

# Nursing Home Admissions: Fairness Of Arbitration Questioned.

In an effort to control litigation costs and prevent runaway jury verdicts, many healthcare facilities include arbitration agreements in their admissions paperwork.

If a patient's claim for damages for medical or nursing malpractice or other wrongful treatment qualifies for arbitration, it is heard and decided by an agreed-upon arbitrator, often a private-practice attorney or retired judge.

Arbitration of a healthcare negligence claim is appropriate only when both sides have fairly and knowingly agreed to arbitration. As arbitration is growing in popularity with healthcare facilities, there is a corresponding growth in court cases questioning whether a frail, elderly, possibly confused or demented person has fairly and knowingly agreed. If they did not, arbitration is out and the patient, or very often the surviving family, can still take the case in front of a civil jury.

The Court of Appeals of Ohio recently looked at these factors:

Was the language about arbitration set apart in a separate document, or buried in the fine print?

Was arbitration explained to the resident or the family, especially the fact the right to go to court is being given up?

Did the resident and the family have a real choice whether or not to sign? Were they forced to sign, either by staff pressure or the pressure of circumstances?

Did the resident have the capacity to understand? Validly agreeing to arbitration requires a higher level of abstract reasoning capacity than merely agreeing to enter a nursing home and consent to care.

Did the resident or family have the chance to opt out of arbitration, after admission, and still remain admitted? **Manley v. Personacare**, 2007 WL 210583 (Ohio App., January 26, 2007).