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## **OHIO SUPREME COURT RECENTLY UPHELD THE ENFORCEABILITY OF A NURSING HOME ARBITRATION AGREEMENT**

On May 7, 2009, the Ohio Supreme Court issued an opinion which validated an arbitration agreement in the discrete setting of a long term care facility and allowed the enforcement of the agreement which divested the Common Pleas Court of jurisdiction to decide a dispute between the nursing home resident and the nursing home facility. In *Hayes v. Oakridge Home*, Slip Opinion No. 2009-Ohio-2054, the Ohio Supreme Court specifically held:

“[W]e hold that an arbitration agreement, voluntarily executed by a nursing-home resident upon her admission and not as a precondition to admission, is not rendered procedurally unconscionable solely by virtue of the resident’s age. We further hold that an arbitration agreement, voluntarily executed by a nursing-home resident and not as a precondition to admission, that waives the right to trial and the right to seek punitive damages and attorney fees, is not substantively unconscionable.”

The court restated the traditional analysis for purposes of examining arbitration agreements and indicated that in order to invalidate such an agreement, the arbitration provision must be both procedurally unconscionable and substantively unconscionable. The court determined that the agreement at issue in *Hayes*, did not meet the criteria for invalidation.

For more than a few years now, nursing home facilities and companies have endeavored to limit expensive litigation which can result as a consequence of “nursing home malpractice litigation.” Facilities, and the companies which own and operate the facilities, have not sought to limit the ability of a resident to recover if injuries and damages result from substandard nursing home care. Rather, the facilities and the owners have sought to obtain greater certainty with regard to the award of damages associated with nursing home malpractice claims and have sought to expedite the extensive and expensive litigation process in the event a nursing home malpractice lawsuit is brought against a facility. Various facilities and nursing home owners have created, discarded, recreated and attempted to implement arbitration provisions associated with the admission of a nursing home resident to a facility. Until the *Hayes* decision, the efforts to draft and enforce an arbitration agreement in the context of a nursing home dispute between a resident (family or estate) and the facility were unsuccessful. With *Hayes*, nursing home

facilities and owners have an opportunity to fairly and economically resolve nursing home malpractice disputes without resort to the Ohio court system.

In the *Hayes* case, the court was confronted with an arbitration agreement which contained the following features:

- (1) The arbitration agreement indicated at the top in boldface capital letters that it was a voluntary agreement.
- (2) In capital letters, just below the heading, the agreement instructed the resident to “please read carefully.”
- (3) The benefits and drawbacks of the arbitration process were explained to the nursing home resident in the agreement and it was stated that the arbitration agreement was optional.
- (4) The arbitration agreement at issue made it abundantly clear to the signing resident that it was voluntary and that execution of the agreement was not a precondition to receiving nursing home care at the facility.
- (5) The arbitration agreement indicated that by executing the agreement, both parties to the agreement were giving up their constitutional rights to a jury trial and further, that the parties needed to pay their own attorneys fees and that there could never be an award for punitive damages.
- (6) The agreement also informed the resident that the arbitration agreement could not be submitted to the resident for approval if the resident’s condition prevented the resident from making a rational decision on whether to agree or not to agree.
- (7) There was a provision in the agreement which indicated that the resident understood that the resident had a right to consult with an attorney prior to signing the agreement.
- (8) The resident signed that the resident understood and agreed that the resident had received a copy of the agreement, that the terms of the agreement had been explained and that the resident had been given an opportunity to ask questions about the agreement.

The thrust of the argument against enforcement of the arbitration agreement was that it was both procedurally and substantively unconscionable. The principal basis for claiming that the agreement was procedurally unconscionable related to the fact that the resident was 95 years of age. Indeed, the Court of Appeals had ruled that the arbitration agreement was procedurally unconscionable because the resident was a 95 year old woman with no business or contract experience. The Court of Appeals had also determined that the agreement was substantively

unconscionable because it took away the resident's rights to obtain attorneys fees, punitive damages and a jury trial.

