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ILLINOIS STATE BAR ASSOCIATION

HEALTH CARE LAWYER

The newsletter of the Illinois State Bar Association's Section on Health Care Law

All the latest developments in health care law

By W. Eugene Basanta and Jennifer Wagner

Cases

Federal decisions

Federal appeals court upholds paramedic's discrimination claim

An African-American paramedic filed suit under 42 U.S.C. § 1981 against a hospital and ambulance service for racial discrimination after he had been placed on three month probationary status by the hospital's medical director of the ambulance service. The probation was allegedly imposed because the plaintiff-paramedic had failed to follow protocols on one occasion in treating a diabetes patient and because of a poor test score. However, the plaintiff's evidence at trial showed that other paramedics, who had not been disciplined, had failed to follow the same protocol as the plaintiff and that several other paramedics had also done poorly on the same test as plaintiff without any adverse consequences. Furthermore, plaintiff presented evidence that the emergency system medical coordinator, who reported to the medical director, had on several occasions shown racial animus to-

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Arbitration clauses in nursing home contracts: FAA preempts Illinois state law restrictions

*By Edward Clancy**

Even though arbitration provides an efficient alternative to litigation, nursing homes have been reluctant to place arbitration provisions in contracts with residents because of Illinois state laws such as the Nursing Home Care Act and the Health Care Arbitration Act. These laws restrict arbitration and mandate the terms of arbitration agreements. However, the Illinois Supreme Court's recent decision in *Carter v. SSC Odin Operating Co*. holds that the Federal Arbitration Act ("FAA") preempts Illinois state law restrictions on arbitration agreements and they are enforceable, as long as they do not run afoul of the state's laws that apply to *any* contract.

The April 2010 decision in *Carter* invalidated the anti-waiver provision of the Nursing Home Care Act, which voids any agreement of a nursing home resident to waive his or her right to trial by jury. In light of this decision, a properly drafted arbitration agreement will eliminate the arbitration prohibition under the Nursing Home Care Act, as well as the restrictions under the Health Care Arbitration Act. Therefore, nursing homes and other health care providers must follow only general state contract law when drafting arbitration agreements.

Enforceability

Section 2 of the FAA provides that an agreement to arbitrate is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract [emphasis added]."[1] State laws that restrict arbitration or mandate the terms of arbitration

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ward plaintiff in remarks made to him.

At trial, the defendant-hospital argued to the jury that the plaintiff had failed to show he was sanctioned due to his racial status. The jury returned a $500,000 verdict against the hospital. Following entry of judgment on the verdict by the trial court, the hospital appealed.

On appeal the hospital sought to argue that it had no contractual relationship with the plaintiff and thus could not be held liable under § 1981 which prohibits racial discrimination in the making and enforcing of contracts. However, because the hospital never argued this point to the jury at trial and never sought a jury instruction in this regard, the appeals court ruled that the hospital had waived this argument.

The hospital also claimed on appeal that the trial judge had erred when he allowed the jury to hear evidence of racially negative comments made by the emergency system medical coordinator to plaintiff. The hospital argued that such comments were not relevant and should not have been presented to the jury because the decision to place the plaintiff on probation was made by the medical director and not by the coordinator. The court rejected this argument. In its view, the evidence supported the conclusion that, while the probation decision was made by the medical director, he had relied on the coordinator who was "a singular influence" in his making of the decision to place the plaintiff on probation.

The Seventh Circuit also rejected the hospital's argument that placing the plaintiff on three month probationary status was not a "materially adverse employment action" under § 1981. The court found first that the hospital had failed to preserve this argument for appeal. The court then went on to find that, in any case, the sanctions imposed on the plaintiff were not so inconsequential as to call for the jury's verdict to be rejected. While on probation, plaintiff had to be watched at all times by a supervisor, who was instructed to not assist the plaintiff, unless necessary to protect a patient. This resulted in the plaintiff being exposed to a patient's blood while the supervisor looked on. While the appeals court rejected most of the hospital's claims on appeal, it did direct that the damage award to the plaintiff be reduced to $250,000. Otherwise, the trial court's judgment was affirmed. *Thompson v. Memorial Hospital of Carbondale,* No. 07-2249, 07-2296, & 07-2297 (7th Cir., Nov. 3, 2010).

Claim against hospital based on recorded conversation considered by Seventh Circuit

Plaintiffs were the former director of physician services at a hospital and a radiologist who provided services at the hospital. They filed suit against several defendants, including the hospital, a hospital employee, its CEO, and its trustees, under the Federal Wiretap Act, 18 U.S.C. §§ 2511, 2520. Plaintiffs alleged in their complaint that they had a conversation criticizing the defendant-hospital's administration on February 24, 2006, when one of them came to the other's office. The conversation was recorded by a dictation machine in the office. The recording began with a few minutes of medical dictation, followed by a click, and then began again in the middle of the plaintiffs' conversation recording to the end of the conversation.

Plaintiffs contended in their suit that the defendant-hospital employee had entered the office while they were talking, turned on the dictation machine when she overheard their critical conversation, and left the room after retrieving some papers that were next to the machine. The conversation was later transcribed, and the employee had the transcript and recording sent to the defendant-CEO. She advised the CEO of the nature of the conversation and told him it was recorded when one of the plaintiffs forgot to turn off his office dictation machine. The CEO gave copies of the transcript to two hospital trustees and informed all trustees of the nature of the conversation. The CEO then had the physician-plaintiff's medical privileges terminated and banned the other plaintiff from entering the hospital, other than for the purpose of receiving health care for herself or a family member.

The plaintiffs filed suit against defendants under §§ 2511 & 2520 of the Federal Wiretap Act. They alleged that their conversation was intentionally intercepted by the hospital employee and then disclosed to the CEO who in turn disclosed it to the trustees. They further alleged that the recording was used to justify sanctioning them. Plaintiffs also asserted that all defendants knew or had reason to know that the recording was obtained illegally, a requirement under the statute. Plaintiffs claimed that the employee and CEO were both acting within the scope of their employment, and as such, the hospital was vicariously liable for their actions.

The district court granted summary judgment to all defendants. The trial court found that, although the recording did not contain the pleasantries that plaintiffs said were exchanged at the beginning of the conversation, it did not prove that the employee had turned on the machine in mid-conversation. The court concluded that the employee did not turn on the machine and determined there was no question of fact to resolve.

In an opinion by Judge Rovner, the Seventh Circuit first considered the question of whether plaintiffs' affidavits submitted in response to the summary judgment motion should be considered. The affidavits stated that the conversation took place on February 24, 2006 while their earlier sworn deposition testimony stated that the conversation took place on or around February 10. Defendants argued that issues of fact cannot be created by an affidavit that contradicts prior sworn testimony. This rule is designed to prevent parties from taking back poor concessions. However, as the court pointed out, this rule only applies where the change is "incredible and unexplained." When "the party offers a suitable explanation such as 'confusion, mistake, or lapse in memory,'" a change in testimony affects only its credibility, not its admissibility."

