# Future of arbitration clauses up in the air

by Allison Retka

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ST. LOUIS, MO -- Dorothy Lawrence did not sign an arbitration clause when she was admitted to Beverly Manor nursing home in Maryville.

But the arbitration clause signed by the 87-year-old's daughter will be now be examined by the Missouri Supreme Court.

It's the first time the high court has had the chance to weigh in on the validity of the fine-print legal clauses that appear in all kinds of contracts. The clauses have become more common in nursing home admission agreements such as the one Lawrence's daughter signed four days before her mother would die from an injury sustained in the facility.

Lawrence's case could affect the status of arbitration clauses in many legal contexts, including loan documents and employment contracts.

As Missouri appellate courts look carefully at the pre-dispute clauses, which direct signers to arbitration forums instead of courts, Congress is considering legislation that would eliminate the clauses from nursing home contracts.

At joint congressional hearings last month, nursing home industry advocates urged politicians to vote against the Fairness in Nursing Home Arbitration Act of 2008. They emphasized that arbitration is a speedy and cost-effective way to resolve disputes, one that's been endorsed by federal statutes and in one notable case, by the U.S. Supreme Court.

But attorneys for the consumers and employees affected by the clauses say the arbitration agreements strip people of their rights to a trial by jury. The clauses should be treated as any other contract, they say.

Missouri appellate courts mulled over these legal viewpoints in two recent opinions that questioned the arbitration clauses and allowed the parties' claims to go forward in court.

In Lawrence v. Beverly Manor, the Missouri Court of Appeals Western District ruled a wrongful death suit over Lawrence's death should go forward in Jackson County Circuit Court.

Beverly Manor, whose parent company operates 82 nursing homes across the United States, moved to compel arbitration based on the arbitration agreement signed in March 2003 by Lawrence's daughter, Phyllis Skoglund.

Three days after Lawrence was admitted to Beverly Manor, she was dropped by nursing home staff and injured her head. She died the next day.

Phillip Burdick, the St. Joseph solo attorney for Lawrence's two children, said he has frequently arbitrated nursing home malpractice cases but only at the agreement of the facility and the family.

Beverly Manor "wants to force arbitration," Burdick said. "I think that's a real serious and dangerous thing to make as law in the state of Missouri, because you're going to have most people who go into nursing homes having little idea of what an arbitration agreement is."

Stephen Strum, a St. Louis attorney with Sandberg, Phoenix & von Gontard, represented Beverly Manor in the case and has defended several other nursing homes in injury and wrongful death lawsuits.

He has five cases pending in the southern and eastern appellate courts. In each case, a circuit court denied the nursing home's motion to compel arbitration.

Strum said Missouri courts have yet to issue a solid opinion on the enforceability of the arbitration agreements. The Beverly Manor case is the Supreme Court's first opportunity to do so, he said.

"Courts for the most part have skirted the entire topic and have not really spent time on that," Strum said.

But what started as a case about enforceability has changed into a retroactivity question about a 2007 Supreme Court decision over wrongful death claims.

In State ex rel. Burns v. Whittington, the Supreme Court ruled that a personal injury suit amended as a wrongful death claim is derivative of the personal injury suit and should remain in the same venue.

The Western appeals court looked to Burns in deciding the Beverly Manor case.

"Perhaps Dorothy Lawrence's daughter would have refused to sign the agreement had she known that a wrongful death claim was a derivative action and would be included in the arbitration agreement," Judge Paul Spinden wrote in his opinion.

However, Spinden noted that Supreme Court's decision in Burns is in conflict with a significant 2006 decision by the Southern appeals court. In Finney v. National Healthcare Corp., that court ruled that a wrongful death claim is a new cause of action that is created and "vested in the statutorily designated survivors at the moment of death."

The decision allowed Jan Finney, whose mother died in a Joplin nursing home, to go forward with her wrongful death suit in Jasper County Circuit Court. Strum, who handled the case for Joplin Healthcare Center, said Finney settled the case for a confidential amount.

Strum said the Supreme Court may have picked up the Beverly Manor case in an effort to clear up the implications of its decision in Burns.

In its application for transfer to the Supreme Court, Beverly Manor argued that Burns should be applied retroactively. Lawrence's wrongful death claim is derived from an injury claim that Dorothy Lawrence agreed to arbitrate, the nursing home argued in its application, so her children are bound by the same arbitration clause.

From there, Strum said he would raise the standard argument to state law challenges to arbitration agreements, that the Federal Arbitration Act pre-empts state law.

"Once you show that interstate commerce is involved, the FAA comes in and trumps anything the state courts say anyways," Strum said. "In most of these cases, you have nursing care that involves supplies and care that crosses state lines."

Just like other contracts

But plaintiffs' attorneys say that since its enactment in 1925, the Federal Arbitration Act has lost some of its legal luster.

The U.S. Supreme Court did use a 1991 decision in Gilmer v. Interstate/Johnson Lane Corp. to green light arbitration for an age discrimination suit when an arbitration clause was in force.

Companies responded by adding arbitration agreements to contracts, trying to keep disputes out of courts and away from juries. But since then, courts have been taking a second look at the clauses.

