

**PLEASE SIGN HERE, HERE, HERE AND HERE...**  
**(and your right to Trial By Jury just went bye-bye!!)**

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Almost every Admission packet for nursing homes now contain pre-dispute arbitration (or ADR) agreements which deny personal injury and wrongful death claimants their constitutionally and statutorily protected civil rights.

Over 5 million seniors suffer abuse or neglect each year in the United States. An estimated 84% of those incidents are not reported to authorities. *Kentucky Attorney General's Guide, "How to Protect Nursing Home Residents" (2008)*. A significant percentage of these occur in nursing homes. While state and federal agencies police nursing home neglect, government oversight alone cannot solve the problem. Residents still suffer and die. The Government Accountability Office (GAO) found that inspectors miss 15% of the most serious violations. *GAO Report 10-70 (Nov. 2009)*. Often these are life threatening violations like failing to provide adequate nutrition and hydration (food and water) to residents. *GAO Report 10-70 (Nov. 2009)*.

This problem is particularly acute in Kentucky. The number of inspectors policing over 300 facilities has dramatically decreased since 2005. *Lexington Herald-Leader, "Number of Nursing Home Inspectors Declines" (June 1, 2010)*. At the same time, the GAO designated Kentucky as one of 15 states with the worst performing nursing homes. *GAO Report 09-689 (Aug. 2009)*. According to the Report, the worst offenders tend to be large "chain-affiliated" for-profit nursing homes with more beds and residents. The decrease in inspectors, and concomitant increase in serious violations, is a recipe for disaster as Kentucky is expected to see a 91.4%

increase in its population over the age of 60 between 2000 and 2030. *Kentucky State Plan on Aging Fiscal Years 2009-2012, p. 10 (2009).*

The Kentucky Long-Term Care Residents' Rights Act allows victims to hold nursing homes directly accountable. KRS 216.515 states that "Every resident in a long-term-care facility shall have at least the following rights" and lists twenty-six specific rights. Importantly, residents or their guardians have the right to be free from "mental and physical abuse." A key component of the Act is the right of victims to seek compensatory and punitive damages for violations "in any court of competent jurisdiction." These rights are an important check on safety in nursing homes, especially where state and federal budgetary constraints leave gaps in meaningful oversight.

Nursing homes, on the other hand, work hard to prevent access to the Courts. The weapon of choice is a boilerplate pre-dispute arbitration (or "ADR") agreement. These are specifically designed to circumvent victims' statutory and constitutional rights. Invariably, such ADR agreements are presented to residents or family members at their most vulnerable - at the time of admission.

A typical story goes like this.... Individuals or their loved ones appear at nursing homes in a state of great anxiety, most often after a period of acute hospitalization, and after the hospital has already made the arrangements for transfer. All that remains is a signature on the nursing home admissions documents. Upon arrival at the nursing home, either the resident or the resident's representative or "sponsor" is given a stack of documents to sign which the admissions officer calls a "standard application packet." The admissions officer does not explain anything. Instead, he or she simply pulls back the pages - only partially - and tells the resident or the resident's sponsor to sign. The whole process takes no more than 10 minutes. Buried in the

documents is a pre-dispute ADR agreement which waives one of the most fundamental and sacred of constitutional rights: the right to trial by jury. Even if the resident or the resident's sponsor had the opportunity to read the document, haggling over legal remedies is the farthest thing from their mind. Nursing homes understand this and exploit these circumstances.