In the instant case, the appeals court found it plausible that plaintiffs could have trouble remembering the exact date on which the conversation at issue took place. Such confusion was also, in the court's view, immaterial. The substance of the prior testimony was not contradicted; i.e., that the employee entered the room during the conversation. It did not seem incredible to the court that plaintiffs could only pinpoint the date after looking at additional information including the timestamp on the recording and the record of a phone call that was received during the conversation that was captured by the dictation machine.

Having accepted the affidavits, the court looked to see whether a genuine issue of material fact precluded summary judgment on the Wiretap Act claims. The Wiretap Act prohibits intentional interception of an oral conversation. 18 U.S.C. § 2511(a). The Act also prohibits intentional disclosure or use of the contents of the intercepted conversation when there is reason to know it was unlawfully intercepted. 18 U.S.C. § 2511(c), (d). The court observed that direct evidence of interception is not necessary, since often the only way to prove stealth is through circumstantial evidence. The court did not resolve the issue of whether the interception or disclosure must involve interstate commerce; the court noted that it may be required, and flagged it as an issue on remand.

The court found that the plaintiffs' and defendants' versions of the story boiled down to a swearing contest. In such a situation, the court said, summary judgment is not appropriate. Drawing reasonable inferences in favor of the plaintiffs as the non-moving party, the court found that a genuine issue of fact existed as to whether the defendant-employee intentionally intercepted the conversation, so summary judgment was precluded on that issue. Summary judgment was also precluded as to whether the employee disclosed the contents of the conversation, since she admitted distributing the transcript and the recording. Further, the court found, because the hospital had not argued that respondeat superior was inapplicable in this case, the claim against the hospital based on the employee's actions remained viable on remand.

As to the CEO and the trustees, the court found they could only be held liable if they knew or had reason to know the recording was illegally obtained when they disclosed or used the contents. The CEO testified that the employee had told him the recording was made when plaintiff-physician forgot to turn off his dictation machine, and if that is all he knew, he had no reason to believe the recording was illegally obtained. The plaintiffs argued that he must have known it was illegal because he e-mailed the trustees asking for the copy of the transcript back after he was contacted by plaintiffs' counsel. However, the court felt it was prudent to secure the return of the transcript once an allegation of illegality was made; as CEO, he had to avoid exposing the hospital to more liability. The court felt it was not reasonable to infer that he knew the recording was illegal simply because he sought the return of the transcript after he was notified that legal proceedings were commencing. Thus, summary judgment as to the CEO was appropriate.

Finally, summary judgment for the trustees was appropriate, Judge Rovner said in her opinion, because the trustee did not use or disclose the contents of the transcript. Further, even if they had suspected the recording was illegal, they had not done anything for which liability could attach. *McCann v. Iroquois Memorial Hospital,* 622 F.3d 745 (7th Cir. 2010).

Employee who participated in internal investigation has no claim under Title VII

Plaintiff filed suit against defendant-hospital under a provision of Title VII which states that an employer may not "discriminate against any individual . . . because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII] made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a). Plaintiff was a part-time chaplain at defendant-hospital. During a search for a new director of chaplain staff, the hospital announced it was considering the interim director as a candidate. Plaintiff expressed her reservations about the interim director's professional demeanor to the hospital's chief human resources officer.

Upon the interim director's appointment as director, plaintiff began complaining that he displayed derogatory attitudes towards women and that he acted like a "good ole boy." Upon receiving this information, the human resources officer began an internal investigation, hoping to alleviate a possible hostile work environment. Plaintiff was interviewed and made statements to the effect that the new director put women down and that it was no wonder that he was highly recommended by a rabbi and a priest, since they come from religious traditions "from which female clergy are excluded." She also complained that no female clerics had been asked to speak at the funeral of the prior chaplain director.

At the conclusion of the investigation, the human resources director and the investiga-

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tor determined that the new chaplain director had not created a hostile work environment; furthermore, the human resources director was disturbed by plaintiff's comments regarding race and religion that she made to the investigator. He recommended that she resign if she was uncomfortable with the new chaplain director. Plaintiff continued to send emails regarding the new director to the human resources director who thereafter suspended her for thirty days believing that she had become preoccupied with this matter. When the suspension did not resolve the situation, plaintiff was fired and filed the instant suit. The district court granted summary judgment to the hospital.

The Seventh Circuit noted first that the district court refused to allow plaintiff to argue the participation clause of Title VII in her response to the motion for summary judgment because she had not raised the participation clause in her complaint. The appellate court stated that was error; under federal law, the plaintiff need only plead facts sufficient to support the cause of action, not legal theories. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Aaron v. Mahl*, 550 F.3d 659, 665-66 (7th Cir. 2008). The court then turned to the core issue of plaintiff's firing and stated that she had merely been involved in an internal investigation, not an investigation conducted by an official body enforcing Title VII. There was no testimony or hearing as contemplated by the statute. The court then formally joined the jurisdictions that limit the participation clause to official investigations. To hold otherwise, the court said, would require rewriting the statute to include internal investigations, and it could discourage internal investigations when they may have been the fastest and most amicable way of resolving issues. Additionally, broadening the statute was a step more properly left to Congress. The court took no position on the question of whether an internal investigation begun after an official investigation counts as part of the official investigation, since that was not the situation in the instant case.

Additionally, the court observed that plaintiff was not fired for participating in any investigation; rather, she was fired for comments she made about the new chaplain director and for her apparent preoccupation with him and issues of race and religion. As the court had observed, "Title VII was not designed to 'arm employees with a tactical coercive weapon' under which employees can make baseless claims simply to 'advance their own retaliatory motives and strategies.' . . . Were we to adopt a different standard, an employee could immunize his unreasonable and malicious internal complaints simply by filing a discrimination complaint with a government agency." *Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 890-91 (7th Cir. 2004). Some courts disagree and allow defamatory statements made during an investigation to stand. However, even the leading case, *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998 (5th Cir. 1969), limits its holding to situations in which the comments, when stripped of their defamatory elements, still state a clam of discrimination. That was not the situation in the instant case; there was no valid accusation with what Judge Posner called an "unsavory wrapping." Plaintiff was simply making complaints about a superior that did not rise to the level of sex discrimination.

Finally, the court stated that plaintiff's claim under the opposition clause of Title VII must also fail, since opposition must be based on a good faith belief, and even as plaintiff admitted, there was no such belief. *Hatmaker v. Memorial Medical Center*, 619 F.3d 741 (7th Cir. 2010).

