

Court Rejects Unconscionability Challenge to Arbitration Agreement That Was "Voluntary" and Not Obligatory

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On September 4, 2018, the Mississippi Court of Appeals upheld an arbitration agreement between a nursing home and its resident. *See Massey v. Oasis Health & Rehab of Yazoo City, LLC*, No. 2017-CA-00086-COA, 2018 WL 4204207 (Miss. App. Sept. 4, 2018). The resident and her husband both executed an admission agreement and separate arbitration agreement when she was admitted. The arbitration agreement provided that: "Signing the Agreement is voluntary and not a condition for admission. The Resident may withdraw his or her consent to arbitrate the Resident's claim by notifying the Facility in writing within thirty days after the Resident's signing of the Agreement." The resident and her husband did not withdraw their consent to arbitrate within the time permitted.

After the resident's death, her husband filed a wrongful death action alleging that she had sustained multiple falls that "caused or contributed to her death." The nursing home and its director of nursing moved to compel arbitration. In response, the resident's husband argued that the arbitration agreement was both procedurally and substantively unconscionable. The trial court found that the arbitration agreement was "valid and enforceable," and granted the motion to compel.

After finding that it had appellate jurisdiction, Mississippi Court of Appeals affirmed. Applying the Federal Arbitration Act ("FAA"), the court concluded that the arbitration agreement was neither procedurally nor substantively unconscionable. Unlike most states that require both, Mississippi allows contracts that are either procedurally or substantively unconscionable to be invalidated. The court noted that procedural unconscionability was frequently associated with "adhesion" contracts, but that not all "adhesion" contracts were procedurally unconscionable. Because execution of the arbitration agreement "was not a condition of admission" and the resident/spouse "were free to reject [it] without loss of services or other consequences," the court concluded that the arbitration agreement was not an adhesion contract or procedurally unconscionable. Rather, it found that the nursing home offered the resident and her husband "an optional arbitration agreement that they were free to reject without any loss of services or other consequences." Substantively, the court found that the \$250 in arbitration costs the resident was required to pay were "equivalent" to the amount of a court filing fee and not unfair. The court also held that the substantively unconscionable terms of the "separate" admission agreement were "severable" from the "independent" arbitration agreement.

Massey is a significant victory for those seeking to enforce arbitration agreements. Consumers routinely challenge such agreements contending that they are "unfair" or were forced upon them on a "take-it-or-leave-it" basis. By not conditioning a transaction upon execution of an arbitration agreement and/or allowing the consumer the right to "opt-out" of the arbitration agreement

within a limited period, many of these type challenges can be defeated. Limiting the amount of any fees that a consumer must pay to an amount equivalent to a court filing fee also minimizes the risk of a substantive unconscionability challenge based upon the “costs” of arbitration. Applying the lessons of *Massey* should greatly reduce successful unconscionability challenges and aid enforcement of arbitration agreements. Review of existing arbitration agreements to address these issues should be a priority.

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