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Board of Contributors: Florida Supreme Court invalidates arbitration provisions in nursing home admission agreements

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In a setback to the nursing home industry, the Florida Supreme Court recently invalidated provisions in nursing home agreements that called for binding arbitration of disputes on the basis that the terms of the agreements violated public policy.



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In Florida, nursing home residents may bring an action to recover damages for violations of the nursing home residents' bill of rights, negligence and wrongful death. It has become a common practice in Florida for nursing homes and assisted living facilities to include provisions requiring the arbitration of any disputes between the resident and the facility, and in some cases, these agreements have included limitations on the nature and amount of damages recoverable. When it recently invalidated two specific arbitration agreements, the Florida Supreme Court reaffirmed the remedial purpose of Chapter 400 of the Florida Statutes, which establishes standards for nursing homes and the rights of residents, and found that provisions in the arbitration agreements, which limited these rights, to be unenforceable.

In *Shotts v. OP Winter Haven*, the court considered whether the limitations on remedies in the arbitration agreement violated public policy, whether a court or an arbitrator must decide whether the arbitration agreement violates public policy and whether the limitation-of-remedies provisions are severable.

In *Shotts*, the resident's niece signed an agreement which contained limitations on remedies provisions that required arbitration to be conducted in accordance with the American Health Lawyers Association

(AHLA) rules and provided that the arbitrators would have no authority to award punitive damages. The agreement also stated that the terms were severable.

The resident's family argued that these provisions violated public policy. The Florida Supreme Court held that a court — not an arbitrator — must decide whether the arbitration agreement violates public policy. The court found the limitations-of-remedies provisions in the agreement violated public policy as they directly undermined the specific statutory remedies created by the legislature. Any arbitration agreement which substantially diminishes or circumvents these remedies violates public policy in Florida and is unenforceable.

The court further found that the provisions were not severable. The AHLA provision goes to the very essence of the agreement and if the provisions were severed, the trial court would be forced to rewrite the agreement and to add an entirely new set of procedural rules and burdens and standards.

In *Gessa v. Manor Care of Florida*, the resident's daughter, acting as her attorney-in-fact, signed admission documents which contained an arbitration agreement. The agreement prohibited an award of punitive damages and capped any award of non-economic damages at \$250,000. As in *Shotts*, the Florida Supreme Court considered whether the limitation of liability provisions were severable, whether a court or an arbitrator must decide whether the arbitration agreement violates public policy, and whether the limitation of liability provisions violate public policy.

The court held that the \$250,000 cap on non-economic damages and waiver of punitive damages violate public policy and were not severable, and a court, not the arbitrator, must decide whether an arbitration agreement violates public policy. In reaching this conclusion, the court found the limitations on liability directly undermined the specific statutory remedies created by the legislature. Any arbitration agreement which substantially limits or circumvents these remedies violates public policy in Florida and is unenforceable.

The nursing home statutes in Florida allow for an award of "punitive damages for gross or flagrant conduct or conscious indifference to the rights of the resident. Moreover, there was no cap on pain and suffering damages in the statute." The court found that the limitations in *Shotts* and *Gessa* directly frustrated the remedies created by the statute and "eviscerated" the remedial purpose of the statute.

Dissenting in both opinions, Justice Polston stated that, contrary to the majority's ruling, the challenged limitations may be severed from the arbitration provisions so the arbitration could go forward as agreed by the parties. And, he wrote, that it was for the legislature — not the Florida Supreme Court — to determine whether Florida's public policy has been violated, as the court should not be a policy maker.

These two decisions render unenforceable any arbitration provision which substantially limits the statutory remedies and remedial purpose of Chapter 400. Arbitration provisions which do not limit the resident's rights and remedies, but simply provide for an alternate means for resolving any dispute between the resident remains to be seen whether the Florida legislature will address this issue. Many nursing homes have opted to offer residents the opportunity to resolve any disputes by way of binding arbitration as a method to expedite the resolution of disputes, control litigation costs and prevent runaway verdicts. Unless the legislature acts, residents and nursing homes will be prohibited from voluntarily entering into arbitration agreements that substantially limit damages.

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