Protecting the Right to a Trial by Jury in Nursing Home Cases: An Update on Guidance from the Centers for Medicare and Medicaid

TOM WAGSTAFF, JR.

Tom is the founding member of Law Office of Tom Wagstaff, Jr. He litigates nursing home neglect cases, personal injury cases, motor vehicle accident cases, and wrongful death cases, primarily in Kansas, Missouri, and Arkansas. He is a member of the KTLA Board of Governors. He serves on numerous committees for KTLA and is currently the section editor on Nursing Home and Elder Abuse for the KTLA Journal. He is a KTLA Benefactor Eagle.

On Aug. 12, 2021, Barbara Doyle, at the age of 74, was admitted to a long-term care facility for a brief, respite stay, as her husband of 52 years, Jack Doyle, was hoping to go visit their grandchildren in Ohio to attend their first communion services. Barbara suffered from Alzheimer's and memory loss for nearly 12 years. On more than one occasion, she wandered away from their home, only to later be found safe and unharmed. Barbara's cognitive deficits prevented her from making the trip with Jack to Ohio, and it gave Jack a needed break from serving as Barbara's primary care giver. Jack was also hoping to use this experience as a "test run" to see if Barbara liked her time at the facility, possibly to explore the idea of a long-term stay. The administrator for the facility conducted a pre-admission screening with Jack and Barbara before her admission on Aug. 12, whereby he learned the foregoing history.

Notwithstanding, the facility chose to admit Barbara to a non-memory care room, meaning to the portion of the facility that was not a locked, secured unit. Approximately three hours after being admitted, Barbara was left alone in her room with cleaning supplies. Also, Barbara had still not yet been introduced to the staff members who were responsible for her while she was a resident that day at the facility. Barbara proceeded to leave her room with no supervision and walked by herself to a different unit at the back of the building. Barbara then opened an unlocked door of the facility and continued to exit the building. The door alarm sounded. A facility staff member watched Barbara exit the building through the door as the alarm sounded. This same staff member did nothing to re-direct Barbara, but instead allowed her to leave, then locked the door preventing re-entry, turned off the door alarm and went back to her job responsibilities with other residents. Barbara was never seen alive again. After significant search and rescue efforts by law enforcement, community volunteers, family and friends, Barbara's body was found in the woods not far from the facility on Aug. 25, 2021, with her cause of death being environmental heat stress.

My office was contacted shortly after Barbara eloped from the facility on Aug. 12 but before her remains were found on Aug. 25. Luckily when we initially spoke with Jack, upon us questioning him, he told us that he still had the admission paperwork, and he was able to send it to us for review that same day. What we learned from our review of the admission paperwork was that it consisted of approximately 64 pages with a one-page arbitration agreement in small type being stuck in the middle of the stack, which Jack had signed on July 27 when he had gone to the facility to sign all the paperwork for Barbara's admission. It was apparent to us that Jack had unknowingly and involuntarily signed this agreement to arbitrate with the facility. We told Jack what he had done, and he had no idea. Jack was scared, vulnerable, and clearly not himself when receiving this news. How could he be? He had just lost his wife of 52-years to a horrific death, and this was the last thing he needed to hear.

Not surprisingly, like so many people in his situation, Jack did not even know what an agreement to arbitrate meant. Jack had no idea what the difference was between a trial by jury, an arbitration, or a mediation, all of which are different and have a distinctly unique process, that us lawyers fully understand, but admittedly take for granted. We should never forget that lay persons rightfully do not understand these processes, nor their important distinctions. Frankly, when Jack signed the agreement to arbitrate, he was not even thinking Barbara would be harmed while a resident at the facility. Thoughts about arbitration or litigation were not on his mind. When Jack went to the facility on July 27 to sign the admission paperwork no one told him in advance what to expect, and he did not want to delay the process with questions or concerns. Jack just signed the documents put in front of him with no instruction and no guidance being offered, because he wanted to ensure that his wife had a safe and secure place to stay while he was in Ohio.

Fortunately for Jack's sake, this agreement to arbitrate provided Jack 30 days to rescind the agreement in writing and in late August of 2021, just days before that deadline was set to expire, Jack did exactly that, thereby allowing this very sad, unfortunate, and avoidable matter to be litigated in open court with no threats of secrecy. Jack was one of the lucky ones, as he was able to invoke and preserve his fundamental and constitutional right to a trial by jury.

Recently, the Centers for Medicare and Medicaid Services (CMS) released a revised CMS State Operations Manual (SOM) Appendix PP on June 29, 2022, that became effective Oct. 24, 2022, which addresses and scrutinizes a nursing home's ability to utilize agreements to arbitrate. CMS outlined certain requirements a nursing home must satisfy if it chooses to have a resident or a resident's representative enter into an agreement for binding arbitration. In particular, the facility must comply with the following five requirements:

1. The facility must not require the signing of an arbitration agreement as a condition of admission or as a requirement to continue to receive care at the facility and must explicitly inform the resident or the resident's representative of their right not to sign the agreement,

2. The facility must ensure that the agreement is explained in a form and manner that is understood and that the resident or the resident's representative acknowledges that they understand the agreement,

3. The agreement must explicitly grant the right to rescind the agreement within 30 calendar days of signing it,

4. The agreement must explicitly state that neither the resident nor the resident's representative is required to sign the arbitration agreement as a condition of admission to the facility or a requirement to continue to receive care, and,

5. The agreement may not contain language that prohibits or discourages communications with federal, state, or local officials, including federal and state surveyors, other federal or state health department employees, and representatives of the Office of the State Long-Term Care Ombudsperson.

