



LEGAL HEALTH UPDATE

Arbitration Agreements in Nursing Home Contracts after Peterson v. Residential Alternatives of Illinois, Inc. and Carter v. SSC Odin Operating Co.

In its April 15, 2010 decision in *Carter v. SSC Odin Operating Co.* (1), the Supreme Court of Illinois held that arbitration agreements with respect to nursing home care are valid only if the specific agreement or contract is subject to the terms of the Federal Arbitration Act (2), including whether the contract involves interstate commerce. In its June 7, 2010 decision in *Peterson v. Residential Alternatives of Illinois, Inc.* (3), the Appellate



BY JOHN M. STALMACK AND CRAIG A. HOFFMAN

Court of Illinois, Third District, held that an agreement or contract to provide nursing home care does not trigger arbitration unless the agreement or contract specifically references arbitration and arbitration is explicitly agreed upon by the parties. Reading the two decisions together, nursing homes and health care institutions operating pursuant to the Nursing Home Care Act (4) in Illinois should take heed that in order to have an effective arbitration agreement and avoid trial, any such agreement or contract must clearly and specifically reference the Federal Arbitration Act and involve interstate commerce and also must be clear to comply with basic contract principles and limit all legal recourse to arbitration.

In Illinois, the Nursing Home Care Act prohibits dispute resolution regarding nursing home care by means other than a trial by jury. (210 ILCS 45/3-606, 3-607 (2006)). However, prior to the decision in *Carter*, many nursing homes and long term health care institutions effectively limited any legal recourse to arbitration simply by having the patient or a representative contractually agree to arbitration upon admission to the facility. Our Supreme Court in *Carter* changed that by ruling that the Federal Arbitration Act preempted the anti-waiver provisions contained in the Nursing Home Care Act only if the contract for arbitration was subject to the terms of the Federal Arbitration Act and the contract involved interstate commerce. The recent decision of the Appellate Court in *Peterson* further limits the use of arbitration agreements by requiring all such agreements to contain clear and explicit language where all parties agree to arbitration.

In *Peterson*, two separate documents were signed upon the decedent Jacob Terhorst's admission to Residential Alternatives of Illinois, Inc. One of the documents was entitled "Contract" and one was entitled "Arbitration Agreement". Neither document expressly incorporated or referenced the other document. After Terhorst's

death six months later, his representative filed suit against the nursing home alleging that the decedent had received inadequate nursing care which ultimately caused his death. The nursing home claimed the action was subject to arbitration pursuant to the "Arbitration Agreement". The trial court agreed and dismissed plaintiff's amended complaint, sending the matter to arbitration.

In the June 7, 2010 decision, the Third District found that the parties had not in fact agreed to arbitrate the dispute and it disagreed with the nursing home's argument that both documents were to be considered as one document

since they were signed on the same day and involved the same parties. The Third District held that documents executed on the same date may not operate as one unified agreement when a contrary contention is manifested. Parties may not incorporate another agreement into a contract without an express "reference" demonstrating an intent to incorporate another agreement into the contract. Further, the rules of contract construction include a strong presumption against adding conditions or provisions that could have been easily included by the parties as terms of the contract, but were not.

While the Third District acknowledged that separate instruments executed at the same time, by the same parties, and for the same purpose are regarded as one contract under certain circumstances, this principle was not applicable to this set of facts since neither document clearly referred to or expressly incorporated the other document. Accordingly, the Third District found that the parties had not agreed to arbitrate the dispute in this matter and that the case would be decided by a jury pursuant to the Nursing Home Care Act.

Thus, all nursing homes and health care institutions operating pursuant to the Nursing Home Care Act must carefully apply the decisions in *Carter* and *Peterson* to all agreements and/or contracts involving patient care if arbitration is preferred and trial is to be avoided.

John M. Stalmack and Craig A. Hoffman of Bollinger, Rubery & Garvey, can be reached at (312) 466-8000.

Citations:

- (1) 237 Ill. 2d 30 (2010).
- (2) 9 U.S.C. §1, et seq.
- (3) 2010 Ill. App. LEXIS 552 (No. 3-09-0743).
- (4) 210 ILCS 45/1-101 et seq.

HEALTHCARE REHABILITATION AND THERAPY

Rehabilitation is About More Than Just Healing Muscles

In the box office hit *The Bucket List*, Jack Nicholson's attitude about customer service improved dramatically after he became a patient in his own hospital. Such a change of heart wasn't necessary for Floyd A. Schlossberg, president of Alden, who recently benefited from his company's long-time commitment to customer satisfaction when he spent 19 days recovering from hip surgery at Alden North Shore Rehabilitation and Health Care Center in Skokie.

"Rehabilitation is more than just healing muscles," contends Schlossberg, who founded his Chicago-based health care organization in 1971. "It's a healing process that identifies and meets

the patient's needs in all areas of life."

Schlossberg believes that successful rehabilitation depends on a person's attitude and ability to persevere, which is greatly influenced by physical surroundings and a knowledgeable, caring rehabilitation team.

"When you come to a place like Alden North Shore (one of Alden's 21 rehabilitation centers), it's like coming to a five-star hotel," says Schlossberg. "Among the amenities are restaurant-style fine dining, free WiFi (wireless Internet access) and private room availability."

Alden's rehabilitation program, which offers physical, occupational and speech therapies up to seven days a week, combines traditional therapy protocols with exercises that build up an extra reserve of strength to promote a return to full functionality. This evidence-based approach, known as Optimal Rehabilitation, involves patient-centered goals and treatment plans that are customized to patients' individual needs.

While the ultimate goal is to return home, Schlossberg says that post-hospital rehabilitation centers "give patients a running start on getting better. Our therapists are special people who have the clinical expertise and the ability to motivate people to progress through what can be a hard, sometimes difficult rehabilitation process."

Although he is president of Alden, Schlossberg scoffs at the idea that his experience was different than that of any other patient. "At Alden, every rehabilitation patient is a VIP," he insists. "People tell me all the time that they are having the same experience I did. The atmosphere and meals are enjoyable, the staff is great, rehab patients work real hard and go to bed exhausted. Then we go home."

Schlossberg predicts that rehabilitation will play an even larger role in Alden's future. "We plan to build more rehabilitation centers," he says. "We will always have the capability of caring for long-term residents, but our emphasis will be on providing therapies that enable people to return to their homes and the community after achieving maximum functionality."



Floyd A. Schlossberg



For more information about Rehabilitation and Therapy Services at Alden, visit www.thealdennetwork.com or call 1-800-351-3130