Nursing Homes, in Bid to Cut Costs, Prod Patients to Forgo Lawsuits

Big Payouts Fade As Arbitration Rises; Ms. Hight Falls Ill

By NATHAN KOPPEL
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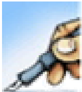
Nursing-home patients and their families are increasingly giving up their right to sue over disputes about care, including those involving deaths, as the homes write binding arbitration into their standard contracts.

The clause can have profound implications. Nursing homes' average costs to settle cases have begun dropping, according to an industry study, even as claims of poor treatment are on the rise. The industry notes arbitration is slicing the number of patients winning big punitive judgments, the added penalties for severe negligence that can pump up the size of jury awards. Meanwhile consumer advocates, plaintiffs lawyers and even some arbitrators are decrying the practice. Two U.S. senators on Wednesday introduced legislation to effectively ban nursing homes from using agreements that compel arbitration in advance.

TO SIGN OR NOT



• **How to Size Up Arbitration Clauses:** See tips for handling admission contracts

Janice Cowart's case shows how the system can work. When her 92-year-old mother, Mary Hight, fell ill for days and became badly dehydrated, her nursing home in Kosciusko, Miss., wouldn't call an ambulance. Ms. Cowart pushed her mother uphill in a wheelchair to a nearby emergency room. Ms. Hight died from heart failure the next day.

Ms. Cowart had accepted a contract with binding arbitration when her mother entered the home. The arbitrator found the home was negligent both in allowing Ms. Hight to become dehydrated and failing to get her to an emergency room. But he awarded the family only $90,000, saying an underlying condition could have caused the death. After paying the lawyers, "we didn't get one cent," says John Estep, Ms. Cowart's brother. The home has denied wrongdoing and declined to comment.

The nursing-home industry's arbitration strategy is part of a much broader response by U.S. companies to consumer lawsuits. Businesses from restaurants to banks have ramped up their use of arbitration agreements in recent years to reduce litigation costs and sidestep emotion-laden juries, often requiring employees or consumers to give up rights to a trial as a condition of receiving services. Studies have suggested about a third of businesses are requiring arbitration for consumer disputes, and about one-fifth of employers are requiring it for complaints by employees.

Nursing homes have been among the biggest converts to the practice since a wave of big jury awards in the late 1990s. Attorneys litigating nursing-home cases on both sides say arbitration has quickly become the rule rather than the exception. Critics say the binding agreements are determining the outcome of high-stakes cases of vulnerable patients that should instead be handled by the courts. Too often, they say, people don't understand whether the clauses are mandatory, or that they are signing away their rights to sue. "It is an unfair practice given the unequal bargaining position between someone desperate to find a place for their loved ones and a large corporate entity like a nursing home," said Sen. Mel Martinez, a Florida Republican who introduced legislation along with Democratic Sen. Herb Kohl of Wisconsin.

'IT SOUNDS SO GOOD FOR THE CUSTOMER'

Tennessee-based National HealthCare Corporation has frequently adjusted how it handles arbitration agreements in response to court cases. In an early training effort, the company planned videos starring its then-general counsel to help staff explain the rationale for arbitration to customers. In one draft script, never produced, then-general counsel Ted LaRoche talks with actors playing customers about the benefits of bypassing the court system; in another Mr. LaRoche has a discussion with employees Robert Adams, now the president of the company, and Charlotte Swafford, now a senior vice president. The scripts were introduced in a court case in which the plaintiffs challenged the company's arbitration agreement. **See the document**.

The biggest arbitration provider, the American Arbitration Association, frowns on agreements requiring arbitration in disputes over nursing-home care and generally refuses such cases. Some patients "really are not in an appropriate state of mind to evaluate an agreement like an arbitration clause," says Eric Tuchmann, the association's general counsel. A second group, the American Health Lawyers Association, also avoids them. Other arbitration groups say they generally accept the cases if the agreements comply with the law.

