

Arbitration Agreements Revisited

Procedural & Substantive Due Process Can Win the Day

I have written in the past on the benefit of Arbitration Agreements and the need for compliance with ***procedural and substantive due process*** in their use. The federal courts including the U.S. Supreme Court, have historically found a strong legislative preference for enforcing Arbitration Agreements. Most state courts have such a preference as well, but some will look very hard for reasons not to enforce these agreements. Failure to follow either procedural or substantive due process in their use will cause most all courts to deny their enforceability. Fairness is the bottom line regarding due process and the enforceability of Arbitration Agreements.

A recent Pennsylvania Superior Appellate Court case issued July 5, 2022, **Kohlman v Grane Healthcare Company** reminds us of the pitfalls when a community fails in the basics of *procedural and substantive due process*. In this case, the court denied the enforceability of the Arbitration Agreement relied upon by the senior living company in their professional liability lawsuits.

What do we mean by due process? The courts look for **fairness** in most contracts but certainly when they involve the elderly in senior care transactions. *Procedural due process* looks at the relationship of the parties and how the Agreement was entered into. Typically, an analysis of the parties respective bargaining power is a starting point. Do they have equal acumen in contracting? Was there a negotiation or not? What are the economics of the parties, and who wrote the contract are all a part of this analysis. In the senior living admissions process the two contracting parties are not viewed as equal. Typically, the resident is not familiar with this form of alternative dispute resolution. As a result, the courts, through case law, have established a relatively uniform set of guidelines on what is required to meet the *procedural due process test*. For example, the courts look to the following:

- Was the resident in the first instance *cognitively able to understand* what they were signing? If not, the conversation is almost over. Too

often the community in pursuit of their occupancy goal glosses over this bedrock requirement. As an aside, the operator who can be shown to focus more on census than care has a very difficult road in front of them.

- Second, if they meet the first test, *was the agreement fully explained to them* in terms of what it is and does? Do they understand that their fundamental right to a jury trial is being waived? Was this discussion carefully documented by the community? Was the resident and or their representative given time to consider or evaluate the agreement with or without counsel?
- Were they given a copy of the Agreement?
- Was it a separate document like an exhibit, attachment, or addendum? Too often the Arbitration language is imbedded inside a multipage Admission contract. The courts have been rather clear that this important agreement cannot be obfuscated by burying it in a larger contract.

The trial court and the appellate court in the above case looked at each of these issues and found that the community failed each prong of the test.

- First, the evidence on the resident's cognitive level was not clear. However, it was clear to the community that she was physically in such distress, pain, and anxiety that she was distracted. The court apparently concluded that she could not fully appreciate what she was being asked to sign. The court noted that this physical and mental condition was apparent to the community. ***Documentation of what a community goes through to first affirm a resident's cognitive level is a Best Practice.***
- Second, the arbitration agreement was not adequately, if at all, fully explained to her. The admissions officer had a hard time recalling what she may have discussed with the resident. This also leads me to conclude that the interaction on this requirement was not well documented. A plaintiff will invariably testify that no one explained

what they were signing, and that they did not know what they were signing. A documented process to explain the Agreement is a Best Practice *to overcome this amnesia*.

- The resident was not given a copy. The record was clear that the community knew the resident wanted her family to review all her documents, which apparently did not happen.
- It was not clear from the appellate court decision if it was a free-standing contract. However, the court did say it was a part of a multipage set of documents. Alluding to, in my opinion, that it may not have been a separate document and contributed into the confusion argument of the plaintiff.

To compound matters for this community, the court also found that *substantive due process* was lacking. What do we mean here? The courts will always look to see if the actual terms of the Arbitration Agreement are **fair**. Taken together do the terms favor one party over the other? The Arbitration Agreements, like the Residency Agreements, are prepared by the communities and are not typically negotiated between equal parties. Often, they have terms more favorable to the community. These are sometimes referred to as *contracts of adhesion* where the party who wrote the agreement has stronger bargaining or intellectual power over the other party.

Terms that have been found to be unfair, if not unconscionable, include the forfeiting of punitive damages, or attorney fees if they are otherwise allowed by statute. Terms that allowed the community to decide when and where to arbitrate or to unilaterally pick the arbitrator. Or the losing party pays the attorney fees of the successful party and or all arbitration costs. This is especially so if a state statute does not allow for such a benefit. In most states the losing party in a professional liability case does not have to pay the other parties attorney fees.

An additional substantive term that must be in an arbitration agreement is that the residency is not conditioned on the resident signing the agreement, and that the resident should always have a reasonable period of time to rescind the agreement.

In the Kohlman case above, the court concluded the requirement that the resident had to pay one-half of the arbitration fees was unfair. The courts might start by simply looking at the economic standing/relationship of the parties to draw such a conclusion. In the above case, the court focused on the fact that such a requirement would not have been an expense of the resident in the traditional legal, or trial court setting. The court concluded this favored the community over the resident. The takeaway here is that the community should step up to pay the relatively modest expenses for the mediation or arbitration. The procedural reasons discussed above are stronger than this substantive issue but taken together, the court had no problem denying the community's motion to compel arbitration.

In summary, the Kohlman case simply highlights the types of terms and processes that most courts would find objectionable in a senior living arbitration agreement case. The outcome of the Kohlman case does not surprise me and is not a bell weather for a change in how arbitrations may fare generally. Review your Arbitration Agreements to satisfy yourself that both the procedural and substantive due process requirements are met. It is also interesting to note that these arbitration agreements can also be deployed into your employment/hiring practices as well. The same issues will be relevant in that setting as well.

CAC Specialty can provide further insight and training on this topic to help ensure that you can enforce your Arbitration Agreements.

David Thurber, JD

Senior Vice President

CAC Senior Living Practice

[*david.thurber@cacspecialty.com*](mailto:david.thurber@cacspecialty.com)

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