INVALIDATING ARBITRATION AGREEMENTS: WERT AND WISLER

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In recent years, it has become an increasingly widespread practice among corporations to impose mandatory arbitration agreements on their clients/customers. By doing so, they attempt to ensure disputes will be resolved in a secret venue more favorable to corporate interests than a jury trial. There is something particularly troubling about a nursing home imposing mandatory arbitration on its patients, especially given a family's vulnerability at the moment an ailing loved one is being signed up for desperately needed care.

Several recent opinions indicate Pennsylvania's appellate courts are willing to very carefully scrutinize mandatory arbitration agreements in the nursing home context. In *Wert v. Manorcare*[1], the Supreme Court found an arbitration agreement was not enforceable because it designated the defunct National Arbitration Forum as the place to resolve disputes. And in *Wisler v. Manor Care of Lancaster PA*[2], the Superior Court found an arbitration agreement unenforceable because a relative lacking authority had signed it. Both opinions are welcome developments for plaintiffs' advocates.

In *Wert*, the plaintiff alleged that Manorcare Nursing Home's negligence had caused the decline and death of her mother over the course of her six month residence. Among the paperwork plaintiff signed when her mother was admitted to Manorcare was a mandatory arbitration agreement. It provided that all claims would be resolved "in accordance with the National Arbitration Forum Code of Procedure."[3] One little problem: the National Arbitration Forum (NAF) was defunct at the time Manorcare asked plaintiff to sign the arbitration agreement.

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The conditions under which NAF became defunct are a fascinating rabbit hole worth exploring. To make a long story short, Minnesota's Attorney General sued the NAF in 2009 because NAF was contradicting its own claims to be an independent and impartial dispute resolution forum, and had undertaken a massive behind-the-scenes effort to convince credit card companies to insert arbitration provisions into their customer agreements and appoint the NAF to decide the disputes. The AG and NAF quickly signed a Consent Judgment in which NAF agreed it would in no way participate, administer or accept fees for any new consumer arbitrations.[4] The ink on the Minnesota Consent Judgment had been dry for almost a year before Manorcare asked Ms. Wert to agree to follow NAF procedures to resolve disputes.

Nonetheless, Manorcare filed preliminary objections to plaintiff's complaint, asking the court to enforce the mandatory arbitration agreement. The court overruled the POs, finding the agreement unenforceable because it relied upon NAF Code procedures that were void at the time. The Superior Court affirmed. In the Supreme Court, Manorcare argued that the NAF provision was severable, it did not designate any specific arbitrator but merely designated use of the NAF Code, and that the purpose of the agreement was clearly to mandate arbitration of disputes. Manorcare also argued that the Federal Arbitration Act "embodies an emphatic federal policy in favor of arbitral dispute resolution," which should override any concerns about technicalities like the validity of the arbitration agreement's NAF provision. Manorcare also relied on the plaintiff's admission that she did not read or understand the arbitration agreement before signing it to argue that the NAF provision was non-integral, and therefore severable.

The Court took strong issue with this last argument: "we recognize that premising the integrality of a contractual term on the subjective understanding of a far less sophisticated non-drafting party is ill-advised public policy that would further distort an already lopsided balance of power."[5] In other words, a corporation with expensive lawyers should not, as a general principle of society, be able to take advantage of the fact that people's sickness or grief might make it hard for them to read and understand legal jargon when they're signing into a nursing home. Ultimately the Court affirmed on the basis of the explicit terms of the arbitration agreement, emphasizing its provision that any disputes "shall be resolved **exclusively** by binding arbitration to be conducted … in accordance with the [NAF] Code of Procedure."[6] In other words, you made your bed Manorcare, now lie in it.

Wisler v. Manor Care of Lancaster PA invalidated an arbitration agreement that had been signed by a person lacking authority to sign on the resident's behalf. The plaintiff, H. Randall Wisler, had signed admission papers, which included an arbitration agreement, on behalf of his father, Herbert Wisler. At the time, Randall assured Manor Care that he had his father's power of attorney, but Manor Care did not ask for the document, and it was never located during the pendency of the litigation. When Herbert suffered numerous falls, pressure ulcers and other horrors, and ultimately died, Randall and his brother filed a lawsuit. Manor Care filed preliminary objections, seeking to enforce the arbitration agreement.