Quick and Cheap

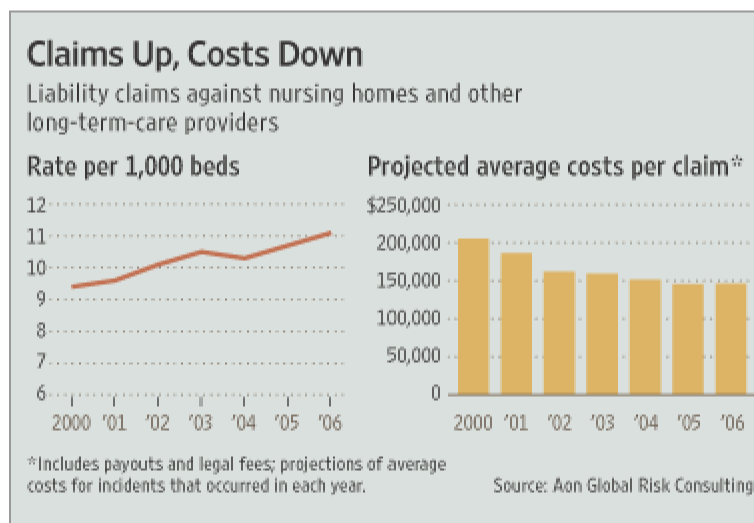
The nursing-home industry says arbitration is relatively quick and cheap -- for the elderly plaintiffs as well as the defendants -- and lets homes concentrate their staff and budgets on caring for patients, not litigation. "It's hard to keep staff focused on doing their best when there is a threat of lawsuits constantly hanging over their heads," says Gerald Coggin, a spokesman for Tennessee-based nursing-home operator National HealthCare Corp. In Tennessee, state legislators this year introduced a bill specifically to allow the nursing-home agreements as a condition of admission, to help homes "hold down or avoid the costs of litigation," says Democratic state Rep. Randy Rinks, one of the sponsors.

The industry was alarmed in the late 1990s by a rash of huge jury awards. In one case, $83 million was awarded in the death of a Texas woman with infected bedsores; $95 million went to a California woman who fractured her hip and shoulder when she allegedly was dropped by nursing-home staff. Both awards were knocked down by the trial judges: the Texas judgment to $56 million, and the California award down to $3.6 million. But plaintiffs lawyers were newly drawn to nursing-home suits by the big awards.

"Every joker and their brother got into the nursing-home area," says the plaintiffs lawyer on the California case, Michael Thamer.

Nursing homes began responding with binding arbitration agreements. Courts in various states struck some of them down -- on the grounds that the pacts were signed under duress or too unfavorable to plaintiffs, or for problems such as not adequately explaining the rights patients were giving up.

But other state courts have upheld the agreements even when entered into by illiterate or infirm patients. In Ohio last year, a court upheld one signed by a woman who had entered a home from a hospital and was suffering bouts of confusion. The court said the agreement was fair, but called the nursing home's use of it "troubling" during "an extremely stressful time for elderly persons of diminished health."



John Maxey II, a leading nursing-home defense lawyer in Mississippi, started helping homes write mandatory arbitration clauses into their admissions contracts around 2000. Some clauses -- not his, he says -- were "punitive and unconscionable." Some nursing homes, for instance, sought to prohibit punitive damages. Most such clauses were struck down. But he says his firm still has defended 12 to 14 nursing-home arbitrations in recent years without seeing an award of more than $100,000. Plaintiffs who lost outright "might have been successful with those cases in court," he says, but adds that "would have been a miscarriage."

Robert Lancaster of St. Petersburg, Fla., who formerly defended nursing homes and is now a full-time mediator and arbitrator, commends arbitration as quicker, cheaper, and more rational than jury trials. But he says nursing homes also like it because in place of a jury of "six laypeople who don't know medicine," arbitrators like himself tend to be "seasoned attorneys" who "hold down runaway results." In about 20 nursing-home disputes he has arbitrated, he said, no awards have exceeded $200,000. He believes that in court, those awards would have averaged at least two-thirds higher. Generally, "I think the defense bar is very pleased with the arbitration results, and the plaintiffs bar is very displeased," he says.

Florida plaintiffs lawyer Leonard Haberman decided arbitrators are too dispassionate when he lost a case last year against an assisted-living facility that he alleged mistreated an 86-year-old resident, Leo Kirshner. Mr. Kirshner died in 2003, a week after he was

admitted to a hospital, where he was diagnosed as dehydrated and malnourished. The arbitrator, Rodney Romano, found no liability partly because Mr. Kirshner, an Alzheimer's patient, refused food and water.

"I argued that it's impossible for an Alzheimer's patient with dementia to resist anything," says Mr. Haberman. "I was shocked at the outcome." He concluded that "by definition, an arbitrator is much less likely to have a 'Damn them, how could they?' outlook" compared with a jury.

Christopher Hopkins, the defense lawyer in the case, says the arbitrator appreciated that the home gave Mr. Kirshner proper care, and that under Florida law, "even incapacitated patients are entitled" to refuse food and water. Mr. Romano, a former nursing-home administrator, declined to discuss the case.

Runaway Awards

A study done last year for the nursing-home industry found that after years of rising, average payouts per claim began to edge down for nursing-home cases resolved in 2004 and 2005, in part due to the rise of arbitration and tort-reform measures. The study, by Aon Global Risk Consulting, projects that with legal fees included, homes' average costs per claim will drop to about $146,000 for incidents that took place in 2006, from about $226,000 for 1999 incidents.

