

Superior Court Provides Road Map for Enforceability of Arbitration Provisions in Assisted Living Residency Agreements

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In *Cardinal vs. Kindred Healthcare, Inc.*, the Pennsylvania Superior Court departed from the recent trend by enforcing an arbitration provision in an assisted living residency agreement in an action involving wrongful death. The court upheld the principle that an arbitration provision is not enforceable with respect to wrongful death claims because wrongful death beneficiaries are the *holders* of the claim, not parties to the agreement. However, the court found that the existence of a wrongful death claim will not in and of itself defeat the enforcement of an arbitration provision as it pertains to the survival claim because the policies in the Federal Arbitration Act and the Pennsylvania Uniform Arbitration Act favor enforcement of these provisions. In fact, if there are no statutory wrongful death beneficiaries, the wrongful death claim may be consolidated with the survival claim and referred to arbitration.

The *Cardinal* court also provided guidance for determining the mental capacity of a patient who signs an arbitration agreement. The court found: (1) the mere weakness of intellect resulting from sickness or old age is not legal grounds to set aside the agreement; (2) the fact that the patient signed a power of attorney years earlier was not sufficient evidence of his lack of capacity to enter into the agreement; and (3) the challenger must present evidence of mental incompetency which is *clear, precise and convincing*. The burden to prove mental incompetency, therefore, is on the challenger and it requires credible witnesses, detailed recollection, and facts such that the testimony is *clear, direct, weighty and convincing* to the fact finder. Interestingly, the court determined that whether the person presenting the arbitration agreement to the resident knew of the implications of the provision was irrelevant. Rather, the state of mind of the resident, not the facility employee, is the focus of inquiry.

Additionally, the court outlined a road map to follow in drafting and presenting the residency agreement. In concluding that the arbitration agreement in *Cardinal* was not procedurally nor substantively unconscionable, the court noted the following terms: (1) the agreement states the parties pay their own costs; (2) the agreement contains a conspicuous, large, bolded notification that the parties, by signing, are waiving the right to a trial before a judge or jury and appeal; (3) notification at the top of the agreement, in bold typeface and underlined, that it is voluntary and signing it is not a condition of admission or continued residency in the facility; (4) the agreement states that the facility will pay the arbitrators' fees and costs; (5) the agreement contains a statement that there are no caps or limits on damages other than those already imposed by state law; and (6) the agreement allows the patient to rescind within thirty days.

Finally, the court also noted that an order overruling preliminary objections seeking to compel arbitration is immediately appealable as a matter of right. 42 Pa.C.S.A. § 7320(a); Pa.R.A.P. 311(a)(8). Thus, if you have an arbitration agreement in your residency agreement which the trial court refuses to enforce, you have the option of seeking immediate relief with the appellate courts.

If you have questions or would like additional information, please contact Kevin Cottone (cottonek@whiteandwilliams.com; 215.864.7108), Alison Russell (russella@whiteandwilliams.com; 215.864.6835) or another member of our Healthcare Group.

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