

# Nursing Home Admissions Agreements: A Discussion of the Unfair Terms in the Agreements Presented to Elders on Entering a Nursing Home



Eric Carlson, Directing Attorney, National Senior Citizens  
Law Center and David H. Seligman, Irving Kaufman  
Fellow, National Consumer Law Center

Jessica Hiemenz  
National Consumer Law Center

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# Presenter – Eric Carlson

- Directing Attorney at the National Senior Citizens Law Center.
- Mr. Carlson has over twenty years of experience in long-term services and supports (LTSS), including home and community-based services, nursing facility care, and assisted living facilities.
- He currently is leading NSCLC's research and advocacy (funded through the Retirement Research Foundation) around LTSS provided through Medicaid managed care.
- Mr. Carlson counsels attorneys from across the country, co-counsels impact litigation that protects LTSS consumers, and is author of the legal treatise Long-Term Care Advocacy (Matthew Bender and Co.).



# Presenter – David Seligman

- Focuses on pre-dispute binding arbitration by providing direct legal services to consumers and employees affected by predatory arbitration agreements and advocacy and research concerning the effects of pre-dispute binding arbitration on low-income consumers.
- Before joining NCLC, David served as a law clerk for Judges Robert D. Sack and Susan L. Carney of the United States Court of Appeals for the Second Circuit and Judge Patti B. Saris of the United States District Court for the District of Massachusetts.
- He has worked for Make the Road New York and a union-side labor law firm in San Francisco. Before law school, he was a New York City Urban Fellow in the New York City Police Department.
- David is a graduate of the Harvard Law School, where he was Supreme Court Chair of the Harvard Law Review.



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# Nursing Home Admission Agreements: A Discussion of the Unfair Terms Presented to Elders

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Eric Carlson, NSCLC

David Seligman, NCLC



**NSCLC**  
National Senior Citizens Law Center

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# Admission Is Difficult Time for Resident and Family

- Health care problems.
- General turmoil.
- Emotional time for all concerned.

# You Can't Believe Everything You Read

- Residents and families are inclined to believe that admission agreements are accurate.
- In fact, admission agreements often conflict with the law.
  - *See, e.g.,* NSCLC, Think Twice Before Signing: Improper and Unfair Provisions in Nursing Home Admission Agreements (2007).



# Consumer Strategies

- Don't sign agreement.
- Cross out offending provisions.
- Negotiate modification to agreement.
- Contest enforcement of offending provisions.
- **State-developed standardized admission agreement.**
  - **Cal. Health & Safety Code § 1599.61.**

# Nursing Home Reform Law

- Applies to every nursing facility certified for Medicare and/or Medicaid.
  - 42 U.S.C. § § 1395i-3 (Medicare), 1396r (Medicaid); 42 C.F.R. § § 483.- 483.75.
- Applies regardless of resident's payment source.
- Does not apply to assisted living facilities.

# Facility Cannot Require Financial Guarantor

- Facility cannot require financial guarantor as condition of admission or continued stay.
  - 42 U.S.C. § § 1395i-3(c)(5)(A)(ii),  
1396r(c)(5)(A)(ii); 42 C.F.R. § 483.12(d)(2).

# A Few Facilities Directly Violate Law

- “[T]he legal representative of Resident and/or the Resident’s Representative ... do each, jointly and severally, guarantee the full, timely, and complete performance of the Resident’s responsibilities, obligations, duties, and agreements under this Agreement and do each, jointly and severally, guarantee the payment of the sums due [facility] under this Agreement. ... Resident’s legal representative and Resident’s Representative **acknowledge and agree that [facility] is relying on the agreements contained in Section A in admitting Resident for occupancy in the Home.**”

# Do Friends or Family Members “Volunteer” to Guarantee Payment?

- To evade the law, facilities have used admission agreements that solicit signature of supposedly-voluntary “Responsible Party.”
  - e.g., Responsible Party required “to be fully responsible for all financial obligations.”
  - Responsible Party: “An individual who **voluntarily agrees** to become obligated for the care and treatment of the Resident.”