The terms of these ADR agreements are also far from balanced. These agreements are invariably one-sided and designed to minimize, if not wholly abolish, residents' rights. For this reason, a Commission composed of the American Arbitration Association, American Bar Association, and American Medical Association found:

"The Commission's unanimous view is that in disputes involving patients and/or plan subscribers, binding arbitration should be used only where the parties agree to same after a dispute arises." *American Arbitration Association, American Bar Association, American Medical Association, Commission on Health Care Dispute Resolution, Final Report, p. 10 (1998)*

These pre-dispute ADR agreements fail to protect patients and ensure a level playing field for dispute resolution. Mandatory arbitration was never intended for these conditions. *See, e.g., Sternlight, Panacea or Corporate Tool: Debunking the Supreme Court's Preference for Binding Arbitration, 74 Wash. U. L. Q. 637 (1996); Note, Judicial Economy at What Cost? An Argument for Finding Binding Arbitration Clauses Prima Facie Unconscionable, 23 Rev. Litig. 463 (2004); Gallagher, Mandatory Arbitration Agreements in Nursing Home Admission Agreements: the Rights of Elders, 3 NAELA Journal 187 (2007).* It was designed to resolve commercial matters and disputes arising from arms-length transactions. The contemporary insertion of arbitration clauses into every kind of case, including personal injury and wrongful death claims, goes beyond legislative intent. Nevertheless, the plain language of state and federal legislation regarding arbitration cannot put ADR agreements beyond the reach of contractual defenses.

Under the Federal Arbitration Act (FAA), arbitration clauses are enforceable except "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2; *see also Volt Information Sciences, Inc. v. Board of Trustees*, 488 U.S. 468 (1989). Kentucky, likewise, permits a party to avoid arbitration "upon such grounds as exist at law for the revocation of any contract." *KRS 417.050*. Simply, if the ADR agreement is unenforceable, the subject claims cannot be submitted to an arbitral forum. While it is true that Kentucky law generally favors the enforcement of arbitration agreements, the existence of a valid arbitration agreement is a threshold matter which must first be resolved by the court. *Mt. Holly Nursing Center v. Crowdus*, 281 S.W.3d 809, 813 (Ky.App. 2008) and *General Steel Corp. v. Collins*, 196 S.W.3d 18, 20 (Ky. App. 2006).

There have been many appellate decisions in recent years addressing pre-dispute ADR agreements in nursing home cases. In *Beverly Health & Rehabilitation Services, Inc., et al. v. Smith*, 2008-CA-000604-MR (Ky. App. 2009), *Unpublished*, an elderly patient's family was asked to sign an arbitration agreement when the patient was admitted to a nursing home. The patient died while in the care of the nursing home, and the patient's estate later filed a wrongful death lawsuit. The trial court denied the nursing home's motion to compel arbitration. In upholding the denial, the Court of Appeals held that "the arbitration agreement plainly states that the execution of the agreement was not a precondition to the admission of the patient or services rendered to the patient." The Kentucky Court of Appeals found that the patient had derived no benefit from entering into the arbitration agreement. Thus, the arbitration agreement was unenforceable, due (in part) to lack of consideration.

In *Kindred Nursing Ctrs. L.P. v. Brown*, 2011 Ky. App. LEXIS 61 (Ky. App. Apr. 1, 2011) an ADR agreement was signed upon admission by the mother of an incapacitated resident.

The nursing home moved to compel arbitration, but was denied. In affirming, the Court of Appeals determined that the ADR agreement was unenforceable as at the time of execution, the resident's mother had not been appointed legal guardian of her incapacitated son (she was appointed legal guardian approximately 13 months after admission) and therefore, lacked legal authority to bind the resident to arbitration thereby waiving his right to trial by jury. The same result was reached in *Kindred Hosps. L.P. v. Smith*, 2011 Ky. App. Unpub. LEXIS 686 (Ky. App. Sept. 23, 2011).

Currently pending before the Kentucky Supreme Court is *Ping v. Beverly Enterprise, Inc., et al.*, 2010-SC-558 dealing with the enforceability of an arbitration clause in a wrongful death case. Kentucky Justice Association did file an *Amicus Curiae* brief in support of the unenforceability of the arbitration agreement.<sup>1</sup>

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<sup>1</sup> Although Kevin Burke & I filed the *Amicus Curiae* brief on behalf of KJA, it would not have been possible without the feedback and suggestions from several KJA members and for that, we are grateful.