

SHORTS

ON LONG TERM CARE

for the North Carolina LTC Community from Poyner Spruill LLP

WHAT'S IN A WORD? N.C. Court of Appeals Invalidates Nursing Home Arbitration Clause Based on Language of the Agreement

by Ken Burgess

Many nursing homes and assisted living communities commonly include arbitration agreements as part of their admission agreement and documents. Typically, these agreements require residents or their legal surrogates to arbitrate disputes with the facility rather than sue in court for damages, and these arguments can cover many types of disputes, including collection actions and medical negligence claims, among others.

Most of these agreements are “pre-dispute arbitration agreements,” meaning the parties to the arbitration agreement both agree, before any dispute has arisen, that if and when one does, they will submit it to arbitration in lieu of court proceedings to resolve their differences. A January 2013 decision by the NC Court of Appeals suggests that long term care providers using pre-dispute arbitration agreements should look closely at the language of these agreements to ensure that they can actually be implemented specifically and precisely as drafted; otherwise they might risk having a court refuse to enforce them.

In *Crossman v. Life Care Centers of America, Inc., et al.*, a mentally competent resident was admitted to a Life Care facility and executed a pre-dispute arbitration agreement. The agreement specifically provided that any and all claims arising out of the care or treatment received by the resident at the facility would



be submitted to binding arbitration “before a board of three arbitrators selected from the American Arbitration Association (AAA) and the arbitrators would apply the applicable rules of the AAA.”

However, the year before this agreement was signed, the AAA issued a policy statement saying it would no longer arbitrate claims between an individual patient and a health care provider under pre-dispute arbitration agreements but would only handle disputes involving post-dispute arbitration agreements. Subsequently, the resident died and his wife sued the facility for negligence, among other claims. When the facility moved to compel arbitration, the wife resisted and sought to invalidate the arbitration agreement because, among other things, it could no longer be administered according to its terms because of the AAA position on pre-dispute arbitration agreements.

Both the trial court and the NC Court of Appeals agreed with the wife and refused to enforce the arbitration agreement. This case does not necessarily mean that NC courts now disfavor arbitration agreements. The court in its opinion noted NC’s strong public policy favoring arbitration over trials. However, the court in this case arguably engaged in hairsplitting in ruling against the facility, distinguishing this case from prior NC court opinions and refusing to enforce the arbitration agreement.

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“THE CLIMB” — NC Activities Directors Win National Award for Their Work in Nicaragua

by Ken Burgess

As you probably know from prior *Shorts* articles, last January I traveled to Nicaragua with my pal Carron Suddreth of Wilkes Senior Village and three activities directors we picked from a statewide competition. We put together the first-ever activities program for impoverished elders in Nicaragua. I remember thinking that if we actually pulled this off, we might change a few lives — the lives of the competition winners for sure and, if God smiled on us, maybe the lives of the Nicaraguan elders. As I reflect on that trip now, over a year later, I realize that the lives we changed were those I predicted, and one life I did not foresee changing — mine.

I've just learned that these three amazing women, Erica Johnson of Liberty Healthcare, Brenda Zimmerman of Lutheran Services for Aging and Jamie Phillips of Avante of Wilkesboro, have been named recipients of the JFR Foundation Life Enrichment Activity Program Award for their work in five Nicaraguan cities last year.

I have so many memories of that trip — 10 days of long road trips in a small van with those ladies. Brenda talking incessantly about whatever came to her mind while she planned her next craft event. Jamie and Erica posing as Hollywood gals with big sunglasses and scarves flying in the dusty Nicaraguan heat. Carron keeping us all “on task.” And our foundation CEO, Keren Wilson, wondering what the heck she got herself into. I also remember the joy on the faces of the Nicaraguan elders and volunteers as our ladies taught them how to paint little wooden boxes and add jewels, how to use exercise bands or dance the Hokey Pokey, and a thousand other things they did.

After our trip was over, Jamie Phillips put together an awesome DVD of our trip. For background music she chose “The Climb” by Miley Cyrus. It's a powerful song about determination and heart and hope. We needed all those strengths for this difficult journey.

Somehow Jamie managed to match every note and lyric of that song with the perfect picture of us working with the elders. Today, as I wrote this article, I played the song for the first time in many months. I must confess, my heart overflowed. My eyes were full of happy tears. I remembered every second of our amazing trip, and I was so proud of these women for winning this national award.

More than that, I was reminded by Miley Cyrus's words and the sacrifices of these three women, of what makes a good life:

I can almost see it
That dream I'm dreaming
But there's a voice inside my head saying
You'll never reach it

Every step I'm taking
Every move I make feels
Lost with no direction
My faith is shaking
But I gotta keep trying
Gotta keep my head held high

There's always gonna be another mountain
Always gonna wanna to make it move
Always gonna be an uphill battle
Sometimes I'm gonna have to lose

Ain't about how fast I get there
Ain't about what's waiting on the other side
It's the climb



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This song epitomizes every emotion I had about this trip. It was a crazy dream that Carron Suddreth and I cooked up at the NC Healthcare Facilities Association meeting in the fall of 2011 that began with, “What if we tried this?” There was a series of impossible challenges in pulling together a training program in a foreign country in nine weeks. All we had was sheer determination to do it and faith that it could be done. We never let the possibility of failure stop us and we just moved it along, one uninformed step after the next. Maybe we were just too dumb to give up.