Medicare reimbursement for residents controlled by Patient Protection and Affordable Care Act of 2010

Plaintiff-hospital sued the Department of Health and Human Services (DHHS), alleging that it was entitled to $2.8 million in Medicare reimbursements for indirect medical education (IME) expenses. In fiscal year 1996, the hospital had sought reimbursement for time that medical residents spent on research that was not related to the care of Medicare patients (pure research). One factor in IME reimbursement is the count of full-time equivalent residents (FTE), and so the issue in this case is the FTE total for 1996 that the hospital submitted which reflected the time that was spent on non-patient research. After administrative review, the Center for Medicare and Medicaid Services (CMS) excluded this time from the count, reasoning that under the reasonable cost system and the prospective payment systems of Medicare, indirect educational costs unrelated to patient care were never reimbursed. CMS also concluded that the regulation regarding FTE count should be interpreted to exclude pure research costs. The district court disagreed with CMS and granted summary judgment to the plaintiff-hospital.

The Seventh Circuit began with a brief review of the history of Medicare reimbursement. Originally, hospitals were paid by Medicare on a reasonable cost basis. This system allowed for certain education costs of teaching hospitals, but did not allow for research that was beyond patient care. Reimbursements were limited in 1972, which put more of a burden on teaching hospitals since they expend funds on medical resident education. To allay this burden, DHHS established the FTE system for teaching activity adjustments. In 1983, Medicare reimbursements were limited again when Congress instituted the prospective payment system (PPS), under which hospitals were no longer reimbursed for graduate education costs. However, a teaching adjustment factor was enacted for indirect medical education (IME) costs, using the FTE system developed before. The 1996 version of the regulation provides in relevant part:

> In order to be counted, the resident must be assigned to one of the following areas:
>
> A. the portion of the hospital subject to the [PPS]
>
> B. the outpatient department of the hospital
>
> C. . . . any entity receiving a grant under section 330 of the Public Health Service Act.

42 C.F.R. § 412.105(g)(1)(ii) (1996). In 2001, this regulation was amended again to address the instant issue. As amended, the FTE count excluded from the "portion of the hospital subject to the [PPS]" and the "outpatient department," any "time spent by a resident in research that is not associated with the treatment or diagnosis of a particular patient." 42 C.F.R. § 412.105(f)(1)(iii) (B) (2001).

In its administrative review proceeding in the instant case, CMS concluded that "area" was a "scope of operation or action" and that "assigned" was an operational term. The district court disagreed and held that "outpatient department" and "portion" related to geographical locations in the hospital. Therefore, the district court held that under the plain text of the regulation, the hospital's IME reimbursement could not be decreased because the medical residents were in the portion of the hospital subject to PPS reimbursement, even if they were conducting pure research.

At issue on appeal was whether the medical residents in 1996 were assigned to the portion of the hospital subject to PPS reimbursement and whether the DHHS interpretation of the regulation agrees with the statute. The hospital argued that the terms of the regulation referred to geographical locations, and the court noted that every district court to have considered the issue had held there was no patient care requirement, thus validating the hospital's position in this case. The government argued that the terms were functional, since PPS reimburses for patient services, not for locations in the hospital.

The appeals court then concluded that the newly enacted Patient Protection and Affordable Care Act of 2010 (PPACA) provided a statutory answer to the issues in this case. The PPACA amended the applicable statute (42 U.S.C. § 1395ww(d)(5)(B)) in two ways that affect the IME FTE calculation and whether costs unrelated to patient care may be reimbursed. First, Congress stated that effective January 1, 1983, the IME FTE count includes "all the time spent by an intern or resident in an approved medical residency training program in non-patient care activities, such as didactic conferences and seminars . . . that occurs in the hospital." PPACA § 5505(b), (c)(1). Congress also clarified that after October 1, 2001, "all the time spent by an intern or resident in an approved medical residency training program in research activities that are not associated with the treatment or diagnosis of a particular patient . . . shall not be counted." PPACA § 5505(b), (c)(3). Congress included as well a provision specifying that this clause should not raise any "inference as to how the law in effect prior to such date should be interpreted." Second, Congress stated that for direct graduate medical education expenses, effective January 1, 2009, all residents' time is reimbursable if residents are "primarily engaged in furnishing patient care . . . [, are engaged in] non-patient care activities, such as didactic conferences and seminars, but not including research not associated with the treatment or diagnosis of a particular patient . . . ." PPACA § 5505(a), (c)(2).

The court concluded that under the statutory provisions effective between 1983 and 2001 as provided in the PPACA, research activities are clearly a part of non-patient care activities. The government argued that pure research is not a subset of non-patient care activity and argued "statutory constructions that render another part of the same provision superfluous" should be avoided. *See Harrell v. U.S. Postal Serv.*, 445 F.3d 913 (7th Cir. 2006). The government also argued that the no inferences clause of the PPACA should control. The hospital argued that Congress was clear when it retroactively allowed for reimbursement for non-patient care activities beginning in 1983, and the court agreed with this position. The court felt that the no inferences clause of the PPACA is unclear and that the language allowing for reimbursement of non-patient care activities during the time period relevant on appeal is clear. Therefore, the court held that the hospital should receive reimbursement for its 1996 IME adjustment for pure research, as the PPACA is dispositive on this issue. *University of Chicago Medical Center v. Sebelius*, 618 F.3d 739 (7th Cir. 2010).

False Claims Act suit dismissed

The False Claims Act, 31 U.S.C. § 3729 et seq., prohibits parties from making false or fraudulent claims for payment against the United Sates. The Act allows private individuals, called relators, to bring civil actions, known as *qui tam* suits, to vindicate rights under the Act. The goal of the Act's *qui tam* provisions is to reward "whistleblowers" who bring significant wrongdoing to light. However, at the same time, federal law places certain restrictions on *qui tam* suits so that those bringing such suits are not simply capitalizing on information discovered or exposed by others. One such restriction is the "public disclosure" bar found in 31 U.S.C. § 3730(e)(4). This section specifies that "no court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative or Government Accounting Office report, hearing, audit, or investigation, or from news media, unless this action is brought by the Attorney General or the person bringing the action is an original source of the information." A recent decision from the Illinois federal district court involves the application of the "public disclosure bar found in § 3730(e)(4).

The relators in this suit based their *qui tam* claim on alleged Medicare violations by attending physicians at a teaching hospital who, they claimed, improperly billed Medicare for surgeries performed by residents under their supervision without complying with relevant Medicare regulations. The defendants, including the physicians and various institutional providers, moved to dismiss the relators' complaint alleging that, under the public disclosure bar, the court lacked jurisdiction and that the plaintiffs did not qualify as "original sources." The plaintiffs conceded that they were not original sources, but argued that their suit was not based on any public disclosure.

In considering the dismissal motion, the trial court explained that a three step inquiry is required with respect to the public disclosure bar. First, the court said, it must determine whether the facts and circumstances of the relator's allegations have already been publicly disclosed. If so, then the court must decide if the claims are "based upon" this publicly disclosed information. Finally, if this is the case, the court will consider whether the relator is an "original source" of this information.

