IN THE

COURT OF APPEALS OF MARYLAND

No. _______
September Term, 2008

CARMAN DICKERSON,
PERSONAL REPRESENTATIVE OF
THE ESTATE OF CARTER BRADLEY
Petitioner,

v.

RICARDO LONGORIA, et al.
Respondents.

Appeal from the Circuit Court for Montgomery County
(The Honorable Ronald B. Rubin, Presiding)

PETITION FOR WRIT OF CERTIORARI

STEFAN SHAIBANI
LAW FIRM OF STEFAN SHAIBANI, PLLC
1150 Connecticut Avenue, NW
Suite 900
Washington, DC 20036
(202) 862-4335

LEAH M. NICHOLLS
DEEPAK GUPTA
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Counsel for Petitioner Carman Dickerson

May 1, 2009

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INTRODUCTION

This petition presents two important and recurring questions concerning the enforceability of arbitration agreements. Because both questions have divided the state and federal courts and have wide-reaching implications for access to justice in Maryland, this Court's review is warranted.

The first question is whether, and to what extent, a nursing home resident is bound by an arbitration agreement signed by someone else, particularly where, as here, there is no power of attorney or advance directive.

As nursing homes increasingly include arbitration clauses in their admissions documents, courts across the country are increasingly faced with this question. The court below applied only traditional agency-law principles, but Maryland, like many other states, has two relevant statutory schemes—the Nursing Home Bill of Rights and the Healthcare Decisions Act. The extent to which these statutes displace the common law of agency has never been resolved in Maryland. Meanwhile, courts in other jurisdictions are deeply divided as to the best way to approach this intersection of statutory and common law: Some find the healthcare-decisions statute controlling, some look beyond the statute to general agency law, and others end their inquiry with the signatory's assertion of authority. Guidance from this Court is badly needed, and this Court's upcoming decision in *Addison v. Lochearn Nursing Home, LLC*, No. 134, September Term 2008, will not resolve the question.

The second question affects a much broader range of cases, from consumer protection to civil rights: When, if ever, is an arbitration clause that gives one party the power to unilaterally select the sole arbitrator enforceable?

No Maryland appellate court has ever addressed, in any context, whether an arbitration agreement giving one party unilateral control of both the pool of potential arbitrators and the selection of the arbitrator is so one-sided as to be unenforceable. The vast majority of jurisdictions, including the Fourth Circuit, have found such

agreements unenforceable. At least two state high courts, however, have upheld such agreements in commercial settings. Lacking any precedent from Maryland, the court below adopted the minority position and enforced the unilateral arbitrator-selection clause in the agreement here. The lower court's position is particularly troubling because it allows drafting parties—frequently repeat corporate players with far more bargaining power—to give themselves complete control over the rules and procedures of arbitration, thereby depriving consumers, workers, and patients of the neutrality that is essential to fair dispute resolution.

REQUIRED BACKGROUND

Carter Bradley died from infected bedsores that spread and deteriorated while he was a resident at Heritage Care, Inc.'s nursing home, St. Thomas More Nursing and Rehabilitation Center. Carman Dickerson, in her capacity as the personal representative of Bradley's estate, filed a medical-malpractice action against Heritage Care and two of Bradley's doctors there.[1] Meanwhile, the nursing home filed a petition to compel arbitration against the estate in the Circuit Court for Montgomery County as *Heritage Care, Inc., et al. v. Carman Dickerson*, docket number 293993-V. Ricardo Longoria, Bradley's doctor at the nursing home and a defendant in the medical-malpractice action, intervened as an additional plaintiff. In a written opinion and order entered October 1, 2008, the circuit court granted the petition to compel arbitration as to Heritage Care and denied the petition as to Longoria. The circuit court found that Bradley and his estate were bound by Heritage Care's arbitration agreement because Dickerson was Bradley's agent and had the authority to waive Bradley's legal

[1]The underlying medical-malpractice action is pending in the Circuit Court for Prince George's County as *Carman Dickerson, as Personal Representative of the Estate of Carter Bradley v. Heritage Care, Inc., et al.*, docket number 08-13295. That action is stayed pending the resolution of Heritage Care's petition to compel arbitration.

rights. The court further found that Heritage Care's agreement was not unconscionably one-sided.