I don’t know what God has in store next for these three award-winning women. But, I’m pretty sure that someday, they will sit a child, or a grandchild, or a nephew or niece on their knee and tell them about Nicaragua. They will tell them about poverty, and strife, giving and love, and the power of a touch or a smile. And maybe one of those kids will, in turn, pay it forward and do some wonderful, kind thing for a stranger, without any promise of reward. I don’t know.

But I do know this. I will never again, for the rest of my life, lose the memory of these amazing women – Carron, Jamie, Erica and Brenda – working a Nicaraguan crowd, with no Spanish-speaking skills, but with the grace of seasoned diplomats, charming the Nicaraguan elders, charming me and doing very wonderful things. We gave them an impossible task, pulled together in a few short weeks, with limited supplies, no training and no real preparation. In return, they won over a nation. They did something that had never been done before, and they taught me about “The Climb.” God does move in mysterious ways.

Congratulations to you - Brenda, Erica and Jamie. You’ve made us so proud. Now, Ladies, it’s time to plan our encore tour of Nicaragua! It’s time to climb.

KEN BURGESS may be reached at kburgess@poynerspruill.com or 919.783.2917.

Ken’s Quote of the Month

“It has been my experience that folks who have no vices have very few virtues.”

~ Abraham Lincoln

Second Annual JFR Foundation Golf Tournament, June 13 and a New National Training Center

The Second Annual JFR Foundation Golf Tournament will be held on June 13, 2013, at the Rock Barn County Club in Hickory, NC. Last year, the tournament raised over \$30,000 towards construction of the first national elder care training center in all of Central America. This year, our goal is \$50,000, an amount that will complete the fundraising for the training center a year ahead of schedule. Many NC long term care providers and vendors attended last year’s tournament or sponsored the event. If you’d like to be part of this great fundraiser by sponsoring the event in some way, please drop me a line. It’s quite a party! Last year, we had more than 50 players and over 30 sponsors. Please let us know if you can help.

Finally, we have naming opportunities at the new national training center in Nicaragua. If you or your organization would like to have your name on a room at the training center, please send me an email at kburgess@poynerspruill.com. We are offering naming opportunities for the medical clinic, therapy room, dining area, pharmacy and other parts of this exciting structure. I’ll be happy to provide more details upon request.

From Our Marketing Department

We are pleased to announce that Ken Burgess, along with 21 other Poyner Spruill attorneys has been recognized as a 2013 North Carolina Super Lawyer; another 13 were named North Carolina Rising Stars 2013 by North Carolina Super Lawyers Magazine. Each year, the publishers of the magazine undertake a rigorous multi-phase selection process that includes a statewide survey of lawyers, independent research to identify outstanding lawyers, evaluation of candidates based on 12 indicators of peer recognition and peer achievement, a blue ribbon panel review by practice area and state, and a discipline check of each candidate. No more than five percent of the attorneys in each state are recognized by Super Lawyers.

Congratulations, Ken! You’ve always been a Super Lawyer in our eyes!



US Citizenship and Immigration Services Publishes New I-9 Form

by Jennifer Parser

On March 8, 2013, the US Citizenship and Immigration Services (USCIS) published a new I-9 Form. This Form is completed in part by all newly hired employees no later than the first day of employment. The employee must choose the documentation establishing identity and employment authorization no later than the third day after beginning employment, and show it to the designated officer of the employer completing the Form. Employers should make arrangements to use the new I-9 Form because earlier versions are acceptable only until May 7, 2013. Thus, after May 7, 2013, all employers must use the revised I-9 Form for each new employee hired in the United States.



The revised Form has several new features, including new fields and a new format to reduce errors. The instructions to the Form also more clearly describe the information employees and employers must provide in each section. English and Spanish versions of the new form are available online at www.uscis.gov.

JENNIFER PARSER may be reached at jparser@poyners.com or 919.783.2955.

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This case also follows a recent trend in many other states of disfavoring pre-dispute arbitration agreements. A growing number of courts around the country are finding these agreements "an unconscionable violation of public policy" and refusing to enforce them. Others, like the NC Court of Appeals in this case, have stopped short of refusing to enforce any pre-dispute arbitration agreement, instead holding the health care provider to a strict and literal reading of its arbitration agreement with patients.

So, what's the lesson of this case? First, review your arbitration agreements carefully and periodically. Make sure the group you have designated as your arbitrator actually still exists and handles health care arbitration matters. From time to time, we've seen arbitration entities, public or private, either get out of the business altogether or limit their work to certain types of

disputes. If the arbitration entity named in your agreement is no longer in business or no longer handling health care claims, for example, you could find yourself with an unenforceable arbitration agreement and headed to trial when a dispute arises. In such cases, you'll need to amend and re-execute your arbitration agreement to ensure its enforceability, and there's no guarantee your residents will agree to do so.

Second, in drafting these agreements, consider designating a process for selection of a backup arbitrator and corresponding procedures and rules governing the arbitration, just in case for some reason your primary arbitration entity no longer can or will handle the claim. This allows some flexibility for changed circumstances. Courts tend to uphold these agreements as long as there is sufficient specificity in the agreement's terms. But as the Crossman case shows, overspecificity also creates the opportunity for a court to find the agreement unenforceable if any of the key designated elements of the agreement can no longer be applied or enforced.