Initially the district court considered whether the relators' allegations in the instant case involved conduct which had already been publicly disclosed in government reports and in news media stories dealing with Medicare billing by physicians at teaching hospitals, the so-called PATH initiative. The court found this to be the case and ruled that, "the PATH initiative, an 'industry-wide public disclosure,' implicated the Defendants in this case and exposed the critical elements of Relators' allegations."

Next, the court looked to see if the relators' *qui tam* suit was "based upon" the "public disclosure" in the PATH initiative. In this regard, the court observed that recently, in *Glaser v. Wound Care Consultants, Inc.,* 570 F3d 907 (7th Cir. 2009), the Seventh Circuit had adopted the majority interpretation, holding that, "an FCA relator's complaint is 'based upon' publicly disclosed allegations or transactions when the allegations in the relator's complaint are *substantially similar* to the allegations already in the public domain." Applying this standard, the court found that the relators' allegations were substantially similar to publicly disclosed allegations, and that their complaint was "based upon" these public disclosures and therefore barred under § 3730(e)(4) unless they could claim to be "original sources" of the information. As to this proviso, the relators had already conceded this point to defendants. Therefore, the court held that it lacked jurisdiction over the matter and dismissed the suit. *Goldberg ex rel. United States v. Rush University Medical Center,* No. 04 C 4584 (N.D. Ill., Nov. 2, 2010).

Illinois decisions

Hospital avoids liability under Gender Violence Act

A nurse intern was sexually assaulted by a physician on staff at a hospital in December of 2004. When she discovered that in 1999 the defendant-hospital, where the assaulting physician had once had privileges, had dismissed him for sexual misconduct, but had failed to disclose this to the latter hospital later that year when it asked for information about the physician during the credentialing process, she sued the defendant-hospital under the Gender Violence Act, 740 ILCS 82/1 et seq. This Act, effective January 1, 2004, provides a private cause of action for victims of "gender-related violence" against, among others, those who encourage or assist others in such acts of violence. The plaintiff-nurse alleged that the defendant-hospital violated the Act when, in 1999, it covered up the physician's sexual misconduct and failed to disclose the earlier misconduct to the latter hospital in response to its credentialing inquiry. The trial court dismissed this claim against the defendant-hospital on the basis that its conduct occurred prior to the effective date of the Act. The circuit court held that the Act could not be retroactively applied to conduct predating the Act. The plaintiff disagreed and appealed.

The focus of the appellate court's analysis was on whether the provisions of the 2004 Gender Violence Act upon which the plaintiff's suit against the hospital was based could be applied retroactively to reach conduct occurring in 1999. The appeals court said no. The Act itself provided that it "applies only to causes of action accruing on or after its effective date," which was January 1, 2004. The plaintiff argued that her cause of action accrued when she was assaulted by the physician in 2004 after the Act became effective. However, the court reasoned that while it was necessary, in order to bring a claim under the Act, that the cause of action accrue after the effective date, this alone was not sufficient to allow a claim to be made under the Act in a case such as this where the complained of conduct predated the Act's effective date. In such a case, and in the absence of an express provision in the statute, the court said its decision turns on whether the statute in question is procedural or substantive in nature. If substantive, then it is not retroactively applied. However, "If the Act is procedural in nature, it may be applied retroactively as long as such retroactive application will not impair rights defendant possessed when acting, increase defendant's liability for past conduct, or impose new duties with respect to transactions already completed."

In the present case, the court said, the Act "is substantive in nature as it creates a new, private right of action for the victims of gender-related violence. The retroactive application of the Act would create a new liability for conduct committed by defendant prior to the Act's effective date of January 1, 2004. As such, retroactive application of the Act is improper." The trial court's dismissal of plaintiff's claim was therefore affirmed. *Doe v. University of Chicago,* No. 1-09-1747 (Ill. App. 1st Dist., Nov. 4, 2010).

Court addresses impact of *Lebron* decision on § 2-622 filing requirements

Plaintiff filed a medical malpractice complaint against defendant-rehabilitation center following an injury she allegedly suffered due to a medication prescribed by a physician employed by the center. Plaintiff noted in her complaint that an affidavit from a health care professional would be filed within ninety days pursuant to 735 ILCS 5/2-622, which mandates that a report from a health care professional similar to the defendant be filed with the plaintiff's complaint or within ninety days thereafter if the complaint is filed just before the statute of limitations expires. On September 18, 2009, ninety-eight days after filing of the complaint, defendant moved to dismiss due to plaintiff's failure to supply the required report. Plaintiff subsequently moved for additional time to file the report, and on September 30, 2009, filed the report without leave of the court. The trial court dismissed the complaint with prejudice, finding that § 2-622 (a)(2) allowed for only one ninety day extension. The trial court also struck the health care professional's report, and plaintiff appealed.

The appellate court noted at the outset that, rather than use the abuse of discretion standard that is usually applied to dismissals with prejudice, a *de novo* standard would be used, since the trial court's decision was based on whether plaintiff complied with § 2-622 and thus is an issue of statutory construction. The court began by examining § 2-622 as it existed at the time plaintiff filed her complaint. At that time, § 2-622 (a)(1) and (a)(2) provided that a report from a health care professional similar to the defendant be filed with the complaint, or if the statute of limitations would expire near the time of the filing, an extension of ninety days to file the report would be granted. 735 ILCS 5/2-622 (a)(1), (a)(2). However, § 2-622 (a)(2) also provided that no additional ninety day extensions would be granted unless plaintiff's counsel withdrew, 735 ILCS 5/2-622 (a)(2). Under § 2-622 (g) failure to file a report would be grounds for dismissal under § 2-619, 735 ILCS 5/2-622 (g). These final two provisions of § 2-622 (a)(2) and (g) were added by Public Act 94-677 effective August 25, 2005.

The appellate court noted that since the time plaintiff had filed her complaint, the law had changed. The decision of the Illinois Supreme Court in *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 930 N.E.2d 895 (2010) voided Public Act 94-677 entirely. Therefore, the provisions of § 2-622 (a)(2) and (g) relevant to the case at bar reverted to what they had been prior to August 25, 2005, since under *Jackson v. Victory Memorial Hospital*, 387 Ill. App. 3d 342, 900 N.E.2d 309 (2d Dist. 2008), when a statute is held to be unconstitutional, its language reverts to what it had been prior to amendment. Prior to the 2005 amendment, § 2-622 (a)(2) stated that a report was to be filed within ninety days, but it did not state that no additional ninety day extensions would be granted, 735 ILCS 5/2-622(a)(2). Further, § 2-622 (g) provided that failure to file a certificate was grounds for dismissal under § 2-619. 735 ILCS 5/2--622(g).

