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Medical Malpractice Update

Susan A. Wagener and Ryan J. Chancellor
HeplerBroom LLC, Chicago

Enforceability of Mandatory Arbitration Agreements in Long-Term Care Litigation

Mandatory arbitration provisions in long-term care facility contracts are generally enforceable and can be a useful tool in managing litigation arising out of the Illinois Nursing Home Care Act (NHCA), 210 ILCS 45/1-101 through 210 ILCS 45/3A-101. Arbitration provisions in long-term care facility contracts are inherently unique, in that they present a set of circumstances where a multitude of issues—including statutory rights under the Illinois NHCA, the resident's capacity to contract, the healthcare power of attorney's capacity to bind the resident, and procedural and substantive unconscionability—factor into the determination of whether the arbitration agreement is valid and enforceable at the time the agreement is entered into. Understanding the law surrounding arbitration agreements is incredibly important to protect and defend the interests of long-term care facilities.

Federal Preemption

Claims brought pursuant to the Illinois NHCA can be subject to a motion to dismiss and compel arbitration. Mandatory arbitration provisions in long-term care facility contracts are enforceable despite provisions in the NHCA due to the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16; 9 U.S.C. §§ 201-208; 9 U.S.C. §§ 301-307, which preempt portions of the NHCA. The NHCA "expressly grants nursing home residents the right to pursue actions for damages and other relief" against nursing home facilities, owners, and licensees. *Sablik v. Cty. of De Kalb*, 2019 IL App (2d) 190293, ¶ 11. The NHCA also contains explicit nonwaiver provisions relating to the right to bring an action and the right to a jury trial, stating that "[a]ny waiver by a resident or his legal representative of the right to commence an action under Sections 3-601 through 3-607, whether oral or in writing, shall be null and void, and without legal force or effect." 210 ILCS 45/3-606. Section 3-607 provides that any party bringing an action under the NHCA, "shall be entitled to a trial by jury and any waiver of the right to a trial by a jury, whether oral or in writing, prior to the commencement of an action, shall be null and void, and without legal force or effect." 210 ILCS 45/3-607.

The Illinois Supreme Court held the anti-waiver provisions of §§ 3–606 and 3–607 are preempted by the FAA. *Carter v. SSC Odin Operating Co.*, 237 Ill. 2d 30, 48-49 (2010). "The FAA applies for purposes of determining the enforceability of an arbitration agreement that might otherwise be invalid under state law." *Folser v. Midwest Care Center II, Inc.*, 398 Ill. App. 3d 563, 580 (2d Dist. 2010). Claims arising under the NHCA are therefore subject to arbitration agreements despite the anti-waiver language in the statute. *Folser*, 398 Ill. App. 3d at 580. *See also Carter,* 237 Ill. 2d at 48-49). Essentially, a properly executed arbitration agreement in a long-term care facility contract waives the right to a jury trial provided for in the statute.

General Enforceability

Illinois courts have long held that the public policy of the state strongly supports the enforcement of arbitration agreements as a means to settle disputes. *Tortoriello v. Gerald Nissan of N. Aurora, Inc*., 379 Ill. App. 3d 214, 227 (2008). Therefore, Illinois courts generally construe arbitration agreements to uphold their validity. *Salsitz v. Kreiss*, 198 Ill. 2d 1, 13 (2001). However, arbitration provisions can be invalidated by any generally applicable state law contract principals, including defenses such as unconscionability and capacity to contract. *Hartz v. Brehm Preparatory Sch., Inc.,* 2021 IL App (5th) 190327, ¶ 41*; In re Est. of Gruske,* 179 Ill. App. 3d 675 (1989).

A recent opinion from the Illinois Appellate Court Fourth District evaluated the nuances of arbitration provisions in long-term care facility contracts. *Taylor v. UDI #4, LLC*, 2021 IL App (4th) 210057-U. *Taylor* is an unpublished opinion that can be cited as persuasive authority due to changes to Ill. S. Ct. R. 23. Regardless, the *Taylor* opinion serves as a welcome refresher on the state of the law in Illinois relating to mandatory arbitration agreements in long-term care facility contracts and as persuasive authority for the enforcement of valid arbitration agreements.

