Challenging Arbitration Agreements in Nursing Home Neglect Cases

By Greg Lawrence

Orders referring cases to arbitration are the bane of plaintiffs' lawyers handling nursing home neglect claims. In the arbitration theater, conducting thorough discovery and (not coincidentally) obtaining a full measure of damages are much more difficult than doing so through the court and jury system.

Nursing home operators routinely present arbitration agreements to new residents at the time of admission along with a host of other documents to be signed. The arbitration agreement is usually one of the last items presented as part of a 30 or 40-page admission package. As a result, the significance of signing away the right to a jury trial can easily be lost. Of course, failing to read the agreement or ask questions about its impact will not prevent its enforcement.

On Sept. 24, 2016, The Centers for Medicare and Medicaid Services (CMS) issued a regulation (42 C.F.R. § 483.70) that invalidates pre-dispute arbitration agreements with respect to nursing homes. While this regulation was to take effect Nov. 28, 2016, its enforcement was preliminarily enjoined Nov. 7 by the United States District for the Northern District of Mississippi.

The court held that CMS overstepped its rule-making authority and essentially enacted legislation. The court also found that CMS failed to include objective evidence gathered in the rule-making process that arbitration agreements caused the harm described by CMS as the basis for the new regulation.

As a result, the status quo remains for challenging arbitration agreements on behalf of nursing home residents. The most common bases for challenging their admissibility include mental capacity, representative capacity and violations of public policy.

The law regarding mental capacity with respect to an arbitration agreement is no different than that for any other type of contract. The core question is whether the resident had the ability to understand the "effect and nature" of the agreement. *John Knox Village of Tampa Bay v. Perry*, 94 So.3d 715 (Fla. 2d DCA 2012).

According to the Alzheimer's Association, nearly 60 percent of nursing home residents suffer from dementia or Alzheimer's disease. Such a diagnosis by itself does not answer the question of capacity as people with early stage dementia will typically have capacity.

The complexity of the cognitive processes required for someone to understand the "effect and nature" of an arbitration agreement should not be overlooked. We use an expert psychologist to explain the cognitive skills required to understand such an agreement, which include concepts of mutual exclusivity; the possibility of unforeseen injuries; legal claims for injuries resulting from neglect; and the difference between jury trials and arbitrations.

Determining whether someone lacked capacity at a certain point in time involves a fact specific analysis with respect to which family members can provide very persuasive testimony. Testimony regarding a resident's failed efforts at managing financial affairs or his or her inability to weigh pros and cons when making a medical care decision are especially helpful. In addition, the resident's medical records may reveal instances of confusion, memory loss and the inability to comprehend relatively straightforward concepts.

Another basis for challenging enforceability occurs when someone other than the resident signs the arbitration agreement. This is a common scenario as, at the time of admission, residents are typically overcoming an illness, injury or recent surgery and may not be up to dealing with the long series of admissions documents. If there is no power of attorney in favor of the signing family member, the agreement cannot be enforced. *Mendez v. Hampton Court Nursing Center*, LLC, 203 So.3d 146 (Fla. 2016). This happens surprisingly often.

The existence of a power of attorney does not end your analysis if the resident lost capacity since executing the power of attorney. Unless the power of attorney was "durable," it will no longer be effective once the resident loses capacity. In this scenario, you again find yourself in the position of proving incapacity of the resident at the time the arbitration agreement was signed.

Arbitration agreements can also be challenged through the various contract defenses including fraud, unconscionability, duress or that the agreement violates public policy. Of these, violations of public policy are the most common. If the agreement provides for any limitation on actual damages or prohibits the recovery of punitive damages, the agreement violates the public policies codified in the Florida Statutes for the uncapped recovery of compensatory damages and the availability of punitive damages in circumstances involving flagrant conduct. *Shotts v. OP Winter Haven, Inc.,* 86 So.3d 456 (Fla. 2011).

Successfully challenging an arbitration agreement in the nursing home context can make all the difference in obtaining a full measure of justice for your client. When you run across an executed agreement, consider whether it is vulnerable to challenge before deciding against taking the case or allowing it to proceed to arbitration.

Greg Lawrence focuses his practice in the areas of nursing home neglect and personal injury. He graduated from the University of Florida Law School with honors in 1993. He is AV-rated by Martindale-Hubbell. He practiced insurance defense work for five years before starting his own practice. Outside of work, Greg enjoys scuba diving, fishing and spending time with his family and friends.