In interpreting the language prior to the amendment, courts had held that failure to comply with § 2-622 did not mandate dismissal with prejudice. *Wasielewski v. Gilligan*, 189 Ill. App. 3d 945, 546 N.E.2d 15 (2d Dist. 1989). Indeed, the trial court could grant the plaintiff another extension for good cause shown. *Tucker v. St. James Hospital*, 279 Ill. App. 3d 696, 665 N.E.2d 392 (1st Dist. 1996). The appellate court in the instant case therefore held that dismissal with prejudice was error.

Finally, the court considered what the appropriate remedy would be. Defendant asked that the case be remanded to the trial court to consider whether good cause existed for an extension and whether striking the report was proper. Plaintiff asked the appellate court to decide whether good cause existed for an extension. The court concluded that it was more appropriate for the trial court to consider these issues, since they involved examinations of fact and the appellate court merely serves as a court of review. *Knight v. Van Matre Rehabilitation Center, LLC,* No. 2-09-

1127 (Ill. App. 2d Dist., Sept. 29, 2010).

Recent *forum non conveniens* decisions from Illinois appellate court

Illinois has long recognized the authority of state courts to transfer cases under the *forum non conveniens* doctrine. This equitable doctrine focuses on considerations of fairness and the "sensible and effective administration of justice." Recently, the First District Appellate Court has considered this doctrine in the context of two medical malpractice cases.

In the first case, as plenary guardian of the estate of plaintiff, her disabled mother, plaintiff's daughter filed a medical malpractice action in Cook County against two physicians and a hospital. The mother had been admitted to the defendant-hospital, located in DuPage County, on August 26, 2007, after attempting suicide. Plaintiff was readmitted on September 15, 2007, complaining of gastrointestinal problems. Ten days later, she again attempted suicide by jumping off of a balcony at the defendant-hospital, causing severe injuries for which she now had to have twenty-four hour nursing home care. She was thereafter declared a disabled person and her daughter, a resident of DuPage County who worked in Cook County, was appointed guardian of the person and the estate of plaintiff. At the time this suit was filed, one defendant-physician resided in Cook County; although he subsequently moved to DuPage County and maintained his practice there. The other defendant-physician also resided and practiced in DuPage County.

Pursuant to Supreme Court Rule 187, the three defendants joined in a motion to transfer the action to DuPage County. The trial court denied the motion. One of the defendant-physicians then filed an interlocutory appeal; that appeal was denied. He then filed a petition for leave to appeal with the Illinois Supreme Court, which issued a supervisory order directing the appellate court to accept the matter for review.

As it reviewed the relevant facts, the appellate court observed that all of the parties to the action resided in DuPage County, and that the location of the injury was in that county as well. The court then noted that following her second suicide attempt, plaintiff was treated at a Cook County hospital for several months and that as a result, approximately forty potential witnesses were produced, all of whom reside or work in Cook County. Additionally, the court pointed out that the guardian worked in Cook County and was also involved in matters of probate there. Finally, plaintiff's attorney worked in Cook County.

Under 735 ILCS 5/2-101, "every action must be commenced (1) in the county of residence of any defendant who is joined in good faith and with probable cause for the purpose of obtaining a judgment against him or her and not solely for the purpose of fixing venue in that county, or (2) in the county in which the transaction or some part thereof occurred out of which the cause of action arose." *Forum non conveniens* allows transfer when "trial in another forum 'would better serve the ends of justice.'" However, the Illinois Supreme Court has held that "[t]he plaintiff has a substantial interest in choosing the forum where his rights will be vindicated, and the plaintiff's forum choice should rarely be disturbed unless the other factors strongly favor transfer." *First American Bank v. Guerine*, 198 Ill. 2d 511, 764 N.E.2d 54 (2002). The Illinois Supreme Court has identified various factors to be considered when deciding a *forum non conveniens* motion. The public factors include "(1) the interest in deciding controversies locally; (2) the unfairness of imposing trial expense and the burden of jury duty on residents of a forum that has little connection to the litigation; and (3) the administrative difficulties presented by adding litigation to already congested court dockets." The private factors are "(1) the convenience of the parties; (2) the relative ease of access to sources of testimonial, documentary, and real evidence; and (3) all other practical problems that make trial of a case easy, expeditious, and inexpensive." The defendant has the burden of proof to show that the plaintiff's choice of forum should be overturned.. The appellate court will only reverse if the trial court abused its discretion and no reasonable person would take the view it adopted..

Applying these criteria, the appellate court found that the trial court had not abused its discretion. As to the public interest factors, the court noted that the trial courts of both Cook and DuPage County were similarly congested, and that Cook County had an interest in the litigation since it was a Cook County hospital that treated plaintiff following her second suicide attempt. Additionally, the court felt that since the jury pool in DuPage County was smaller, it may be harder to find 12 impartial people there since they are more likely to be familiar with the defendants.

As to the private interest factors, the court noted that forty-five potential witnesses resided or worked in Cook County and that the guardian worked and was involved in guardianship proceedings there as well. Defendants claimed that the distance between DuPage and Cook County made it difficult for them to defend the suit in Cook County. However, the court observed that the Daley Center in Cook County is located thirty-two miles from the DuPage County courthouse; this was not an unreasonable distance.

Defendants argued that under *Dawdy v. Union Pacific R.R. Co.*, 207 Ill. 2d 167, 797 N.E.2d 687 (2003), the plaintiff's choice of forum should be suspect because it is neither her county of residence nor the site of the injury. However, the court felt that because the guardian worked in Cook County and an overwhelming number of witnesses were there, it was not unreasonable for the trial court to deny the motion to transfer. Therefore, the order was affirmed. *Shirley v. Kumar* ___ Ill. App. 3d ___, 935 N.E.2d 638 (1st Dist. 2010).

In contrast, in a November decision in another medical liability case, the First District Appellate Court ruled that the trial court had abused its discretion when it refused to grant the defendants' motion to transfer the case from Cook County to McHenry County. In this case, the decedent, a resident of Kane County, had been treated at the defendant-hospital's facility in McHenry County, as well as at the defendant-physician's office in that same county. Following the decedent's death, the plaintiff as special administrator of the estate, filed suit in McHenry County. Two years into the litigation, the plaintiff voluntarily dismissed the suit and refilled it in Cook County. In response, the defendants moved to transfer the case back to McHenry County under the *forum non conveniens* doctrine. The trial judge denied the motion on the basis that the defendant-hospital was a resident of Cook County. The defendants appealed.