Dickerson appealed the circuit court's order compelling arbitration to the Court of Special Appeals, which has not decided this case. The appeal is currently pending as *Carman Dickerson, Personal Representative of the Estate of Carter Bradley v. Ricardo Longoria, et al.*, No. 1857, September Term 2008. Longoria filed a cross-appeal, which he subsequently dismissed. The attached Brief for Appellant Carman Dickerson, Personal Representative of the Estate of Carter Bradley ("Brief"), along with the Appellant's Record Extract, was filed in the Court of Special Appeals on April 6, 2009. The appellee's brief is currently due May 6, 2009, and the appellant's reply brief is due May 26, 2009.

QUESTIONS PRESENTED

1. Absent a power of attorney or other advance directive, does a friend or relative have the authority to bind a nursing-home resident to an arbitration agreement included in the nursing-home-admissions documents?

2. Is an arbitration agreement providing that one party will unilaterally select the sole arbitrator from a list created by that party so one-sided as to be unenforceable?

PERTINENT STATUTES

The relevant parts of the Maryland Health Care Decisions Act, MD. CODE ANN. HEALTH-GEN. § 5-601, *et seq.,* and the Maryland Nursing Home Bill of Rights, MD. CODE ANN. HEALTH-GEN. § 19-344, are reproduced in the Brief at 1A–6A.

STATEMENT OF THE FACTS

Carman Dickerson, in her capacity as the personal representative of Bradley's estate, filed a medical-malpractice action against Heritage Care.[2] Heritage Care seeks

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[2]A more detailed description of the facts is in the Brief at 2–8.

to compel arbitration of the medical-malpractice claim under the arbitration agreement included in its admissions papers. In relevant part, Heritage Care's arbitration agreement provides that any disputes arising out of Bradley's stay at the nursing home must be submitted to binding arbitration and that "[t]he arbitrator will be selected by the Facility from a list of individuals who are certified in dispute resolution or are retired judges who routinely offer their services as arbitrators."

At the time of Bradley's admission to the nursing home, he was alert and oriented and had never been deemed incapable of making his own decisions by a physician. Nevertheless, the nursing-home-admissions coordinator did not speak to Bradley and instead intercepted Dickerson immediately upon her arrival at the nursing home. At the admissions coordinator's behest, Dickerson signed a large stack of admissions documents, including Heritage Care's arbitration agreement, while Bradley waited on a gurney in the hallway, moaning and groaning in pain. Though the admissions documents required that a nonresident signatory indicate the source of his or her authority and provide supporting documentation, in most places, Dickerson did not identify the source of her authority and did not provide Heritage Care with any documents. The admissions coordinator indicated once in the documents that Dickerson held Bradley's power of attorney, but did not include the required documentary support. And it is undisputed that Dickerson did not actually hold a power of attorney to act on Bradley's behalf, nor had Dickerson been appointed to do so by a court or other advance directive. Dickerson herself indicated on the documents only that she had the ability to control Bradley's funds. In fact, Dickerson had the authority only to endorse and deposit Bradley's veterans' benefits checks.

After Bradley's death, Dickerson was appointed as the personal representative of Bradley's estate and brought a medical-malpractice action against Heritage Care and its physicians. Heritage Care filed a petition to compel arbitration, which was granted by the circuit court. This appeal followed.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER A NONRESIDENT CAN BIND A NURSING-HOME RESIDENT TO THE NURSING HOME'S ARBITRATION AGREEMENT ABSENT A POWER OF ATTORNEY OR OTHER ADVANCE DIRECTIVE.

As this Court recognized in *Walton v. Mariner Health of Maryland, Inc.*, the Maryland Legislature has found that the nursing-home-admissions process is stressful, and admittees and their families are in no position to carefully read and negotiate a contract. 391 Md. 643, 665, 894 A.2d, 584, 597 (2006) (quoting Bill Summary, H.B. 683 at 2); *see also Podolsky v. First Healthcare Corp.*, 58 Cal. Rptr. 2d 89, 101 (Cal. Ct. App. 1996); Donna Ambrogi & Frances Leonard, *The Impact of Nursing Home Admission Agreements on Resident Autonomy*, 28 GERONTOLOGIST 82, 83 (1988) ("[T]he time of admission is very likely to be full of confusion and stress for all involved, and the residents (or more likely, their representative or family member) commonly sign all the documents without knowing or understanding what they are signing."). Meanwhile, both arbitration clauses in nursing-home-admissions agreements and reports of nursing-home abuse and neglect are on the rise. Nathan Koppel, *Nursing Homes, in Bid to Cut Costs, Prod Patients to Forgo Lawsuits*, WALL ST. J., Apr. 11, 2008, at A1; *see also* U.S. Gov't Accountability Office, GAO-07-241, NURSING HOMES: EFFORTS TO STRENGTHEN FEDERAL ENFORCEMENT HAVE NOT DETERRED SOME HOMES FROM REPEATEDLY HARMING RESIDENTS 27 (2007).

