ARBITRATION DEVELOPMENTS OF NOTE: HEALTHCARE AND BEYOND WHO DECIDES — THE ARBITRATOR OR THE COURT?[±]

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Whether a healthcare case should be decided in arbitration or in court is a subject of much recent litigation. When a contract contains an arbitration clause, does this mean that the case will be heard by an arbitrator? Not necessarily. In recent litigation, both federal and state courts have reiterated that arbitration is a creature of contract law. As such, courts have examined the facts and circumstances of entry into the contract, as well as the arbitration clause itself, to determine the appropriate forum for adjudication of the dispute. In the past few years, many organizations and individuals involved in healthcare disputes have sought assistance from the court before, after and during the middle of arbitration cases.

I. WHEN WILL A COURT COMPEL ARBITRATION

A court's decision concerning whether to compel arbitration often turns on the parties' relationship to the contract containing the arbitration clause. Did the party consent to arbitration by entering into the agreement that contained the arbitration clause? If the party is an assignee, did the assignor sign the agreement to arbitrate? Does the

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contract evidence the intent of the parties or any intent as to the rights of third party beneficiaries?

In *CardioNet Inc., et al. v. Cigna Health Corp*.,[1] medical device providers sued Cigna for its decision to cease providing coverage for services of certain devices. These lawsuits were brought against Cigna directly and derivatively as assignees on behalf of patients (participants in an ERISA plan) who used the services of the device companies. Cigna moved to compel arbitration, based on a contract provision that required arbitration of disputes "regarding the performance or interpretation of the Agreement." The district court granted the motion to compel arbitration, but the Third Circuit reversed after a review of the facts, finding that neither the direct nor the derivative claims alleged pertained to "the performance or interpretation of the Agreement." Rather, the direct claims sounded in tort, and the derivative claims arose under ERISA. Moreover, the Court held that, as assignees of the derivative claims, the medical device providers must be treated as non-signatories of the agreement because the assignors did not sign the agreement to arbitrate.

As in *CardioNet,* the U.S. District Court for the Western District of Arkansas denied a motion to compel arbitration where a patient, Jessica Mounce, was not a party to the provider agreement between the hospital and her insurer that contained a mandatory binding arbitration clause.[2] In this case, the defendant medical center sought to compel Mounce to arbitrate, contending that she was seeking to enforce benefits as a third- party beneficiary under the agreement. The contract, however, specifically prohibited third parties from obtaining rights under the Provider Agreement: "there is no intent by either party to create or establish third party beneficiary status or rights as to any patient." Where the contract required only signators to arbitrate claims, the court found that Arkansas law did not require a patient, who was not a party to the provider agreement, to arbitrate under said contract.

The U.S. District Court for the Northern District of California reached the opposite result from the courts in *CardioNet* and *Mounce* in *Sanzone-Ortiz v. Aetna Health of Cal., Inc.*[3] There the court granted Aetna's motion to compel arbitration of a patient's statutory challenge

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[1] *751 F.3d 165* (3rd Cir. 2014).

[2] *Mounce v. CHSPSC, LLC*, 2015 BL 421584, W.D. Ark., No. 5:15-cv-5197, 12/22/15.

[3] 2015 BL 42366, N.D. Cal., No. 15-cv-3334, 12/22/15.

to Aetna's "benefits cap" for the treatment of autism under ERISA and California's Mental Health Parity Act. Among other allegations, the patient argued that she never agreed to arbitrate her claims. However, the court ruled that the patient consented to the arbitration by signing the ERISA plan enrollment agreement that provided for binding arbitration as the final process to resolve any dispute between the parties relating to the plan.

As these cases demonstrate, one must review carefully: 1) the entire agreement that contains an arbitration clause; and 2) the exact status of any party that attempts to take advantage of or repudiate the arbitration clause. If a party or assignor did not sign the agreement, he or she may not be able to benefit from the arbitration provision. Conversely, a party who enters into an ERISA plan or other complex agreement may not be able to repudiate the arbitration provision contained in that document.

