ILLINOIS DEFENSE COUNSEL
IDC QUARTERLY

Civil Practice and Procedure

Donald Patrick Eckler
Freeman Mathis & Gary LLP, Chicago

In Wake of *Clanton* the Fourth District Charts Course Favorable to Arbitration

With increasing frequency Illinois courts are contending with arbitration clauses in a variety of contexts, but most often in nursing home cases. *See, e.g., Ipina v. TCC Wireless,* 2023 IL App (1st) 220547-U, *Peterson v. Devita,* 2023 IL App (1st) 230356, *Eska v. Jack Schmi Ford, Inc.,*2023 IL App (5th) 220812-U, *Mulligan v. The Loft Rehab. and Nursing Home of Canton, LLC,* 2023 IL App (4th) 230187, *Parker v. Symphony of Evanston Healthcare, LLC,* 2023 IL App (1st) 220391, *KEK, LLC v. 1120 Club Condo. Ass'n*, 2023 IL App (1st) 230782-U, *Beecham v. Lakeview Law Grp. of Sonny Shalom, P.L.L.C.,* 2023 IL App (1st) 230437-U, *AOJ Operations, Inc. v. Offutt* , 2023 IL App (5th) 220487-U, and *Overland Bond & Inv. Corp. v. Calhoun*, 2023 IL App (1st) 221804.

Among the Illinois Appellate Court districts, the Fourth District has been the most favorable to parties seeking to compel arbitration. The recent decisions in *Nord v. Residential Alts. of Ill., Inc.*, 2023 IL App (4th) 220669 and *Mikoff v. Unlimited Dev., Inc.*, 2024 IL App (4th) 230513 demonstrate the position of that court as amenable to arbitration.

Clanton v. Oakbrook Healthcare Centre, Ltd.

The Illinois Supreme Court decision in *Clanton v. Oakbrook Healthcare Centre, Ltd.,* 2023 IL 129067 resolved the split between the Illinois Appellate Court First District and the Illinois Appellate Court Fourth District on the application of termination on death clauses. In *Mason v. St. Vincent's Home,* 2022 IL App (4th) 210458, the Fourth District held that a termination on death clause did not apply to an arbitration provision, while the First District in *Clanton v. Oakbrook Healthcare Centre, Ltd.*, 2022 IL App (1st) 210984 held the opposite. The supreme court sided with the First District and held that a termination on death clause in a nursing home contract applied to the arbitration agreement and precluded arbitration of Survival Act claims. In addition, the supreme court reversed *Mason* to the extent that it conflicted with that conclusion. *Clanton*, 2023 IL 129067, ¶ 25.

Almost as important as what *Clanton* reversed, is what was left in place by the *Clanton* decision. Specifically, in *Clanton*, the supreme court did not disturb the *Mason* court's very arbitration friendly discussion of Illinois law on procedural and substantive unconscionability as well as the standard of review of abuse of discretion for factual findings on a motion to compel arbitration. *Mason,* 2022 IL App (4th) 210458, ¶¶ 17-19, 22-24. *See* Melinda Kollross: *A Special Note on Illinois Supreme Court's Treatment of* Mason v. St. Vincent Home, Inc., 2022 IL App (4th) 210458 *in* Clanton v. Oakbrook Health Care, Ltd., 2022 IL 129067 (Clausen Miller, September 26, 2023).

Nord v. Residential Alternative of Illinois

With the stage set, we turn to the two most recent arbitration cases from the Fourth District involving nursing home contracts. In *Nord*, the Fourth District considered the import of the following provision in a residency agreement:

"[t]he term of the contract shall commence on the day the Resident enters the Facility and terminate the day the Resident is discharged." *Nord*, 2023 IL App (4th) 220669, ¶ 47. The circuit court denied a motion to dismiss and compel arbitration and the defendant appealed. *Nord*, 2023 IL App (4th), ¶ 2.

In support of its position that the Fourth District should reverse the circuit court, the defendant contended that the arbitration clause was in a separate agreement from the residency agreement and thus not controlled by the termination clause. *Id*. ¶ 47. In rejecting that argument, the Fourth District quoted *Gallagher v. Lenart*, 226 Ill.2d 208, 233 (2007) in which the Illinois Supreme Court stated the "long-standing principle that instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction are regarded as one contract and will be construed together." *Gallagher*, 226 Ill.2d at 233. In the face of the *Clanton* decision holding that termination on death clauses include the termination of an agreement to arbitrate, the Fourth District equated discharge with death. *Nord*, 2023 IL App (4th), ¶ 47.

Applying the termination clause, and given that the patient died leading to the lawsuit against the defendant facility, the Fourth District held that, in the absence of a provision that allowed for the arbitration clause to survive termination, including the delegation clause of the agreement to arbitration, the contract as a whole terminated and the circuit court's decision to deny arbitration was affirmed. *Id*. ¶¶ 48, 53.

Mikoff v. Unlimited Development, Inc.

In *Mikoff*, in contrast to *Nord*, the circuit court granted the defendants' motion to dismiss and compel arbitration, and the Fourth District affirmed as to the Survival Counts, but relying on *Carter v. SSC Odin Operating Co.*, 2012 IL 113204, reversed as to the Wrongful Death Act counts. *Mikoff*, 2024 IL App (4th) 230513, ¶¶ 1-3, 43, 49. Given that the *Mikoff* court contended with a termination on death clause that provided "[t]he term of the contract shall commence on the day the Resident enters the Facility and terminates the day the Resident is discharged, subject however to the following provisions" like that in *Nord*, it is important to understand the reasons for the seeming contrary conclusion. *Id*. ¶ 5.