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The trial court held it was unenforceable and the Superior Court affirmed. For the arbitration agreement to be enforceable, Manor Care would have to establish that Randall had authority to sign it on his father's behalf under principles of agency. In the absence of a document evidencing the scope of Randall's authority, there is no way to know just what Herbert authorized him to do, the court held. Even if he had the power to sign admissions paperwork, it would have to be established that he had the explicit power to waive litigation rights in favor of arbitration. The court also rejected Manor Care's argument that in the absence of the written document, Randall's authority had been established by principles of apparent authority. Application of apparent authority would have required some manifestation on Herbert's part of granting his son authority. Because Herbert was not present during the admission process, there was no evidence supporting apparent authority.

The court held that Manor Care could not even rely on Randall's own deposition admissions to establish that he had power to bind his father to the arbitration agreement. One cannot pull oneself into a position of agency; "rather, such authority emanates from the principal's action and not the agent's."[7] The Superior Court cautioned all entities relying on a purported agent's authority in entering a contract with the principal: "If a third party relies on an agent's authority, it must ascertain the scope of that authority at the time of reliance. The third party that fails to do so acts at its own peril."[8]

These opinions bring welcome protections for people who need nursing homes, who may be unprepared to protect themselves at an extremely vulnerable moment.

Both *Wert* and *Wisler* would appear to remain good law and effective means of invalidating arbitration agreements even in light of the Supreme Court's September 28, 2016 decision in *Taylor v. Extendicare Health Facilities, Inc.*[9] In fact, the *Taylor* opinion stated that it declined to address generally applicable contract defenses, and stated that "the parties will have the opportunity to litigate whether there is a valid and enforceable arbitration contract in accord with generally applicable contract defenses…"[10] Though the Court characterized FAA preemption as a "juggernaut," it presumably is not powerful enough to render an invalid contract enforceable.

NOTES

[1] 124 A.3d 1248 (Pa. 2015).

[2] 124 A.3d 317 (Pa. Super. 2015).

[3] Id. at 1251 n.1.

[4] Consent Judgment, State of Minnesota v. National Arbitration Forum, Inc., et al., (Hennepin County District Court, No. 27-CV- 09-18550, July 17, 2009).

[5] 124 A.3d at 1260.

[6] Id. at 1262 (emphasis in original).

[7] 124 A.3d at 326.

[8] Id. at 327 (citations omitted).

[9] No. 19 WAP 2015, slip op. (Pa. Sept. 28, 2016). The import of Taylor is discussed in Daniel Bencivenga's article in this issue of The Verdict.

[10] Id. at 36.

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It was in law school that Joseph Traub was first inspired to work on behalf of catastrophically injured laborers, helping represent them in claims against the manufacturers of the defective industrial machines that caused their injuries. Since graduating, cum laude, from Temple University Beasley School of Law, his professional work has expanded to representing people catastrophically injured by defective industrial and consumer products, unsafe construction practices, dangerous driving and serious medical errors. For example, he has represented a man thrown from a scissor lift with poor lateral stability, a woman whose arm was pulled into a commercial ironing roller, a family struck by a drunk driver, and a man whose throat cancer was missed by a pathologist. His work has helped provide financial relief, as well as a sense of justice and resolution, to victims and their families while also encouraging safer products and medical practices.

Mr. Traub has lectured and published articles on various topics relevant to the practice of personal injury litigation, including principles of legal ethics, strategies in construction litigation and federal preemption. As a member of the Amicus Curiae Committee of the Pennsylvania Association for Justice, Mr. Traub advocates for the rights of injured persons in the appellate courts of Pennsylvania. His appellate advocacy on behalf of his own clients has resulted in several positive developments in the law, including ensuring funds are available to compensate malpractice victims where a doctor's insurance carrier goes bankrupt (Heim v. Medical Care Availability and Reduction of Error Fund, 23 A.3d 506 (Pa. 2011)), and allowing medical experts to testify where they are familiar with the care at issue even if they do not practice in the same specialty as the defendant (Vicari v. Spiegel, 989 A.2d 1277 (Pa. 2010)). He is also on the Board of Directors of the National Lawyers Guild Philadelphia Chapter, an association of lawyers and legal workers doing primarily civil rights and public interest advocacy. In his free time he enjoys distance running and playing drums in a band.

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