Binding Arbitration Agreements in the Nursing Home Context.

In your run-of-the-mill car accident or premises liability trial, the plaintiff has the difficult task of overcoming a societal belief that the such claims are frivolous. Not so in nursing home litigation. Most people have a family member or friend, or at least know of someone, who has had a negative experience in a nursing home. In addition, the plaintiff in such a case is generally an elderly and frail person. In our society, the elderly are given respect, which tends to translate into credibility. As a result, unlike other personal injury claims, a nursing home case is tried on a more level playing field.

How have nursing home proprietors fought to keep the field unbalanced? Simple, by attempting to revoke the resident's Constitutionally guaranteed right to trial by jury through the use of binding arbitration agreements.

These agreements are generally buried among the pages and pages of nursing home admission forms, somewhere between the *Pneumoccocal/Influenza Vaccine Status Consent Form* and the *Funeral Home Preference Form*. They generally read something like this:

"Any controversy, dispute, disagreement or claim of any kind arising between the parties after the execution of this Agreement shall be settled exclusively by binding arbitration. This arbitration clause is meant to apply to all controversies, disputes, disagreements or claims including, but not limited to, all breach of contract claims, negligence and malpractice claims, and all other tort claims."

In the midst of the whirlwind of being admitted into the dreaded nursing home, these agreements are commonly signed by unwitting, often uneducated, people who do not understand their implications or their import. Alternatively, they are signed by the spouse or child of a new resident who is dealing with the emotional baggage attached to putting a loved one into a nursing home.

It need not be stated that binding arbitration is not the ideal manner of resolving a claim against a nursing home. Not only is the resident deprived of a jury trial, the cost of arbitrating such cases can be exorbitant. Unlike traditional arbitrations, these arbitration provisions specifically identify the forum in which the dispute will be arbitrated.

These "neutral forums" generally have procedural requirements similar to the tax code in their ease of understanding and compliance. In addition, they require excessive fees along every step of the way.

In one such forum, the filing fee alone can be as high as $1,750. Additional costs are taxed upon the claimant throughout the process. The following costs are illustrative of how costs in such a forum can pile up:

Request for Subpoena: $75
Request of Extension of Time: $100
Request for Non-Dispositive Order: $250
Request for Dispositive Order: $500
Request for Discovery Order: $500
Objection to Discovery Order: $500
Request for Expedited Relief: $750

This is a sampling of the potential costs involved in the initial stages of such an arbitration. They increase when the actual arbitration is commenced. If the parties in this particular forum will settle for a non-participatory hearing (i.e. where the arbitrator makes a ruling based on documents filed), the cost can be as much as $2,500. Want to actually participate in the hearing? That can cost $5,000 (with the caveat that the arbitration forum may assess higher fees!)

As you can see, the procedural nightmare associated with these arbitration forums, coupled with the expense of pursuing a binding arbitration under these parameters, can effectively destroy a litigant's ability to pursue a claim. So, can a resident who signed such a clause avoid a binding arbitration? Maybe, but it won't be easy.

First of all, many of these clauses contain a statement that the agreement can be revoked by the resident within 30 days of entering into the agreement. As such, attorneys who take in a nursing home case which involved an incident or accident that occurred shortly after admission, should immediately revoke the arbitration agreement in writing. This should be done in all cases in which it is known that the agreement was entered into, and in all cases in which the existence of an arbitration agreement is unknown or uncertain.

Unfortunately, many cases of nursing home neglect arise after that 30 day period has expired. If that is the case, the agreement is difficult to overcome. However, there are some avenues which can be taken to attempt to defeat an arbitration provision. They include (1) proving the provision is unconscionable, (2) attacking the power of attorney in cases in which a relative signed the provision on behalf of the resident, and (3) attacking the provision based on statutory defects.

Unconscionability

In order to succeed on the unconscionability argument, the plaintiff must prove that the agreement was <u>both</u> substantively <u>and</u> procedurally unconscionable. Substantive unconscionability refers to the commercial reasonableness of the contract terms themselves.[i]

Since "commercial reasonableness" varies based on the context of the provision, there is no generally accepted list of factors which are indicative of substantive unconscionability. However, in the nursing home context, one item which is indicative of substantive unconscionability is a "loser pays" provision.

In *Small v. HCF of Perrysburg*,[ii] the 6th District held that the binding arbitration provision was substantively unconscionable because it contained a clause which stated: "the prevailing party in the arbitration shall be entitled to have the other party pay its costs for the arbitration, including reasonable attorneys' fees and prejudgment interest."[iii] The court found this clause "troubling" because it could discourage the pursuit of claims, and for that reason deemed it "undoubtedly unconscionable."[iv]

Other arguments weighing in favor of substantive unconscionability include (1) terms that the resident <u>must</u> arbitrate all

of his claims but the home can bring a claim for non-payment in a court of law,[v] (2) arbitration terms that are not conspicuous,[vi] and (3) an arbitration provision that does not expressly advise the resident that he is giving up his right to a jury trial.[vii]

Procedural unconscionability involves an examination of the respective bargaining positions of the parties.[viii] Arbitration provisions in nursing home admission agreements can be found procedurally unconscionable if the resident or agent is under stress at the time of the execution and if the provision is not explained to them. This was found to be the case in *Small, supra*, where the court affirmed the trial court's finding that the arbitration provision was not enforceable because, at the time of its execution, the signor, who was 69 years old, was under a great deal of stress and the agreement was not explained to her. This, according to the 6th District, amounted to procedural unconscionablility. Other considerations in regard to procedural conscionability include the "age, education, intelligence, business acumen, experience in similar transactions, whether terms were explained to the weaker party, and who drafted the contract."[ix]

However, in order for this tact to succeed, the provision must be substantively **and** procedurally unconscionable. For instance, in *Fortune v. Castle Nursing Homes,*[x] the plaintiff successfully argued that the provision was *substantively* unconscionable because it contained a "loser pays" provision. However, because the court was not convinced that there also existed *procedural* unconscionability, the case was remanded for binding arbitration.

