HOW TO FIGHT BINDING ARBITRATION CLAUSES CONTAINED IN ADMISSION AGREEMENTS

by
Blake A. Dickson

DICKSON & CAMPBELL, L.L.C.

3401 Enterprise Parkway, Suite 420
Beachwood, Ohio 44122
Telephone (216) 595-6500
BlakeDickson@TheDicksonFirm.com
www.TheDicksonFirm.com

Report from the AAA, ABA and AMA.

In the Fall of 1997, the American Arbitration Association, the American Bar Association and the American Medical Association, the leading associations involved in alternative dispute resolution, law, and medicine, collaborated to form a Commission on Health Care Dispute Resolution (the Commission). The Commission's goal was to issue, by the Summer of 1998, a Final Report on the appropriate use of alternative dispute resolution (ADR) in resolving disputes in the private managed health care environment. Their Final Report discusses the activities of the Commission from its formation in September 1997 through the date of its report, and sets forth its unanimous recommendations.

The Commission issued its Final Report on July 27, 1998. The entire 46 page report is available at the web site for the American Arbitration Association at the following address:

http://www.adr.org/sp.asp?id=28633

The report concluded on page 15, in Principle 3 of a section entitled, "C. A Due Process Protocol for Resolution of Health Care Disputes." that;

"The agreement to use ADR should be **knowing and voluntary**. Consent to use an ADR process should **not** be a requirement for receiving emergency care or treatment. In disputes involving patients, binding forms of dispute resolution should be used only where the parties agree to do so **after** a dispute arises." (Emphasis added)

Fairness in Nursing Home Arbitration Act of 2008.

- On Thursday, May 22, 2008, a Bill was introduced in the United States House of Representatives that would prohibit nursing home operators from subjecting their residents, and their prospective residents, to binding arbitration. A companion Bill was introduced in the United States Senate in April of 2008.
- One of the Bill's co-sponsors, Representative Linda Sanchez, a Representative from California, was quoted as saying, "This legislation will not prohibit arbitration. Instead, it will simply ensure that residents have the choice whether to arbitrate a dispute after it has arisen." The Bill is known as the Fairness in Nursing Home Arbitration Act of 2008.
- Representative Sanchez was also quoted as saying, "The long term care industry is one stark example where businesses draft take-it-or-leave-it admission agreements for prospective residents that include pre-dispute, mandatory arbitration clauses."

Procedural unconscionability involves those factors bearing on the relative bargaining position of the contracting parties.

- Age.
- Education.
- Intelligence.
- Business acumen and experience.
- Relative bargaining power.
- Who drafted the contract.
- Whether the terms were explained to the weaker party.
- Whether alterations in the printed terms were possible.
- Whether there were alternative sources of supply for the goods in question.

Substantive unconscionability involves those factors which relate to the contract terms themselves and whether they are commercially reasonable.

- The fairness of the terms.
- The charge for the service rendered
- The standard in the industry
- The ability to accurately predict the extent of future liability.
- Was the clause part of an admission packet.
- Was it buried?
- Was it separate?
- Is there a "loser pays" rule.
- Does it prohibit punitive damages?
- Who arbitrates a dispute? Is it the AHLA?