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Health-Care Arbitration Developments: Who Decides, the Arbitrator or the Court?

By Katherine Benesch

Whether or not a health-care 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, they 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 several years, many organizations and individuals involved in health-care disputes have sought assistance from the court before, after and during the middle of arbitration cases.

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When Will a Court Compel Arbitration

A court's decision concerning whether or not 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 contract evidence the intent of the parties or any intent as to the rights of third party beneficiaries?

In *CardioNet Inc. v. Cigna Health Corp.*, 751 F.3d 165,2016 BL 126165 (3rd Cir. 2014), 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. *Mounce v. CHSPSC, LLC*, 2015 BL 421584, W.D. Ark., No. 5:15-cv-5197, 12/22/15. In this case, the defendant medical center sought to compel Mounce to arbitrate, contending that she was seeking to enforce benefits under the agreement, as a third- party beneficiary. 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 only re-

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quired 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 court in *CardioNet* and *Mounce* in *Sanzone-Ortiz v. Aetna Health of Cal., Inc.*, 2015 BL 42366, N.D. Cal., No. 15-cv-3334, 12/22/15. There, the court granted Aetna's motion to compel arbitration of a patient's statutory challenge 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 specific 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 a contract with an ERISA plan or other complex agreement, may not be able to repudiate the arbitration provision contained in that document.

Post-Acute Care Pre-Dispute Arbitration Agreements

Arbitration agreements signed when an individual enters a long-term care facility present a special case involving health-care consumers, their families and/or legal representatives. Many of the disputes over 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 health-care 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*, 811 F.3d 192, 2016 BL 11066 (6th Cir. 2016), 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 claims pursuant to a predispute arbitration clause in the decedent's contract with a health-care facility. In some states where wrongful death actions are derivative of the decedent's claims, an arbitration clause in an agreement signed by the decedent is binding upon wrongful death beneficiaries.

In an earlier series of cases decided by the Supreme Court of Kentucky on Sept. 24, 2015, *Extendicare Homes, Inc. v. Clark*, 478 S.W.3d 306, 2015 BL 309131 (Ky. 2015), 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 further examined 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 jury trial. 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.

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 this decision, 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. A strong dissent follows the lengthy majority opinion.

Recently the California Court of Appeals ruled in *Monschke v. Timber Ridge Assisted Living, LLC*, 2016 BL 24410, Cal. Ct. App., No. A144289, 1/29/16, 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.

Similarly, in *Barrow v. Dartmouth House Nursing Home*, 88 Mass. App. Ct. 128, 14 N.E.3d 318 (2014), 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 health-care proxy, which was held to be insufficient to authorize the health-care 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 the prior Massachusetts decisions, including *Johnson v. Kindred Healthcare, Inc.*, 466 Mass. 779, 2 N.E.3d 849 (2014), and *Licata v. GGNSC Malden Dexter, LLC*, 466 Mass. 793, 2 N.E.3d 840 (2014), that defined the standards for authorizing arbitration agreements and distinguished them from other forms of agency authority, such as health-care proxies.

Mississippi law yields a different result. On March 14, 2016, the U.S. Court of Appeals for the Fifth Circuit in *Gross v. GGNSC Southaven, LLC*, No. 15-60248, 2016 BL 78720 (5th Cir. Mar. 14, 2016), filed its opinion vacating two lower court orders in which the 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. 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.

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The nursing homes appealed from denials by the federal district court of their motions to compel enforcement of the arbitration agreements under the Federal Arbitration Act, 9 U.S.C. § 1 et seq. The Fifth Circuit decision presents a thorough and strong affirmation of the strength and policy behind the FAA. 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 FAA, the Fifth Circuit cites *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) 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.'' 563 U.S. at 342.

