Florida's Second District Court of Appeal Upholds the Enforceability of Arbitration Agreements in Disputes with Nursing Homes While Striking Down Provisions Requiring Each Party to Bear Its Own Attorney's Fees

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For the second time in less than a month, a Florida appellate court addressed the issue of arbitration agreements and their enforceability as it relates to disputes residents of nursing homes may have with the nursing home. In the more recent of these decisions, *Hochbaum v. Palm Garden of Winter Haven*, Florida's Second District Court of Appeal ruled that while part of the arbitration agreement in question did violate public policy and therefore could not be enforced, the agreement itself was still enforceable because the questionable clause in dispute did not go to the heart of the contract and therefore could be severed from the agreement.

In *Hochbaum*, the wife of a deceased nursing home resident had signed three separate arbitration agreements at various junctures on behalf of her husband, who had been a resident at the defendant nursing home. Each agreement provided that any disputes between the nursing home resident and the nursing home would be resolving in binding arbitration rather than in Florida state or federal court. The arbitration agreements also each provided that each party would be responsible for its own attorney's fees in connection with any such arbitrations.

The former nursing home resident subsequently passed away and his wife filed suit under several Florida statutes against the nursing home, including Florida Statutes Chapter 415, which provides a cause of action for exploitation, neglect or abuse of a vulnerable adult. Chapter 415 also includes a provision for the award of attorney's fees for a party which prevails in an action under that Chapter of the Florida Statutes. The nursing home moved to compel arbitration of the wife's lawsuit on the basis of the arbitration agreements signed by the former nursing home resident's wife, a request which the trial court granted despite the plaintiff's objection that enforcing the agreements would be unconscionable.

Upon appeal, Florida's Second District Court of Appeal reversed the trial court's decision compelling arbitration, but only as it related to the attorney's fees provision of the arbitration agreements. It did not find that the entire agreement requiring arbitration of the deceased resident's wife's claims would be void as against public policy despite being urged to do so by the plaintiff.

Instead, the appellate court found that the portion of the arbitration agreement which required each party to bear its own attorney's fees in connection with any arbitration was void as against public policy. Nevertheless, it found this attorney's fee provision of the arbitration agreements did not go to the heart of the arbitration agreements and was therefore severable from the remainder of the arbitration agreements. The Second DCA therefore allowed the trial court's order compelling the case to arbitration to stand with the absence of the agreements' attorney's fees provision.

Although the nursing home lost the battle to preserve the arbitration agreements in their entirety, this was a victory for nursing homes and their ability to require residents or their representatives to abide by arbitration agreements, a welcome development for nursing homes in the wake of the Florida Supreme Court's September 22, 2016 *Mendez v. Hampton Court Nursing Center, LLC* decision finding that a former nursing home resident's estate was not

bound by a forced arbitration clause in an agreement which was signed by the former nursing home resident's son when his father was first admitted to the nursing home. This case offers a lesson to nursing homes to be careful in how they draft their arbitration agreements with residents, as the type of agreement in *Hochbaum* may be more likely to survive a challenge than the agreement in *Mendez.*