The *Mikoff* court, unlike the *Nord* court held that the delegation clause of the arbitration agreement did not terminate on death and held, pursuant to *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 528 (2019), that it was for the arbitrator to determine if the discharge terminated the agreement. *Mikoff*, 2024 IL App (4th) 230513, ¶ 53. Distinguishing *Clanton* from *Mikoff*, the Fourth District pointed out that the termination provision in *Clanton* provided termination on death, while the termination clause in *Mikoff* provided termination on "discharge";and that under the delegation clause, "[w]hether death constitutes a 'discharge' that triggers termination of the contract is a question of contract interpretation" and "matters of contract interpretation are for an arbitrator to decide initially," citing *Kinkel v. Cingular Wireless, LLC*, 357 Ill. App. 3d 556, 562 (2005). *Mikoff*, ¶ 55.

In addition, unlike in *Clanton* where the Federal Arbitration Act ("FAA") was not raised as the basis for the position, the Fourth District in *Mikoff* found that the FAA was crucial to the outcome. *Id*. ¶ 56. Further, *Mikoff* distinguished *Nord* on the bases that "discharge" was conceded to be akin to "death". *Nord* did not address the controlling precedent in the United States Supreme Court decisions in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) and *Moses H. Cone Mem'l Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). *Mikoff,* ¶ 57. Finally, in *Mikoff*, the Fourth District found that the plaintiff challenged the arbitration clause as a whole, but did not challenge the delegation clause specifically, citing *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 72 (2010). In *Rent-A-Center*, the Supreme Court held that "because plaintiff has not 'challenged the delegation provision specifically,' we are obligated to give it and the arbitration agreement full effect." *Mikoff*, ¶¶ 58-59.

In a special concurrence, Justice Harris, who was on the panel that decided *Nord* and recognizing the incongruity between the decisions, wrote "after further consideration, I am persuaded by defendants' argument in this case that after a court has determined that an arbitration agreement, such as the agreement here and the one in Nord, was formed, any other issue relating to the existence or enforceability of the arbitration agreement is reserved for the arbitrator to decide. This is owing to the preclusive effect of the agreement's delegation clause on a court's authority to decide." *Id*. ¶ 66.

In partial dissent and partial concurrence, Justice Turner stated he would have affirmed the circuit court's decision in its entirety. *Id*. ¶ 68. He came to the conclusion because once the court finds that there is an agreement to arbitrate, it is the responsibility of the arbitrator to decide the scope of the arbitration. *Id*. Justice Turner distinguished the Illinois Supreme Court's decision in

Carter v. SSC Odin Operating Co., LLC, 2012 IL 113204, 976 N.E.2d 344 on the basis that contract formation was not before the Illinois Supreme Court and because there was no delegation clause in the arbitration provision before the court. *Carter*, 2012 IL 113204, ¶ 70. Relying on *Henry Schein*, Justice Turner opined that the majority erred in "jumping to the merits of the arbitrability issue, despite a valid delegation clause." *Id*. ¶ 71.

Justice Turner also criticized the decision in *Nord*, contending that it conflicts with *Henry Schein*, and concluded that "the effect of the termination-upon-death clause in the admission contract on the arbitration agreement in *Nord* was a matter for the arbitrator." *Id*. ¶ 73.

Conclusion and Takeaways

These decisions show that the settled law on arbitration of nursing home claims following *Carter* may be upset as the law regarding arbitration under the Federal Arbitration Act has developed in the years since its issuance over a decade ago and there may yet be a basis to challenge the more recent *Clanton* decision. Counsel defending nursing home claims involving arbitration clauses and, indeed, any case in which arbitration plays a role, would do well to familiarize themselves with these arguments, including the power of delegation clauses. In addition, counsel drafting such agreements should include delegation clauses in the arbitration clauses.

However, in order to take advantage of these arguments and invoke the preemption of federal law, it is essential to prove the application of the FAA in the first instance by showing the burden that the transaction places on commerce. In *Key v. Accolade Healthcare of the Heartland, LLC,* 2024, IL (4th) 221030, ¶ 30 the Fourth District reversed the grant of a motion to dismiss under 735 ILCS 5/2-619(a)(9) and compel arbitration because the defendant "did not provide an affidavit detailing the contract's connections to commerce." Even before a court that has proven to be amenable to arguments favoring arbitration, it is essential that defendants provide the necessary factual support.

About the Author

Donald Patrick Eckler is a partner at *Freeman Mathis & Gary LLP*, handling a wide variety of civil disputes in state and federal courts across Illinois and Indiana. His practice has evolved from primarily representing insurers in coverage disputes to managing complex litigation in which he represents a wide range of professionals, businesses and tort defendants. In addition to representing doctors and lawyers, Mr. Eckler represents architects, engineers, appraisers, accountants, mortgage brokers, insurance brokers, surveyors and many other professionals in malpractice claims.

About the IDC

The Illinois Defense Counsel (IDC) is the premier association of attorneys in Illinois who devote a substantial portion their practice to the representation of business, corporate, insurance, professional and other individual defendants in civil litigation. For more information on the IDC, visit us on the web at www.IDC.law or contact us at PO Box 588, Rochester, IL 62563-0588, 217-498-2649, 800-232-0169, admin@IDC.law.