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Care Facility Arbitration Agreement Enforcement Hinges on Authority of the Signatory to Bind the Patient

The Tennessee Court of Appeals held that a power of attorney for health care decisions provided an attorney-in-fact with authority to agree that the principal would arbitrate disputes with a nursing home. Several Mississippi opinions also concluded that for an arbitration agreement to be enforceable, the resident's agent needed specific legal authorization to bind the resident.

In *Owens v. National Health Corp.*, No. M2005-01272-COA-R3-CV, 2006 WL 1865009 (Tenn. Ct. App. June 30, 2006), King signed a durable power of attorney naming Daniel as her attorney-in-fact for health care decisions. The power of attorney authorized Daniel to execute "any waiver, release or other document which may be necessary in order to implement the health care decisions" made on King's behalf.

Three weeks later, Daniel admitted King to a nursing home run by National Health Corporation ("NHC"). The admission contract Daniel signed included an arbitration provision, so when King's conservator, Owens, sued NHC for alleged negligence, NHC moved to compel arbitration. The trial court denied the motion, finding that Daniel did not have authority to agree to arbitration on King's behalf.

The Court of Appeals disagreed. Based on statutory definitions, the court concluded that "consenting to care at a nursing home is a 'health care decision.'" More importantly, the court determined that Daniel's authority to execute "any waiver, release or other document" necessary to implement this health care decision enabled him to agree to arbitration on King's behalf.

Owens argued that federal law would not allow NHC to enter an arbitration agreement with a patient receiving Medicare or Medicaid because the agreement constitutes additional consideration. The court rejected this argument, concluding that "requiring a nursing home admittee that receives Medicare or Medicaid to agree to arbitrate any dispute he or she has with the nursing home is not charging an additional fee or other consideration."

The court also rejected Owens' argument that the arbitration agreement was unconscionable. The agreement "did not change the nursing home's duty to use reasonable care in treating King, nor limit the nursing home's liability for any breach of that duty," the court noted. Instead, the agreement "merely shifted the

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disputes to a different forum.”

Mississippi courts have followed the principle announced in *Owens*, while coming to a different conclusion on the facts. In *Mariner Health Care, Inc. v. Ferguson*, No. 4:04CV245-D-B, 2006 WL 1851250 (N.D. Miss. June 30, 2006), Ferguson’s family brought a wrongful death action against Mariner after Ferguson died while residing in a nursing home affiliated with Mariner.

Mariner moved to compel arbitration pursuant to an arbitration agreement signed by Ferguson’s sister. In opposing the motion, Ferguson’s family argued that the sister lacked authority to bind Ferguson to the arbitration agreement. As the court observed, to establish the existence of a valid arbitration

agreement, Mariner had to demonstrate that the sister had actual, apparent, or statutory authority to act as Ferguson’s agent.

The court found that Mariner failed to demonstrate that the sister had actual authority because there was no proof that Ferguson gave her sister express authority to act on her behalf. The court also found that Mariner failed to demonstrate that the sister had apparent authority because there was no action by Ferguson to indicate that the sister was acting as her agent. Also, Mariner’s “own assessment of Ferguson show[ed] the court that she lacked the mental capacity to understand what was happening.”

Finally, the court found that a Mississippi statute authorizing the sister to make “health-care decision[s]”

did not give the sister specific statutory authority to bind Ferguson to the arbitration agreement.

The court’s decision is in line with three decisions recently issued by another judge in the same district. See *Mariner Healthcare, Inc. v. King*, No. 4:04CV263, 2006 WL 1716863 (N.D. Miss. June 19, 2006); *JPMorgan Chase & Co. v. Conegie*, No. 4:05CV212, 2006 WL 1666686 (N.D. Miss. June 12, 2006); *Mariner Healthcare, Inc. v. Green*, No. 4:04CV246, 2006 WL 1626581 (N.D. Miss. June 7, 2006).

Arbitration provisions in nursing home admission agreements remain enforceable even where the admitted resident does not sign them. However, courts are careful to determine the specific legal authority under which the signatory’s assent binds the resident.