In the analysis set forth by the court's majority, both procedural and substantive unconscionability were well explained. The court held with regard to procedural unconscionability:

“In determining whether an arbitration agreement is procedurally unconscionable, courts consider “the circumstances surrounding the contracting parties’ bargaining, such as the parties’ age, education, intelligence, business acumen and experience, \*\*\* who drafted the contract \*\*\* whether alterations in the printed terms were possible, [and] whether there were any alternative sources of supply for the goods in question.”

Further, the court held that with regard to a determination of substantive unconscionability the following applied:

An assessment of whether a contract is substantively unconscionable involves consideration of the terms of the agreement and whether they are commercially reasonable. Factors courts have considered in evaluating whether a contract is substantively unconscionable include the fairness of the terms, the charge for the service rendered, the standard in the industry, and the ability to accurately predict the extent of future liability. No bright-line set of factors for determining substantive unconscionability has been adopted by this Court. The factors to be considered vary with the content of the agreement at issue.

In *Hayes*, the court determined that the arbitration agreement at issue, as heretofore described, was neither procedurally nor substantively unconscionable.

The court addressed the procedural unconscionability issue first and determined that there was insufficient evidence presented at the trial court level to support a finding that the arbitration agreement was procedurally unconscionable. The agreement at issue in *Hayes* clearly delineated in several places that it was voluntary and not a condition of a resident's admission to the facility. The court further observed that there was an acknowledgement in the document at issue that the resident understood the terms and that those terms had been explained to the resident. The court determined that the mere fact that the resident was 95 years of age at the time the agreement was signed was an insufficient basis to conclude that the arbitration agreement was procedurally unconscionable.

The court also determined that there was no basis to conclude that the arbitration agreement was substantively unconscionable. The court concluded that the agreement between a resident and a nursing home facility was commercially reasonable; the provisions in the agreement in which the resident waived the right to seek punitive damages and attorneys fees was deemed commercially reasonable since both sides were to bear their own fees and costs. The court conducted a balancing test to determine “what was given up” by the parties. The resident gave up the right to punitive damages, attorneys fees and a jury trial. However, the

court observed that the nursing home facility gave up its legal right to pursue an action for filing a groundless complaint pursuant to R.C. §2323.51 and Ohio Civ.R. 11. Also, the facility waived its legal rights under R.C. §2323.42 to seek court costs and attorneys fees in the event there was no reasonable good faith basis for the underlying claim. Finally, by entering into the arbitration agreement, the nursing home facility waived its right to seek a dismissal of the complaint filed by the resident for failure to comply with the Ohio Civ.R. 10(D)(2) requirement for an affidavit of merit. Thus, the court concluded that both parties relinquished legal rights by agreeing to arbitrate disputes.

As noted at the outset, most appellate districts in Ohio had previously concluded that arbitration agreements in the context of a nursing home admission were procedurally and substantively unconscionable and, therefore, unenforceable. A concurring opinion in *Hayes* authored by Justice Lanzinger identified one of the more significant appellate decisions which held that arbitration agreements were procedurally and substantively unconscionable; *Small v. HCF of Perrysburg, Inc.*, 159 Ohio App. 3d 66 (2004). However, the majority of the Court concluded that there should be no “unease” over applying arbitration clauses in situations where provisions at issue are commercially reasonable and fair to both parties.

In the unreported decision of *Manley v. Persona Care of Ohio*, 11<sup>th</sup> Dist. Case No. 2007-Ohio-343, the Court of Appeals determined that an arbitration agreement was procedurally unconscionable but not substantively unconscionable and was thus subject to enforcement. The court provided some guidelines with regards to rendering an agreement not substantively unconscionable. The agreement contained warnings which were printed in boldface type and these included:

- (1) He/she has the right to seek legal counsel concerning this agreement;
- (2) The execution of this agreement is not a precondition of admission or to the furnishing of services to the resident by facility, and the decision of whether to sign the agreement is solely a matter of the resident’s determination without any influence;
- (3) This agreement may not even be submitted to resident when resident’s condition prevents him/her from making a rational decision whether to agree;
- (4) Nothing in this agreement shall prevent resident or any other person from reporting alleged violations of law to the facility, or the appropriate administrative, regulatory or law enforcement agency;
- (5) The ADR process adopted by this agreement contains provisions for both mediation and binding arbitration, and if the parties are unable to reach settlement informally, or through mediation, the dispute shall proceed to binding arbitration; and
- (6) Agreeing to the ADR process in this agreement means that the parties are waiving their right to a trial in court, including their right to a jury trial, their right to a trial

by judge, and their right to appeal the decision of the arbitrator(s) in a court of law.