John Campbell, a St. Louis attorney with Simon Passanante, is representing consumers in several cases that

are challenging arbitration agreements in payday loan contracts.

He said the new trend is for courts to treat arbitration clauses as they do regular contracts.

"You still have to be able to vindicate your rights there," he said. "And you have to have agreed to go there. It still has to be a contract. Two people still have to agree to do it."

The mandatory pre-dispute clauses contained in contracts for nursing homes, loans and employment documents do not meet those standards, he said.

"There's not a belief by anyone that on the part of the consumer, they actually read it, liked it, wanted it and agreed to it, which is what you normally have in a contract," Campbell said.

Campbell's client won a ruling in St. Louis County Circuit Court earlier this year in a case against Quick Cash, a payday lender based in Overland Park, Kan. Circuit Judge Richard Bresnahan ruled in January that a portion of a Quick Cash arbitration agreement prohibiting class actions against the company was unconscionable.

"If a clause immunizes a defendant and paralyzes consumers, it is unconscionable," the judge wrote in his 20-page opinion. "Here, there is overwhelming evidence this has occurred."

Quick Cash has appealed Bresnahan's opinion to the Eastern appeals court, where briefs are still being filed.

On July 1, St. Louis City Circuit Judge Michael B. Calvin likewise ruled that the class action waiver in an arbitration clause printed by Advance Loans on its payday loan documents was unconscionable. Campbell is representing named plaintiff Lavern Robinson in that case.

The rest of the company's arbitration clause should be enforced, Calvin wrote in his order.

Clauses for employees

On the employment law front, the Western appeals court recently issued a blow to an arbitration clause that Hallmark Cards foisted on its employees.

The court ruled that Mary Kay Morrow, a former Hallmark employee, can go forward in Jackson County with her age discrimination suit. The company had argued that Morrow was bound by a mandatory arbitration clause phased in after she had worked at the company for more than 20 years.

"There can, of course, be an enforceable contract to arbitrate claims entered into between employer and employee," Judge James Smart Jr. wrote in the court's majority opinion. "The program that Hallmark purported to impose on the at-will employment relationship, however, was not a 'contract to arbitrate' under Missouri law."

Jeffery Hanslick, a Husch Blackwell Sanders attorney in Kansas City for Hallmark, said the company intends to seek a rehearing of the case or a transfer to the Supreme Court.

"The suspicion that folks have toward arbitration agreements is misplaced," Hanslick said. "Those doubts should be resolved in the Federal Arbitration Act and in favor of arbitration."

Mark Jess, an attorney with Employee Rights Law Firm in Kansas City, represented Morrow in the case. He said arbitration works for two parties who are on equal footing and both agree to the forum.

"We have so many protections for our other constitutional rights," Jess said. "It's unimaginable that you can have the equivalent of an economic loaded gun to your head. It's crazy."

Congress is also considering legislation this year that would ban mandatory arbitration clauses in employment, consumer and franchise contracts. In past sessions, Washington has taken up legislation similar to the

Arbitration Fairness Act, with no success.

Donna Lenhoff, public policy director for the San Francisco-based National Employment Lawyers Association, said even with bipartisan support among its more than 100 cosponsors, the measure is stuck on a crowded legislative calendar.

The election year has also stymied its chances for passage, she said, when "the conventional wisdom is very little will be passed, if anything."

'Watching the case'

Violette King, the director of Nursing Home Monitors, is watching the Fairness in Nursing Home Arbitration Act and the Beverly Manor case very closely. King runs the nonprofit advocacy organization for nursing home residents and families from her home in Godfrey, Ill.

She said the group first started getting calls about arbitration agreements in nursing home contracts about 10 years ago. Back then, she said, she offered rudimentary advice to the families: Scratch out the arbitration portion of the contract and initial it.

"They were afraid not to sign it, afraid they wouldn't get the bed they needed," King said. "They were usually in crisis mode or very stressed with the condition of their loved one."

She said the clauses usually are buried at the end of 15-page contracts.

The Missouri Department of Health and Human Services, which regulates nursing homes across the state, forbids the facilities from discharging a resident if she refuses to sign an arbitration clause. In fiscal year 2007, the department fielded 26,395 reports of abuse and neglect of the elderly, and noted the number is on the rise.

The state's Long-Term Care Ombudsman Program educates residents and families about their rights and fields complaints from residents. In literature offered by the Ombudsman's office, a 2007 guide to nursing home admission agreements urges residents not to sign contracts that include arbitration clauses.

The guide, which was put together by Washington D.C.-based National Senior Citizens Law Center, includes language that says, "A resident should not waive her right to a jury trial. A jury generally is better than an arbitrator in understanding a resident's point of view."

The guide, "Nursing Home Agreements: Think Twice Before Signing" was issued after the nonprofit organization studied 175 nursing home admission agreements from Missouri. Of those agreements, 18 percent included arbitration clauses.

King said litigation is one of last threats to the big business of nursing homes. The 2005 changes to tort law limited families' abilities to bring suit against the companies, she said.

"Tort reform has already limited their access to the courts," King said. "Mandatory arbitration is like slamming the door completely shut."