Florida Courts Split on Whether Courts or Arbitrators Decide the Enforceability of Limitations on Remedies

There is a split of authority among Florida appellate districts on the issue of whether the court or arbitrator should decide the enforceability of remedial limitations in an arbitration agreement.

In *SA-PG-Ocala, LLC v. Stokes*, Nos. 5D05-3776, 5D05-3777, 2006 WL 2347369 (Fla. Dist. Ct. App.-5th Aug 11, 2006), Stokes signed an arbitration agreement in connection with her admission to a nursing home. Under the designated rules of arbitration, an arbitrator could not award “consequential, exemplary, incidental, punitive or special damages” unless the claimant demonstrated intentional or reckless misconduct “by clear and convincing evidence.”

The court held that the remedial limitations rendered the arbitration agreement unenforceable because “[i]t would be against public policy to permit a nursing home to dismantle the protections afforded patients by the Legislature through the use of an arbitration agreement.”

The nursing home argued that the arbitrator should determine the validity of the remedial limitations. The court disagreed, noting the validity of an arbitration agreement is a “threshold determination.” The court also rejected the nursing home’s argument that the remedial

limitations should be severed from the agreement, mainly because there was no severability clause.

In *Bland ex rel. Coker v. Health Care and Retirement Corp. of America*, 927 So.2d 252 (Fla. Dist. Ct. App.-2nd 2006), a Florida court from a different appellate district came to the opposite conclusion regarding an arbitrator’s authority to decide the enforceability of remedial limitations. In *Bland*, the court found “no reason why the arbitrator, in the first instance, cannot decide whether to enforce the remedial limitations.”

Whether by the court or by the arbitrator, arbitration agreements with remedial limitations are carefully reviewed to ensure that the agreement does not “prohibit or substantially limit a person from enforcing and vindicating rights and protections or from seeking and obtaining statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public.” *Am. Gen. Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 89 (4th Cir. 2005).

The most effective way to avoid this type of litigation is to incorporate by reference a set of arbitration rules that allows the arbitrator to award all remedies available under applicable law.

Healthcare Arbitration Agreement Enforced Despite AAA's Refusal to Accept the Claim

The Idaho Supreme Court held that arbitration should proceed even though the designated administrator refused to accept the matter for lack of a post-dispute agreement to arbitrate.

In *Deeds v. Regence Blueshield of Idaho*, No. 31180, 2006 WL 2089247 (Idaho July 28, 2006), Deeds sued Regence seeking reimbursement under a health insurance policy that provided for "arbitration in accordance with the applicable rules of the American Arbitration Association ["AAA"]."

The trial court granted Regence's motion to compel arbitration, but Deeds later discovered that the AAA had implemented a policy whereby it "no longer accept[s] the administration of cases involving individual patients without a post-dispute agreement to arbitrate." When Deeds refused to sign a post-dispute agreement, the trial court vacated its arbitration order and set the matter for trial.

After determining that the trial court's order was appealable, the court considered whether the arbitration clause was enforceable despite the AAA's requirement of a post-dispute agreement. The court concluded that

arbitration should "proceed 'in accordance with the applicable rules of the AAA using a different arbitrator."

In reaching this conclusion, the court reasoned that the appointment of a AAA arbitrator was unnecessary because "the AAA rules governing th[e] dispute are simple procedural rules of general applicability." Moreover, Deeds presented "no evidence that the AAA itself [wa]s central to the agreement to arbitrate."

Lastly, the court observed, the Idaho Uniform Arbitration Act provides for court appointment of an arbitrator "if the agreed method fails or for any reason can't be followed." Accordingly, the court remanded the case to the trial court to appoint an arbitrator.

