

2009 DRAFTING REQUEST

Bill

Received: **04/12/2010**

Received By: **phurley**

Wanted: **As time permits**

Companion to LRB:

For: **Peter Barca (608) 266-5504**

By/Representing:

May Contact:

Drafter: **phurley**

Subject: **Courts - miscellaneous**

Addl. Drafters:

Extra Copies:

Submit via email: **YES**

Requester's email: **Rep.Barca@legis.wisconsin.gov**

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Nursing home arbitration agreements

Instructions:

identical to 09-4396

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	phurley 04/12/2010	jdyer 04/13/2010		_____			
/1			rschluet 04/13/2010	_____	sbasford 04/13/2010	cduerst 04/14/2010	

FE Sent For:

none needed

<END>

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/?	phurley	1/4 Bjld					
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FE Sent For:

<END>



4674/1
LRB-4396/1
PJH:ldjrs stays
MNR

2009 SENATE BILL 673

4-12-10
D-note

April 7, 2010 - Introduced by Senator TAYLOR, cosponsored by Representative BARCA. Referred to Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing.

Regen

✓x

1 AN ACT to create 895.449 of the statutes; relating to: nullifying certain
2 arbitration agreements between a resident and a nursing home or similar care
3 facility. ✓

Analysis by the Legislative Reference Bureau

Under current law, with few exceptions, contractual agreements that compel parties to litigation to submit to arbitration to resolve all or part of the dispute between the parties are enforceable.

Under this bill, contractual agreements that compel arbitration and that limit the rights of a resident to bring a civil lawsuit or limit the remedies available to a resident in a suit against a nursing home, adult family home, resident care apartment complex, or community-based residential care facility are void as against public policy.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

4 SECTION 1. 895.449^{✓x} of the statutes is created to read:
5 **895.449 Certain arbitration agreements void.** Any provision in a contract,
6 covenant, or agreement between a resident, or a person acting on behalf of the

SENATE BILL 673

SECTION 1

1 resident, and a facility defined in s. 50.01 (1), (1d), (1g), or (3), 50.49 (1) (a), or 50.90
2 (1), that is made before the resident suffers injury or harm that compels arbitration
3 between the parties, and that limits or waives the right of the resident to bring a civil
4 action against the facility or that limits the resident's remedies in a civil action
5 against the facility, is void as against public policy and shall not constitute
6 a defense in any action, suit, or proceeding.

7 **SECTION 2. Nonstatutory provisions.**

8 (1) This act applies to contracts that are entered into before, on, or after the
9 effective date of this subsection. ✓

10 (END)

d-note
↓

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

-4674/ldn
LRB-4396/P1dn
PJH:jld:rs

↑ stays

February 23, 2010

new date

March 2, 2010

Barca

Eric, Representative Barca,

This draft is identical to 2009 Senate Bill 673.

Please review this draft to ensure that it is consistent with your intent. I drafted this as a preliminary draft because I do want to bring a couple of questions and issues to your attention.

First, do you want to limit the voiding effect to arbitration agreements that are entered into before a resident suffers an injury? As worded, the draft would nullify an arbitration agreement that the parties enter into after a person is injured, as part of a settlement package. Is that your intent?

Second, the draft applies to certain facilities listed in s. 50.01. It does not apply to hospitals or to hospices; please let me know if that is consistent with your intent.

Third, the nonstatutory provision I included in this draft nullifies arbitration provisions in existing contracts. This could be considered an unconstitutional impairment of contract. The federal and Wisconsin constitutions both provide that the legislature may not pass a law "impairing the obligation of contracts" (article I, section 10, of the U.S. Constitution and article I, section 12, of the Wisconsin Constitution). However, this prohibition is not absolute.

The courts have held that a state may impair an existing contract in the exercise of its police powers for the general public welfare. Wisconsin courts would likely use the following analysis to determine whether the legislature may impair an existing contract for the general public welfare:

- a. Does the legislation substantially impair an existing contract?
- b. If the impairment is substantial, is there a significant and legitimate public purpose for the legislation?
- c. Even if there is a significant and legitimate public purpose, is the legislation a reasonable and necessary means of achieving that public purpose?

Although it is not possible to predict how a court would decide a challenge to this draft, I thought that you should at least be aware of this issue.

Please let me know how you wish to proceed or if you have any questions or other concerns.

NO
Please note that

Peggy Hurley
Legislative Attorney
Phone: (608) 266-8906
E-mail: peggy.hurley@legis.wisconsin.gov

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-4674/1dn
PJH:jld:rs

April 13, 2010

Representative Barca,

Please review this draft to ensure that it is consistent with your intent. This draft is identical to 2009 Senate Bill 673.

Please note that the nonstatutory provision in this draft nullifies arbitration provisions in existing contracts. This could be considered an unconstitutional impairment of contract. The federal and Wisconsin constitutions both provide that the legislature may not pass a law "impairing the obligation of contracts" (article I, section 10, of the U.S. Constitution and article I, section 12, of the Wisconsin Constitution). However, this prohibition is not absolute.

The courts have held that a state may impair an existing contract in the exercise of its police powers for the general public welfare. Wisconsin courts would likely use the following analysis to determine whether the legislature may impair an existing contract for the general public welfare:

- a. Does the legislation substantially impair an existing contract?
- b. If the impairment is substantial, is there a significant and legitimate public purpose for the legislation?
- c. Even if there is a significant and legitimate public purpose, is the legislation a reasonable and necessary means of achieving that public purpose?

Although it is not possible to predict how a court would decide a challenge to this draft, I thought that you should at least be aware of this issue.

Please let me know if you have any questions or other concerns.

Peggy Hurley
Legislative Attorney
Phone: (608) 266-8906
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Duerst, Christina

From: Carla McDonald [cmmcd@charter.net]
Sent: Wednesday, April 14, 2010 8:09 AM
To: LRB.Legal; Inabnet, Kay
Cc: McDonald, Carla; Kostelic, Jeff
Subject: RUSH: LRB 09-4674/1 Topic: Nursing home arbitration agreements

Please Jacket LRB 09-4674/1 for the ASSEMBLY.

Lead is Rep. Peter Barca

Assembly co-sponsors are:

Rep. Cory Mason
Rep. Kelda Helen Roys

Senate co-sponsor is:

Sen. Lena Taylor

This is a rush, as Rep. Richards would like to notice this for a hearing tomorrow after an exec at 9 am.

Carla M. McDonald
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