Elder Update
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Nursing Home Arbitration Agreements: Quality Care May Eliminate Concerns

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In the May 2008 issue of *FHCA Pulse*, Florida Health Care Association (FHCA) Chairman David Sylvester expressed disappointment regarding the Fairness in Nursing Home Arbitration Act introduced by Senators Mel Martinez (R-FL) and Herb Kohl (D-WI). I, on the other hand, find the act quite encouraging.

The proposed legislation seeks to stop the growing practice by long-term care facilities requiring that elders and individuals with disabilities seeking admission agree to forgo their legal rights to access our judicial system and submit instead to binding arbitration if they are harmed or injured.

This legislation would not preclude parties from agreeing to arbitration once disputes arise; it only prohibits such agreements from being constructed at the time of admission, before new residents can fully comprehend the terms. In fact, the legislation echoes the sentiment of the largest provider of arbitration services, the American Arbitration Association, which discourages agreements requiring arbitration in nursing home cases.

The Federal Arbitration Act (FAA), enacted in 1925, was created to free up the flow of commerce. It provided businessmen a "fast-track" system that bypassed the logjam of the courts to resolve disputes and allowed them to move forward. These were businessmen, with relatively equal business savvy, standing on level ground. They knew the arbitration system did not provide all the finely honed safeguards afforded by the courts, but it did offer speed and, often, a reduction in attorney fees and costs. For that, they were willing to trade one for the other in an "arm's-length" transaction.

That is not the same scenario typically found in a long-term care facility's admission office. A corporation, along with a staff of lawyers, has taken the time to research the benefits of arbitration. An elderly person is there because he or she needs help with medication and activities of daily living. The senior may have heard the word "arbitration," but may not understand its legal significance. A stack of paperwork is placed before the senior to sign. Embedded in the pile is a binding arbitration clause that purports to offer full disclosure; also in the pile, however, there is often a statement binding the senior to an undisclosed set of rules of an arbitration association.

Often, these rules limit the senior's right to discovery and the amount and types of awards recoverable while elevating the burden of proof needed to obtain compensation. The elder may not know that arbitrators are not required to follow legal precedents established by years of case law, or that the decision of the arbitrator is essentially not open for review, even if the decision is based upon an incorrect application of settled law.

When the state adds a law or regulation pertaining to a long-term care facility, it is because a persistent issue has gone unchecked and has, or could have, a negative effect on vulnerable citizens. We unnecessarily add to our costs when we fail to do what we should and neglect to hold others accountable. Consequences can be motivators for change, unless an industry tries to escape them or relies upon someone else to shoulder the burden.

Arbitration agreements over the last decade have proven their ability to lighten the consequences of wrongful behavior and save long-term care facilities a substantial amount of money. They have not, however, deterred offenses, as evidenced by the fact that complaints about care issues have increased. Perhaps a more effective solution would be to increase the amount of time spent on direct care. When staffing hours decrease, the quality of care declines and complaints increase. When facilities increase staffing hours per resident, the quality of care rises and there are fewer complaints.

With the economy pulling at us from every direction, it is important for businesses to prioritize their budget considerations. Problems arise, however, when money becomes the primary focus and eclipses the practice that established the business in the first place – fulfilling customers' needs. It is understandable – even vital – for long-term care facilities to operate under the best fiscal management principles, but those principles should never take priority over caring for people and providing quality services to meet their needs.

When a service is careless, customers suffer and may feel the need to seek solutions through legal channels. Offering quality service from the start and ensuring that customers' needs are met, however, can decrease or even eliminate the need for litigation. How? The answer is simple. Satisfied customers don't sue.