

ADVOCACY ISSUES
FOR INJURED DISABLED ADULTS

- I. Contract Issues – Waiver of Liability
 - A. Waiver of Liability
 - 1. Waiver of liability is permissible under Illinois law unless
 - i. Fraud
 - ii. Conduct causing the injury is Willful and Wanton
 - 2. General Exceptions
 - i. The bargaining position of the parties reflects a substantial disparity.
 - ii. Enforcement violates public policy
 - iii. The social relationship between the parties militates against upholding the waiver
 - B. Defenses to its Enforcement (Contract Defenses)
 - 1. Failure to Read before signing
 - i. Not a defense if had an opportunity to become familiar with and comprehend the terms of the document.
 - ii. If deprived of the opportunity to become familiar with and comprehend the terms of the document, then this is a valid defense.
 - 2. Lack of Capacity of Ward to Consent
 - i. Valid defense
 - 3. Lack of Authority by Signatory on behalf of Ward
 - i. Who signed the waiver?
 - a. Family
 - 1. What authority did they have to bind the Ward?
 - b. Agent pursuant to power of attorney
 - 1. Do they have the authority to do so under?
 - c. Court appointed lay person as guardian
 - 1. Does the court's order grant the authority?
 - d. Court appointed representative of the Department
 - 1. Does the court's order grant the authority?
 - 4. Authentication
 - i. Burden on the facility to prove the document is authentic:
 - a. Who was present;
 - b. Familiar with the handwriting;
 - c. Personally acquainted with a party signing the document;
 - d. Personal knowledge about the facts and circumstances regarding the signing of the document.
 - 5. What were the representations made at the time of signing by the person presenting the waiver?
 - i. Examples:

- a. The person presenting the document is dismissive about it's importance: "They just ask me to have people sign it. As far as I know, it's just something they want in the file, but no one pays any attention to it."
 - b. They are provocative:
 - 1. "If you don't sign it, then John Doe cannot participate in _____ (the activity)."
A. This may be enforceable.
 - 2. "If you don't sign it, then John Doe cannot be admitted to the nursing home / ICF-DD facility."
A. This is NOT enforceable, as it is a violation of federal law for nursing homes and ICF-DD facilities that participate in Medicare and Medicaid, as one cannot add conditions to admission that are in excess of those permitted by federal law.
 - c. The admissions person tries to be helpful, but they are unable to answer some or all of the questions because they do not understand all or parts of the document.
6. What were the circumstances when the document was presented?
- i. Emergency admission
 - a. Duress and stress of needing to make an unplanned admission is a consideration.
 - ii. Staff unfamiliar with the waiver and cannot explain
 - iii. Given the opportunity to review and sign it later.
 - iv. Given the opportunity to revoke it within a reasonable time period, such as 30 days.
7. Liability release clauses are strongly disfavored.
- i. The clauses are strictly construed against the party seeking to rely on them.
 - ii. Does the waiver actually apply to the issue at hand?
 - a. The analysis is whether the waiver pertains to a danger associated with the ordinary risks associated with activity or usage addressed by the waiver.
 - 1. Exculpatory clauses are construed against the party it benefits, so broad clauses excluding virtually everything are limited to the context of foreseeable dangers
 - b. Examples:
 - 1. Waiver to reside at a residence.
 - A. It is contemplated that there may be hazards regarding residents physically acting out towards one another. Thus, an injury caused by one

resident hitting another, when there is reasonable supervision, is likely not actionable.

B. It is not contemplated that the facility would fail to do background checks and fail to screen sexual offenders from positions that entail resident contact.

C. It is not contemplated that the facility would fail to prevent residents from gaining access to obvious hazardous objects (e.g., cutlery knives in the kitchen;) and an injury caused by a resident injury another with such a hazard object.

2. Waiver to participate in an outing to a restaurant.

A. It is contemplated that the disabled adult may fall or trip in unfamiliar surroundings.

B. It is not contemplated that the chaperone would leave the disabled adult behind, during which time the disabled adult fell while looking for the group.

8. Options for a representative of the Department

i. Refuse to sign

a. Risks: Your ward is refused the service

b. Benefits: It is *possible* that services may be provided without signing the waiver

ii. Ask that they clarify the meaning before signing

a. Risk: Your ward is refused the service

b. Benefits: They can't answer your questions as to the scope of its applications, potentially opening the door to avoiding its application due to lack of informed consent

iii. Amend by striking or addition

a. Risk: Your ward is refused the service

b. Benefits: You've struck or modified the offending provision.