The plaintiff in *Taylor*, as independent executor of the deceased's estate, filed a complaint against defendants alleging they provided negligent nursing home care to Floyd Dodson, which resulted in his death. Taylor, 2021 IL App (4th) 210057-U, ¶ 2. In response, the defendants filed a motion to dismiss and compel arbitration of the claims under the NHCA, as Floyd and his legal representative, Jack, entered into a valid and enforceable arbitration agreement at the time Floyd was admitted to Leroy Manor. *Id*. ¶ 11. In response to the defendants' motion to dismiss and compel arbitration, the plaintiff alleged that the arbitration agreement was unenforceable because Floyd lacked the capacity to contract, that Jack was not acting as his health care agent under power of attorney, and that the agreement was procedurally and substantively unconscionable. *Id.* ¶ 15.

Capacity

The NHCA states that an adult person shall be presumed to have the capacity to contract for admission to a long-term care facility unless he has been adjudicated a 'person with a disability' within the meaning of Section 11a-2 of the Probate Act of 1975, or unless a petition for such an adjudication is pending in a circuit court of Illinois. 210 ILCS 45/2-202. A party seeking to set aside a transaction has the burden to prove mental incompetence, and "incompetence cannot be inferred merely from old age, physical illness or defective memory." *Gruske*, 179 Ill. App. 3d at 678.

An impairment of the mind that is a natural result from old age or disease is not enough to nullify an agreement "so long as the person in question was able to comprehend the nature of the transaction and to protect her interests." *Id*. "Capacity to contract requires that a party be of sufficient mental ability to appreciate the effect of what he is doing." *In re Marriage of Davis*, 217 Ill. App. 3d 273, 276 (5th Dist. 1991).

In *Taylor*, it was noted that, "Floyd was 85 years old, had dementia, an eighth-grade education, could not read, and could not speak but could communicate by nodding in response to yes and no questions." *Taylor,* 2021 IL App (4th) 210057-U, ¶ 50. The court found that the affidavits of the plaintiff and Jack showed that Floyd could not have read and understood the documents he was required to sign upon admission to the facility. *Id*. ¶ 54. However, the court noted that while the plaintiff may have shown why Floyd could not have understood the arbitration form on his own, "nothing in the record suggests Floyd was incapable of understanding the need to designate a person to make healthcare decisions for him." *Id*. In other words, even if Floyd were unable to understand the arbitration agreement, there is nothing to suggest

that he did not know he needed somebody who could understand it to sign for him. *Id*. ¶ 18. Therefore, the question became whether Jack, as power of attorney, could bind Floyd to the arbitration agreement.

Power of Attorney

The law distinguishes between an arbitration provision that is required for admission to a nursing-care facility, and an arbitration provision that is separate and not required for admission. *Fiala v. Bickford Senior Living Grp., LLC*, 2015 IL App (2d) 141160, ¶ 45. "If an arbitration provision is required for admission to a care facility then it becomes part and parcel of the health-care decision to admit the patient to the facility." *Fiala*, ¶ 45. An agreement that is separate from the admissions contract is "outside the power of the agent exercising the right to make health-care decisions." *Id.* ¶ 46. Therefore, a person who is authorized to make healthcare decisions by a power of attorney can bind the resident to an arbitration provision entered into as part of the nursing home contract if the agreement is integral and required for admission. *Id.* ¶ 45.

In *Taylor*, the arbitration provision was required to be admitted into the nursing home, and the home required it to be signed by the resident, the power of attorney, or both. *Taylor*, IL App (4th) 210057-U, ¶ 55. Therefore, Jack's signing of the arbitration agreement on behalf of his father was a health-care decision required for Floyd to receive care. *Id*. ¶ 56. *See also Curto v. Illini Manors, Inc.*, 405 Ill. App. 3d 888, 894 (3d Dist. 2010). Since Floyd had capacity to name Jack as his power of attorney and Jack was able to bind Floyd to the arbitration provision, the next challenge was to the actual terms of the agreement. *Taylor*, 2021 IL App (4th) 210057-U, ¶¶ 65, 69.