Theresa Bourdon, one of the study's authors and an Aon managing director, says she has looked at more than 200 claims altogether that were subject to arbitration, and none has yielded a multimillion-dollar payout. "We are not seeing big pops," Ms. Bourdon says. In some states, "we are seeing the elimination of large runaway awards," she says.

Kansas City, Mo., plaintiff's attorney Tim Dollar contends punitive damages could have added at least $3 million to an arbitration award he recently won for the family of a nursing-home resident who died in 2004 after repeated falls from her wheelchair. The plaintiffs claimed that the Missouri home, Hillview Nursing and Rehabilitation Center, failed to use a lap restraint that would have prevented the falls. The arbitrator ruled in their favor and awarded $525,000 in "compensatory" damages, mainly for pain and suffering, and more than $200,000 in attorney's fees.

But he declined to award punitive damages, without explaining why. The nursing home previously had been cited by state authorities for failing to adopt adequate procedures to prevent falls, according to a December 2003 state survey, which noted one resident had fallen five times in the previous month. Hillview and its counsel didn't respond to requests for comment.

The arbitrator, Richard Ralston, a former corporate-defense attorney, declined to comment about the case. But he said that generally, "I think you would see fewer punitive awards of any size in arbitration than in court," largely because arbitrators are "less likely to react emotionally than a group of jurors."

Nursing homes aren't contending otherwise. Skilled Healthcare Group Inc.'s 2007 financial report says arbitration has "significantly reduced our liability exposure." The company, which operates 75 nursing homes in six states, first employed arbitration in 2003, two years after filing for bankruptcy in part because of a $6 million judgment. That case was later settled for a lesser amount. Now that plaintiffs must arbitrate, says general counsel Roland Rapp, "we have found in virtually every case, we can come to a rational resolution of settlement," because both sides realize "the possibility of a highly emotionally driven verdict is unlikely." Some nursing homes pay all the costs of arbitration and others split the costs with plaintiffs; at one firm, arbitrators make anywhere from $350 an hour to $10,000 a day but nursing-home cases are generally near the low end.

Read the admission agreement between Attala Community Care Center and Mary Hight and Janice Cowart, plus **see the decision of the arbitrator** in their case.

Some nursing homes make the arbitration agreement a condition of entering, but many others stop short of that, in an effort to avoid court challenges. Often, plaintiffs attorneys say, patients and families complain they were confused about the terms.

Mary Hight's family, who wanted to sue over the nursing home's refusal to call an ambulance, hadn't realized they had signed an arbitration agreement at all, says her son, Mr. Estep. But their six-page admissions contract with the Attala County Nursing Center included a paragraph requiring arbitration. It also said that if the family challenged the agreement in court they would have to pay the home's legal fees.

'Mom at 90'

That type of provision was declared "one-sided" and "oppressive" by the Mississippi Supreme Court last year in a separate lawsuit. But it helped pressure Ms. Hight's family to accept the arbitration, said the family's attorney, A. Lance Reins.

Ms. Hight had moved into the nursing home in 2002. She was diagnosed in 2003 with congestive heart failure, but Mr. Estep says she otherwise was in good health and continued to vacation with the family. "Mom, at 90, would be on the beach in sunglasses and a bathing suit," he says.

In 2004, Ms. Cowart heard from her sister that Ms. Hight was ill. When Ms. Cowart checked on her mother, she testified, "Her mouth is sunken in. Her eyes are bulging. She is as white as a sheet....And she kept saying, 'I feel like I'm going to faint.'" Ms. Cowart, who wouldn't comment for this story, asked the staff why her mother hadn't been taken to an emergency room, according to her deposition. Arbitrator James Cothren, a former plaintiffs attorney, concluded that instead of seriously assessing the medical situation, the staff "engaged in this diatribe" with Ms. Cowart over ambulance costs.

Mary Hight

But he said there was insufficient proof that dehydration caused Ms. Hight's death. Medical experts for Ms. Cowart and the home gave conflicting testimony. Mr. Cothren's award of $90,000 was compensation for Ms. Hight's physical injuries, pain and suffering and mental anguish, as well as the home's failure to call an ambulance, he wrote. He declined to award punitive damages, but didn't say why. Mr. Reins says his firm's expenses on the case outweighed the award.

Mr. Estep was troubled to learn later that Mr. Cothren and an attorney defending the nursing home had given a joint presentation about arbitrations for the state bar association while Mr. Cothren was deciding the case. Mr. Cothren says his award was based on law and evidence, not personal associations: "Mississippi is a small state, and everyone knows everyone," he says. Larry Houchins, executive director of the Mississippi Bar Association, says the presentation didn't mention the Hight case and that he sees no issue.

Since the ruling, Ms. Cowart's lawyer, Mr. Reins, says he's become wary of taking on matters that are subject to arbitration. "You know, at the end of the day, you won't get the relief you want," he says.

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