II. POST-ACUTE CARE PRE-DISPUTE ARBITRATION AGREEMENTS

Arbitration agreements signed when an individual enters a long term care facility present a special case involving healthcare consumers, their families and/or legal representatives. Many of the cases about these agreements involve wrongful death actions, based on state statutes that dictate who may pursue a claim on behalf of the decedent. In these instances, courts are concerned with the ability of the healthcare entity to deprive an elderly or disabled individual and his/her family of access to court. Contrary to other areas of the law, these particular cases pit the national and state policies favoring arbitration against an individual's constitutional right to a trial by jury.

One recent ruling, *Richmond Health Facilities-Kenwood, LP v. Nichols*,[4] raised the issue of whether an agreement to arbitrate in a nursing home contract is binding upon the beneficiaries who file a wrongful death action on behalf of a decedent. As wrongful death claims are based on state statutes, it is state law that determines whether a beneficiary can be bound by an arbitration clause that he or she did not sign. In Kentucky (as in some other states), wrongful death claims are independent of any claim held by a decedent at the time of death. Thus, wrongful death beneficiaries are not required to arbitrate their

[4] 811 F.3d 192 (6th Cir. 2016).

claims pursuant to a pre-dispute arbitration clause in the decedent's contract with a healthcare facility. In states where wrongful death actions are derivative of the decedent's claims, an arbitration clause in an agreement signed by the decedent usually is binding upon wrongful death beneficiaries.

In an earlier series of cases decided by the Supreme Court of Kentucky on Sept. 24, 2015,[5] the court examined in detail the language of three power of attorney agreements held by individuals acting as agents for nursing home residents. The residents in all three cases had died prior to the time the agent filed a claim in court against the nursing home (for personal injuries and wrongful death). At the time of the resident's admission, each agent signed the nursing home's pre-dispute arbitration agreement, requiring all claims to be resolved in arbitration. Where the agent's power of attorney was found to be valid, this Court examined further the language of the power of attorney agreement that gave the agent his/her authority to waive the decedent's (or beneficiaries') constitutional right to a trial by judge or jury. In this case, the Court ruled that none of the three powers of attorney granted authority specific enough to allow the agent to relinquish the principal's constitutional right to a trial by the court or a jury. A strong dissent follows the lengthy majority opinion.

As the above cases demonstrate, it may not be enough that the nursing home's pre-dispute arbitration agreement advises residents fully of their rights. Under the decisions in Kentucky, the resident must have specifically granted his or her agent the authority to relinquish the constitutional right to a trial in court and to replace that right with an out-of-court arbitration.

Recently the California Court of Appeals ruled that, by California statute, a wrongful death claim is not derivative of claims held by the decedent, and belongs only to the beneficiaries. As the beneficiaries were not signatories on the arbitration agreement in this case, they were not bound by it, and could take their claims to court. *Monschke v. Timber Ridge Assisted Living, LLC*.[6]

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[5] *Extendicare Homes, Inc., d/b/a Shady Lawn Nursing Home, et al. v. Janis E. Clark, Executrix of the Estate of Olive G. Clark, Dec'd, et al.*, 478 S.W.3d 306 (Ky. 2015).

[6] 2016 BL 24410, Cal. Ct. App., No. A144289, 1/29/16.

Similarly, in *Barrow v. Dartmouth House Nursing Home*,[7] the Appeals Court of Massachusetts reversed the decision of the Massachusetts Superior Court, which had compelled Mr. Barrow (as executor of his mother's estate) to pursue all claims for wrongful death in arbitration. The Appeals Court found that the arbitration agreement signed by Mr. Barrow, at the time his ninety-six year old mother entered a nursing home, was not enforceable. Mr. Barrow had a healthcare proxy, which was held to be insufficient to authorize the healthcare agent to enter into an arbitration agreement that his mother did not specifically authorize him to sign. The court based this opinion in part on prior Massachusetts decisions that defined the standards for authorizing arbitration agreements, and distinguished them from other forms of agency authority, such as health care proxies.[8]

