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Arbitration and Other Protective Clauses in Long Term Care Admission Agreements

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The past one-and-a-half decades have witnessed explosive growth in claims brought against long term care facilities. There were 4.8 claims per 1,000 occupied beds in 1992. By 2003, that claims ratio had risen to 14.3.[1] Severity of claims also rose. Taking into account frequency and severity from 1992 to 2003, the cost per occupied bed in long term care facilities for general liability/professional liability rose 600%.[2] The plaintiff bar continues to display interest in litigating against the long term care industry. The American Association for Justice (formerly the Association of Trial Lawyers of America) has online educational programs such as "Punitive Damages in Nursing Home Cases" and "Successful Medical Malpractice Suits and Defense in Florida" available to its members.[3]

In response to this litigious environment, the long term care industry began to utilize patient admission agreements with protective clauses. One such clause that has seen widespread use is the arbitration clause. The Federal Arbitration Act provides statutory authority for the use of these clauses in admission agreements.[4] The purpose of the Federal Arbitration Act was to relieve congestion in courts and to provide parties with an alternative method of dispute resolution that is faster and less costly than traditional litigation.[5] Generally, arbitration clauses have been favored by long term care facilities as being protective while the plaintiff bar has viewed these clauses as harmful to patients' interests.

Most courts have held properly drafted and executed arbitration agreements are enforceable. For example, the Mississippi Supreme Court recently held that arbitration provisions within a nursing home admission agreement fall within the scope of the Federal Arbitration Act.[6] Because there is a presumption favoring agreements to arbitrate, doubts regarding an agreement's scope are resolved in favor of arbitration.[7]

While the courts may favor the enforcement of valid arbitration agreements, the agreement must meet a variety of tests to first be found to be a valid arbitration agreement. The first ground upon which many arbitration agreements are challenged is unconscionability. The Court of Appeals of Ohio provided a well-reasoned analysis of the issue of unconscionability.[8] In *Manley v. Personacare of Ohio*, Patricia Manley went to Lake Med Nursing Home, following a week of hospitalization. Upon entering Lake Med Nursing, Ms. Manley signed a document entitled "Alternative Dispute Resolution Agreement Between Resident and Facility." This document required all future claims be submitted to binding arbitration. Ms. Manley subsequently died and her estate filed suit. Personacare (d/b/a Lake Med) filed a motion to stay the proceeding and to have the matter referred to arbitration. Manley's estate argued that the arbitration agreement was unconscionable and thus should be found void. The Ohio Appellate Court's opinion stated:

> There are two prongs that must be met for a successful claim of unconscionability, substantive unconscionability and procedural unconscionability. A substantive unconscionability analysis considers whether the actual terms of the contract are commercially reasonable. Procedural unconscionability involves

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> those factors bearing on the relative bargaining position of the contracting parties, including their age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, and whether alterations in the printed terms were possible.[9]

The Ohio Court of Appeals found that procedural unconscionability existed at the time Ms. Manley signed the admissions agreement.

> By definition, an individual being admitted into a nursing home has a physical or mental detriment that requires them to need the assistance of a nursing home. Further, the reality is that, for many individuals, their admission to a nursing home is the final step in the road of life. As such, this is an extremely stressful time for the elderly persons of diminished health. In most circumstances, it will be difficult to conclude that such an individual has equal bargaining power with a corporation that, through corporate counsel, drafted the form contract at issue.[10]

While it may seem that procedural unconscionability could be found at the executing of most long term care admission agreements, some facilities have developed ways to remedy this natural obstacle.

One method used by some facilities to avoid procedural unconscionability is to make the arbitration agreement voluntary. In *Reagan v. Kindred Healthcare Operating, Inc.*, an arbitration agreement was signed by a patient, Hazel Rayborn, when she was admitted to a long term care facility.[11] The Estate of Rayborn later argued that the arbitration agreement was an unconscionable contract of adhesion.[12] However, the court found that the method used by the facility in securing Ms. Rayborn's signature was not unconscionable. The agreement was not a prerequisite to admission. Further, the court noted that the agreement was a stand-alone document with a description of the waiver of patients' right to a trial. Finally, Ms. Rayborn was given the opportunity to have her family or counsel assist her with the agreement.[13] Other courts have found that affording a patient a thirty-day period to revoke his or her consent to the arbitration agreement helped avoid procedural unconscionability.[14]

