

RESIDENT CARE FACILITY LEGAL ALERT

THE CONTRACT: HOW TO AVOID COSTLY LITIGATION

RECENT LEGAL CASE ADDRESSES ARBITRATION CLAUSES

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The legal fees and other business costs of lost productivity can be substantial when a company is involved in defending a lawsuit brought by a resident for some alleged negligence and subsequent injury. Clearly, prudent business practice requires efforts to minimize or eliminate those litigation costs by including an arbitration clause in the resident care facility contract that the resident signs at the time of admission. Put simply, an arbitration clause requires that all disputes by the resident against the resident care facility be referred to a dispute resolution arbitrator or panel that determines the rights and duties of the parties and awards damages, if warranted. This dispute resolution model is an alternative to a court proceeding before a judge and jury. Typically, the costs of arbitration are less than defending a lawsuit and may more quickly resolve the dispute with less publicity. Arbitration allows company employees to return their focus to doing their jobs of helping provide care to all the residents.

The Fifth District Court of Appeals of Ohio, whose jurisdiction includes Stark County, Tuscarawas County, Holmes County, and twelve other counties, recently concluded that an arbitration clause in a resident care admission agreement to be invalid, unconscionable, and unenforceable. Fortune v. Castle Nursing Homes, Inc., 164 Ohio App.3d 689.

To summarize briefly the facts of the case, Ms. Fortune slipped and fell in the shower, while under the care of a nursing aide, resulting in injury to the resident's leg. A lawsuit was filed in Holmes County Court of Commons Pleas. The resident care facility motioned the Court to postpone the Court proceedings until after arbitration was completed as required in the resident admission agreement. The trial court refused to postpone the lawsuit and the resident care facility appealed that decision. The Fifth District Court of Appeals granted the appeal, but required the trial court to hold a hearing to determine the relative bargaining position of the prospective resident as compared to the resident care facility when the resident admission contract was signed. According to law, if the trial court subsequently finds an imbalance in bargaining strength between the parties (which is likely) then the trial court may then conclude that the arbitration clause is not enforceable; thus, the lawsuit could continue without delay.

The clear message of the Fifth District Court of Appeals is three-pronged: first, arbitration provisions in consumer agreements should be reviewed with special scrutiny; second, the resident's right to a jury trial is important and shifting the attorney fees of both parties in the lawsuit to the losing party may not be enforced; and third, the arbitration clause should be prominently displayed in the agreement with clear and distinct language stating the relinquished rights of the resident in close proximity to where the resident signs the admission contract.

To quote the Fifth District Court's opinion, "... we are not finding that a binding arbitration clause may never be included in an admission agreement." Therefore, it is critically important to periodically review & revise all business agreements, in particular admission contracts, to manage risk, increase productivity, and achieve greater profitability.

The attorneys at Krugliak, Wilkins, Griffiths & Dougherty are available to assist with the review and preparation of resident care facility contracts and procedures, as well as to provide answers to questions regarding this area.

NOTE: This general summary of the law should not be used to solve individual problems since slight changes in the fact situation may require a material variance in the applicable legal advice.

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This update has been prepared by Krugliak, Wilkins, Griffiths & Dougherty Co., L.P.A. as a general summary of the law and is not a substitute for legal advice. If you have any questions regarding this topic, call (330) 497-0700 or e-mail legal@kwgd.com.

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