Mississippi law reaches a different result. On March 14, 2016, the U.S. Court of Appeals for the Fifth Circuit filed its opinion vacating two lower court orders in which the circuit court found that district court judges had misinterpreted Mississippi law in refusing to compel arbitration in wrongful death and negligence actions against two nursing homes.[9] In both cases, the plaintiffs brought actions in state court on behalf of the estates of their mothers. Both plaintiffs had signed nursing home admission agreements containing arbitration clauses on behalf of their mothers. The nursing homes appealed from denials by the federal district court of their motions to compel the arbitration agreements under the Federal Arbitration Act. The Fifth Circuit decision presents a thorough and strong affirmation of the strength and policy behind the Federal Arbitration Act. In considering the district court orders with respect to the issues of actual and apparent agency authority, estoppel and ratification, the Court of Appeals thoroughly reviewed Mississippi and United States Supreme Court law. The Court vacated and remanded the cases on the issue of actual authority and found that Mississippi state law required some proof of agency for a non-signatory to be bound by the arbitration agreement. Nonetheless, no formal device, signed by the signator, is required to establish actual agency. In reference to the Federal Arbitration Act, the Fifth Circuit cites *AT&T Mobility LLC v.*

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[7] 88 Mass. App. Ct. 128, 14 N.E.3d 318 (2014).

[8] *Johnson v. Kindred Healthcare, Inc.*, 466 Mass. 779, 2 N.E.3d 849 (2014); *Licata v. GGNSC Malden Dexter, LLC*, 466 Mass. 793, 2 N.E.3d 840 (2014).

[9] *Gross v. GGNSC Southaven, LLC.* No. 15-60248 (5th Cir. Mar. 14, 2016).

Concepcion [10] for the proposition that, "courts must place arbitration agreements on equal footing with other contracts and enforce them according to their terms." The Circuit Court opined that a formal written requirement to establish agency in these circumstances would "disproportionately impact arbitration agreements."[11]

The Pennsylvania Supreme Court in *Wert v. ManorCare of Carlisle PA., LLC,*[12] found unenforceable an arbitration agreement requiring the use of the National Arbitration Forum's code for dispute resolution between the skilled nursing facility and its residents. The arbitration agreement was unenforceable because NAF had been prevented from accepting consumer disputes in arbitration. The Supreme Court of Pennsylvania held that NAF's participation in the arbitration was an essential element of the agreement, and remanded the case for trial. The U.S. Supreme Court denied review.

Conversely, the Arkansas Supreme Court in *Courtyard Gardens Health & Rehab., LLC v. Arnold*,[13] ruled that the unavailability of the National Arbitration Forum, the designated arbitrator, to hear all claims against a nursing home does not make the arbitration agreement unenforceable, as the language in the contract requiring the NAF to arbitrate the case was severable. Further, the agreement was governed by the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 1 et seq., which provides that a substitute arbitrator may be named when the chosen arbitrable forum is unavailable. A recent decision by the Eighth Circuit Court of Appeals upholds this view.[14]

A factor complicating the issue of pre-dispute arbitration in nursing homes is the fact that on Oct. 4, 2016, HHS published its new rule forbidding nursing homes from requiring residents to agree upon admission to arbitrate disputes between them. Scheduled to take effect on Nov. 28, 2016, this rule (81 Fed. Reg. 68,867) has temporarily been enjoined by the U.S. District Court for the Northern District of Mississippi in the case of Am Health Care Ass'n v. Burwell, N.D. Miss., No. 16-cv-233, filed 10/17/16). The future of this rule also remains in doubt under the Trump administration.

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[10] 563 U.S. 333,339 (2011).

[11] 563 U.S. at 342.

[12] 124 A.3d 1248 (Pa. 2015), *review denied as GGNSC Gettysburg LP v. Wert,* U.S., No. 15-820, 2/29/16.

[13] No. CV-14-1105 2016 BL 49357 (Ark. Feb. 18, 2016).