# “Voluntary” Responsible Party Provisions Are Illegal and Unenforceable.

- Why illegal?
  1. Facility actually is requiring guarantee.
  2. Family members are deceived.
  3. No benefit provided.

*See, e.g.,* Podolsky v. First Healthcare Corp.,  
58 Cal. Rptr. 2d 89 (1996).

# Increasingly, Liability Conditioned on Access to Resident's Money

- Federal law says:
  - “However, the facility may require an individual who has legal access to a resident's income or resources available to pay for facility care to sign a contract, **without incurring personal financial liability**, to provide facility payment from the resident's income or resources.”
    - 42 C.F.R. § 483.12(d)(2).

# Contracts Impose Duties on “Responsible Parties”

- If “responsible party” has access to resident’s funds, admission agreement imposes duty on responsible party to:
  - Pay all money owed to nursing facility.
  - As applicable, take all necessary steps to arrange for Medicaid eligibility.



# Courts Split on Holding Responsible Parties Liable on Independent Duty

- In most cases, fact-specific determinations.
  - Generally agent is not liable to creditor for debt of the principal (the resident, in this case).
  - On the other hand, courts have little patience for family members who have misappropriated residents' money.

# Eviction Only for Six Reasons

- Resident needs higher level of care.
- Resident does not need nursing facility care.
- Resident's presence endangers others' health.
- Resident's presence endangers others' safety.
- Resident has failed to pay.
- Facility is closing.
  - 42 U.S.C. § § 1395i-3(c)(2), 1396r(c)(2); 42 C.F.R. § 483.12(a).

# Some Agreements Give Facility Full Discretion to Evict

- e.g., Facility “shall have the right to remove any Resident from [the nursing home], after appropriate notice, when in her judgment it is in the best interest of the other Residents, [and] for medical reasons as defined by [the nursing home] or [the nursing home’s] physician.”

# It Should Be OK For Resident To Be “Difficult”

- But agreement authorizes eviction for being:
  - “unduly disturbing, unduly noisy, objectionably untidy, noncooperative or destructive in behavior and action.”
  - “uncooperative or destructive to people or facility.”
- Another admission agreement broadly authorizes eviction “due to mental [or] physical conditions.”

# Some Agreements Have Laundry List of Eviction Justifications

- e.g., “Attending physician provides a discharge order. This typically, but not necessarily, is an order for transfer to a hospital.”
- “Your welfare (medical, psychological, etc.) needs, in the opinion of the Facility, cannot be adequately met by Facility within its reasonable and customary provision of nursing home services.”

## Laundry List (cont.)

- “Upon reasonable efforts of Facility, You and/or your significant others remain dissatisfied with the services of Facility as provided within Facility’s reasonable and customary provision of nursing home services.”
- “Labor shortages, strikes, etc.”
- “Other similar circumstances not listed above.”

# Eviction Notice Generally Must Be 30 Days in Advance

- “Practicable” notice allowed under certain circumstances.
  - “Practicable” should give resident enough time to receive decision on appeal.
    - 42 U.S.C. § § 1395i-3(c)(2)(B), 1396r(c)(2)(B); 42 C.F.R. § 483.12(a)(4).
- Some admission agreements misstate law.
  - Resident agrees to “vacate immediately.”
  - Ten-day notice.
  - “Appropriate” notice.

# Waivers of Liability Are Likely Illegal, and Certainly Unfair

- Waivers are strictly construed against the nursing home.
- Waivers cannot eliminate any standard set by state or federal law.
  - Primary function of waiver is to discourage resident and family from seeking assistance or compensation.



# What Is a Reasonable Expectation for a Resident?

- Nursing Home Reform Law sets high standards.
  - Nursing facility must provide services so resident can reach the highest practicable level of function.
    - 42 U.S.C. § § 1395i-3(b)(2)(A), 1396r(b)(2)(A); 42 C.F.R. § 483.20(k).

