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Defeating Nursing Home Arbitration Agreements: Are You Overlooking Your Best Argument?

by Kathleen J. St. John

For the practitioner representing injury victims in actions against nursing homes, the typical first hurdle is defeating a "motion to stay proceedings and compel arbitration" due to an arbitration agreement signed when the patient was admitted to the nursing home.

Pre-injury arbitration agreements are ubiquitous in the nursing home context. Sometimes they are part of the Admissions Agreement itself; sometimes they are a free-standing document submitted for signature in a thick pile of admissions papers. Although the language varies, they typically require the parties to submit to binding arbitration any controversy, dispute, disagreement, or claim of any kind arising out of, or related to, the Admissions Agreement – though often with the droll exception of "claims arising out of nonpayment of charges" for which the nursing home reserves to itself the right to litigate in a court of law.

Although pre-injury arbitration agreements in the nursing home context are classic adhesion contracts, drafted by the nursing home for its benefit and entered into by the patient or her representative with little appreciation of its potential consequences, challenging them as unconscionable is an uphill battle. Between the preemptive power of the Federal Arbitration Act[1] which embodies an "emphatic federal policy in favor of arbitration"[2] and Ohio statutory and judge-made law expressing "a strong presumption favoring arbitration"[3], the plaintiff challenging an arbitration agreement on unconscionability grounds has a significant burden to shoulder: she must prove the agreement is both procedurally and substantively unconscionable.[4] As the Ohio Supreme Court's decision in *Hayes v. Oakridge Home*[5] illustrates, this burden is not easily met.

There is, however, a more promising avenue for challenging many nursing home arbitration agreements. Before being entitled to a presumption favoring arbitration, the party seeking to compel arbitration has the burden of proving the existence of a valid written arbitration agreement.[6]

When, as is often the case, a pre-injury arbitration agreement is not signed by the patient but by a family member, its validity turns on whether the family member had authority to enter into the agreement on the patient's behalf.

Nursing homes typically rely on one of two potential sources of authority: a Durable Power of Attorney for Health Care or apparent authority. Both are problematic for the nursing home and provide a fertile area for the plaintiff to challenge the enforceability of the agreement.[7]

I. Durable Powers of Attorney for Health Care Do Not Authorize The Agent To Enter Into Arbitration Agreements On The Patient's Behalf.

Under Ohio law, the Durable Power of Attorney for Health Care is a creature of statute, governed by Chapter 1337 of the Ohio Revised Code. Specifically, R.C. 1337.12(A)(1) provides:

> An adult who is of sound mind voluntarily may create a valid power of attorney for

> health care by executing a durable power of attorney, in accordance with division (B) of section 1337.09 of the Revised Code, **that authorizes an attorney in fact... to make health care decisions for the principal** at any time that the attending physician of the principal determines that the principal has lost the capacity to make informed health care decisions for [him or herself].... (emphasis added).

What constitutes a "health care decision" within the contemplation of the statute is defined in R.C. 1337.11(G) and (H) as follows:

> (G) 'Health care' means any care, treatment, service, or procedure to maintain, diagnose, or treat an individual's physical or mental condition or physical or mental health.
>
> (H) 'Health care decision' means informed consent, refusal to give informed consent, or withdrawal of informed consent to health care.

The statutory scheme also provides that a durable power of attorney for health care may be created "[b]y use of... a printed form," but the authorization that may be contained within that printed form may *only* pertain to health care decisions.[8] Many, if not most, individuals with durable powers of attorney for health care use printed forms; thus, in most cases in which these forms are relied upon as the basis of the agent's authority, the question becomes whether the decision to enter into a pre-injury arbitration agreement constitutes a "health care decision."[9]

Clearly, it does not. The durable power of attorney for health care is a limited power of attorney, and, as such, it must be strictly construed.[10] A decision to enter into a pre-injury arbitration agreement does not satisfy the statutory definition of a health care decision, as it does not involve informed consent to health care, refusal to give informed consent to health care, or withdrawal of informed consent to health care. Instead, it pertains to the forum in which any future *legal disputes* will be resolved, and results in the patient waiving her right to jury trial if, at some future date, the nursing home causes injury to the patient.

Moreover, the decision to sign the arbitration agreement cannot be deemed a "health care decision" as, under Ohio law, it cannot be a requirement for being admitted to the nursing home. Section 2711.23(A) of the Ohio Revised Code prohibits medical care providers, including nursing homes, from requiring the signing of a pre-injury arbitration agreement as a condition to admission.[11] If agreeing to arbitrate future claims is not a condition of access to health care, there is no logical nexus between the arbitration agreement and receiving health care from the nursing home.[12]

Although it seems obvious that a durable power of attorney for health care does not authorize the patient's agent to sign a pre-injury arbitration agreement on behalf of her principal, this argument only recently has been addressed – and adopted – by an Ohio appellate court.

