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Client Alert

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Georgia State Court Upholds Nursing Home Arbitration Agreement

The development of Georgia case law on the enforcement of nursing home arbitration agreements took another step forward recently, as the State Court of Chatham County granted a motion to compel arbitration brought by Arnall Golden Gregory attorneys in favor of a defendant nursing home in Savannah. The plaintiff sued the facility in state court, alleging negligence in the care that he had received, even though he had voluntarily entered into an arbitration agreement with the facility upon admission. The arbitration agreement at issue was a separate, stand-alone agreement, and contained language that made it clear that its execution was not a condition of admission.

By way of background, the Georgia Arbitration Code renders unenforceable pre-dispute arbitration agreements for claims arising out of personal injury or wrongful death based on tort. Thus, a nursing home arbitration agreement or an arbitration clause in a nursing home admission agreement would arguably be unenforceable under Georgia law. Nevertheless, the Chatham County State Court found that the Federal Arbitration Act ("FAA"), which has been broadly interpreted by the United States Supreme Court to favor arbitration, preempted the Georgia Arbitration Code.

The application of the FAA turned upon the court's recognition that there was a sufficient nexus between interstate commerce and the general business activity of the nursing home, a nexus that is necessary to invoke the FAA. The factors the court relied upon in reaching this conclusion included the fact that the nursing home routinely provided services to residents of other states, that it received payments from out-of-state insurance companies, that it participated in Medicare and Medicaid, and that it regularly purchased goods and supplies from sources outside of Georgia.

Although the FAA preempts Georgia arbitration law in transactions involving interstate commerce, plaintiffs still often argue that an arbitration agreement should be revoked based on state law grounds that apply to any contracts. In the Chatham County case the plaintiff attempted to do this by arguing from several angles, including that the arbitration agreement was not supported by consideration, that the plaintiff was not competent at the time of admission to execute the agreement, and that there had been no "meeting of the minds" with respect to the terms of the agreement.

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The court rejected each of plaintiff's arguments outright. With respect to the alleged lack of consideration, the plaintiff had argued that the arbitration agreement was not a true contract because only one party – in the plaintiff's opinion, the nursing home – derived any benefit from it. The court disagreed, finding that both sides were bound by the agreement, and that the parties' mutual promises created mutual consideration for the agreement.

Likewise, the court rejected the plaintiff's argument that he had been delusional when he executed the agreement. The only evidence offered by the plaintiff in support of his alleged incompetence was a physician's list of the plaintiff's medications, which included various painkillers. The court held that this list did not prove that at the time of admission the plaintiff was under the influence of any medication that would have affected his mental capacity. To the contrary, the facility's records indicated that the plaintiff had been alert, oriented, and verbally responsive on the day of his admission. The court held that an unsupported allegation of incompetence was insufficient to defeat the defendant's motion to compel arbitration.

Finally, the court rejected the plaintiff's argument that there had been no mutual understanding or "meeting of the minds" with respect to the terms of the agreement. The court held that the plaintiff had an obligation to read the contract, and that it appeared that its language should have been understandable to the plaintiff. The court also pointed out that, because the plaintiff would have received treatment whether or not he had executed the arbitration agreement, he could have simply declined to sign it if it was his desire to avoid future arbitration.

It should be noted that the Chatham County case stands as but one decision in the development of Georgia's burgeoning nursing home arbitration case law, and although it may be found to be persuasive to other courts, it is does not constitute binding authority in other courts. It is not yet known whether the plaintiff will seek to appeal the court's decision.

As nursing home arbitration agreements are upheld by courts in Georgia and in other states, early indications are that their use is having the desired effect – namely, that long term care liability costs are stabilizing. Recently, Aon Risk Consultants published a study, entitled *Long Term Care: 2008 General Liability and Professional Liability Actuarial Analysis*, examining the effects of tort reform and the use of arbitration agreements on the liability costs incurred in the long term care industry. In focusing on one large provider in the study group that had implemented its arbitration program in 2003, the Aon study found that paid claims were 31 percent lower for cases that were subject to arbitration and that defense costs were reduced by approximately 20 percent. The study found that claims subject to arbitration were also resolved an average of 67 days sooner than regular litigation claims.

While the Aon study represents good news for nursing homes that elect to implement arbitration programs, the horizon is not entirely rosy. At this time, Congress is considering federal legislation that would seek to make pre-dispute arbitration provisions between long term care facilities and their residents or the residents' representatives invalid and unenforceable. Under the proposed "Fairness in Nursing Home Arbitration

Act of 2008" (H.R. 6126, S. 2838), an arbitration agreement would only be enforceable if the parties entered into it after a dispute arose, at which point any agreement between the parties is far less likely. Clearly, this legislation, which unfairly singles out providers of long term care, would undermine the FAA.