# Facility Prefers to Characterize Decline/Injury as Inevitable

- e.g., “The parties hereto agree that the services provided by [facility] and others within this facility are not designed to somehow protect the Resident from **everyday, normal risks and responsibilities of living**, including, but not limited to, such general accidents and situations **such as falling, choking and weight loss and/or dehydration resulting from a Resident’s failure to partake of food and drink.**”

# Are Falls Inevitable?

- “The Resident may fall or continue to fall and ... such falls may result in injury to or the death of the Resident. ...[T]he Resident’s family and I have been advised that we have the right to sit with the Resident at all times or to obtain and hire, at our expense, a sitter to be with the Resident while the Resident remains in the Facility, and that due to the Resident being at risk for falls, we should employ private sitters for the Resident.”

# What Is Under Facility's Control?

- Nursing home not liable for circumstances beyond its control, “including, but not limited to, acts of God, acts of terrorism, strikes and **changes in economic conditions that affect the nursing home's operation**. Additionally, Resident and Responsible Party agree that Facility will not be liable for ... any changes in services or service **limits due to changes in payment levels** received by the Facility from Resident and/or third party payors, including, but not limited to, Medicare and Medicaid.”

# Limitations on Damages

- “[T]he prevailing party’s damage shall be limited to his/her/its direct, economic damages. ... The term economic damages means those damages arising from pecuniary loss or harm, including but not limited to, **costs for medical care, equipment and services, costs to repair or replace personal property and loss of income.**”

# Arbitration

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# Questions?

- Eric Carlson, [ecarlson@nsclc.org](mailto:ecarlson@nsclc.org)
- David Seligman, [dseligman@nclc.org](mailto:dseligman@nclc.org)

# THI of N.M. at Hobbs Ctr., LLC v. Patton, 741 F.3d 1162 (10th Cir. 2014)

## A Tale of Three Agreements (All Signed on June 26, 2007)

### Power of Attorney

#### DURABLE POWER OF ATTORNEY FOR HEALTH CARE

I, Willie Gorge Patton Sr., of 419 South Willow, Hobbs, State of New Mexico, being of sound mind, voluntarily Power of Attorney for Health Care.

#### PRIOR DESIGNATIONS

I revoke any prior Durable Power of Attorney for Health Care.

#### APPOINTMENT OF AGENT (ATTORNEY-IN-FACT):

In the event that I have been determined to be incapable of providing informed consent for medical treatment and procedures, I wish to designate as my agent for health care decisions:

Lillie Mae Patton  
419 South Willow  
Hobbs, State of New Mexico, 88240  
Telephone: 505-397-2916  
Relationship: wife

#### APPOINTMENT OF ALTERNATE AGENT (ATTORNEY-IN-FACT)

If I revoke Lillie Mae Patton's authority or if Lillie Mae Patton is not willing, able, or reasonably available to me, I designate as my alternate agent:

Linda Barry  
2424 N. St. Anne  
Hobbs, State of New Mexico, 88240  
Telephone: 505-392-5457  
Relationship: Daughter

### Admission Agreement

#### ADMISSION AGREEMENT - NEW MEXICO

RESIDENT NAME: Willie Patton  
RESIDENT NUMBER: \_\_\_\_\_  
DATE OF ADMISSION: 6-26-07

THIS ADMISSION AGREEMENT ("Agreement") as above dated is by and among Hobbs Health Care ("Health Care Center"), Willie Patton ("Resident") and/or Linda Barry POA ("Resident's Durable Power of Attorney for Health Care"/"Resident's Legal Guardian"/"Resident's Responsible Party" hereinafter collectively "Representative").

