal Arbitration Act

Generally, the Federal Arbitration Act applies to arbitration agreements and broadly encourages their use. Courts sometimes strike down state statues that regulate arbitration agreements because they are inconsistent with or preempted by the FAA.

In Colorado, however, the Health Care Availability Act has been held by the Colorado Supreme Court to be a law regulating insurance that reverse preempts the Federal Arbitration Act under the McCarran Ferguson Act, 15 U.S.C. §§1012(b), and the arbitration patient protections have been upheld.[4]

The courts have continuously applied the HCAA arbitration act to arbitration agreements in the nursing home context.

In two cases we handled, the courts have accepted, in light of *Allen v. Pacheco*, that the HCAA applies to non-insurance related defendants.

For example, the Colorado Supreme Court, in holding that Powers of Attorney may sign nursing home arbitration agreements, also remanded the matter to the trial court for factual findings on the question of whether there was undue pressure and duress and illegal conditioning of admission on execution of the arbitration agreement, contrary to the HCAA.[5]

In is important to be aware that the United State Supreme Court has recently struck down a state's regulation of arbitration agreements in the nursing home context as violative of the FAA. In 2012, the Court held that a West Virginia statute that sought to prohibit nursing home contracts from containing arbitration provisions violated the FAA. The West Virginia Supreme Court had held that the FAA disallowed such arbitration agreements in wrongful death or personal injury cases and upheld the state statute. The U.S. Supreme Court reversed, holding that state laws that categorically prohibit arbitration of a particular type of claim violate the FAA.[6]

The West Virginia court did not hold the statute in question held to be a law regulating insurance in reverse preemption of the FAA. While it appears to be well settled in Colorado that the FAA does not invalidate the HCAA, litigators should be sure to include their objections to arbitration agreements under the FAA as well. Colorado's approach to date has not been to prohibit arbitration altogether but simply to impose certain restrictions on overreaching agreements. The state affords residents some rights with respect to such agreements, including the right to be protected from not being admitted for refusing to sign them and to rescind within prescribed times.

Common law unconscionability and contract formation concepts are also grafted into the FAA. Thus, the FAA states that arbitration agreements shall be enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."[7]

In attacking the validity of any arbitration agreement in a health services context, make clear all the grounds for such objection under the HCAA, but preserve all contract formation common law objections as well.

Where it is still timely to rescind, mention these grounds in the rescission letter.

Relevant factors in evaluating the unconscionability of an arbitration agreement in Colorado include standardized agreements between parties of unequal bargaining strength, lack of opportunity to read the document, substantive and procedural unfairness in the terms, relationship of the parties, and the circumstances surrounding the formation of the contract.[8]

If it is too late to rescind, you should still conduct a full interview on the topic so that you can contest the validity of the arbitration agreement where warranted.

We will often send a letter regarding the unconscionability of the agreement even where it is past the 90 days to put the facility on notice that we are going to contest the arbitration agreement, but you can also do this in the lawsuit.

The validity of an arbitration agreement is a question for the trial court.[9]

If we have rescinded an arbitration agreement, we plead that fact in the complaint.

If there was not time to rescind, but there are grounds for invalidating the agreement based on common law contract formation grounds, we often file a complaint and include a request for declaratory judgment that an arbitration agreement is invalid. The court shall then "proceed summarily to decide" whether there is an enforceable agreement to arbitrate.[10] The court should be asked to review evidence and hold an evidentiary hearing if necessary.[11]

The presumption in favor of arbitrability drops out when the parties dispute the existence of a valid arbitration agreement.[12]

Other issues to look for in contesting arbitration agreement

Readmission?

Arguably, a facility needs to obtain a new arbitration agreement for each admission. When a patient goes to the hospital for more than an outpatient visit, often the nursing home actually

discharges them. They are not guaranteed the same room when they get back nor are there other indicators that it was intended that they be treated as continuously admitted. If there is an old arbitration agreement, but there has also been an intermediate hospital stay, another avenue for argument is that this constitutes a new admission and thus there was no arbitration agreement relative to the admission in question.

Who Signed?

In the zeal to get arbitration agreements signed, facilities often have whoever is present and standing sign all the documents - sometimes even obtaining signatures from patients admitted with severe dementia. Be sure to watch out for signatures by patients who totally lacked the capacity to contract or by family members when the patient had capacity and had not granted such powers to their family.

As often as not, even family members who sign for patients in the elder care context totally lack legal authority to contract away legal rights. The Colorado Supreme Court has not fully settled the issue, but at least one appellate court has held that "'medical treatment' in the context of a health care proxy is to be narrowly construed and does not include the authority to sign an arbitration agreement on behalf of an incapacitated patient."[13]

Some facilities even present family members with medical powers of attorney papers at the time of admission and then have them sign arbitration agreements. Watch for such procedures as elements of duress, unconscionability and sharp practices contesting the validity of the agreements.

