

# Long-Term Care and Nursing Home Litigation



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# National Statistics

- Approximately 1.5 million Americans live in nursing homes
- Number predicted to increase over the next 10 years as the Baby Boomer generation continues to age
- Institutionalization is much more common at older ages
  - 1% of Americans aged 65 to 74 reside in institutions
    - compared to -
  - 13% of Americans age 85 or older reside in institutions
    - 52% of nursing home residents are age 85 and older
- Medicaid is the primary payer source for most certified nursing home residents (approximately 62%)
- Nationally, a year of nursing home care typically costs over \$82,000
- In 2015, nursing homes had an 82% occupancy
- In 2015, 68% of American nursing homes were for-profit facilities



# Alabama Statistics



- 14% of Alabama citizens are aged 65 or older
  - Approximately 85,000 Alabama citizens are age 85 or older.
  - The number of Alabama citizens 85 or older will grow 61% by 2030.
- In 2015, over 81% of Alabama's nursing homes were for-profit facilities
  - Recent studies have found that non-profit nursing homes generally deliver a higher quality of care.
- Alabama's nursing home occupancy rate is approximately 88%

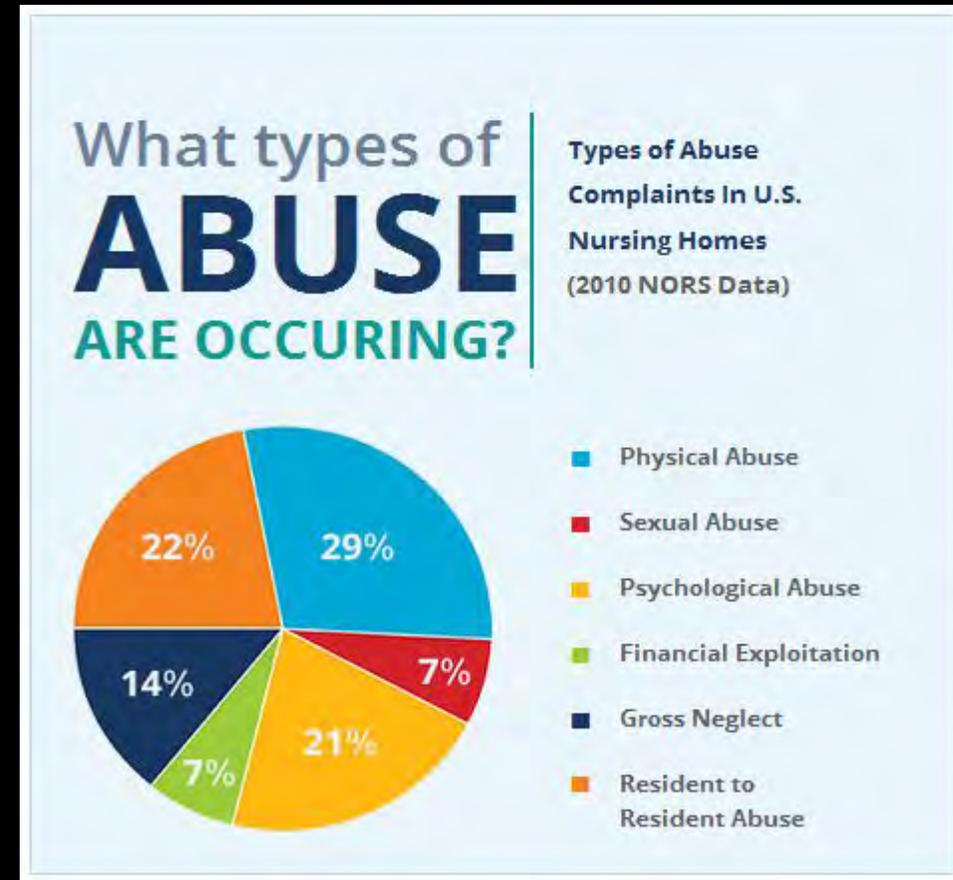
# Abuse and Neglect

- Types of Abuse

- Physical Abuse
- Emotional Abuse

- Types of Neglect

- Withholding of Care
- Delay of Care
- Insufficient Care
- Medication Errors



# Nursing Home Litigation

## Primary Types of Cases



Falls

Bedsore

Choking

Medication Errors

Abuse/Neglect

Malnutrition/Dehydration

Failure to Treat and Transfer

# Key Documents

## The Documents Matter

- Nursing Home Chart
- Hospital Chart
- Death Certificate
- Other Records

## HIPAA Barriers



# Frequent Obstacles to Successful or Sufficient Recovery



- Arbitration
- Medical Liability Acts
- Limited Insurance Coverage

# Federal Arbitration Act (“FAA”)

## Federal Arbitration Act §§ 1-16

9 U.S.C. §2 - A written provision in any maritime transaction *or a contract evidencing a transaction involving commerce* to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

With very few exceptions, the FAA preempts any state law identified in a contract and only the FAA will apply to the arbitration of disputes arising under or related to the parties’ contractual agreement. *See Kindred Nursing Ctrs., L.P. v. Clark*, 137 S.Ct. 1421 No. 16-32 (May 15, 2017).