WHEREAS, the parties to this Agreement wish to admit Resident to Health Care Center and hereto agree as follows:

#### I. GENERAL CONDITIONS

1. **Inducement:** Resident and/or Representative affirm that all information submitted to Health Care Center in order to induce Health Care Center to enter into this Agreement is true and correct, including but not limited to financial information, medical history and medical diagnosis. Submission of any false information will constitute a breach of this Agreement.

2. **Personal Property:** It is understood that Health Care Center is not responsible for either damage to or theft/loss of valuables, monies or clothing belonging to Resident unless they are held in trust by Health Care Center for safekeeping and the damage, theft or loss was caused by the negligent or willful conduct of Health Care Center personnel. Personal property will not be considered to be held in trust unless the policies and procedures outlined in the Admission Handbook and any future amendments thereto, have been followed. Health Care Center reserves the right to prohibit certain personal effects, funds, or other property of Resident in accordance with state and federal law. The Health Care Center is not liable for either damages to or theft/loss of any personal belongings or personal care items, such as dentures, hearing aides and eyeglasses, except with respect to damage, theft or loss caused by the negligent or willful conduct of Health Care Center personnel.

3. **Emergency Care:** In case of an emergency and Resident's personal physician is not available, Resident and/or Representative hereby gives permission to Health Care Center to retain a physician on Resident's behalf. The physician so retained will bill Resident directly and Health Care Center will not be responsible for payment of the bill for such service.

4. **Representative:** Representative will act on behalf of Resident for all purposes permitted under applicable law. Representative will pay all fees and charges incurred hereunder by or on behalf of Resident using proceeds from Resident's assets or estate. Representative may act in more than one capacity and will be bound by the applicable terms and conditions of this Agreement. Except when Representative has access to Resident's assets, or as otherwise expressly provided to the contrary herein, or as permitted by state or federal law, Representative will not become personally liable for the payment of Resident's fees and charges by signing this Agreement. To the extent possible, Resident acknowledges and consents to the execution of this Agreement by Representative.

### Arbitration Agreement

#### PLEASE READ CAREFULLY

#### HEALTH CARE CENTER - RESIDENT/REPRESENTATIVE ARBITRATION AGREEMENT

#### I. EXPLANATION

Under state and federal law two or more parties may agree in writing for the settlement by arbitration of any dispute arising between them. Arbitration is a method for resolving disputes without involving the courts. It is frequently faster and less expensive than using the court system. In these arbitration proceedings, a private individual, called an arbitrator, who is selected by the Resident and/or the Resident's Representative and the Health Care Center, hears the dispute. The decision of the arbitrator binds both parties and is final. By agreeing to binding arbitration, both parties waive the right to trial before a judge or jury. It is understood that any dispute as to professional negligence, medical malpractice, and/or general negligence, that is, as to whether any professional or medical services rendered under the admissions agreement were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by Federal Arbitration Act, and not by a lawsuit or resort to court process except as the Federal Arbitration Act provides for judicial review of arbitration proceedings. Both parties to this agreement, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration.

#### II. AGREEMENT

This Agreement is made between Hobbs Health Care ("Health Care Center"), its parents, affiliates, and subsidiary companies, owners, officers, directors, medical directors, employees, successors, assigns, agents, attorney and insurers, Willie Patton ("Resident") and Linda Barry POA ("Resident's Durable Power of Attorney for Health Care"/"Resident's Legal Guardian"/"Resident's Responsible Party" hereinafter collectively "Representative"). It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assigns, heirs, personal representatives, guardians or any persons deriving their claims through or on behalf of Resident.

It is understood by Resident and Representative that he or she is not required to use the aforesaid Health Care Center for Resident's healthcare needs and that there are numerous other health care providers in the State where the Health Care Center is located that are qualified to provide such care. Resident/Representative understands that signing this Agreement to arbitrate is a precondition for medical treatment or admission to the Health Care Center. The Resident/Representative also understands that nothing in this Agreement prevents him/her from contacting regulatory or administrative agencies in relation to services provided by the Health Care Center, and that, once admitted, the Resident cannot be discharged for refusing to sign this Agreement. The Resident, Representative and the Health Care Center further acknowledge that the operation of the Health Care Center and its provision of services to Resident involve interstate commerce.