Also, be sure to obtain copies of the instruments by which family members (or facilities) believed the family member had the authority to sign on behalf of a resident. Many legal powers of attorney specifically exclude the right to bring claims or submit to arbitration, others are limited in scope and render such agreements invalid. Often family members believe they have a general legal power of attorney when they actually have a medical proxy decision-making power.

Who is the Arbiter?

Arbitration agreements will often name the arbiter who is to handle the matter. Because the American Arbitration Association generally refuses to arbitrate in cases against health care facilities, and because the National Arbitration Forum has agreed not to handle medical claims as part of a settlement with the State of Minnesota relating to claims of extreme facility/business bias, arbitration agreements listing these arbiters may also be attacked on these grounds. Courts may appoint another arbiter when the arbiter selected is not willing to handle the case, but where the court can find the identity of the arbiter to be integral to the agreement, courts can invalidate the agreement.[14]

Similarly, where the arbiter is one-sided, like the American Health Lawyers Association, or in the exclusive choice of the facility, such facts may be held to support arguments of unconscionability.

Who is Bound?

While case law is relatively clear that a signature of a patient can bind heirs to arbitration in a wrongful death case even where the heirs did not themselves sign, be sure to review the arbitration agreement to see who specifically is bound.

In *Allen v. Pacheco*, the arbitration clause specifically included claims for "death" asserted by a Kaiser "members heir or personal representative." The Colorado Supreme Court determined that a non-party spouse's claim for wrongful death may or may not fall within the scope of the agreement depending on what the parties intended. Thus, you may be able to limit the reach and application of arbitration agreements to non-parties where there was no clear intent for them to be bound by the parties to the agreement. It is not uncommon for nursing home agreements to speak about claims by the resident only, and not ever mention "death" or "wrongful death" claims or have any clause mentioning or discussing such claims. You should look at this question of the scope of the agreements in each case and argue that, absent a meeting of the minds regarding application of the agreement to heirs in wrongful death, there can be no order compelling arbitration of claims by a nonparty to an agreement who was not intended to be bound by it.

Proposed legislation.

For the past few Congressional sessions, there have been efforts to introduce legislation to amend the FAA. Senator Al Franken introduced the Arbitration Fairness Act of 2013, S. 878, in May of this year, and it is in the Senate Judiciary Committee. If passed, this law would amend the FAA to make it clear that pre-dispute arbitration agreements are unenforceable in the consumer and services contexts. While previous bills in the past have failed, this is something to keep an eye on in the nursing home arbitration context.

Assisted Living Facilities.

Assisted living facilities will argue that the HCAA does not apply to them because they are not health care facilities as defined at 13-64-202. Of course, this also means assisted living facilities

may not avail themselves of the caps on recovery contained in the HCAA for health care facilities. While the mandatory rescission rights and other HCAA statutory protections may not be available in contesting an arbitration agreement in this context, you should evaluate the same duress, unconscionability and formation problems discussed above and present them to the court. ▲▲▲

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Endnotes:

[1] The author thanks Bailey Woods for her research assistance with this article. Woods is a third year law student at the University of Denver Sturm College of Law who interned with CTLA in the Summer of 2013.

[2] C.R.S. § 13-64-403(1).

[3] C.R.S. § 13-64-403(1.5) and (3).

[4] *See Allen v. Pacheco*, 71 P.3d 375, 383-384 (Colo. 2003) (C.R.S. § 13-64-403 qualifies as a statute enacted for the purpose of regulating the business of insurance even though it also applies to "non-insurer 'health care providers'" also).

[5] *Moffett v. Life Care Ctrs. of Am.*, 219 P.3d 1068 (Colo. 2009), *See also*, *Lujan v. Life Care Ctrs. of Am.*, 222 P.3d 970 (Colo. App. 2009) (evaluating HCAA arbitration provision and holding that a health care proxy holder could not sign an arbitration agreement for a resident upon admission to a nursing home in Colorado.

[6] *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012).

[7] 9 U.S.C.A. § 2.

[8] *See e.g., Davis v. M.L.G. Corp.,* 712 P.2d 985, 991 (Colo. 1986).

[9] C.R.S. § 13-22-206(2). See also, 9 U.S.C.A. § 3, *Prima Paint Corp. v. Flood & Conklin Mfg. Co*., 87 S. Ct. 1801 (1967).

[10] *See* C.R.S. § 13-22-207.

[11] *See J.A. Walker v. Cambria*, 159 P. 3d 126 (Colo. 2007).

[12] *Lujan*, 222 P.3d at 977, *citing Dumais v. Am. Golf Corp.,* 299 F.3d 1216, 1220 (10th Cir. 2002).

[13] *Lujan*, 222 P. 3d at 974.

[14] *See Ranzy v. Tijerina*, 393 F. App'x 174 (5th Cir. 2010), *Brown v. ITT Consumer Fin. Corp.,* 211 F.3d 1217 (11th Cir. 2000).