II. Contract Issues – Arbitration Clauses / Agreements

A. Arbitration clauses are very common, especially residential agreements. They are either a clause in residential contract or a separate agreement.

B. Federal Arbitration Act

1. It governs all contracts having an arbitration provision under the Supremacy Clause of the U.S. Constitution.

2. Arbitration is favored

3. Regular contract defenses apply

4. State statutes and state constitutional rights to a jury trial do not prohibit the enforcement of valid arbitration clauses.

i. Example:

- a. The Illinois Nursing Home Care Act states that the resident has a right to a jury trial. A *valid* arbitration clause overrides that right.
 - ii. The Illinois State Constitution provides for the right to a jury trial in civil cases. A *valid* arbitration clause overrides that right.
- C. Why is Arbitration Bad?
 - 1. The common complaint with arbitration is that the arbitrators “go native,” meaning the arbitration entity wants the business of the nursing homes and, thus, they tend to overwhelmingly rule in the favor of the nursing homes. In 2009 the Minnesota Attorney General reached a settlement agreement with the National Arbitration Forum (“NAF”) to no longer handle consumer arbitrations within days of filing a class action based on allegations of business practices that were biased towards consumer. NAF subsequently amended its arbitration agreement to exclude pre-event arbitrations involving personal injury.
 - 2. It can be prohibitively expensive, as there is commonly a panel of three attorneys serving as arbitrators, each charging an hourly rate at the rate reserved for appearing in court.
- D. Defenses
 - 1. Lack of consideration
 - i. The arbitration clauses cannot be a condition of admission to a nursing home or ICF-DD participating in Medicare or Medicaid. Therefore, there is no consideration supporting the resident’s agreement to mediate.
 - ii. The admissions contract states that it is the entire contract and the entity tenders to the resident a separate arbitration clause, which would lack any consideration.
 - 2. Fraud
 - 3. Duress
 - 4. Lack of Capacity
 - 5. Lack of Authentication
 - 6. Failure to Explain
 - i. Often times the person presenting the contract with the arbitration clause or the separate arbitration agreement has no understanding of what is being presented and cannot answer basic questions
 - a. What is arbitration? How does it differ from a jury trial?
 - b. What are the limits on discovery?
 - 1. Often times a party is limited to 2 or 3 discovery depositions? The burden is on the plaintiff and they

commonly cannot meet their burden with so little opportunity to investigate the case

- c. How soon must the case proceed to arbitration?
 - 1. Many arbitration agreements require the arbitration proceedings be held within a short time (e.g., 6 months) dating from the request for arbitration. This is a major disadvantage for the plaintiff, who has to retain expert witnesses to review the file and render opinions.
 - d. What does it cost?
 - 1. Every time a party wants the arbitrator to rule on a motion or attend a phone conference, an additional cost is incurred.
 - e. How does it differ from a jury trial?
 - 1. Jury of peers versus a single arbitrator or a panel of arbitrators
 - f. Are the result public?
 - 1. Arbitration awards rarely public and have any public scrutiny as a consequence.
 - g. How do the monetary awards compare between arbitration and a jury trial?
 - h. What are the rights to appeal?
 - 1. Arbitration commonly does not have the right to appeal.
7. Unconscionable
- i. Why would anyone in their right mind sign an agreement giving away their right to a jury trial *before* the event occurred?
 - a. Given a bath in scalding water that causes third degree burns.
 - b. Failure to use a wander guard and the person is killed when they elope and are hit by a car.
 - c. Faulty bedrails that result in a permanent brain injury.
 - ii. Why would anyone in their right mind sign an agreement that gave away their rights to attorney's fees under the Nursing Home Care Act in the event their civil claim against the nursing home is successful?
 - iii. The operating entity does not have to arbitrate if they claim they are owed money, but the resident has to arbitrate when the resident claims they are injured through the fault of the nursing home / ICF-DD.
 - iv. The contract or arbitration clause is commonly intermingled with other admission documents, which are presented by someone who could not explain the terms or answer

