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Nursing Home Arbitration Clauses: Why I Didn't Become a Transactional Attorney

I have the dubious distinction of being on the losing side of the first appellate decision in the state of Florida regarding an "Arbitration Clause" in a Nursing Home admission contract. Thus, having lost Fenelus vs. Lakeside Health Center, 853 So. 2d 500 (Fla. 4th DCA 2003), I guess I am entitled to summarize how the law has developed since Fenelus was decided.

Nursing Homes have been inserting these little devils into their "admission packets" for unsuspecting elderly residents, or their next of kin, to sign, for many years. These Arbitration Clauses, usually buried deep in the multiple pages of documents to sign, mandate that any dispute arising from the care of the resident be settled by arbitration in some draconian forum such as the American Arbitration Association, or pursuant to Florida Statute 682 (the Florida Commercial Arbitration Code).

The unsuspecting Plaintiff's attorney usually discovers the existence of the Arbitration Clause upon receiving a "Motion to Dismiss and/or Compel Arbitration" in response to the initial Complaint. The Plaintiff attorney must then dive into the world of Contract Law (didn't we become trial attorneys to avoid "diving into Contract Law?").

The analysis of whether the Arbitration Clause can be defeated begins with the test set out by the Florida Supreme Court in Seifert v. U.S. Home Corp, 750 So.2d 633 (Fla. 1999). Under Seifert, there are three elements for courts to consider when ruling on a motion to compel arbitration: (1) whether a valid agreement to arbitrate exists, (2) whether an arbitrable issue exists, and (3) whether the right to arbitration has been waived.

Under the first prong of Seifert, the issue of the signor's legal capacity to sign the contract is examined: Did the signor have a power of attorney? Was the signor the Resident or the Resident's agent? Was the signor the health care surrogate of the Resident? Such issues regarding capacity have arisen in the various appellate decisions:

Fenelus, supra (health care surrogate - not a power of attorney); Romano vs. Manor Care, Inc. 861 So. 2d 859 (Fla. 4th DCA 2003) (signor was Resident's 79 year old husband); Gainesville Health Care Center, Inc. v. Weston, 857 So. 2d 278 (Fla. 1st DCA 2003) (daughter/power of attorney of resident signed agreement seven weeks after admission).

The next part of the first Seifert prong involves an analysis of whether the agreement was both substantively and procedurally unconscionable. The case of Powertel vs. Bexley, 743 So.2d 570 (Fla. 1st DCA 1999) describes this analysis, combined with the more recent "sliding scale" analysis of Romano, supra. To render a contract void due to unconscionability, the contract must be both procedurally and substantively unconscionable. "Procedural unconscionability" refers to the circumstances under which the contract is entered. This involves looking at the circumstances surrounding the transaction to determine whether the complaining party had a choice whether or not to enter into the contract. Was the signor rushed? Did the signor have an opportunity to ask questions? Was the document explained to the signor? Was the document buried within a stack of two inches of admission documents to sign? Conversely, "substantive unconscionability" deals with the unreasonableness and unfairness of the contractual terms. The substantive component focuses on the wording of the agreement itself.

Two recent appellate courts have found an arbitration clause to be unenforceable under this first Seifert prong. In Lacey vs. Heartland Health Care, 30 FLW D2681 (Fla. 4th DCA November 30, 2005), the 4th DCA found that, because the subject clause limited punitive damages, and capped noneconomic damages, the agreement was substantively invalid as a whole. The Court also noted that the arbitration clause failed to contain a severability provision, which might have allowed the Court to sever the offending terms and uphold the arbitration provision. Thus, the Plaintiff attorney should carefully examine these admission agreements to see if they contain a severability clause. In Prieto vs. Healthcare and Retirement Corporation of America, 31 FLW D10 (Fla. 3rd DCA December 21st, 2005), the Third District held that the subject admission agreement was substantively unconscionable because it limited non-economic damages to $250,000, barred punitive damages, barred attorneys fees, and restricted access to certain discovery. Thus, while early appellate decisions were leaning in favor of upholding arbitration agreements, the recent trend has appeared to be in favor of allowing Plaintiffs access to the courts.

The second prong of Seifert (is there an arbitrable issue) addresses whether the arbitration clause encompasses the cause(s) of action alleged in the Complaint. This prong depends on exactly what causes of action are alleged (statutory 400 count, common law negligence count, breach of contract, false advertising, etc..) versus the wording of the arbitration clause. This analysis is usually case-specific.

The third prong of Seifert addresses whether the party seeking to enforce arbitration has waived the right to enforce the Arbitration Clause. This usually arises if the Defendant has taken some action that is inconsistent with its attempt to enforce arbitration, such as participating in the discovery process. The crafty Defendant will limit its initial discovery requests to matters pertaining to arbitration only. Often, I have faced an early

"Motion to limit discovery to arbitration issues", which, unfortunately, is usually granted. The depositions of the two (or more) signors to the contract are taken, involving matters related only to the circumstances involved in the signing of the agreement and their relative signatory powers.

In sum, the analysis of each of these cases often turns on some very subjective factors. At a recent deposition in one of my cases, my client, aged 75, was giving his video deposition regarding his ability to read the admission contract that he signed on behalf of his wife, the prospective Resident. When asked (on the video) to read the document into the record, he whipped out a large battery-powered magnifying glass with a little light on the end of it, which he had been prescribed for his horrible glaucomas in both eyes. He said, "Even with this magnifying glass, I can't read this little bitty writing; I don't know what it says. I'm practically blind and I could have never read this document.". This was one of my better days since Fenelus was decided in 2003.

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