In the event of any controversy or dispute between the parties arising out of or relating to Resident's stay at the Health Care Center, the Health Care Center's Admission Agreement, or breach thereof, or relating to the provision of care or services to Resident, including but not limited to any alleged tort, personal injury, negligence, contract, consumer protection, claims under the New Mexico Unfair Trade Practices Act, or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively "Disputes"), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration, as provided by the National Arbitration Forum Code of Procedure or other such association.



# The Arbitration Clause

## I. EXPLANATION.

Under state and federal law two or more parties may agree in writing for the settlement by arbitration of any dispute arising between them. Arbitration is a method for resolving disputes without involving the courts. It is frequently faster and less expensive than using the court system. In these arbitration proceedings, a private individual, called an arbitrator, who is selected by the Resident and/or the Resident's Representative and the Health Care Center, hears the dispute. The decision of the arbitrator binds both parties and is final. By agreeing to binding arbitration, both parties waive the right to trial before a judge or jury. It is understood that any dispute as to professional negligence, medical malpractice, and/or general negligence, that is, as to whether any professional or medical services rendered under the admissions agreement were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by Federal Arbitration Act, and not by a lawsuit or resort to court process except as the Federal Arbitration Act provides for judicial review of arbitration proceedings. Both parties to this agreement, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration.

Pursuant to a pre-dispute, forced arbitration clause, I give up the right to a jury trial in any dispute against a nursing home before even knowing what the dispute might be.

Is THAT a good deal?

# Maybe Not?

## Arbitrator Bias: The “repeat player” problem

- “Repeat player” bias is difficult to measure, but some recent studies have shown that the busiest arbitrators are also the arbitrators most likely to rule in favor of the repeat player, and that the *most* repeated players are more likely to receive favorable outcomes. (Recent studies have concluded the same about nursing home disputes.)

## Curtailed discovery

- The nursing home will almost always have access to all of the relevant documents.
- Limited discovery makes it difficult to uncover uniform practices that might support punitive damages.

## Arbitration fees

- There are two broad categories of arbitration clauses: those concerned with class litigation and those concerned with individual litigation. Sometimes those concerned with the possibility of class litigation state that the defendant will pay the arbitration costs. Generally arbitration clauses concerned with preventing *individual* litigation, like those present in nursing home agreements, require the parties to bear their own costs upfront, which can be quite costly to plaintiffs.

## Limited judicial review

- Arbitral awards are only vacated if the arbitrator exceeds his or her authority, which may, in some jurisdictions, be the case if an arbitrator *manifestly disregards the law*.

## Arbitration is secret

- Because, unlike judicial proceedings, arbitration is conducted in private, it does not exert the same force on industry practices.

## Stall tactics on the part of defendants(an emerging problem)

- Failing to pay arbitration fees; stalling before agreeing on an arbitrator.

“Although we support and administer pre-dispute arbitration in other case areas, we thought it appropriate to change our policy in these cases since medical problems can be life or death situations and require special consideration.” -- Senior Vice President of AAA in 2002



# The Federal Arbitration Act, 9 U.S.C. § 2

## The Fictions of Assent and Equality

Until the past decade, numerous state laws limited the enforceability of arbitration clauses in contexts like nursing home disputes, where arbitration is inherently unfair. (“[W]e determine that Congress did not intend for the FAA to apply to arbitration clauses in pre-injury contracts, where a personal injury or wrongful death occurred after the signing of the contract. In the context of pre-injury nursing home admission agreements, we do not believe that such arbitration clauses are enforceable to compel arbitration of a dispute concerning negligence that results in a personal injury or wrongful death.” *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 659, 724 S.E.2d 250, 263 (W.V. 2011), *vacated by Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201(2012)).