[14] *Robinson v. EOR-ARK, LLC*, 2016 BL 377791, 8th Cir., No. 15-3406 (11/14/16).

From the above, one can see that consumer disputes involving long term care facilities are a breed unto themselves. One must review carefully the authority of the individual seeking to validate or escape the arbitration process, the arbitration clause itself, the circumstances of the signing of the agreement containing the arbitration clause and state statutes, where a death action is involved. It is only after an analysis of all of these factors that one may be able to determine whether or not a court will enforce an arbitration provision.

III. VACATUR OF ARBITRATION AWARDS

Parties may seek court intervention during two time periods related to arbitration matters: 1) prior to commencement of the arbitration proceeding; and/or 2) with a motion for vacatur to set aside an award, after it has been entered. There are numerous grounds for vacatur, and a full discussion of this subject is beyond the scope of this summary. Nonetheless, two recent healthcare cases bear mention here. In the first case below, vacatur was sought by a party, which strongly believed that the arbitrator upheld a contract that would be illegal if enforced because it could require the hospital to violate Stark, anti-kickback and Medicare laws and regulations.

In *Jupiter Med. Ctr., Inc. v. Visiting Nurse Ass'n of Fla, Inc.*,[15] the Florida Supreme Court found that the FAA precluded it from vacating an arbitration decision that enforced a contract between a home healthcare agency (VNA) and a hospital (Jupiter Medical Center). After the arbitration panel awarded damages and fees for breach of contract, Jupiter Medical Center filed a motion to vacate the award because it either mandated illegal conduct or imposed damages for a party's failure to engage in such conduct. The hospital alleged that the arbitration panel interpreted the contract and related discharge planning procedures in a manner that could cause the hospital to violate multiple federal and state healthcare laws and regulations.. Specifically, there was a provision in the contract that required it to be construed in accordance with all laws, and in particular, to comply with the Anti-Kickback Statute. After a long and complex procedural course, the case was decided by the Florida Supreme Court. In deciding the case, the Florida Supreme Court first considered whether the FAA applied to the case, as both parties to the contract were Florida companies. However, because the case involved referral of Medicare patients, the court

[15] 154 So. 3d 1115 (2014) (*review denied,* U.S., No. 14-944 5/4/15).

concluded the transaction involved interstate commerce, and the FAA applied. The Court then reviewed the United States Supreme Court decision in *Hall St. Assocs., L.L.C. v. Mattel, Inc.*,[16] which determined that the FAA bases for vacating or modifying an arbitral award cannot be supplemented judicially or by contract. In *Hall St.*, the Supreme Court held that there are limited bases for vacating an arbitration award under the FAA (found at 9 U.S.C. §§ 10 and 11), and alleged illegality of the contract is not one of them.

In another decision, the U.S. Court of Appeals for the Sixth Circuit reviewed the agreement between the parties, and found that it did not authorize a court to award additional attorneys' fees beyond those issued by the arbitrator.[17] The court affirmed the district court's judgment denying Glenwood's motion for attorneys' fees and fee enhancement, but reversed the lower court's denial of prejudgment interest and remanded the case for findings of fact to determine whether Glenwood was entitled to an award of prejudgment interest.

As both of these cases reveal, courts are reluctant to set aside awards rendered by arbitrators, which are considered to be final and unappealable. This is true where there is not a clear violation of the agreement to arbitrate, and even where a contract leading to illegal results is alleged. In sum, to have a chance of prevailing on a motion for vacatur, one must review carefully Section 10(a) of the FAA, as well as the Uniform Arbitration Act, which gives two additional grounds for vacatur. In the alternative, the FAA must not apply to the case (unlikely in healthcare disputes), and state law must not prevent vacatur on the facts of the particular matter.

IV. PREEMPTION BY THE FEDERAL ARBITRATION ACT (9 U.S.C. §§ 1 – 13)

The following cases illustrate the proposition that in arbitration cases involving consumers, even the Supreme Court of the United States will look hard before upholding a contract's arbitration clause.

