When a family confronts admitting a loved one to a nursing facility, it can be an emotional and fearful time. Most families face this scenario without any previous experience. They do not know what lies ahead. In many cases, the need for nursing facility admission is an emergent situation, wrought with many questions and few answers. What nursing facility do I choose? Is the nursing facility I do choose a safe place for my loved one? How do I pay for the nursing facility stay? Is there a safe nursing facility nearby? These are just a few of the questions families ponder—sometimes with only a matter of hours to make a decision. The selection of a nursing facility usually involves a whirlwind of facility tours, Internet research on the quality of the facility, and completion of piles of paperwork. All too often families don’t know where to turn for advice. A lot of faith goes into the information provided to families by the nursing facilities themselves. Families seek this advice with the expectation that the information they are given is meant to help their loved ones receive the best care possible. Unfortunately, that does not always happen.

If neglect and abuse of a loved one occurs while in the care of a nursing facility, a family is often surprised to discover later that within the piles of admission documents is an arbitration agreement that they signed under the barrage of paper and under the gun of time constraint. The arbitration agreement aims to take away the resident’s constitutional right to a jury trial forever. While no court would enforce a contract signed by a party while having a real gun held to their head, residents with an immediate need for nursing facility care have been forced to give up their right to a jury trial when it is discovered an arbitration agreement was within the documents signed upon admission. Even though the resident could die without the necessary nursing facility care, the agreements are still enforced.

However, arbitration agreements, like any other contract, are subject to defenses such as lack of capacity, lack of authority, impossibility, fraud in the inducement, mistake and other defenses. The most common defense is that the person who signed the arbitration agreement simply lacked authority to sign the contract on the resident’s behalf. Many times this analysis comes down to whether there was a power of attorney and whether the language of the power of attorney gave the agent the authority to waive the principal’s constitutional right to a jury trial in the future. This issue was addressed by the Supreme Court of Kentucky in Ping v. Beverly Enterprises, Inc., 376 S.W.3d 581 (Ky. 2012), cert. denied, 134 S.Ct. 705, 187 L.Ed.2d 567 (2013) and later in Extendicare Homes, Inc. v. Whisman, 478 S.W.3d 306 (Ky. 2015), cert. granted, --S.Ct.--, 2016 WL 3617216 (2016). In both Ping and Whisman, the Supreme Court of Kentucky followed the longstanding principle that powers of attorney should be strictly construed when determining the breadth of authority. But what if there was authority and none of the defenses listed above apply? Is it conscionable to present an arbitration agreement to a resident or their family when they are in the midst of making life or death decisions about medical care? Under certain circumstances, should pre-dispute arbitration agreements in the nursing context not be enforced? These questions are not new. However, they also are not fully resolved.

Unconscionability and Arbitration Agreements

There is precedent in Kentucky law for courts to find arbitration agreements unconscionable in certain contexts. The Court of Appeals of Kentucky upheld an Order of the Fayette Circuit Court denying a motion to compel arbitration in the case of Valued Services of Kentucky LLC v. Watkins, 309 S.W.3d 256 (Ky. App. 2009). In Watkins, the Court discussed the doctrine of unconscionability and how it is “directed against one-sided, oppressive and unfairly surprising contracts . . .” and that “[u]nconscionability determinations being inherently fact-sensitive, [the] court must address such claims on a case-by-case basis” Id. at 261 (citing Conseco Finance Servicing Corp v. Wilder, 47 S.W.3d 335, 341-42 (Ky. App. 2001))(emphasis added). Even some of the major arbitration services in the United States addressed the issue of the unconscionability of pre-dispute arbitration agreements. The American Health Lawyers Association’s
Alternative Dispute Resolution Service Rules were at one time revised to state that the service will administer arbitrations of “consumer health care liability claims” only if “all of the parties agreed in writing to arbitrate the claim after the injury has occurred.” American Health Lawyers Association Rules of Procedure for Arbitration (Revised May 2012) (emphasis added). The American Arbitration Association (AAA) issued a Healthcare Policy Statement where the association stated that it would not administer healthcare arbitrations that “relate to medical services, such as negligence and medical malpractice disputes, unless all parties agreed to submit the matter to arbitration after the dispute arose.” AAA Healthcare Policy Statement (2003)(emphasis added).