Further, the arbitration agreement at issue in *Manley* provided the resident thirty days within which to reject the agreement, thus the resident was given an opportunity to reconsider the decision regarding the arbitration agreement and if unhappy with the agreement, the ability to reject the agreement within thirty days of executing it. Further, the *Manley* court found it highly persuasive that the agreement was not substantively unconscionable because the agreement provided that the facility would be responsible for the entire cost of the mediation process and the cost for arbitration for the first five days of hearing and the dividing of costs equally between the parties for arbitration proceedings which lasted more than five days. Thus, there was no deterrent effect on a resident's decision to bring a claim against the facility. Since the invalidation of an arbitration agreement requires that it be found to be both procedurally unconscionable and substantively unconscionable the *Manley* court held that the arbitration provision at issue was enforceable.

Both long term care facilities and residents of those facilities can derive great benefit from arbitration agreements in the context of nursing home malpractice litigation. Costs are reduced, there is no impediment to the prosecution of a claim, resident rights are in no way affected and, if properly drafted, a resident will fully understand the nature and scope of the arbitration agreement and the mutual relinquishment of certain rights. As a matter of procedure and policy with regard to drafting agreements, the specific language set forth by the court in *Hayes* and some of the qualifiers outlined by the *Manley* court are worth considering. There is certainly less of a chance for a determination that an arbitration agreement is substantively unconscionable if it has the following features:

- (1) It is a stand-alone agreement, not imbedded in the admission agreement or package.
- (2) The agreement is worded in "lay language," no legalese or technical verbiage is used and the appearance of the document makes it easily read and understood. Boldface fonts and colorization of certain provisions will certainly support the enforcement of such an agreement.
- (3) A clear description of the rights which are being relinquished by both parties; a very specific description of the rights relinquished by the resident (jury trial, judge trial, appellate rights, punitive damages, recovery of attorneys fees) should be set forth in the agreement as should the various rights relinquished by the facility itself (frivolous conduct by the litigant, right to attorneys fees under certain circumstances, right to obtain affidavits of merit on both issues of substandard care and causation).
- (4) A clear indication that the resident was given the right to examine the document, think about the provisions and have the provisions fully explained.

In *Manley*, the court was impressed by the fact that when the agreement was explained by the resident, the resident was specifically advised by way of example that if hot soup were spilled on the resident and the resident was injured that the resident would not have a right of jury trial for injuries suffered in the accident but would have the claim adjudicated through arbitration.

- (5) A clear description of the right by the resident to rescind the agreement within thirty days of signature and an explanation as to the mechanism of doing so. For example, the agreement might state that the resident could simply draw an "X" over the arbitration agreement and initial it to rescind the agreement within thirty days of executing the agreement.
- (6) The individual who explains the agreement to the resident and countersigns the agreement on behalf of the facility should chart in the admission notes that the resident received a full explanation of the agreement and the physical and mental condition of the resident at the time of the explanation (whether the family was present, whether the resident was agitated, nervous, under the influence of any medications, was in any way not able to comprehend the events at issue, etc.). The likelihood of enforcing an arbitration agreement can be enhanced if there are individuals who can testify regarding the status of the resident at the time of signature the charting of the resident's status can be enormously helpful.

In conclusion, arbitration agreements in the context of a nursing home resident are now enforceable under certain circumstances. The party opposing the enforcement of an arbitration agreement must prove that the agreement is both procedurally and substantively unconscionable. Since the Ohio Supreme Court has now determined that in most instances the arbitration agreement between a nursing home and a resident is not procedurally unconscionable, the facilities must turn their attention to ensuring that arbitration agreements are drafted in such a way as to guard against a finding that the agreement is substantively unconscionable. With an arbitration agreement in place, both the facility and the nursing home resident will benefit from the economical and prompt resolution of all disputes which may arise between a resident and a nursing home.