Courts have stricken a variety of provisions related to arbitration on grounds of substantive unconscionability. In *Trinity Mission Health and Rehabilitation of Clinton v. Estate of Scott ex rel. Johnson,* the Court of Appeals of Mississippi held that three separate provisions of an arbitration agreement were void as unconscionable.[15] The agreement in the *Trinity* case attempted to force patients to arbitrate claims against Trinity while allowing Trinity to access the courts for its claims against patients. The court found this double standard unconscionable. The agreement in *Trinity* also provided that in collections matters, the resident would be responsible for the cost of the litigation. Finally, the agreement required the parties to submit to a grievance resolution process for all matters, except for payment of services. Citing *Covenant Health Rehab v. Brown,*[16] the court stated, "In fact in *Brown*, the Supreme Court found that the entire grievance resolution procedure in the admission agreement was unconscionable and should be stricken since it was 'one-sided, oppressive, and unconscionable.'"[17]

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Other facilities utilizing arbitration agreements have failed because they attempted to directly limit damages. The Florida courts have addressed such attempts. An admission agreement that limited non-economic damages to $250,000 and excluded punitive damages was found to be unenforceable because it deprived the patient of rights under a state statute protecting nursing home residents.[18] Florida's Assisted Living Facilities Act[19] has similarly been used to strike non-economic damages caps and prohibitions on punitive damages from long term care admission agreements.[20] More creative waivers also have been stricken on grounds of unconscionability. Attempts by Covenant Health Rehab of Picayune to require residents to waive all claims except those for willful acts and to waive liability for criminal acts of individuals were

found unconscionable.[21] Unilateral provisions and damage limitations such as those above are most often found to be substantively unconscionable by courts.

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Arbitration agreements in long term care admission documents are often challenged on grounds that an unauthorized third party signed on behalf of the resident. In *Sikes v. Heritage Oaks,* Joel Sikes was admitted to Heritage Oaks West Retirement Village.[22] During the admission process, his wife, Eugenia, signed an arbitration agreement on his behalf. Subsequently, Eugenia and her family brought a medical malpractice claim against Heritage Oaks for alleged negligent care of her husband prior to his death. Heritage Oaks compelled arbitration and the issue became Eugenia's authority to execute an arbitration agreement on behalf of her husband. "Apparent authority looks to the actions of the principal, Joel Sikes, to determine if he participated in, had knowledge of, or acquiesced in his agent, Eugenia, signing on his behalf."[23] The court found no evidence that Joel Sikes had taken actions to induce others to believe that his wife was his agent. As such, the arbitration agreement was found to be unenforceable.[24]

However, in cases where the spouse of a resident was given authority by the resident to sign on his or her behalf, the results differ. The Tennessee Court of Appeals held in *Necessary v. Life Care Centers of America, Inc.* "that the Plaintiff who had Decedent's express authority to sign the admission documents at the healthcare facility, also had the authority to sign the arbitration agreement on the Decedent's behalf as one of those admissions documents."[25]

There is a split of authority when it comes to an authorized healthcare representative executing an arbitration agreement on behalf of an incapacitated resident. In *Owens v. National Health Corporation,* the Supreme Court of Tennessee held that under Tennessee statutory law, "an attorney-in-fact acting pursuant to a durable power of attorney for health care may sign a nursing home contract that contains an arbitration provision because this action is necessary to consent to health care."[26] California takes the opposite view. "Although the Legislature has specifically conveyed authority over medical decision making and enforcement of rights to family members, it has not conveyed authority over the arbitration decision to family members."[27] A state-by-state analysis needs to be performed to determine if an authorized healthcare representative may sign an arbitration agreement for an incapacitated resident.

CONCLUSION

Arbitration agreements have become fairly common documents that long term care facilities request residents to execute upon admission. The use of these agreements is a reaction to the litigation climate within which these facilities operate. Arbitration agreements have generally been enforced by the courts provided that they are executed in a procedurally proper manner and do not contain unconscionable terms. While bilateral requirements are typically acceptable, unilateral caps on damages have generally been fatal.

