Overview

Presentation is composed of two parts:

- (1) Practical Issues in Health Law
  - New data about predispute binding arbitration agreements in nursing home admission contracts
  - New legislation related to this issue
  - Discuss some N.C. case law.
- (2) Policy discussion/opposition to these agreements
  - Bad for nursing home residents
  - Bad for society / taxpayers

No Bargaining Power - No Real Choice - Patricia Manley

- 66 years old
- Assaulted just before hospitalized; still frightened from assault.
- Numerous physical ailments; bouts of confusion, mild cognitive impairment.
- Couldn't remember month or year she retired.
- Was transferred directly from hospital to nursing home.
- She was alone at time of transfer; agreement not explained to her.
- Couldn't sign her name on any line of the admission agreement including the binding arbitration agreement.
- Ohio court found procedural unconscionability; but not substantively unconscionable so arbitration compelled.
- NC has the same test for unconscionability.
Overview

- Historically Healthcare Providers Did Not Require Elderly/Informed to Sign Predispute Binding Arbitration Agreements
- AAA/AHLA "Officially" Opposed to
- According to a AAA representative, "Nothing is more emotional or personal or devastating than a health care problem. If you buy a lemon car, it's not life or death. It's not a medical problem. That's what puts this on a higher playing field.
- Take this with a grain of salt.

Overview

- BAAs in nursing home admission contracts were virtually unheard of 10 years ago.
- Now approximately 44% of nursing homes in NC include predispute binding arbitration clauses in their admissions packets.
- Proliferation due in part to the Supreme Court's expansive interpretation of the Federal Arbitration Act of 1925.

The Federal Arbitration Act of 1925

- The Federal Arbitration Act provides that a "written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.
N.C. courts will uphold these agreements

- N.C. has a "strong public policy favoring arbitration."
- Only Nursing Home/ALF case located was Raper v. Oliver House LLC, 637 S.E.2d 551 (N.C. App. 2006).
- Court conducted a traditional contracts analysis and upheld the agreement despite the inequity in bargaining power; the uniqueness of this type of consumer transaction and that this was an adhesion contract that required the losing party to pay the other party's attorneys fees.

General litigation considerations for plaintiff and defense counsel

- Courts uphold these agreements regularly.
- The best argument for plaintiffs are usually agency-related arguments:
  - Person signing did not have power of attorney;
  - Resident was competent but someone signed on her behalf;
  - Ostensible agency arguments often fail.
- For defense counsel a conservative approach is best.

Fairness in Nursing Home Arbitration Act of 2008

- Amend FAA to prohibit predispute binding arbitration clauses in nursing home admission contracts.
- Sen. Mel Martinez (FL-R) is the lead sponsor.
- Democratic President and majorities in Senate and House of Representatives suggest passage is promising.
- Almost certain to be reintroduced.
- Only successful amendment to FAA was on behalf of automobile dealers.
Predispute binding arbitration agreements are bad for residents

- Most nursing homes in N.C. preserve their access to court to collect fees.
- Arbitrators can make final, virtually unreviewable, decisions in nursing home cases and never have to explain the basis for their decision in writing.
- May Require Arbitration at the Facility
- Limit Discovery
- Loser Pays Attorneys' Fees
- Caps on Damages; No Punitive Damages

Arbitration is more costly for residents

- Filing fees for courts: $150 - $300
- Substantial arbitration fees for Med Mal cases
  - Filing fees as much as $2,000
  - Case manager fees: $750
  - Arbitrators fees: $4,000 - $7,000
  - Sometimes separate fees for written findings

Medical Malpractice Awards: Arbitration versus Litigation

<table>
<thead>
<tr>
<th>System</th>
<th>Mean Award</th>
<th>Median Award</th>
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<tr>
<td>Kaiser Arbitration 37</td>
<td>$272,971</td>
<td>$102,740</td>
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<tr>
<td>Jury Verdict Research Database 28</td>
<td>$2,173,637</td>
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<td>Bureau of Justice Statistics Database (1992) 29</td>
<td>$857,000</td>
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<td>Bureau of Justice Statistics Database (1996) 36</td>
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Comparison of hypothetical arbitration award and jury award

- Assuming Median Award of $102,740
- Contingency Fee (33%) $33,904
- Expert Witness Fees $10,000
- ½ half arbitration fees $5,000
- Recovery in Arbitration: $52,836
- Recovery in Public Courts: $190,620

($286K - 33% & $10K witness fees)

Staff cuts as a response to limited liability

- Limiting liability can lead to staff cuts.
- Sept. 2007 N.Y. Times reported the private equity firms bought several large nursing home chains in Florida, structured the ownership and management over as many as 15 corporations for a single nursing home so as to keep the assets judgment-proof - then they cut staff and other resources dramatically at a majority of the facilities - quality of care declined sharply. One suit claims 15 deaths occurred in 3 years from negligent care. One death occurred because a large pressure sore became contaminated with feces - that facility was described as a "Hellhole."


Keeping these disputes in the public domain is in the public’s interest

- Arbitration is a private, confidential process, so the company can avoid bad press concerning a damaging result.
- Lawsuits are filed in public - they keep the community aware of what is happening at the local nursing home.

http://www.wwayv63.com/node/5151southport
- New Bush Admin Rule - Can’t get survey records without permission from CMS.

Other public interest concerns

If private suits are required to be arbitrated, there is virtually no public forum in which nursing home cases will be litigated. This is because federal hearings resulting from long term care enforcement action are not open to the public. It seems fundamentally inconsistent with democratic values to have litigation about care that is publicly funded be held in secret.

My proposal: CMS should prohibit these agreements

- CMS has ample authority under OBRA '87 to prohibit these agreements. The statute authorizes the Secretary to impose and requires nursing homes to adhere by, "any requirements relating to the health, safety, and well-being of residents or relating to the physical facilities thereof as the Secretary may find necessary. The statute also gives the Secretary virtually unfettered discretion to establish any other right for nursing home residents that the Secretary chooses.

- 89.6% of nursing homes in the U.S. are certified to participate in the Medicare / Medicaid programs.