The appeals court, considering the public and private factors noted above, found that the trial court had given too much weight to the fact that, for venue purposes, the defendant-hospital was a resident of Cook County. While venue might be proper in that county, the *forum non conveniens* doctrine involves, the court said, broader considerations as to "the relative convenience of competing forums." In the instant case, the court noted

the treatment at issue occurred in McHenry County and the vast majority of the witnesses resided in that county as well. Further, the court opined that public factors weighed in favor of moving the suit to McHenry County. Specifically, the court said that McHenry County, as the place of treatment, had an interest in the medical care provided within the county. Additionally, the court observed that the courts of McHenry County were less congested than those of Cook County. In the court's view, this case in reality lacked "any real connection to Cook County" and should have been transferred by the trial court back to McHenry County where it had originally been filed. *Bruce v. Atadero,* No. 1-09-2463 (Ill. App. 1st Dist., Nov. 12, 2010).

Court considers HIPAA regulations and access to blood alcohol test results

The defendant was involved in a motor vehicle accident on March 18, 2007. He was taken to a hospital for treatment, whereupon hospital personnel performed a blood serum alcohol test, the result of which was 0.104. At subsequent grand jury proceedings, the state's attorney requested that the grand jury issue a subpoena *duces tecum* on two occasions. On April 17, 2007, the state's attorney asked for a subpoena *duces tecum* ordering the hospital to produce "any and all blood and/or urine tests done and the results pertaining to [the defendant] for treatment received on or about March 18, 2007 [in addition to] reports. . . for purposes of determining blood alcohol concentration of [the defendant]." The subpoena was made returnable to the grand jury, though it was sent to the state's attorney's office by mistake. He reviewed the records, which did not contain any blood alcohol test, then returned to the grand jury and formally asked them to release the documents to him.

On August 16, 2007, the state's attorney again asked the grand jury for a subpoena *duces tecum*, this time directing the hospital to send general hospital records pertaining to the defendant in an effort to find any blood alcohol tests that were done. The second subpoena was also made returnable to the grand jury, and again was sent to the state's attorney by mistake. The state's attorney reviewed the records, which included no blood alcohol test, then contacted the hospital directly and received the blood alcohol serum results on October 23, 2007. The state's attorney then appeared before the grand jury, shared all the information gathered, and formally asked them to release the second batch of documents to him. On January 18, 2008, the grand jury indicted defendant at the request of a special prosecutor.

Defendant moved to suppress the blood alcohol evidence on September 16, 2008, arguing that the state's attorney had misused the grand jury's subpoena power and improperly acquired confidential medical information by causing the documents requested from the hospital to be delivered to the state's attorney's office. The trial court denied the motion to exclude the blood alcohol evidence, stating that the test results were obtained pursuant to a proper subpoena properly requested by the state's attorney, and that the documents were made returnable to the grand jury. The court felt there was no evidence the state's attorney had acted in bad faith or intentionally caused the documents to be misdirected. Additionally, the trial court noted that the subpoenas were issued preindictment and that the state's attorney appeared regularly before the grand jury and kept it informed.

On February 12, 2009, the state charged defendant by information with misdemeanor DUI, and he was found guilty after a stipulated bench trial. Defendant moved for a new trial, which was denied. Defendant appealed and argued that the blood alcohol evidence was inadmissible at trial.

The appellate court noted that in reviewing a denial of a motion to suppress, findings of fact and credibility factors will be granted deference, but the legal question will be resolved *de novo. People v. Slater*, 228 Ill. 2d 137, 886 N.E.2d 986 (2008). The court noted that grand juries may issue subpoenas, returnable to the grand jury, and that issues of privilege and relevance are inapplicable since the rules of evidence do not apply; the grand jury may also disclose subpoenaed documents to the state's attorney. *People v. Wilson*, 164 Ill. 2d 436, 647 N.E.2d 910 (1994). However, the court distinguished the instant case from *Wilson*, since in *Wilson* the subpoena at issue was prepared at the direction of the state's attorney instead of the grand jury, was made returnable to the state's attorney, and the documents obtained were never shown to the grand jury. The Illinois Supreme Court determined that the state's attorney had abused his power, but that the defendant was not prejudiced because by following the proper procedures, the state's attorney could still have obtained the documents.

In the instant case, the state's attorney followed all the proper procedures. Additionally, even if he had not acted properly, he still could have obtained the records by following the correct procedures. The defendant therefore was not prejudiced in either event. The court noted that the Illinois Vehicle Code allows blood alcohol results obtained in a hospital emergency room to be forwarded to law enforcement agencies upon request and that confidentiality rules do not apply to those records. 625 ILCS 5/11-501.4(a) (West 2008).

The court also addressed the defendant's apparent reliance on the Health Insurance Portability and Accountability Act (HIPAA) and its implementing regulations. *See* 45 C.F.R. §164.512 et seq. The court noted that HIPAA does not create a privilege for medical information; rather, it gives procedures for disclosure of such information from a covered entity. *United States v. Bek*, 493 F.3d 790 (7th Cir. 2007). The court concluded that law enforcement agencies are not covered entities under HIPAA. *See* 45 C.F.R. §§160.102, 164.104, 164.502(a). In fact, HIPAA contains a law enforcement exception that addresses grand juries. *See* 45 C.F.R. §164.512(f)(1)(ii)(B) (2005). The defendant cited to no authority stating that even if the information had been improperly obtained, that suppression was warranted, and HIPAA does not contain such a remedy. The judgment of the trial court was affirmed. *People v. Bauer*, ___ Ill. App. 3d ___, 931 N.E.2d 1283 (5th Dist. 2010). ■

Arbitration clauses in nursing home contracts: FAA preempts Illinois state law restrictions

Continued from page 1

agreements conflict with the FAA, and the FAA preempts conflicting state law when interstate commerce is involved.[2] In *Carter,* the Illinois Supreme Court held that the anti-waiver provisions of the Nursing Home Care Act did not apply to arbitration agreements, because the Act is aimed at arbitration agreements specifically, not at contracts generally, which is inconsistent with Section 2 of the FAA.[3] In *Doctor's Associates v. Casarotto*, the Supreme Court held that the FAA preempted a restrictive Montana statute that required an arbitration clause to appear in a specific format.[4] Furthermore, in *Fosler v. Midwest Care Center II, Inc.*, an Illinois appellate court held that a nursing home arbitration agreement sufficiently involved interstate commerce for FAA purposes, because the nursing home received Medicare and Medicaid payments and out-of-state insurance payments and purchased medical equipment and supplies from outside of Illinois.[5] Thus, the FAA governs arbitration agreements in nursing homes and other health care settings, and the drafters of these agreements should look to general contract law for guidance in drafting. Drafters seeking arbitration should reiterate that the FAA governs the arbitration provisions in their contracts, because the FAA will not apply if the parties expressly agree that state law governs all sections of the arbitration agreement.[6]

Delegation provisions. Like choice of law provisions, delegation provisions affect the enforceability of arbitration agreements. Generally, if a contract contains a "delegation provision" that expressly gives an arbitrator the authority to decide whether the agreement is enforceable, the matter of enforceability will go before an arbitrator, not a court.[7] In *Rent-A-Center West, Inc. v. Jackson*, an employee contended that an arbitration agreement was substantively and procedurally unconscionable, because he signed it as a condition of employment, it was non-negotiable, and the provisions for fee splitting and limitations on discovery were unfair.[8] Since the contract contained a delegation provision, the Supreme Court held that an arbitrator would decide the question of unconscionability.[9] Drafters promoting arbitration must therefore balance the usefulness of delegation provisions with the precedent of judicial decisions.