As we move forward and courts continue to clarify the role of arbitration agreements in long term care admissions, it is likely that more refined provisions will be used. Specialty arbitration services for long term care facilities seem likely. James Wootten, a Washington D.C.-based attorney, is promoting a new type of dispute resolution system that seeks to create a "justice system that will be a better complement to the healthcare systems they are meant to support."[28] Others promote the use of contracts to ensure qualified, accountable experts in the event of a future claim. These approaches are generally bilateral and designed to promote integrity in testimony. While arbitration agreements select the forum in which claims will be handled, one can craft contractual provisions that go to the qualifications of experts testifying in the proceedings.

Whether traditional arbitration agreements or next generation contractual provisions, we can expect to see terms of admission documents be under judicial scrutiny for the foreseeable future.

In the face of substantial litigation claims, the long term care industry will continue to attempt, ex ante, to obtain some protection from resident admissions agreements.

Whether traditional arbitration agreements or next generation contractual provisions, we can expect to see terms of admission documents be under judicial scrutiny for the foreseeable future.

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1 *Long Term Care General Liability and Professional Liability, 2004 Actuarial Analysis,* Aon Risk Consultants, Inc. report by Theresa W. Bourdon and Sharon C. Dubin, 2004. *Id.* at 9.
2 *Id.* at 8.
3 *See* westlegaledcenter.com.
4 Federal Arbitration Act, 9 U.S.C.S. § 1 et seq.
5 *O.R. Securities, Inc. v. Professional Planning Assocs.,* 857 F.2d 742 (11th Cir. 1988).
6 *Vicksburg Partners, L.P. v. Stephens,* 911 So.2d 507 (Miss. 2005).
7 *Sikes v. Heritage Oaks West Retirement Village,* 238 S.W.3d 807, 809 (Tex. App. 2007), citing *In re Kellogg Brown & Root, Inc.,* 166 S.W.3d 732, 737 (Tex. 2005).
8 *Manley v. Personacare of Ohio,* No. 2005-L-174, 2007 WL 210583 (Ohio Ct. App. Jan. 26, 2007).
9 *Id.* at note 14.
10 *Id.* at ¶ 29.
11 *Reagan v. Kindred Healthcare Operating, Inc.,* No. M2006-02191-COA-R3-CV, 2007 WL 4523092 (Tenn. Ct. App. Dec. 20, 2007).
12 *Id.* at 1.
13 *Id.* at 15.
14 *Buraczynski v. Eyring,* 919 S.W.2d 314 (Tenn. 1996).
15 *Trinity Mission Health and Rehabilitation of Clinton v. Estate of Scott ex rel. Johnson,* No. 2006-CA-01053-COA, 2008 WL 73682 (Miss. Ct. App. Jan. 8, 2008).
16 949 S.2d 732 at 739 (Miss. 2007).
17 *Id.* at 11.
18 *See Romano v. Manor Care,* 861 So.2d 59 (Fla. Dist. Ct. App. 2003); *Blankfeld v. Richmond Health Care, Inc.,* 902 So.2d 296 (Fla. Dist. Ct. App. 2005).
19 Fla. Stat. Ann. § 429.01 et seq.
20 *Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham,* 953 So.2d 574 (Fla. Dist. Ct. App. 2007).
21 *Covenant Health Rehab of Picayune, L.P. v. Brown,* 949 So.2d 732 (Miss. 2007).
22 *Sikes v. Heritage Oaks West Retirement Village,* 238 S.W. 3d 807 (Tex. App. 2007).
23 *Id.* at 810 (Tex App. 2007).
24 *Id.*
25 *Necessary v. Life Care Ctrs. of Am., Inc.,* No. E2006-00453-COA-R3-CV, 2007 WL 3446636 (Tenn. Ct. App. Nov. 16, 2007).
26 *Owens v. National Health Corp.,* No. M2005-01272-SC-R11-CV, 2007 WL 3284669 (Tenn. Nov. 8, 2007).
27 *Flores v. Evergreen at San Diego, LLC* 148 Cal.App. 4th 581, 590 (2007).
28 Correspondence from Wootton to Sacopulos, November 9, 2007.