The prevalence of arbitration clauses in nursing-home agreements is demonstrated by this Court's hearing of another nursing-home arbitration case already this term: *Addison v. Lochearn Nursing Home, LLC*, No. 134, September Term 2008. *Addison*, however, will not resolve the important and unsettled questions presented in this petition. The question in *Addison* is whether the resident's counterclaim falls within the scope of that agreement's unusually narrow arbitration

clause and who (the court or the arbitrator) should decide the issue. In contrast, this case presents the more fundamental question of whether, when a nonresident signs the arbitration agreement, the resident is bound by that agreement.

A. The Interplay Between the Statutory Schemes Governing Nursing-Home Admissions and Healthcare Decisions and the Common Law of Agency Is Unsettled.

No appellate decision in Maryland addresses the circumstances under which a family member can bind a nursing-home resident to a nursing-home-admissions agreement containing an arbitration clause absent a power of attorney or advance directive. In Maryland, nursing-home admissions and healthcare decisionmaking are governed by two statutory schemes, the Nursing Home Bill of Rights and the Health Care Decisions Act. Because the Legislature recognized that nursing-home admissions are stressful and that residents and their families are not in a position to read and negotiate nursing-home contracts, it enacted the Nursing Home Bill of Rights, which outlines the substantive terms of nursing-home agreements within the state. MD. CODE ANN. HEALTH-GEN. § 19-344; *see Walton*, 391 Md. at 665, 894 A.2d at 597. The Nursing Home Bill of Rights also prohibits nursing homes from soliciting the signatures of nonresidents on nursing-home-admissions agreements absent documentation that the resident is incapable of making his or her own decisions and limits the duties and obligations of that nonresident signatory. MD. CODE ANN. HEALTH-GEN. § 19-344(b), (c). Those duties and obligations—as well as the definition of "agent" in the statute—are discussed only in the context of financial obligations, and there is no case law interpreting the statute's impact on portions of admissions agreements unrelated to finances.

Here, the admissions agreement that Dickerson signed defined "agent" exactly as the statute does: as "a person who manages, uses, or controls the funds or assets that legally may be used to pay the applicant's or resident's share of costs or other

charges for the facility's services." *Id.* § 19-344(c)(1). Because the Nursing Home Bill of Rights defines such an agent's authority only in terms of financial rights and obligations, if Dickerson did indeed commit to being Bradley's agent by signing the nursing-home-admissions documents, her authority appears to be limited to those financial obligations and would not extend to the authority to waive Bradley's right to bring his claims in court. No appellate court in Maryland, however, has ever considered whether and to what extent the Nursing Home Bill of Rights's narrow definition of "agent" displaces the common law when aspects of the admissions agreement other than the financial agreement are at issue.

Assuming that the nursing home admissions process, including any attendant arbitration agreement, is a healthcare decision, the Maryland Health Care Decisions Act's definition of "agent" would also apply. Courts, however, are divided as to whether agreeing to arbitrate in a nursing-home-admissions agreement is a healthcare decision. Some courts have held that it is, *e.g.*, *Owens v. Nat'l Health Corp.*, 263 S.W.3d 876, 884 (Tenn. 2008), while others have held that the decision of whether to waive legal rights to a jury trial is not a healthcare decision, *e.g.*, *Blankfield v. Richmond Health Care, Inc.*, 902 So. 2d 296, 301 (Fla. Ct. App. 2005). And in still others, including in Mississippi and California, it depends on the precise wording of the contract or healthcare power of attorney itself. *Compare Miss. Care Ctr. of Greenville, LLC v. Hinyub*, 975 So. 2d 211, 218 (Miss. 2008) (not a healthcare decision), *with Covenant Health Rehab of Picayune, L.P. v. Brown*, 949 So. 2d 732, 737 (Miss. 2007) (surrogate properly appointed under the healthcare decisions statute could bind resident); *compare Flores v. Evergreen at San Diego*, 55 Cal. Rptr. 3d 823, 829 (Cal. Ct. App. 2007) (not a healthcare decision), *with Hogan v. Country Villa Health Servs.*, 55 Cal. Rptr. 3d 450, 455 (Cal. Ct. App. 2007) (authorized by healthcare power of attorney).