The Pennsylvania Supreme Court in *Wert v. Manor-Care of Carlisle Pa., LLC,* 124 A.3d 1248, 2015 BL 352718 (Pa. 2015), *review denied as GGNSC Gettysburg LP v. Wert,* U.S., No. 15-820, 2/29/16, 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*, No. CV-14-1105, 2016 BL 49357 (Ark. Feb. 18, 2016), ruled that the unavailability of the National Arbitration Forum, the designated arbitrator, to hear all claims against a nursing home did 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 FAA, which provides that a substitute arbitrator may be named when the chosen arbitrable forum is unavailable.

From these cases, one can see that consumer disputes involving long-term care facilities are a breed unto themselves. Where a wrongful death action is involved, 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. It is only after an analysis of all of these factors that one can determine whether or not a court will enforce an arbitration provision.

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 that strongly believed that the arbitrator upheld an illegal contract that required the hospital to violate the Stark, anti-kickback and Medicare laws and regulations.

In *Jupiter Med. Ctr., Inc. v. Visiting Nurse Ass'n of Fla, Inc.*, 154 So. 3d 1115 2014 BL 315049 (2014) (*review denied,* U.S., No. 14-944 5/4/15), the Florida Supreme Court found that the FAA precluded it from vacating an arbitration decision that enforced a contract between a home health-care agency, VNA, and Jupiter Medical Center. After the arbitration panel awarded damages and fees for breach of contract, the hospital filed a motion to vacate the award because it allegedly either mandated illegal conduct or imposes damages for a party's failure to engage in such conduct. Specifically, the hospital alleged that the arbitration panel construed the contract and related discharge planning procedures in a manner that violated multiple federal and state health-care laws and regulations prohibiting kickbacks for Medicare referrals. After a long and complex procedural journey, the case was decided by the Florida Supreme Court. In deciding the case, the court first considered whether the FAA applied to the action, as both parties to the contract were Florida companies. However, because the case involved referral of Medicare patients, the court 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.*, 552 U.S. 576 (2008), 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 (found at 9 U.S.C. § § 10 and 11) for vacating an arbitration award under the FAA and that the alleged illegality of the contract is not one of them.

In another decision, *Crossville Med. Oncology, P.C. v. Glenwood Sys.*, 610 Fed.App'x 464, 2015 BL 127179 (6th Cir. 2015), the U.S. Court of Appeals for the Sixth Circuit reviewed an agreement between the parties and found that it did not authorize a court to award additional attorneys' fees beyond those awarded by the arbitrator. 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 an illegal contract 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 health-care disputes), and state law must not prevent vacatur on the facts of the particular matter.

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 U.S. Supreme Court will look hard before upholding a contract's arbitration clause.

In *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 2012 BL 50142 (U.S. 2012), the Supreme Court vacated a ruling by the West Virginia Supreme Court of Appeals, which had held that the FAA does not preempt state public policy against predispute arbitration agreements that apply to claims of personal injury or wrongful death against nursing homes. The Supreme Court 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] '' *Id.* at 1204 and cases cited therein. 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 health-care parties, the U.S. 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 Serv. Group, L.P.*, 9 A.3d 306, 2014 BL 262821 (N.J. 2014), *cert. denied* at 576 U.S. ___, 83 U.S.L.W. 3888 (6/8/15). 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 court found, the New Jersey arbitration statute was not preempted by the FAA.

These cases reiterate that courts are concerned that consumers facing arbitration provisions may not clearly be aware that they have waived the constitutional right to a hearing by the court or a jury trial. 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.

Court Intervention in Pending Arbitrations

In *Blue Cross Blue Shield of Mass. v. BCS Ins. Co.*, 671 F.3d 635, 638 (7th Cir. 2011), 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 appeals court 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 a 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 an arbitrator.

Conclusion

The above cases confirm that the courts will give deference to the arbitration clause in any contract,[1] 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 of the 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 decisions and awards in cases conducted pursuant to arbitration clauses in contracts involving purely health-care business disputes and parties.

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[1] 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.

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