Unconscionability

Arbitration agreements can be invalidated for substantive unconscionability, procedural unconscionability, or both. *Zuniga v. Major League Baseball*, 2021 IL App (1st) 201264, ¶14. Substantive unconscionability concerns the relative fairness of the terms of the contract, while procedural unconscionability consists of impropriety that deprived one party of a meaningful choice in entering the contract. *Hartz v. Brehm Preparatory Sch., Inc.,* 2021 IL App (5th) 190327, ¶ 48-49.

Substantive unconscionability looks into whether the terms of the arbitration provision are so "one-sided as to oppress or unfairly surprise an innocent party." *Phoenix Ins. Co. v. Rosen,* 242 Ill. 2d 48, 60 (2011). Procedural unconscionability exists where "a term is so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware he was agreeing to it." *Kinkel v. Cingular Wireless*, LLC, 223 Ill. 2d 1, 22 (2006). "A provision will not be found procedurally unconscionable merely because it is presented in fine print or uses legal language that an average consumer might not fully understand." *Zuniga*, 2021 IL App (1st) 201264, ¶ 15. An arbitration agreement is not substantively unconscionable because it waives the right to a jury trial under the NHCA. *Taylor*, IL App (4th) 210057-U, ¶ 66. A waiver of a jury trial is inherent in arbitration, and the right to a jury trial and nonwaiver provisions in the NHCA are preempted by the FAA. *Carter v. SSC Odin Operating Co.,* 237 Ill. 2d 30, 48-49 (2010).

In most every case where procedural unconscionability is found, there exists some factor that made "the relevant contract term difficult or onerous for the non-drafting party to find" while entering into the contract. *Zuniga*, 2021 IL App (1st) 201264, ¶ 18.

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Practice Tip

To ensure the validity and enforceability of the arbitration provision of the admission contract, it is recommended that the long-term care facility implement a consistent procedure for discussion of the contract provisions. The facility should allow sufficient time to walk through the admissions paperwork, answer questions, and provide additional information if needed. Specifically, an explanation of the arbitration provision should be provided. If a resident has been deemed incompetent, it is further recommended that the long-term care facility ensure that the resident has a power of attorney in place. For a power of attorney to bind the resident, the arbitration provision must be required for admission to the home in order to receive healthcare related services, and an integral part of the contract. Make sure the arbitration provision is clearly identified and the terms are unambiguous. When an action is commenced against your long-term care facility client, obtain a copy of the admissions contract prior to filing a responsive pleading to determine whether a mandatory arbitration clause exists and to consider whether to file a motion to dismiss and compel arbitration. Understand that while the NHCA explicitly creates a right to a jury trial, a properly executed and legally enforceable arbitration provision preempts that right, and the claim will be subject to the arbitration agreement.

About the Authors

Susan A. Wagener is a partner in *HeplerBroom*'s Chicago office and focuses her legal practice on the defense of health care professional licensure cases, medical malpractice, nursing home litigation, and general healthcare law matters. In addition to her active trial practice, she regularly presents and publishes on topics related to malpractice risk management and the defense of disciplinary matters. Ms. Wagener is licensed to practice in Illinois and Wisconsin and is admitted to the bars of the United States Supreme Court, the Illinois Supreme Court, and the United States District Court for the Northern District of Illinois.

Ryan J. Chancellor is an associate attorney in the Chicago office of *HeplerBroom LLC*. Mr. Chancellor is a member of the firm's wide-ranging Insurance Group, and he focuses his practice on insurance coverage, fraud, and bad faith litigation, as well as commercial general liability, premises liability, and construction-related matters in both state and federal court.

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