Possible State-Law Defenses Against Arbitration Agreements

1. Substantive Unconscionability

Illinois courts may find a portion of a contract unenforceable, because it is substantively or procedurally unconscionable or a combination of both.[10] A clause or term in a contract is substantively unconscionable if it is unreasonably one-sided or overly harsh.[11] If particular terms of an arbitration agreement are unconscionable, Illinois courts will sever the unconscionable terms and enforce the remainder of the arbitration agreement.[12] Thus, drafters of arbitration agreements should eliminate provisions for biased arbitrators, prohibitive administrative costs, option clauses, and distant arbitral venues. They should also make clear there is a mutual promise to arbitrate.

a. Biased Arbitrators. A provision in an arbitration agreement may be substantively unconscionable if it names arbitrators with a clear, pre-existing bias in favor of the drafting party.[13] The bias may be small, but it must be direct, definite, and capable of demonstration. *Id*. When an institution drafts an arbitration agreement or includes an arbitration clause in a larger agreement, it might create business for arbitrators with a particular, relevant background.[14] If there is a consistent relationship between the institution and specialized arbitrators, charges of partiality on the part of the arbitrators might follow.[15]

There is a presumption of bias where an arbitrator and one of the parties to the arbitration meet separately to negotiate on a different matter.[16] In *Drinane v. State Farm Mutual Insurance Company*, the arbitrator overcame the presumption of bias, even though he failed to disclose that he had a pending case against an individual whose insurer was a party to the arbitration.[17] The sworn statements of the arbitrator and other key personnel revealed that the disputed issues in the arbitration were not discussed, thus overcoming the presumption of bias.[18] However, arbitrators are now required to disclose any dealings that might create an impression of possible bias.[19] Furthermore, in *Anderson v. Prab Conveyors, Inc.*, the court held that the defendant company could not itself arbitrate a dispute to which it was a party, in spite of a provision to that effect in a signed arbitration agreement.[20] The court found that it would be unconscionable to compel the opposing party to submit its claim to the company itself.[21]

Health care providers should ensure that arbitration agreements do not name particular arbitrators and should require arbitrators to disclose dealings that might create an impression of bias. They should also confirm that they are not arbitrating disputes internally and that they allow opposing parties to submit claims in a neutral forum.

b. Prohibitive Administrative Costs and Arbitral Venues. Parties to arbitration must pay the administrative costs of arbitration, including any arbitration fees.[22] Some arbitration agreements specify that the party drafting the agreement must pay the arbitrators.[23] Courts might find such agreements substantively unconscionable, because arbitrators might be inclined to favor the drafting party, if such a payment provision generates continued business.[24] On the other hand, courts might find a clause requiring a non-drafting party to pay some or all of the costs of arbitration to be substantively unconscionable, because such a clause could discourage dispute resolution.[25]

The party seeking to invalidate a provision on the theory that arbitration is prohibitively expensive has the burden of proving the likelihood of incurring prohibitive costs.[26] In Illinois, the party may meet this burden with evidence of the prohibitive costs and proof of incapability of meeting those costs.[27] To help ensure that arbitration agreements are enforceable and that the costs of arbitration are not prohibitively expensive, drafters can divide the administrative costs equally among the parties. Statements such as "[Provider] and [Resident] shall equally bear all fees and expenses of the arbitration," will most likely survive in court. Agreements that require arbitration far from the non-drafting party's home might also be substantively unconscionable.[28] Health care organizations should ensure that arbitration agreements provide for arbitration in venues that are reasonable for non-drafting parties, even if the agreements require a particular arbitral

forum.

c. Option Clauses. Some arbitration agreements require non-drafting parties to arbitrate claims but allow drafting parties to choose between litigation and arbitration.[29] Others require non-drafting parties to litigate claims but allow drafting parties to arbitrate.[30] Illinois courts could find these option provisions unconscionable, because they give the drafting party a post-dispute choice of forum and lack mutuality.[31] Although courts will not necessarily find option provisions unconscionable, organizations should avoid drafting arbitration agreements with these clauses, without providing clear exceptions to bind both parties to arbitration.

d. Lack of Consideration. If one party must agree to arbitrate, but the other retains an option to sue, the arbitration agreement might be unconscionably one-sided and void for lack of consideration. Under Illinois law, "a mutual promise to arbitrate is sufficient consideration to support an arbitration agreement."[32] However, the promises to arbitrate need not be identical.[33] For example, in *General Motors Acceptance Corp. v. Johnson*, the court upheld an agreement to arbitrate, where the parties made a mutual promise to arbitrate, but one of the parties also forfeited its right to participate in a class action.[34] A drafter of an arbitration agreement should ensure that both parties are agreeing to arbitration, or that there is valid consideration for the entire contract if the arbitration clause is part of a larger agreement.

2. Procedural Unconscionability

Procedural unconscionability exists if a contractual term is so difficult to see, read, or understand that the non-drafting party could not have been aware of it.[35] Unequal bargaining power and hidden or confusing contractual terms suggest procedural unconscionability.

a. Contract of adhesion. Illinois courts will not deny the enforcement of an arbitration agreement solely because it is a contract of adhesion, where the drafting party has all of the bargaining power.[36] If a court were to do so, it would be applying the unconscionability doctrine more aggressively to arbitration agreements than to contracts generally, an application that the FAA prohibits. The party in a superior bargaining position can prepare a valid contract, without allowing the other party to negotiate any terms.[37] A "take-it-or-leave-it" provision in a contract does not automatically make the agreement unconscionable; one would have to show fraud or other wrongdoing to invalidate the clause.[38]

Health care providers will often have superior bargaining power in comparison to parties signing arbitration agreements. While one may attack these agreements as contracts of adhesion, that reason alone will not be enough to invalidate them. Providers should ensure that no fraud or wrongdoing occurs in contract formation. To this end, they can confirm that residents or patients have time to reflect about the arbitration provision, point out the provision, and explain the consequences of signing.

b. Hidden Contractual Terms. Although Illinois courts are reluctant to find arbitration clauses procedurally unconscionable where notice of the clause appears in contractual text, courts will not enforce arbitration provisions that are so difficult to find and to read that non-drafting parties cannot be aware of them.[39] In *Bunge Corp. v. Williams*, the court did not find an arbitration clause that appeared on the back of a soybean sales contract procedurally unconscionable where notice of the clause appeared on the front of the contract.[40] The court reasoned that the non-drafting party had the ability and opportunity to read all provisions of the contract and therefore could not claim ignorance of its terms and conditions.[41] Nursing home providers should confirm that residents are able to read and understand all arbitration provisions in nursing home contracts before executing agreements.