In *Primmer v. Healthcare Indus. Corp.*[13], the Fourth Appellate District held the trial court correctly denied the nursing home's motion to stay proceedings and compel arbitration because the durable power of attorney for health care signed by the plaintiff's daughter did not authorize her to waive the plaintiff's right of access to the court and agree to binding arbitration. The court reasoned that "[t]he applicable Ohio statutory definitions of 'health care' and 'health care decision' governing powers of attorney for health care and the interpretation of similar issues by foreign jurisdictions support the conclusion that a decision to waive the right to litigate in favor of arbitration is legal in nature rather than being a health care decision."[14]

The court in *Primmer* noted that, "the 'conclusion that a health care agent does not have the authority to bind the principal to an arbitration agreement comports with the view of a majority of courts in other jurisdictions that have considered similar issues.'"[15] The court also quoted at length from *Dickerson v. Longoria*, in which a Maryland appellate court recognized a distinction between arbitration agreements that are a condition of admission and those that are not. In *Dickerson*, the court found that while the former agreements fall within the definition of health care decisions, the latter do not.[16] The court explained:

> The decision to sign a free-standing arbitration agreement is not a health care decision if the patient may receive health care without signing the arbitration agreement. In such a case, the decision primarily concerns the legal rights of the patient with respect to resolving legal claims. If signing the arbitration agreement is necessary to receive health care, then the decision to sign the agreement is a health care decision because the receipt of health care depends on whether the patient agrees to arbitrate his or her claims.[17]

Since Ohio does not permit a nursing home to condition admission upon the signing of an arbitration agreement, the signing of an arbitration agreement can never be deemed a health care decision in this state. Thus, if an arbitration agreement signed by a family member is to be valid in this state, the family member's authority to sign must derive from a source other than the durable power of attorney for health care.

II. Health Care Powers Of Attorney Do Not Become Effective Until The Principal Has Been Determined, By His Or Her Physician, To Lack The Capacity To Make Informed Health Care Decisions For Him Or Herself.

Prior to *Primmer*, some Ohio courts addressed a different rationale for finding a health care power of attorney to be an insufficient source of authority for the agent to sign a nursing home arbitration agreement on the principal's behalf. Noting that an agent's authority under a health care power of attorney is triggered *"only if*... the attending physician of the principal determines that the principal has lost the capacity to make informed health care decisions for the principal"[18], these courts found the agent lacked authority to sign the arbitration agreement unless there was evidence that the principal's physician had made the requisite determination of the principal's incapacity.[19]

Although these decisions continue to be worth citing in opposing a motion to compel arbitration, their legitimacy is called into question by the *Primmer* rationale. If the health care power of attorney is incapable of conferring upon the agent the right to enter into pre-injury arbitration agreements, then whether that power of attorney has been activated by a physician's determination of the principal's incapacity is beside the point. Still, unless and until the Supreme Court adopts the *Primmer* rationale, it is advisable to continue making this alternative argument, assuming it is available under the facts of your case.

III. The Apparent Authority Arguments Are Typically Flawed On Their Facts.

The other source of authority upon which nursing homes rely to support their contention that the family member was authorized to sign the arbitration agreement on the patient's behalf is "apparent authority." This argument is heavily dependent on the facts, but, given the circumstances in which most people are admitted to nursing homes, it is often readily defeated.

To prove the existence of apparent authority, the nursing home must demonstrate:

(1) "[T]hat the principal held the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permitted [the putative agent] to act as having such authority[,]" and

(2) "[T]hat the person dealing with the agent knew of those facts and acting in good faith had reason to believe and did believe the agent possessed the necessary authority."[20]

The principal herself, and not her putative agent, "must somehow represent to a third party, either intentionally or negligently, that the agent had authority to act on the principal's behalf."[21] That is, "[t]he principal must hold out the agent as possessing sufficient authority to embrace the particular act in question, or knowingly permit him to act as having such authority."[22] The nursing home, as the party asserting the existence of an apparent agency, has the burden of proving such a relationship exists.[23]

In *Primmer*, the court rejected the nursing home's argument that, if the health care power of attorney did not provide the daughter with authority to sign the arbitration agreement, she nonetheless had apparent authority to do so. The court noted the only evidence the nursing home had of a "holding out" by the plaintiff was the fact that he made his daughter his agent under a health care power of attorney. That evidence, however, was irrelevant as the power of attorney did not give the daughter the authority to enter into an arbitration agreement on his behalf.[24] Moreover, there was no evidence the father was even present when the daughter signed the agreement, or that the nursing home had a reasonable belief the daughter was authorized to sign on his behalf.[25] And the daughter's signing of *other* admissions papers did not endow her with apparent agency, as "a claim of apparent authority cannot be based on [the putative agent's] acts."[26]

