



Client Alert

Contact Attorneys Regarding
This Matter:

Jason E. Bring
404.873.8162 - direct
404.873.8163 - fax
jason.bring@agg.com

W. Jerad Rissler
404.873.8780 - direct
404.873.8781 - fax
jerad.rissler@agg.com

Arnall Golden Gregory LLP
Attorneys at Law

171 17th Street NW
Suite 2100
Atlanta, GA 30363-1031
404.873.8500

2001 Pennsylvania Avenue NW
Suite 250
Washington DC 20006
202.677.4030

www.agg.com

North Carolina Court of Appeals Reverses Trial Court's Denial of Motion to Arbitrate

On January 17, 2012, the North Carolina Court of Appeals issued an opinion in *Westmoreland v. Heritage Healthcare of High Point LLC, et al.*, No. COA10-1103, N.C. Ct. App. (*Westmoreland Opinion*) reversing a North Carolina trial court's denial of a nursing home defendant's motion to compel arbitration. More specifically, the appellate court ruled that the trial court erred by ruling that the arbitration agreement at issue was unconscionable. Accordingly, the case was remanded to the trial court for entry of an order directing the parties to submit the matter to arbitration in accordance with the terms of the parties' arbitration agreement.

By way of procedural background, a former resident's daughter filed the lawsuit on September 15, 2009, against the operator of a nursing home facility in Guilford County, North Carolina. The complaint sought monetary damages based on allegations that the former resident's death was proximately caused by the negligence of the defendant. In response, the defendant moved to dismiss the complaint or stay the proceedings and compel arbitration based upon an arbitration agreement executed at the time of the resident's admission to the facility. The Guilford County trial court held a hearing on the defendant's motion to compel arbitration in December 2009 and then later issued an order denying the defendant's motion on April 12, 2010. More specifically, the trial court ruled that the arbitration agreement was both procedurally and substantively unconscionable and, therefore, unenforceable. The defendant appealed the trial court's ruling and argued before the North Carolina Court of Appeals on March 23, 2011.

The relevant facts regarding the execution of the arbitration agreement provide that the resident's daughter, as attorney in fact for her father, placed her father in the defendant's nursing home on July 17, 2006. One day later, the parties executed an arbitration agreement that "provided that any claims between the parties would be resolved by binding arbitration and that the parties waived their right to trial before a judge or jury." Further, the agreement was presented as a separate agreement, labeled in bold font as an arbitration agreement, and "explicitly stated that execution of the arbitration agreement was not a condition to [the resident] being admitted to or remaining in the facility."¹

¹ *Westmoreland Opinion* at 2.

The North Carolina appellate court's opinion noted North Carolina's "strong public policy favoring arbitration," and then reviewed the trial court's determination that the parties' arbitration agreement was an unconscionable contract, which was a question of law and required de novo review.² The appellate court's inquiry into whether the arbitration agreement was unconscionable required "consider[ation of] all the facts and circumstances of a particular case, and if the provisions are then viewed as so one-sided that the contracting party is denied any opportunity for a meaningful choice, the contract [would] be found unconscionable."³ More specifically, to establish unconscionability, "a party must demonstrate both procedural unconscionability and substantive unconscionability."⁴

As explained in more detail in the opinion, "procedural unconscionability involves 'bargain naughtiness' in the form of unfair surprise, lack of meaningful choice, and an inequality of bargaining power."⁵ In its review, the North Carolina Court of Appeals did not find any "bargain naughtiness" and therefore concluded that the arbitration agreement was not procedurally unconscionable. More specifically, the appellate court did not defer to the trial court's legal conclusion "that because plaintiff was an 'ordinary consumer' and defendant was a 'sophisticated health care service provider' that there was a '*prima facie* inequality of bargaining power.'"⁶ Instead, the appellate court evaluated the facts of this case on an individual basis and found that the arbitration agreement clearly and unequivocally provided that:

1. the plaintiff had a right to consult an attorney;
2. the plaintiff had a right to receive an explanation or clarification of the terms of the agreement; and
3. the plaintiff did not have to execute the agreement to obtain admission for her father.

Accordingly, the appellate court reversed the trial court's ruling on procedural unconscionability and held that "a party cannot come into court and complain that an agreement is unconscionable because she failed to read it."⁷

The appellate opinion also held the trial court erred by ruling that the arbitration agreement was substantively unconscionable. The trial court based its conclusions of substantive unconscionability upon three factors:

1. the policy of the American Arbitration Association against arbitrating negligent health care claims under pre-dispute arbitration agreements;
2. the allocation of benefits and detriments; and
3. the cost-shifting provisions under the arbitration agreement. The appellate court found error in this analysis.⁸

² *Id.* at 5.

³ *Id.* at 6.

⁴ *Id.* at 7.

⁵ *Id.* at 8.

⁶ *Id.* at 10.

⁷ *Id.* at 12.

⁸ *Id.* at 14.

Regarding the policy of the American Arbitration Association (AAA), the appellate court noted that the arbitration agreement only required that the AAA rules be used to conduct the arbitration, and the policy “did not preclude arbitration of the claims by a non-AAA arbitrator.”⁹ The appellate court also concluded that “the AAA policy statement is in direct conflict with North Carolina’s strong public policy in favor of arbitration.”¹⁰ Therefore, it was error to conclude “that performance of the arbitration agreement was impossible due to the policies of the AAA.” Next, in addressing the allocations of benefits and detriments issues, the appellate court held that “any analysis of mutuality must be based upon the conditions existing at the time that the arbitration agreement was entered into, and not retroactively.”¹¹ Accordingly, the trial court erred by taking a retroactive look at the arbitration agreement’s terms and concluding that they were one-sided. Finally, the North Carolina Court of Appeals simply rejected the trial court’s conclusion that the cost-shifting provisions under the arbitration agreement “would deter a claimant in her financial position from seeking to vindicate her rights” because there was no evidence introduced to show “the difference in the cost of arbitration and the cost of litigating [plaintiff’s] claims in court.”¹²

The issues were argued and briefed by W. Jerad Rissler. For a copy of the *Westmoreland Order*, please click [here](#).¹³

⁹ *Id.* at 16.

¹⁰ *Id.* at 17.

¹¹ *Id.* at 19–20.

¹² *Id.* at 23.

¹³ <http://www.agg.com/media/interior/publications/Bring-Rissler-Westmoreland-Order.pdf>

Arnall Golden Gregory LLP serves the business needs of growing public and private companies, helping clients turn legal challenges into business opportunities. We don't just tell you if something is possible, we show you how to make it happen. Please visit our website for more information, www.agg.com.

This alert provides a general summary of recent legal developments. It is not intended to be, and should not be relied upon as, legal advice.