

CANHR is a private, nonprofit 501(c)(3) organization dedicated to improving the quality of care and the quality of life for long term care consumers in California.

## **Arbitration Agreements: Why They Should Be Prohibited in Admission Agreements**

No citizen of California should be required to surrender basic constitutional rights and civil protections to secure a bed in a nursing home or in a residential care facility or as a condition for adequate care. This is particularly true when the citizens being asked to sign these agreements suffer from a variety of physical and mental ailments, and when they and their family members do not understand what they are signing.

Yet, this is exactly what is happening in California today. In an effort to prevent residents from being able to sue for abuse or neglect, nursing homes and residential care facilities are asking new and current residents to sign admission agreements that include binding arbitration provisions.

### **What is Binding Arbitration?**

By signing an RCFE or nursing home admission agreement that includes an arbitration provision, the parties are agreeing to give up their constitutional right to have a dispute, including neglect and abuse cases, decided in a court of law in front of a jury, and instead are agreeing to the use of binding arbitration. This means that the decision of the arbitrator is final and there is no appeal. This means that, rather than having the issue decided in public by a jury of their peers in front of a judge, the matter will be decided in private, by a private (and very expensive) arbitrator. Arbitration proceedings are not part of the public record and not subject to judicial review.

### **Myths & Facts About Arbitration Agreements**

#### **Myth: Agreements are “Voluntary”**

The providers of care would have you believe that residents and their family members are “voluntarily” signing these agreements. These pre-dispute arbitration provisions are usually part of a host of documents involved in an admission to an RCFE or a nursing home.

They are usually presented in a “take it or leave it” setting. Family members often feel compelled to sign such agreements to ensure that the care of their family member is not compromised. If they don’t sign the agreement, they probably won’t be admitted to the facility in the first place. Few of the residents or their representatives understand the consequences of the agreement, nor are they represented by counsel. Yet they are asked to sign a legal document drafted by the facility’s legal counsel relinquishing their right to a trial by jury. What bargaining power does a Medi-Cal resident or an aged or disabled consumer have in this marketplace?

#### **Myth: Arbitration is Neutral**

According to one nursing home industry attorney: “The greatest appeal of arbitration for the provider is that this process takes the case out of the hands of the jury (whose biases we are all too familiar with) and entrusts it to a neutral arbitrator.”

The truth is that this “neutral” arbitrator is a private judge whose services can cost anywhere from \$400 to \$1,000 an hour or more. The plaintiff bringing a neglect case is a one-time customer for the private arbitrators, while corporate defendants and insurance companies will be involved in cases again. Some judges take this into account: if they want repeat business, they know if they impose a high compensatory award - let alone punitive damages - the corporate defendant or its insurance company won't use their services again.

### **Myth: Arbitration is Faster**

Requiring arbitration agreements actually denies quick access to justice for the aged and the disabled. Under current California law, a plaintiff who is 70 or older or one in compromised health can ask for a preference, i.e., an expedited hearing. When the Court grants a preference, the trial must be set within 120 days. In arbitration proceedings, where the plaintiff is ill or dying, the defendants can and do drag out the selection of the arbitrator and seek indefinite postponements of the hearing until the plaintiff is dead. The arbitrator also can ignore the requests of dying plaintiffs to a speedy hearing. The victims of such delays have no recourse to a higher court and no right to an independent review of procedural abuses.

### **Myth: Arbitration is Cheaper**

Given a choice, what would you rather have? A public judicial officer who is paid by the taxpayers or a private judge, whose services can add \$10,000 to \$20,000 in out-of-pocket costs to your lawsuit. Few nursing home residents, 64% of which have their costs paid for by Medi-Cal, can afford a private arbitrator. Indeed, arbitration might be cheaper for the nursing home or RCFE, since the money's not coming out of their pocket - but the pocket of the insurance company. Victims of neglect and abuse need protection from the public courts and the jury system, not higher costs and added risks.

## **Prohibit Pre-Dispute Arbitration Agreements**

California's policy makers should prohibit pre-dispute arbitration clauses in RCFE and nursing home admission agreements. If the parties choose to enter arbitration after a dispute arises, that is their right. But the process should be voluntary, without coercion, and the resident's admission or stay in a facility should not be conditioned upon the signing of a one-sided agreement.

For more information about arbitration agreements in long-term care contracts, visit <http://www.canhr.org/arbitration/index.html>