Although, in other cases, the principal's presence – and failure to protest – when the nursing home arbitration agreement was signed has been held to constitute a "holding out" giving rise to apparent agency, such decisions should be narrowly limited to their facts.[27] In most situations, the health – if not the mental status – of the person entering the nursing home is significantly compromised[28], assuming he or she is even present when the admissions papers are signed, which is often not the case. The family members themselves are typically distressed; and rarely are they, or the patient, anticipating having to file a lawsuit due to some future wrong the nursing home might commit. The very notion of having to decide – when admitting one's loved one to the nursing home – the forum in which to bring an unanticipated future lawsuit is absurd. And this is assuming that the patient and her family members are even aware the arbitration agreement is contained within the papers they are signing, or that the nursing home admissions people explain (or themselves understand) those provisions – which themselves are fairly dubious assumptions.

If the nursing home wants to prove the family member signing the arbitration agreement was the patient's "apparent agent", it must have sufficient, credible evidence that the patient – in a lucid mental state – held that family member out as having authority to sign a legal document depriving the patient of her right to litigate in a court of law any future action she might have against the nursing home. As the Kentucky Supreme Court recently stated:

> [W]ithout a clear and convincing manifestation of the principal's intention to do so, we will not infer the delegation to an agent of the authority to waive a fundamental personal right so constitutionally revered as the 'ancient mode of trial by jury.[29]

That is a steep burden and one that, in the typical case, should be difficult, if not impossible, for the nursing home to meet. ■