In *Marmet Health Care Center, Inc. v. Brown*,[18] the Supreme Court of the United States vacated a ruling by the West Virginia Supreme Court of Appeals, which held that the FAA does not preempt state

[16] 552 U.S. 576, 581, 128 S. Ct. 1396 (2008).

[17] *Crossville Medical Oncology, P.C. v. Glenwood Sys.*, 610 Fed. App'x 464 (6th Cir. 2015).

[18] 132 S. Ct. 1201 (U.S. 2012).

public policy against predispute arbitration agreements that apply to claims of personal injury or wrongful death against nursing homes. The Supreme Court of the United States in *Marmet* reaffirmed its prior rulings that, "when state law prohibits **outright** the arbitration of a particular type of claim, the analysis is straightforward: the conflicting rule is displaced by the FAA." [emphasis added][19] The U.S. Supreme Court found that there was no exception in the West Virginia statute for personal injury or wrongful death claims. The Court did remand the case, however, to determine whether the arbitration clause was otherwise unenforceable under state common law principles.

While it is not a case involving healthcare parties, the United States Supreme Court declined to review the issue of whether the FAA preempted the decision by the New Jersey Supreme Court in the case of *Atalese v. U.S. Legal Services Group, L.P.*[20] In this case, the New Jersey Supreme Court held unenforceable an agreement with a consumer for binding arbitration, where the contract containing the arbitration clause did not "clearly and unambiguously signal…" that the plaintiff was waiving the right to pursue her statutory claims in court. In this case, state law did not "prohibit outright the arbitration of a particular type of claim". Thus, the New Jersey arbitration statute was not preempted by the FAA.

These cases reiterate that courts are concerned that consumers in arbitration may not clearly be aware that they have waived the constitutional right to a hearing by the court or by a jury. Where a consumer is a party to an arbitration agreement, the court will look harder at the facts and circumstances of the matter to ensure that individual constitutional rights are protected.

V. COURT INTERVENTION IN PENDING ARBITRATIONS

In *Blue Cross Blue Shield of Mass. v. BCS Ins. Co.*,[21] the U.S. Court of Appeals for the Seventh Circuit affirmed that judges must not intervene in pending arbitrations to direct the arbitrators to resolve an issue one way or another. Courts may review cases at the beginning or at the end, but not in the middle of the adjudication. In this complex set of appeals involving class action arbitration, the Court of Appeals

[19] *Id.* at 1204 and cases cited therein.

[20] 9 A.3d 306 (N.J. 2014), *cert. denied* at 576 U.S. ____, 83 U.S.L.W. 3888 (6/8/15).

[21] 671 F.3d 635, 638 (7th Cir. 2011).

found that the arbitrator, not the court, should determine the question at issue of how to handle all of the plans' claims.

This case reveals once again the court's reluctance to second-guess an arbitrator's decision. This is particularly true in the middle of an arbitration, where the court believes that one party is attempting to circumvent appropriate findings by the arbitrator.

VI. CONCLUSION

The above cases confirm that the courts will give deference to the arbitration clause in any contract,[22] as well as to the FAA and its underlying principle that assigns importance to arbitration within the system of adjudication in the United States. Nonetheless, courts will review carefully state law, as well as all facts and circumstances surrounding a dispute about whether a court or an arbitrator should decide the case. In spite of the prominence of arbitration in the legal system, federal and state courts protect the right of a consumer to bring his or her claims to court, or to a jury trial. Wrongful death actions against nursing homes and long term care facilities are a special type of consumer dispute, in which the details of the state statutes are of paramount importance. By contrast, commercial parties can remain secure in the knowledge that the courts often will uphold arbitration processes, decisions and awards in cases conducted pursuant to arbitration clauses in contracts involving purely business healthcare disputes and parties.

[22] This brief summary updating recent caselaw does not cover cases where a challenge is brought in court to the validity of the entire contract containing the arbitration clause.