Beyond these highlights, CMS also mandates that binding arbitration agreements used by nursing homes must allow for the selection of a neutral arbitrator and convenient venue agreed upon by both parties. Facilities must retain a copy of the signed agreement to be available for inspection upon request for five years after the resolution of the dispute, and not to be overlooked facilities should also ensure they account for any state-level requirements governing the use of arbitration agreements with admission documents.

Notably, a state surveyor who is investigating whether a facility complied with these CMS requirements for arbitration agreements is charged with asking the nursing home resident or the nursing home resident's representative the following questions:

1. What was your understanding of the arbitration process when a dispute arises?

2. Did you understand that you were giving up your right to litigation in a court proceeding (i.e., that you were giving up your right to a trial by jury)?

3. Were you told that the facility could not require you to enter into an arbitration agreement to be admitted to or remain in the facility?

4. Did you feel you were obligated, required, forced, or pressured to sign the arbitration agreement? If yes, how so?

5. Is there anything you would like to have known before signing the arbitration agreement?

Also, a state surveyor for CMS when investigating this issue is to explore the following questions with facility staff:

1. When and under what circumstances do you request a resident or their representative to agree to an arbitration agreement?

2. How do you ensure the resident or the resident's representative fully understands the terms of the arbitration agreement?

3. How do you ensure an agreement is explained in a form and manner that accommodates a resident's or a representative's needs?

4. What is your process for allowing rescission of an arbitration agreement in the first 30 days?

Moreover, a surveyor for CMS is to look at the records to determine in the record if (1) the agreement clearly states that a resident or the resident's representative is not required to enter into the agreement as a condition of admission, and (2) there is evidence that an agreement was explained in a form, manner, and language that is understood by the resident or the resident's representative.

CMS, based on the foregoing, understandably wants safeguards in place to protect nursing home residents and their families from being forced into binding arbitration. CMS is appropriately concerned that arbitration agreements pose a harm to nursing home residents which undoubtedly is a very vulnerable, frail, and dependent population base, and that arbitration agreements present a legitimate risk of not being a "fair handshake." CMS realizes these agreements need to be carefully examined and studied before conceding their enforceability. This approach makes sense. The nursing homes are the ones that are used to and that understand the arbitration process, not the nursing home resident. The nursing homes are the ones that routinely work with the same arbitrators on their cases time and time again, not the nursing home resident. The nursing homes are the ones that drafted the arbitration agreement, not the nursing home resident. The nursing homes are the ones that have already consulted with lawyers about the decision to arbitrate, not the nursing home resident. The nursing homes are the ones that know the good and the bad venues, not the nursing home resident. And, the nursing homes are the ones that have experience with our judicial system, not the nursing home resident. All the while, the nursing home resident or the resident's representative is being handed a pile of documents and understandably just signs them on the spot with no explanation.

There should be little dispute that the playing field is inequitable and that the use of an arbitration agreement does not favor the nursing home resident. It is for this reason that the CMS guidance is important to know and understand. Also, it is significant to remember that based on this guidance not only do the correct words and warnings need to be in the arbitration agreement, but for the agreement to be held to be enforceable it needs to be determined that the resident or the resident's representative truly understood what was at stake and was not pressured into signing the agreement. The language in the agreement is not enough. A deep dive into how the document was explained to the resident or the resident's representative, along with learning what the resident or the resident's representative understood is necessary. At bottom, the enforceability of arbitration agreements in the context of long-term care is to be and needs to be evaluated with a high level of scrutiny and care to protect and to assist elderly Kansans and their families that require the services of nursing home facilities. Elderly Kansans deserve that, and they deserve to be able to invoke and preserve their constitutional rights, markedly their right to a trial by jury.

As practitioners in this area of the law, it is important to identify as early as possible if your client, a family member, or a legal representative signed an agreement to arbitrate. Ideally, this discussion and evaluation should begin at the initial meeting with the client. It then is critical to learn the circumstances surrounding that event and to read the arbitration agreement to determine if the afore-referenced CMS criteria are satisfied, and to also determine if the arbitration agreement meets basic contract principles that impact its enforceability (i.e., duress, fraud, unconscionable terms, or proper authority to sign). Also, when reading the arbitration agreement, it is critical to determine if there is anything that can be done to rescind the agreement, such as providing written notice rescinding the agreement. These items need to be considered in a timely manner.

Simply put, nursing homes put these arbitration agreements in the admission documents for a reason, which is for their own benefit. The arbitration agreements are designed to help the nursing home, not the resident. Nursing homes understand that the deck is stacked in their favor in an arbitration and that if the case proceeds to arbitration it will not be heard by the public, and that their odds of a favorable result dramatically increase. At bottom, the right to have access to our courts is fundamental to our judicial system and to our democracy, protected by federal and state constitutions, and should not be given up lightly. Arbitration agreements used by nursing homes need to be heavily scrutinized, as they are inequitable impediments to an elderly Kansan's right to a jury trial, and hopefully when challenged and considered such an agreement is determined to be unenforceable, thereby allowing the nursing home resident full access to the judicial system.