End Notes

1. 9 U.S.C. §1, *et seq.*
2. *Marmet Health Care Center, Inc. v. Brown*, __ U.S. __, 132 S.Ct. 1201, 1203 (2012).
3. *Taylor Bldg. Corp. of Am. v. Benfield,* 117 Ohio St.3d 352, 2008-Ohio-938, ¶27; *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, ¶15; R.C. 2711.01(A).
4. *Hayes*, at ¶20.
5. *See* n. 3, *supra.*
6. *Dodeka. L.L.C. v. Keith*, 11 Dist. No. 2011-P-0043, 2012-Ohio-6216, ¶25; *Hall v. Frantz,* 9th Dist. No. 19630, 2000 Ohio App. LEXIS 2186, *7; and see *Maestle v. Best Buy Co.,* 8th Dist. No. 79827, 2005-Ohio-4120, ¶10 ("[C]ourts may not force parties to arbitrate disputes if the parties have not entered into a valid agreement to do so.").
7. The focus of this article is on actions by the patient against the nursing home, or survivorship actions on the patient's behalf after his or her death. As for wrongful death actions, the Ohio Supreme Court has held that "[a] decedent cannot bind his or her beneficiaries to arbitrate their wrongful death claims." *Peters v. Columbus Steel Castings Co.*, 115 Ohio St.3d 134, 2007-Ohio-4787, paragraph two of the syllabus. Thus, the agent's signing of the arbitration agreement on the principal's behalf should never force the wrongful death beneficiaries to be bound by the arbitration agreement, even if the agent who signs the agreement is herself a wrongful death beneficiary. *See, e.g., McFarren v. Emeritus at Canton*, 5th Dist. No. 2013CA00040, 2013-Ohio-3900, ¶30 (the arbitration agreement was not effective as to the wrongful death beneficiaries, including the grandson who signed the agreement, because he was signing as the decedent's purported representative and not in his individual capacity).
8. R.C. 1337.17 ("By use of such a printed form, a principal may authorize an attorney in fact to make health care decisions on his behalf, but the printed form shall not be used as an instrument for granting authority for any other decisions.").
9. Even if a printed form is not used in drafting the health care power of attorney, the powers granted the agents in these documents are typically limited to "health care decisions" and do not extend to decisions concerning the forum in which future litigation must be held.
10. *Spence v. Emerine*, 46 Ohio St. 433, 438 (1889); *In re Blackburn*, 4th Dist. No. 05CA3014, 2006-Ohio-406, ¶9; *Huntington Nat'l Bank v. Val Homes, Inc.*, 11th Dist. No. 2011-G-3021, 2012-Ohio-526, ¶29.
11. R.C. 2711.23(A) ("To be valid and enforceable any arbitration agreements... for controversies involving a medical... claim that is entered into prior to a patient receiving any care, diagnosis, or treatment shall include or be subject to the following conditions: (A) The agreement shall provide that the care, diagnosis, or treatment will be provided whether or not the patient signs the agreement to arbitrate[.]").
12. *See Dickerson v. Longoria*, 414 Md. 419, 444-448, 995 A.2d 721 (2010).
13. *Primmer v. Healthcare Indus. Corp.*, 4th Dist. No. 14CA29, 2015-Ohio-4104.
14. *Id.* at ¶2.
15. *Id.* at ¶20, quoting *Johnson v. Kindred Healthcare, Inc.*, 466 Mass. 779, 789-790, 2 N.E.3d 849 (2014). *See also, Life Care Centers of America v. Smith*, 298 Ga. App. 739, 742-743, 681 S.E.2d 182 (2009) (agreeing that "the plain language of the health care power of attorney did not give Smith the power to sign away her mother's or her mother's legal representative's right to a jury trial" and noting that "other states' case law directly on point... have reached this same conclusion, holding that a health care power of attorney was insufficient to bind the principal"); *State ex rel. AMFM, LLC v. King,* 230 W.Va. 471, 740 S.E.2d 66 (W.Va. 2013) at syllabus eight ("An agreement to submit future disputes to arbitration, which is optional and not required for the receipt of nursing home services, is not a health care decision under the West Virginia Health Care Decisions Act, W.Va. Code §16-30 et seq."); *Texas City View Care Ctr. v. Fryer,* 227 S.W.3d 345 (Tex. App. 2007) ("nothing in the medical power of attorney indicates that it was intended to confer authority on Griffin to make legal, as opposed to health care, decisions for Emmons, such as whether to waive Emmons' right to jury trial by agreeing to arbitration of disputes.... Thus, even if the medical power of attorney had become effective, the scope of Griffin's authority would not have extended to signing the arbitration agreement[.]"); *Flores v. Evergreen at San Diego, LLC*, 148 Cal. App. 4th 581, 594, 55 Cal. Rptr. 823 (2007) ("Unlike admission decisions and medical care decisions, the decision whether to agree to an arbitration provision in a nursing home contract is not a necessary decision that must be made to preserve a patient's well-being. Rather, an arbitration agreement pertains to the patient's legal rights, and results in a waiver of the right to a jury trial.")
16. *Primmer*, at ¶19, quoting *Dickerson v. Longoria*, 414 Md. 419, 444-448, 995 A.2d 721 (2010).
17. *Id.*
18. R.C. 1337.13(A)(1) (emphasis added).
19. *Tedeschi v. Atrium Centers, LLC*, 8th Dist. No. 97647, 2012-Ohio-2929, ¶18; *McFarren v. Emeritus at Canton*, 5th Dist. No. 2013CA00040, 2013-Ohio-3900, 997 N.E.2d 1254, ¶18 ("If the conditions required for a power of attorney to come into being are not fulfilled, the representative has no authority to bind the principal.").
20. *Master Consolidated Corp. v. BancOhio Natl. Bank*, 61 Ohio St.3d 570, 575 N.E.2d 817 (1991), at the syllabus.
21. *Medina Drywall Supply, Inc. v. Procom Stucco Systems*, 9th Dist. No. 06CA0014-M, 2006-Ohio-5062, ¶10.
22. *Akers v. Classic Properties, Inc.*, 12th Dist. No. CA2003-03-035, 2003-Ohio-5436, ¶14.
23. *Id.; see also, Mortgage Electronic Registration Systems, Inc. v. Mosley,* 8th Dist. No. 93170, 2010-Ohio-2886, ¶39.
24. *Primmer*, 2015-Ohio-4104, at ¶24.
25. *Id.* at ¶25.
26. *Id.* at ¶26.
27. For instance, in *Broughsville v. OHECC, LLC*, 9th Dist. No. 05CA-008672, 2005-Ohio-6733, the court found apparent agency because the plaintiff was present when the arbitration agreement was signed by her daughter, but she "made no attempt to stop [her daughter from signing it], to ask questions of [the nursing home] or to request to read the document." *Id.* at ¶11. The court noted that "[w]hile it is averred that [the plaintiff] suffers from mild dementia, nowhere is it argued that she was incompetent at the time of the signing or was unable to vocalize an objection to [her daughter's] action." *Id.* "In fact, the only reason for [the daughter's] intervention was that [the plaintiff] was suffering from contractures." *Id.*
28. *See, e.g., Koch v. Keystone Pointe Health & Rehabilitation*, 9th Dist. No. 11CA010081, 2012-Ohio-5817, ¶11 (patient, whose daughter-in-law signed the arbitration agreement, had not held her out as having authority to act on his behalf, where "[h]e was confused upon his initial transfer from the hospital to [the nursing home], and there was no evidence that he informed anyone at [the nursing home] that his daughter-in-law had the authority to act on his behalf."); *Templeman v. Kindred Healthcare, Inc.*, 8th Dist. No. 99618, 2013-Ohio-3738, ¶23 (rejecting nursing home's apparent agency argument where the patient, admitted with a tracheotomy tube, "neither acted nor held her son out as her representative.").
29. *Extendicare Homes, Inc. v. Whisman*, 2015 Ky. LEXIS 1867 (Ky. Sept. 24, 2015).