In light of the broadening interpretation of a 1920s statute known as the Federal Arbitration Act, plaintiffs seeking to avoid arbitration face an uphill battle.

*AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011)

“The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”

*THI of N.M. at Hobbs Ctr., LLC v. Patton*, 741 F.3d 1162 (2014)

Courts cannot refuse to enforce an arbitration clause on any grounds evincing a “perceived inferiority of arbitration to litigation as a means of vindicating one’s rights.”

Pending legislation to undo this legal shift: Arbitration Fairness Act, Fairness in Nursing Home Arbitration Act



# Some of the Grounds for Avoiding Enforcement: Unconscionability

- **PROCEDURAL:** If the circumstances surrounding the admission reflect severe one-sidedness or duress, an arbitration agreement is more likely unconscionable.
- **SUBSTANTIVE:** An arbitration clause might be deemed unconscionable due to the excessive fees and costs of arbitration, but in deciding whether an arbitration clause is unconscionable in this regard, courts have held plaintiffs to a high standard in producing substantial, reliable evidence concerning the likely costs of the arbitration and the plaintiffs' inability to pay.
- **SUBSTANTIVE:** If the arbitration clause prohibits the award of non-compensatory damages, like punitive damages, a court is likely to find it unenforceable as contrary to law.
- **BUT . . .** Who decides? The question whether the arbitrator or the court decides if an arbitration clause is enforceable is hotly contested.

# There Was No Agreement

**A REMINDER:** The FAA favors the enforcement of *existing* arbitration clauses. There is no federal policy in favor of the *formation* of arbitration clauses.

In the nursing home context, the easiest way to challenge the enforcement of an arbitration clause is by arguing that the resident is not bound by the clause because he or she never agreed to the admissions agreement as a whole or the arbitration agreement in particular. This issue arises most frequently in cases where the resident did not actually sign the agreement. But nursing homes will argue the following:

1. The party signing the agreement was acting as the **agent** of the resident.
2. The party signing the agreement was acting under **statutory authority**.

# Agency

- Questions: (1) Does a principal-agent relationship exist? (2) What is the scope of that relationship?
- Apparent Authority (where there is no express or implied agreement providing an agent with the authority to make decisions on behalf of the principal).

The inquiry: (a) acts of the principal suggesting the authority exists; (b) reasonable and detrimental reliance by a third party

- Actual Authority (where the principal and agent have agreed that the agent shall act on the principal's behalf). In the nursing home context, the "actual authority" analysis is frequently guided by state laws defining the contours of specific types of principal-agent relationships.

The inquiry in the vast majority of cases: whether the statutorily-identified relationship at issue (generally a "power of attorney") expressly allows the agent to enter into an arbitration agreement (*i.e.*, Is the decision to enter into an arbitration agreement a "health care" or "medical" decision as defined by the power of attorney and state law?).



# Statutory Authority

Inquiry: Whether the statutory language applies

## Example Statute

- (1) A surrogate may make a health-care decision for a patient who is an adult or emancipated minor if the patient has been determined by the primary physician **to lack capacity and no agent or guardian has been appointed** or the agent or guardian is not reasonably available.
- (2) An adult or emancipated minor may designate any individual to act as surrogate by personally informing the supervising health-care provider. In the absence of a designation, or if the designee is not reasonably available, **any member of the following classes of the patient's family who is reasonably available, in descending order of priority, may act as surrogate:** (a) The spouse, unless legally separated; (b) An adult child; (c) A parent; or (d) An adult brother or sister.

**Miss. Code. § 41-41-211**

# What do I do?

1. Don't sign an arbitration clause if you can avoid it! (Is it necessary? Is the person covered by the agreement already a resident?)
2. Fight an arbitration clause if you can.
3. If you can't beat 'em, join 'em.



# Questions?

Eric Carlson: [ecarlson@nscl.org](mailto:ecarlson@nscl.org)

David Seligman: [dseligman@ncl.org](mailto:dseligman@ncl.org)





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