Arbitration agreements must be put on an equal plane with other contracts. *Id.*

# Former CMS Proposed Rule Regarding Pre-Dispute Binding Arbitration

- In October 2016, CMS published **The Reform of Requirements for Long-Term Care Facilities Final Rule** which would have eliminated pre-dispute binding arbitration agreements in nursing home admission agreements for facilities that receive Medicare funds.
- Nursing Home industry opposition
- Court challenge – November 2016 U.S. District Court for the Northern District of Mississippi issued preliminary injunction in favor of nursing home industry
  - *See American Health Care Assn., v. Burwell*, 217 F. Supp. 3d 921 (N.D. Miss. 2016).
- CMS review and reconsideration of the arbitration requirements in the 2016 Final Rule
- Post January 2017, CMS issues a revised proposed Final Rule striking the elimination of pre-dispute binding arbitration agreements in nursing home admission agreements
  - New rule proposes some regulations regarding nursing home binding arbitration agreements

# Current CMS Proposed Rule

- CMS Issues Proposed Revision Requirements for Long-Term Care Facilities' Arbitration Agreements
  - The prohibition on pre-dispute binding arbitration agreements is removed.
  - All agreements for binding arbitration must be in plain language.
  - If signing the agreement for binding arbitration is a condition of admission into the facility, the language of the agreement must be in plain writing and in the admissions contract.
  - The agreement must be explained to the resident and his or her representative in a form and manner they understand, including this it must be in a language they understand.
  - The resident must acknowledge that he or she understands the agreement.
  - The agreement must not contain any language that prohibits or discourages the resident or anyone else from communicating with federal, state, or local officials, including federal or state health department employees, or representatives of the State Long-Term Care Ombusman.
  - The facility must post a notice regarding its use of binding arbitration in an area that is visible to both residents and visitors.

For more information, the proposed regulation can be found at: <https://www.federalregister.gov/public-inspection/>

# Strategies to Fight Motion to Compel Arbitration

“A court may invalidate an arbitration agreement based on ‘generally applicable contract defenses,’ but not on legal rules that ‘apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.’”

*Kindred Nursing Ctrs., L.P. v. Clark*, \_\_\_ U.S. \_\_\_, 137 S.Ct. 1421 (May 15, 2017) citing *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 339, 131 S.Ct. 1740 (April 27, 2011)(emphasis added).

## Possible Defenses:

- Incompetency of the Resident/Patient to sign agreement
- Authority of the family member to sign agreement
- Inability to produce document
- Other contract-based defenses:
  - Unconscionability – terms grossly unfair to resident
  - Duress or Undue Influence – lack of choice considering stress and secure medical care
  - Adhesion - lack of choice, difference in bargaining power, etc.
  - Misrepresentation
  - Lack of adequate signature(s)



# Arbitration Panels

JAMS



AAA



Private Arbitrators

Others



# Standard of Care

Alabama Code § 6-5-542

Standard of Care. The standard of care is that level of such reasonable care, skill, and diligence as other similarly situated healthcare providers in the same general line of practice, ordinarily have and exercise in like cases. A breach of the standard of care is the failure by a health care provider to comply with the standard of care, with failure proximately causes personal injury or wrongful death . . . §6-5-542(2).

# Establishing Standard of Care

- Expert Testimony

RE: standard of care

“In cases brought under the AMLA, the plaintiff generally must establish through expert testimony that there has been a breach of the standard of care.”

“[S]uch testimony is allowed only from a ‘similarly situated health care provider.’”

*Hill v. Fairfield Nursing and Rehabilitation Center, LLC*, 134 So.3d 396, 401 (Ala. 2013).

- Case Documents:

- Doctor’s orders
- MDS and resident assessments
- Nursing care plans

- Testimony of nursing personnel

- State and Federal regulations



# Insurance Coverage

– Or Lack Thereof –

- No legal requirement the LTC or nursing facility carry insurance
- Some have as little as \$25,000 in coverage
- More and more had “diminishing coverage” policies
- Having to pierce the corporate veil is a real possibility
- In Alabama, insurance coverage is not discoverable
- Rule 26(a)(1)(A)(iv) of the Federal Rules of Civil Procedure seems to require disclosure

Thank you.

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