Despite the fact that many arbitration services themselves see the unconscionability in pre-dispute arbitration agreements in the healthcare context, the arbitration agreements continue to be included within nursing facility admission paperwork, unwittingly signed by residents and family members, and in many cases, enforced by the courts. While certainly the doctrine of unconscionability would prevent some arbitration agreements from being enforced under certain sets of circumstances, see supra Watkins, the question remains as to whether or not the circumstances surrounding admissions to nursing facilities in all cases would be sufficient to satisfy the requirements of an unconscionability contract defense. It does not require any mental gymnastics to realize that basically the same factual scenario exists in almost every nursing facility admission. Does this unique set of facts make nursing facility pre-dispute arbitration agreements unconscionable? The Centers for Medicare & Medicaid Services (CMS) answered this question for nursing facility companies in the affirmative.

The New CMS Rule and Unconscionability

The Secretary of Health and Human Services (Secretary), through CMS, issued a rule “requiring that facilities must not enter into an agreement for binding arbitration with a resident or their representative until after a dispute arises between the parties.” 81 Fed Reg. 68,796-797 (Oct. 4, 2016)(emphasis added). As stated by CMS, “[t]his final rule does not prohibit binding arbitration, only the use of pre-dispute binding arbitration agreements.” Id. In

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many cases Medicare and Medicaid are the sole payors for nursing facility services, and Congress requires the Secretary to create rules and regulations relating to the quality of care and the delivery of services in the long term care context. Id. CMS reviewed a litany of court cases, literature, and articles in the formulation of the new rule. Id. at 68,793. The concerns with pre-dispute arbitration agreements in the nursing facility context studied by CMS in its review included: unequal bargaining power between resident and the long term care facilities; inadequate explanations of the arbitration agreement; inappropriateness of presenting the agreement upon admission; an extremely stressful time for the residents and their families; negative incentives on staffing and care as a result of not having the threat of substantial jury verdict for sub-standard care; and the unfairness of the arbitration process. Id. CMS sought declaratory judgment that the CMS arbitration rule is unlawful and entry of orders preliminarily and permanently enjoining the Secretary and Acting Administrator from enforcing the arbitration rule. Burwell at 3. The practical reality for attorneys litigating nursing facility neglect and abuse cases is, however, not whether the rule has staying power, but that an arm of the United States Government reached the findings upon which the rule is based, i.e., nursing facility defendants cannot un-ring that bell.

There is no crystal ball to determine if the new arbitration rule will survive challenges in the courts. If the rule survives, nursing facilities that choose to continue to receive the financial incentive of Medicare and Medicaid dollars will have to enter into their arbitration agreements after the injury and dispute occurs. While the arbitration rule sets some requirements on when the nursing facility can present arbitration agreements, there is no absolute prohibition against arbitration agreements in the nursing facility context, whatsoever. The question is, after the haze lifts and families are truly able to contemplate how their loved ones were treated—would they choose to sign such an agreement? Would they choose an agreement stripping them of their constitutional right to hold the facilities accountable in court for the world to see? If they chose arbitration, their claims of neglect and abuse of their loved ones would be decided behind the cloak of secrecy required by most arbitration agreements.

Impact of the CMS Rule on Your Practice
So what does this new CMS rule mean for your practice? Are pre-dispute arbitration agreements in the nursing facility context extinct? Not so fast. The rule has already faced legal challenge. The American Health Care Association, among others, recently requested a preliminary injunction in the United States District Court for The Northern District of Mississippi, enjoining CMS from enforcing the new rule barring nursing facilities receiving federal funds from entering into new pre-dispute arbitration agreements with their residents. American Health Care Association, et al. v. Burwell, In Her Official Capacity as Secretary of Health and Human Services, et al., C.A. No. 3:16-CV-00233 (N.D. MS 2016). The CMS rule was supposed to take effect on November 28, 2016. 81 Fed Reg. 68,688 (Oct. 4, 2016). The original complaint filed by the American Health Care Association sought declaratory judgment that the CMS arbitration rule is unlawful and entry of orders preliminarily and permanently enjoining the Secretary and Acting Administrator from enforcing the arbitration rule. Burwell at 3. The practical reality for attorneys litigating nursing facility neglect and abuse cases is, however, not whether the rule has staying power, but that an arm of the United States Government reached the findings upon which the rule is based, i.e., nursing facility defendants cannot un-ring that bell.