Under the Maryland Health Care Decisions Act, a person is only an agent for

another, meaning that the person makes healthcare decisions on behalf of another, if that person is appointed as an agent under an advance directive. MD. CODE ANN. HEALTH-GEN. § 5-606(c). Where there is no such directive, as is the case here, a surrogate decisionmaker, whose authority to act on behalf of the patient is more circumscribed than that of an agent, may be appointed. *Id.* §§ 5-605–606. First, however, two physicians must certify the patient as being incapable of making informed medical decisions, *id.* §§ 5-605(a)(2), -606(a)(1), and the surrogate, if not an immediate family member, must present an affidavit explaining his or her relationship to the patient, *id.* § 5-605(a)(3)(ii). This procedure was not followed here. This comprehensive step-by-step framework suggests that the Legislature intended to displace common law principles of agency, but there is no statement from any Maryland appellate court to that effect.

This Court has never addressed the Maryland Nursing Home Bill of Rights's admissions-agreement regulations outside of the financial liability context, nor has it applied the Maryland Health Care Decisions Act's procedural requirements for the appointment of agents and surrogate decisionmakers. *See Walton*, 391 Md. at 666–68, 894 A.2d at 597–99 (applying the Nursing Home Bill of Rights to determine financial liability for an unpaid bill); *Wright v. Johns Hopkins Health Sys. Corp.*, 728 Md. 568, 571–78, 587, 728 A.2d 166, 167–73, 175 (1999) (outlining the procedures for appointing an agent or surrogate under the Health Care Decisions Act and applying other provisions of the Act to a living will). Because it is undisputed that there is no written power of attorney or advance directive here, this case would enable the Court to explain the interaction between these two statutes and common-law agency principles.

B. No Maryland Appellate Court Has Addressed Agency in the Nursing-Home Context and Courts Around the Country Have Not Analyzed the Issue Uniformly.

As discussed above, no Maryland appellate court has weighed in on the interaction between Maryland's statutes governing agency in the nursing-home and healthcare contexts and common-law principles of agency. Courts around the country are also struggling with decisions about whether non-residents may bind nursing-home residents to arbitration agreements, and they are not always taking the same approach.

In the absence of a valid power of attorney or advance directive, a majority of jurisdictions to have addressed the issue, contrary to the decision below, decline to bind a resident to an agreement signed by a nonresident when that nonresident is not the properly designated healthcare decisionmaker under that state's statutory equivalent to the Maryland Healthcare Decisions Act. In reaching such a decision, some courts consider authority under the statute to be the only applicable authority, *e.g.*, *Hinyub*, 975 So. 2d at 217–18, while others also consider whether the signatory had actual or apparent authority under traditional common-law agency principles, *e.g.*, *Compere's Nursing Home v. Farish*, 982 So. 2d 382, 384 (Miss. 2008); *Carraway v. Beverly Enters. Ala., Inc.*, 978 So. 2d 27 (Ala. 2007); *Goliger v. AMS Props., Inc.*, 19 Cal. Rptr. 3d 819, 820 (Cal. Ct. App. 2004). Others have held that arbitration agreements are not healthcare decisions at all, or held that it depends on the precise wording and nature of the agreement itself. For example, in Mississippi, which has a healthcare decisions statute, whether an arbitration agreement is a healthcare decision depends on whether a waiver of the right to a jury trial is required for admission to the nursing home. *Compare Brown*, 949 So. 2d at 737 (because the waiver was necessary to receive services, it was a healthcare waiver, which a statutory surrogate is authorized to make under the statute), *with Hinyub*, 975 So. 2d at 218 (distinguishing

Brown and holding that because the waiver was not necessary to receive healthcare, it was not a healthcare decision); *see supra* page 7. Finally, at least one jurisdiction has found authority based on the fact of the nonresident's signature alone without considering either the state's healthcare decisions act or general agency principles. *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983, 987 (Ala. 2004).

As is apparent from this survey of the case law, courts are divided as to the proper way to approach the agency analysis in the nursing-home context, even in cases involving statutory schemes similar to Maryland's. Maryland courts thus need guidance from this Court as to how to analyze cases in which a nursing home is trying to enforce an arbitration agreement signed by a nonresident.

II. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER AN ARBITRATION AGREEMENT PROVIDING THAT ONE PARTY HAS UNILATERAL CONTROL OVER THE POOL AND SELECTION OF ARBITRATORS IS UNCONSCIONABLY ONE-SIDED.

Whether or not an arbitration clause that gives one party unilateral control over the pool and selection of arbitrators is so one-sided as to be unconscionable is an issue of first impression in the Maryland appellate courts. As outlined in the Brief at 26–31, in the consumer and employment context, other courts—including the Fourth Circuit—have held that such agreements are unenforceable. *McMullen v. Meijer, Inc.*, 355 F.3d 490, 494 (6th Cir. 2004); *Murray v. United Food & Commercial Workers Int'l Union*, 289 F.3d 297, 303–04 (4th Cir. 2002); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938–39 (4th Cir. 1999); *Vincent v. Schneider*, 194 S.W.3d 853, 859 (Mo. 2006); *Toppings v. Meritech Mortgage Servs., Inc.*, 569 S.E.2d 149, 149 (W.Va. 2002); *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 177 (Cal. 1981); *Ditto v. RE/MAX Preferred Props., Inc.*, 861 P.2d 1000, 1004 (Okla. Civ. App. 1993). This is not surprising. After all, an impartially selected arbitrator is key to guaranteeing an impartial arbitral forum. This is especially true where, as here, an arbitration

agreement does not specify the rules of arbitral procedure, and the arbitrator is free to select one-sided rules, such as unconscionably restrictive discovery, loser-pays schemes, and inaccessible locations. *See* Brief at 31–33. Indeed, the United States Supreme Court has held that an arbitral forum in which one party selects the arbitrators, even when those arbitrators are selected from a neutral pool, lacks the minimum impartiality to vindicate constitutional rights. *Chi. Teachers Union No. 1 v. Hudson*, 475 U.S. 292, 308 n.21 (1986) (labor arbitration would be permissible only "so long as the arbitrator's selection did not represent the Union's unrestricted choice").

Nevertheless, the high courts of New York and Connecticut have held that one-sided arbitrator-selection provisions are enforceable in commercial agreements between sophisticated parties. *Westinghouse Elec. Corp. v. New York City Transit Auth.*, 623 N.E.2d 531, 532 (N.Y. 1993) (enforcing a one-sided arbitrator-selection clause in a multimillion dollar contract between a large corporation and a government agency); *Hottle v. BDO Seidman, LLP*, 846 A.2d 862, 865 (Conn. 2004) (enforcing a one-sided arbitrator-selection clause in an accounting firm's partnership agreement). In holding that the provision was not unconscionable, the circuit court below cited these decisions in support of its conclusion. For the reasons explained in the Brief, the Connecticut Supreme Court's decision was wrongly decided, and, at the very least, both cases are inapplicable here because their reasoning is grounded in the sophisticated nature of the parties involved, reasoning that is out of place in the nursing-home admissions process where consumers are particularly vulnerable and unlikely to read contracts carefully. *See* Brief at 30–31 & 31 n.9. Nevertheless, the circuit court below followed these commercial cases, demonstrating the need for this Court's consideration of whether one-sided arbitrator-selection clauses are enforceable outside the commercial context. And this Court's guidance would not only impact nursing-home arbitration agreements, but would decide the issue for a wide range of noncommercial arbitration clauses in consumer and employment agreements.

CONCLUSION

For the above reasons, this Court should grant certiorari.

Respectfully submitted,

____
LEAH M. NICHOLLS
DEEPAK GUPTA
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th St., NW
Washington, DC 20009
(202) 588-1000

STEFAN SHAIBANI
LAW FIRM OF STEFAN
SHAIBANI, PLLC
1150 Connecticut Ave., NW
Suite 900
Washington, DC 20036
(202) 862-4335

Counsel for Petitioner Carman Dickerson

Dated: May 1, 2009
Font: Century Expanded, 13 point

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and correct copies of the foregoing Petition for Writ of Certiorari were served via first class mail postage prepaid, this 1st day of May, 2009, on each of the following:

D. Elizabeth Walker
WALKER & MURPHY, LLP
1700 Rockville Pike
Suite 400
Rockville, MD 20852
Attorney for Respondent Heritage Care, Inc.

Amy B. Heinrich
GOODELL, DEVRIES, LEECH & DANN, LLP
One South Street
Suite 2000
Baltimore, MD 21202
Attorney for Respondent Ricardo Longoria

____
Leah M. Nicholls