

Another Look at Arbitration: A Power of Attorney Does Not Need to Specifically Grant Authority to Enter Into an Arbitration Agreement

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The South Carolina Court of Appeals recently provided a general yet thorough overview of the court's perspective as to arbitration agreements, with a focus on such agreements in light of authority granted pursuant to a power of attorney. *Thayer W. Arredondo, as Personal Representative of the Estate of Hubert Whaley v. SNH SE Ashley River Tenant, LLC, et al.*, 2019 WL 3814725 (August 14, 2019).^[1]

Prior to his death, Whaley executed and delivered to his daughter, Arredondo, a General Durable Power of Attorney as well as a Health Care Power of Attorney. Pursuant to the authority granted, Arredondo executed certain documents, including an Arbitration Agreement, as a part of Whaley's admission to and stay in a residential/community care facility owned, operated and staffed by Defendants. Arredondo, also the Personal Representative of Whaley's estate, subsequently brought an action against Defendants alleging various causes of action including their negligence in providing care to Whaley. Defendants moved to compel arbitration of the claims pursuant to the Arbitration Agreement signed by Arredondo. The trial court denied Defendants' motion and the matter came before the court on Defendants' appeal.

Arredondo's General Power of Attorney granted broad authority to execute unspecified instruments regarding all types of property, as well as "choses in action." The Health Care Power of Attorney granted Arredondo equally broad power to make health care decisions and to pursue legal action and grant any waiver required by health care providers. Because, however, neither power of attorney specifically addressed arbitration, Arredondo argued she was not authorized to enter into the Arbitration Agreement, thereby defeating its terms. The court rejected that argument.

The Federal Arbitration Act ("FAA") provides that arbitration agreements are valid, irrevocable and enforceable except upon such legal or equitable

grounds as warrant the revocation of a contract. Such provision creates an equal-treatment principle; specifically, an arbitration agreement may be invalidated based on general contract defenses but not on any rule that purports to apply only to arbitration. Thus, the broad powers granted to Arredondo under the powers of attorney were sufficient to authorize the execution of the Arbitration Agreement despite the lack of a specific reference to arbitration in either document.^[2]

The court likewise rejected Arredondo's argument that the Arbitration Agreement was unconscionable. South Carolina defines unconscionability as the absence of meaningful choice on the part of one party as a result of one-sided contract provisions, along with conditions so oppressive that no reasonable person would impose them and no fair and honest person would accept them. In assessing unconscionability, our courts generally consider the nature of the harm to plaintiff; whether plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power and sophistication, and whether the arbitration clause is conspicuous. Here, the court found Arredondo did not lack meaningful choice. The Arbitration Agreement was a clearly labeled, separate document that adequately described the waiver of trial rights, as well as the finality of any decision reached by an arbitration panel, selected in a manner clearly set forth therein. The Arbitration Agreement was not unbalanced or oppressive; it imposed the same waivers and restrictions on both parties, and provided that the costs of the arbitration would be shared equally, assuming the resident could afford to do so. If the resident could not afford the arbitration costs, Defendants would pay the costs in exchange for the ability to choose the number of arbitrators. Moreover, even if the contract was one of adhesion, unequal bargaining power alone would not invalidate the arbitration agreement.

Arredondo argued the Arbitration Agreement was oppressive because of its limitation on discovery and recoverable damages. This argument also failed. Our court has previously balanced discovery limitations against the simplicity, informality and expediency emanating from such restrictions, finding that minimized discovery alone does not render an arbitration agreement unenforceable. Additionally, while an arbitration agreement is unenforceable if it purports to disallow mandatory statutory damages, the agreement at issue is not oppressive simply because it prohibited punitive damages. Prohibition of incidental, special, consequential or punitive damages is not contrary to public policy.

This opinion reinforces two well-established theorems. First, the cardinal rule of contract interpretation is to determine and effectuate the intention of the parties, and such rule likewise governs when interpreting a power of attorney.^[3] Next, arbitration continues to be favored as a means of resolving disputes. Consequently, the conditions pursuant to which an arbitration agreement is found to be unenforceable are likely extreme.

[1] This is an unpublished opinion; it has no precedential value and should be cited only as provided by Rule 268(d)(2), SCACR.

[2] The Supreme Court rejected Kentucky's "clear statement rule," which provided a power of attorney could not authorize a representative to enter into an arbitration agreement without specific language to that effect. See *Kindred Nursing Ctrs. Ltd. P'ship* 137 S. Ct. at 1426-27.

[3] See Arbitration Agreements and Powers of Attorney Both Subject To Strict Construction.