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Issue Spotting for Unconscionability
For the time being, the new CMS arbitration rule highlights the common contract defense so often glossed-over by attorneys and the courts. With the unique set of facts of each nursing facility neglect and abuse case, was it unconscionable for the nursing facility to present a pre-dispute arbitration agreement to the resident or his or her family? This question must be answered in each case. Both procedural and substantive unconscionability are recognized defenses to any contract—including arbitration agreements. Factors relevant to a procedural unconscionability inquiry include, but are not limited to: the bargaining power of the parties; the conspicuousness and comprehensibility of the contract language; the oppressiveness of the terms; and the presence or absence of meaningful choice. Schmuerle v. Insight Communications Co., L.P., 376 S.W.3d 561 (Ky. 2012)(citing Jenkins v. First American Cash Advance of Georgia, LLC, 400 F.3d 868, 875-876 (11th Cir. 2005)). Factors relevant to substantive unconscionability inquiry include, but are not limited to: the commercial reasonableness of the contract terms; the purpose and effect of the terms, the allocation of the risks between the parties; and public policy concerns. Id. (citing Jenkins, 400 F.3d at 876).

Determining whether either, or both, of these unconscionability defenses apply requires a practitioner to conduct an investigation of the admissions process. Obtaining a complete copy of the admissions file, including the arbitration agreement, is necessary in evaluating the reasonableness of the arbitration agreement itself. In some cases, inspecting the original admissions file would be wise, in order to determine exactly what was presented to the resident or the family. Arbitration agreements are required to be in writ-

Talk to the signor of the arbitration agreement. Was the arbitration agreement actually explained, or was the signor simply told the agreement was “for admission” or “so the facility can get paid”? Investigate the physical and mental condition of the signor. Did he or she have any auditory or visual deficits, did he or she suffer from dementia or some other cognitive condition that would affect the ability to understand the agreement? Investigate the process the admissions coordinator went through in explaining the admissions paperwork. Was the arbitration agreement explained at all? Was it a requirement of admission? The Kentucky Attorney General weighed in on this issue all the way back in 1978, and stated that “[l]ike all rights granted to citizens the individual has the right to waive the protection of such rights. Such waiver must be completely voluntary and with the individual’s knowledge of the rights being waived.” Kentucky Attorney General Opinion, 1978 Ky. AG LEXIS 157 (dtd. September 29, 1978)(emphasis added).

Investigate the cost of the arbitration as outlined in the arbitration agreement. It is unusual for the costs to be absolutely prohibitive for a nursing facility resident with limited resources to be able to vindicate his or her rights under the requirements of the arbitration agreement. The arbitration agreement may be unenforceable due to its excessive cost. Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 89-92 (2000). If the arbitration agreement appears unconscionable due to the excessive cost to be borne by the resident, keep in mind that the U.S. Supreme Court in Green Tree required more than a mere statement that the costs are too excessive. The court must be provided with evidence of the excessive cost and how this would be overly burdensome on the resident. In those cases where the nursing facility resident already struggles with minimum resources and may be relying on Medicaid to pay for nursing facility care, be sure to present this evidence to the Court so a just ruling can be made.

The Supreme Court of Kentucky recognizes that it is “a basic principle that an arbitration clause is not enforceable if it fails to provide plaintiffs with an adequate opportunity to vindicate their claims. Accordingly, arbitration clauses certainly may continue to be struck down as unconscionable if their terms strip claimants of a statutory right, which cannot be vindicated by arbitration, for example, the arbitration costs on the plaintiff are prohibitively high. Schnuerle at 573. Read the arbitration agreement carefully. Does it strip away a right, excessively limit discovery, prevent the resident from adequately presenting evidence or attempt to limit due process in some other manner? If so, the facts of the case may make the arbitration agreement unconscionable.

The new CMS rule regarding arbitration resulted from a careful analysis of the circumstances surrounding nursing facility admissions. The factors considered by CMS have many parallels to those considered by courts when evaluating the defense of contract unconscionability. Regardless of the future of the CMS rules, the common defenses to contract formation should not be forgotten when a practitioner encounters an arbitration agreement in any context, including cases of nursing facility neglect and abuse.

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