3. Mental Capacity

In order to form a valid contract, both parties must be of sufficient mental ability to appreciate the effect of the contract, and they must be able to exercise free will in forming the contract.[42] In order to void a contract on the grounds of mental incapacity, at least one of the parties must possess a degree of mental weakness that renders that party incapable of protecting his or her interests.[43] Because arbitration agreements are on the same footing as other contracts, these agreements will be invalid if one of the parties does not possess the requisite mental capacity to form a valid contract. Although Illinois case law does not provide guidance on how Illinois courts will resolve issues related to mental capacity and arbitration agreements, case law from other jurisdictions provides some guidance. In 2003, the U.S. Court of Appeals for the Tenth Circuit determined that challenging the enforceability of a contract must involve challenging the entire contract rather than individual provisions in the contract.[44] This suggests that a court would invalidate an arbitration agreement or an arbitration provision in a larger contract if one of the parties lacks the mental capacity to form a valid contract. Additionally, the court in this case held that a judge, not an arbitrator, must decide a mental capacity challenge to an arbitration agreement.[45] However, the recent decision in *Rent-a-Center* suggests that this choice of forum might not be possible if an arbitration agreement contains a delegation provision requiring an arbitrator to determine the enforceability of the contract.

Nursing homes that use arbitration agreements should be aware that residents and patients must possess sufficient mental capacity in order to execute valid contracts. This is particularly important in nursing homes and hospitals where a resident or patient might have a significant mental impairment. When a third party signs an arbitration agreement on behalf of a resident or patient, health care organizations should confirm that the third party has the authority to bind the party to the agreement.

Additional Recommendations

Health care providers can use the following checklist to create arbitration agreements that are enforceable under the FAA and general state contract law.

Recommendations for Drafting

- State that the FAA governs the arbitration agreement.
- Consider the costs and benefits of enforceability issues reaching the courts.
- Avoid naming an arbitrator in an arbitration agreement if there is a question of neutrality.
- Specify that arbitration costs be divided equally among parties.
- Provide for arbitration in venues that are reasonable for non-drafting parties.
- Indicate that both the resident or patient and the provider are bound to arbitrate their claims.
- Use plain language to avoid unintended awards of attorneys' fees.

Recommendations for Execution

- Confirm that the resident or patient has mental capacity to execute a valid contract.
- If a third party signs for the resident or

patient, require proof of the third party's authority, such as a signed Power of Attorney document.
- Provide the resident or patient adequate time to read and comprehend the arbitration provision or agreement.
- Point out an arbitration provision in a larger agreement and explain the consequences of signing.
- Ask the patient to initial next to the arbitration provision if it is within a larger contract.
- Ask the patient to sign the arbitration agreement if it is a separate document. ■

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1. 9 U.S.C. §2.
2. *See Doctor's Associates v. Casarotto*, 517 U.S. 681, 116 S. Ct. 1652 (1996).
3. *See Carter v. SSC Odin Operating Co.,* 237 Ill. 2d 30, 927 N.E.2d 1207 (2010).
4. *Doctor's Associates*, 517 U.S. at 688.
5. *Fosler v. Midwest Care Center II, Inc.*, 398 Ill. App.3d 563, 578, 928 N.E.2d 1, 14 (2nd Dist. 2010).
6. *See Glazer's Distributors v. NWS*, 376 Ill.App.3d 411, 876 N.E.2d 203 (1st Dist. 2007) and *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 109 S. Ct. 1248 (1989).
7. *See Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010).
8. *Id. at 2781.*
9. *Id*.
10. *Razor v. Hyundai Motor America*, 222 Ill. 2d 75, 99, 854 N.E.2d 607, 622 (2006).
11. *Zobrist v. Verizon Wireless*, 354 Ill.App.3d 1139, 1147, 822 N.E.2d 531, 540 (5th Dist. 2004).
12. *Wigginton v. Dell, Inc.*, 382 Ill.App.3d 1189, 1198, 890 N.E.2d 541, 549 (5th Dist. 2008).
13. *Giddens v. Board of Ed. of City of Chicago*, 398 Ill. 157, 167, 75 N.E.2d 286, 291 (1947).
14. Stephen J. Ware, *Arbitration and Unconscionability after Doctor's Associates v. Casarotto*, 31 Lake Forest L. Rev. 1001, 1022 (1996) (*quoting* S. Gale Dick, *ADR at the Crossroads*, Disp. Resol. J., Mar. 1994 at 47, 55 (1994)).
15. *Id*.
16. *Drinane v. State Farm Mutual Ins. Co.*, 153 Ill. 2d 207, 215, 606 N.E.2d 1181, 1185 (1992).
17. *Id.*
18. *Id.*
19. *Rosenthal-Collins Group, L.P. v. Reiff*, 321 Ill. App.3d 683, 687, 748 N.E.2d 229, 233 (1st Dist. 2001).
20. *Anderson v. Prab Conveyors, Inc.*, 69 Ill. App.2d 224, 231, 216 N.E.2d 252, 256 (1st Dist. 1966).
21. *Id*.
22. Ware at 1023, *quoting* Sarah R. Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. Rev. 449, 478 (1996).
23. *Id.*
24. *Id.*
25. *Id.*
26. *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 92, 121 S. Ct. 513, 522 (2000).
27. *Bess v. DirecTV*, 381 Ill.App.3d 229, 240, 885 N.E.2d 488, 498 (5th Dist. 2008).
28. Ware at 1026.
29. *Id.* at 1024.
30. *Id.* at 1025.
31. *Id.*
32. *Aste v. Metropolitan Life Insurance Co.*, 312 Ill.App.3d 972, 975, 728 N.E.2d 629, 632 (1st Dist. 2000).
33. *General Motors Acceptance Corp. v. Johnson*, 354 Ill.App.3d 885, 894, 822 N.E.2d 30, 37 (1st Dist. 2004).
34. *Id.*
35. *Razor*, 854 N.E.2d at 622.
36. *Zobrist*, 822 N.E.2d 531 at 541.
37. *Id.*
38. *Id.*
39. *Bunge Corp. v. Williams*, 45 Ill.App.3d 359, 364, 359 N.E.2d 844, 847 (5th Dist. 1977).
40. *Id.*
41. *Id.*
42. *Thatcher v. Kramer*, 347 Ill. 601, 609, 180 N.E. 434, 437 (1932).
43. *English v. Porter*, 109 Ill. 285 (1884).
44. *Spahr v. Secco*, 330 F.3d 1266, 1273 (10th Cir. 2003).
45. *Id.*

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