The court's decision is in harmony with *Blue Cross Blue Shield of Alabama v. Rigas*, 923 So. 2d 1077 (Ala. 2005), which involved the same AAA policy. In *Rigas*, the Alabama Supreme Court noted the general rule: "Where the arbitrator named in the arbitration agreement cannot or will not arbitrate the dispute, a court does not void the agreement but instead appoints a

Healthcare ADR Legislative Activity

Alaska SB 289 (Signed into law, 7/10/2006)

Subjects: Payor/Provider Contracting; Mediation

Requires that contracts between HMOs and healthcare providers include dispute resolution terms calling for, at minimum, an initial meeting within 10 days of the dispute arising and mediation within 30 days of the initial meeting. Parties may seek any other relief allowed by law after 60 days have passed from the commencement of mediation.

Florida SB 388 (Signed into law, 6/13/2006)

Subjects: Assisted Living Facilities; Mediation

Mandates a 75-day waiting period after notice of a negligence claim or claim of a violation of a resident's rights during which the applicable statute of limitations is tolled. Requires mediation between the parties within 30 days of claimant's receipt of the defendant's response to the claim. After the 75-day period, the claimant has 60 days within which to file suit.

Iowa HF 2716 (Signed into law, 5/24/2006)

Subjects: Benevolent Gestures; Arbitration

Prevents the admissibility of statements and gestures "expressing sorrow, sympathy...or a general sense of benevolence" from being admitted into evidence in a civil action or arbitration for professional negligence, personal injury, or wrongful death.

Did You Know?

Under the terms of the Federal Arbitration Act (FAA), a direct appeal may be sought from a non-final court order:

- refusing to stay court proceedings pending arbitration, 9 U.S.C. § 16(a)(1)(A), or
- denying a petition to compel arbitration, § 16(a)(1)(B).

However, an appeal may not be taken from a non-final order:

- granting a stay of court proceedings pending arbitration, § 16(b)(1),

- compelling arbitration, § 16(b)(2), or
- refusing to enjoin arbitration, § 16(b)(4).

These FAA provisions reflect a strong federal policy of respecting private agreements to arbitrate and enforcing their terms as written. By selectively facilitating and restricting interlocutory appeals, the FAA ensures that contractual arbitrations can be conducted efficiently and without undue delay.

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- Healthcare ADR Legislative Activity
- Nursing Home Arbitration Agreement That is Optional is Fully Enforceable

Nursing Home Arbitration Agreement That is Optional is Fully Enforceable

The Ohio Court of Appeals held that a nursing home's arbitration agreement was not unconscionable because the agreement clearly stated it was optional and not a condition of admission.

In *Hanson v. Valley View Nursing & Rehabilitation Center*, No. 23001, 2006 WL 2060575 (Ohio Ct. App. July 26, 2006), Hanson brought a medical malpractice action against Valley View, where his mother had been a resident. Valley View moved to compel arbitration pursuant to an arbitration agreement that Hanson signed on behalf of his mother.

Hanson argued that the arbitration clause was unconscionable and therefore unenforceable. In rejecting this argument, the court found that

Hanson failed to prove the agreement was procedurally unconscionable.

As the court noted, the arbitration agreement was separate from the admission agreement and not a condition of admission. Hanson had the option of rejecting the arbitration agreement. In fact, Hanson's mother was admitted to Valley View before he signed the agreement.

In rejecting Hanson's argument that the agreement was unconscionable because he was not represented by an attorney, the court noted that Ohio law does not require the presence of an attorney for the formation of a valid contract, and that Hanson was an experienced businessman capable of understanding contracts more complex than the arbitration agreement.

NATIONAL ARBITRATION FORUM

The National Arbitration Forum is a leading provider of dispute resolution services, with over 1,500 legally-trained mediators and arbitrators located in 50 states and 29 countries. We offer the full range of healthcare dispute resolution services, including arbitrations resulting from predispute agreements between patients/enrollees and healthcare providers and plans, medical disclosure/ "I'm Sorry" programs, and arbitration and mediation of contractual disputes between providers, plans, and payers.

To receive the complimentary White Paper, *Mediating and Arbitrating Healthcare Disputes*, which includes drafting tips and model ADR language, or for expert information on how to implement a healthcare ADR program, contact us at 877-655-7755, or healthcare@adrforum.com.