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ELDER LAW MINUTE

Last week I quoted a personal care home agreement which attempted to protect a facility from liability if anything bad happened to the resident. Some facilities even have videos which they require new families to watch which warn that bad things will happen in long-term care facilities and it is wrong to blame the facility.

Sometimes it is not the facility's fault. For example, when a resident falls and breaks a hip, it is not the facility's fault unless negligence led to the fall (*e.g.* the resident tripped over a vacuum cord in the hall). But when it is the facility's fault, will the family be able to recover all of the damages that they are entitled to?

Many nursing home and personal care home agreements today contain mandatory binding arbitration agreements. If the resident agrees to waive his right to a trial when he enters the facility is he out of luck when the negligence occurs?

It is very common for victims to challenge the arbitration clause when they are preparing to bring an action against the facility. Many malpractice attorneys feel that a case will settle for more if there is a threat that it could otherwise be tried in front of a jury (in public.) Besides the fact that a jury might use its verdict to punish the facility for its actions, going to trial could be devastating for a facility's reputation in the community. So avoiding trial is something that has a significant value.

Courts around the nation have many times found the arbitration clause to be unenforceable. The courts look at whether the party that signed the contract had authority to bargain away the patient's right to a trial; whether the parties had equal bargaining power; and whether the person who signed was under duress. Some courts however have enforced the arbitration clause. A Mississippi Court recently upheld an arbitration clause because it found that the facility would have taken it out of the contract had the resident asked.

Therefore, it is very important to take the admission agreements seriously. Are you waiving your right to a trial? Are you agreeing to limit the facility's liability? Are your children agreeing to be personally liable for your debt? Are you agreeing to pay a hefty up-front move-in fee which is non-refundable. Many of these provisions are negotiable, and it is clearly better to eliminate the repulsive terms up front than to litigate their enforceability after you have become a victim of the facility's negligence.