On the other hand, in *Manley v. Personacare,*[xi] the plaintiff was able to convince the 11th Appellate District that the clause was *procedurally* unconscionable because of the age of the resident, the fact that she was under a great deal of stress during the admission process, the fact that she had no legal expertise, and the fact that she had a mild cognitive impairment. However, the court held that the clause was nonetheless enforceable because it was not *substantively* unconscionable.

Although it can be done, proving unconscionability can be a difficult row to hoe, and arbitration provisions are being updated to comply with changes in Ohio law, thus making them even more difficult to overcome.

Attacking the POA

Oftentimes, individuals admitted to nursing homes are suffering from Alzheimer's, dementia and/or other maladies and are unable to complete the paperwork necessary for admission. This often results in a family member, pursuant to a healthcare power of attorney, completing the paperwork, and entering into the binding arbitration agreement.

In fighting an agreement under these circumstances, the scope of the power of attorney must be determined. According the Ninth District Court of Appeals, "a power of attorney is a written instrument that authorizes an agent to perform **specific acts** on behalf of his principal. * * * In general, a power of attorney **is to be construed strictly against any enlargement**

beyond the authority actually conferred." (Emphasis added.) *Bacon v. Donnet.*[xii]

As such, the argument can be made that while a healthcare POA does provide the attorney in fact with the power to sign standard, boilerplate admission forms, signing away the Constitutionally guaranteed right to trial by jury exceeds the scope of the authority granted in such a POA, and the resident is not bound as a result.

Although no Ohio appellate court has specifically addressed this issue, it has been addressed by two California appellate courts. In *Goliger v. AMS Properties, Inc.,*[xiii] the court refused to compel arbitration under these circumstances, indicating that while the attorney in fact did have the power to make health care decisions, that "does not equate with being an agent empowered to waive the constitutional right of trail by jury."

Similarly, in *Pagarigan v. Libby Care Center, Inc.,*[xiv] the court refused to enforce an arbitration agreement entered into by an attorney-in- fact pursuant to a health care POA, stating "the nursing home defendants do not explain how the next of kin's authority to make medical treatment decisions for the patient...translates into authority to sign an arbitration agreement on the patient's behalf at the request of the nursing home."

(*Note*: a similar argument was advanced in Ohio's 9th District in *Broughsville v. OHECC, LLC.*[xv] However, *Broughville* is distinguishable in that the resident was competent yet gave her daughter authority to complete the admission forms on her behalf. The court rejected the argument that she exceeded the scope of her authority because the daughter had apparent authority to sign all forms, including the arbitration agreement.)

Statutory Defects in the Agreement

According to R.C. §2711.23, "***to be valid and enforceable*** any arbitration agreements pursuant to sections 2711.01 and 2711.22 of the Revised Code for controversies involving a medical, dental, chiropractic, or optometric claim that is entered into prior to a patient receiving any care, diagnosis, or treatment ***shall include*** or be subject to the following conditions ...." The statute then enumerates 10 conditions for enforceability, the absence of any one of which "shall" invalidate the arbitration provision.

These conditions include the right to treatment/care whether or not the agreement is signed, a mandatory 30 day revocation period, that the agreement constitutes a waiver of the right to trial by jury, and several others. While no appellate court has yet invalidated an arbitration agreement in the nursing home context because it lacked the conditions mandated by R.C. §2711.23, at least one trial court has done so.

In *Heppner v. Beverly Enterprises-Ohio, Inc.,* [xvi] the Lake County Court of Common Pleas refused to enforce an arbitration agreement because it did not specifically state that the costs of the arbitration must be divided equally between the parties, as mandated by R.C. §2711.23(E.)

While these are not the only avenues of defeating binding arbitration agreements, they are among those that have met with some success. Unfortunately, these

binding arbitration provisions are very difficult to overcome, and many Ohio courts have held that they are valid and enforceable.

(Note: the issue of whether an arbitration provision can be enforced on beneficiaries in a wrongful death claim outside of the nursing home arena is currently pending in the Ohio Supreme Court in *Peters v. Columbus Steel Castings Co.*, 10th App. No. 05AP-308, 2006 Ohio 382.)

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[i] *Collins v. Click Camera & Video, Inc. (1993), 86 Ohio App.3d 826, 621 N.E.2d 1294.*

[ii] *159 Ohio App.3d 66, 2004-Ohio-5757.*

[iii] *Id. at ¶ 17.*

[iv] *Id. at ¶ 26.*

[v] *Fortune v. Castle Nursing Homes, 5th App. No. 05 CA 1, 2005-Ohio-6195.*

[vi] *Id.*

[vii] *Id.*

[viii] *Collins v. Click Camera & Video, Inc. (1993), 86 Ohio App.3d 826, 621 N.E.2d 1294.*

[ix] *Featherstone v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 159 Ohio App.3d 27, 2004-Ohio-5953 ¶ 13.*

[x] *5th App. No. 05 CA 1, 2005-Ohio-6195.*

[xi] *11th App. No. 2005-L-174, 2007-Ohio-343.*

[xii] *9th App. No. 21201, 2003-Ohio-1301, ¶28.*

[xiii] *(Oct. 21, 2004), CA 2nd App. No. B166686.*

[xiv] *(2002), 99 Cal. App.4th 298, 302.*

[iv] *9th App. No. 05CA008672, 2005-Ohio-6733.*

[xvi] *Lake County Common Pleas No. 05CV002059.*