- questions, such that the agreement is passed off as “standard stuff” when it is, in fact, a substantial loss of rights *before* the fact.
- v. Admissions to facilities are commonly at a time of high stress for the resident, the family, and agent/guardian.
 - vi. The arbitration entity has established arbitration rules in conjunction with the corporate entity that operates the facility.
 - vii. Civil discovery is limited in the course of the arbitration proceeding, thereby limiting the injured party’s ability to develop facts to support their claim.
 - viii. Plaintiff was not offered the procedural rules for arbitration at the time of signing the agreement and the procedural rules are onerous (arbitration out of state, for example).
 - ix. Arbitration has to be performed in such a short time period that it would be impossible for Plaintiff to develop the necessary proof of their claim.
 - x. The time for commencing arbitration is shorter than the statute of limitations for filing the claim in court.
 - xi. The arbitration proceedings are held in a geographic region that is prohibitively expensive or physically impossible for plaintiff to attend.
8. Only binds the actual parties to the agreement.
 - i. It is highly common for arbitration agreements to only be signed by the nursing home when the management company and other related operating entities of the nursing home have not signed the agreement. The latter should not benefit from an arbitration clause that they have not signed.
 - ii. On rare occasions, the nursing home has failed to sign the agreement, thereby precluding the formulation of a contractual agreement.
 9. Violation of Public Policy
 - i. Limitations of remedies provisions authorized by the legislature (attorney’s fees);
 - ii. Unequal remedies
 - a. Again, the nursing home can go to court and collect 100% of its unpaid bill, but an injured resident has to go to arbitration and receive less than the full value of their claim.
 - iii. Cost shifting (more expensive to pursue arbitration than to go to court and the nursing home never has claims that are subject to arbitration)
 10. Lack of mutuality

- i. It is common for arbitration clauses to require a threshold Nursing home's claim against a resident is going to be rather minor, usually an unpaid bill. Common arbitration clauses provide that arbitration is required only if the amount in dispute is over \$10,000. The likelihood of a nursing home pursuing a claim against the resident for a sum in excess of \$10,000 is remote; however, an injured nursing home resident is likely to have a claim far in excess of \$10,000. Thus, only residents have to proceed to arbitration for their claims, while the nursing home faces no such constraint.

11. Impossibility of Performance

- i. The entity identified in the arbitration agreement to conduct the arbitration is no longer operating. This is often held to be an integral part of the agreement and rendering it impossible to perform.
- ii. The arbitration agreement specifies that particular entity's arbitration rules are to be used, the arbitration entity no longer conducts pre-dispute arbitrations, and its rules state it is the sole entity authorized to interpret those rules, courts have held the arbitration agreement is impossible to perform, as the designation of a particular set of rules is an integral part of the arbitration agreement.

III. Types of Injury Claims

- A. Auto Accidents
- B. Failure to secure when being transported
- C. Falls
- D. Burns
- E. Pressure Ulcers
- F. Sexual Assaults
- G. Choking
- H. Bowel Obstruction
- I. Dehydration
- J. Malnutrition
- K. Tube Feeding Errors
- L. Medication Errors
- M. Elopement
- N. Faulty Equipment
- O. Bedrail Injuries
- P. Physical Restraints
- Q. Chemical Restraints
- R. Qui Tam

IV. Steps to Take When a Disabled Adult Is Injured

- A. Notify the agency charged with oversight of the facility
 - 1. Nursing Homes:

i. Illinois Department of Public Health
(800) 252-4343

ii. Illinois State Police Medicaid Fraud Control Unit 801 South Seventh Street, Suite A Suite F Springfield, IL 62703 (217) 785-3322	Illinois State Police Medicaid Fraud Control Unit 8151 W. 183 rd Street, Tinley Park, IL 60477 (708) 633-5500
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Illinois State Police
Medicaid Fraud Control Unit
1100 Eastport Plaza Dr.
Collinsville, IL 62234
(618) 346-3434

2. Assisted Living:
 - i. Same as above
3. ICF-DD
 - i. Same as above
4. CILA Homes
 - i. Office of Inspector General (DHS): (800) 368-1463

B. Contact the police when appropriate

1. Assaults
2. Elopement
3. Injuries of unknown origin – Nursing Homes are required to do so under the provisions of the Affordable Care Act.

C. Photos

1. Injuries
2. Scene
3. Equipment

D. Identify witnesses

1. Names
2. Addresses
3. Phone numbers

E. An attorney is likely to be needed where there is a serious injury.

V. Post Injury Issues

A. Medicaid

1. Injury proceeds can effect ongoing eligibility
 - i. Nursing Home Care Act protects the proceeds from claims by Public Aid.
 - a. This includes not counting the net proceeds towards future eligibility.
2. Special Needs Trusts
3. No claim against proceeds for wrongful death.

- B. Medicare
 - 1. Medicare must be reimbursed
 - 2. No claim against unrelated bills
 - 3. No claim against proceeds for wrongful death.
- C. Relocation of Resident