

T&E Litigation Newsletter - 1/16/14

January 16, 2014

Mark E. Swirbalus

The holiday season was quiet, but the new year has brought us two reported decisions by two different courts, both relating to nursing homes.

First, in *Johnson v. Kindred Healthcare, Inc.*, Case No. SJC-11335, 2014 Mass. LEXIS 7 (January 13, 2014), the Supreme Judicial Court answered the question of first impression in Massachusetts of whether a health care agent's agreement with a health care facility to arbitrate disputes arising from the principal's stay at the facility constitutes a "health care decision" binding on the principal pursuant to the health care proxy statute, G.L. c. 201D, § 5.

The brief background is that the administrators of the decedent's estate brought a wrongful death action in Superior Court against a nursing home and related entities and individuals. In response, the defendants sought to enforce the mandatory arbitration provision in the nursing home agreement. The decedent's health care agent (his wife) had signed the agreement on his behalf.

The estate argued that the health care agent's entering into the agreement, and specifically the mandatory arbitration provision, was not binding because it was not a "health care decision" as that term is defined and used in the health care proxy statute. The Court agreed, explaining that the Massachusetts Legislature intended to distinguish between a health care proxy, which limits an agent's decision-making authority on behalf of an incapacitated person to health care decisions, and a durable power of attorney, guardianship or conservatorship, each of which authorizes much broader decision-making power on behalf of an incompetent person. "Unlike a health care proxy, a durable power of attorney can authorize an agent to make decisions affecting the principal's business, estate, finances, and legal relationships in a variety of contexts unrelated to health care."

In support of this conclusion, which comports with the majority view in other jurisdictions that have considered similar issues, the Court pointed to the history of the health care proxy statute, where the Legislature considered but rejected an alternative bill that would have combined the roles of health care agent and attorney-in-fact, and noted that the statutory scheme ultimately enacted by the Legislature maintains a distinction between these fiduciary roles. The Court also reasoned that if it were to define "health care decisions" more broadly, then many decisions made by a health care agent would override the more expansive powers allocated to an attorney-in-fact, guardian or conservator.

Second, in *Rockingham County Nursing Home v. Harnois*, Civil Action No. 11-11057-JGD, 2014 U.S. Dist. LEXIS 3042 (January 10, 2014), the United States District Court for the District of Massachusetts addressed a nursing home's fraudulent transfer claim against the trustee of an irrevocable trust. The nursing home alleged that the settlor transferred to the trust her primary residence, which was also her primary asset, with the intent of avoiding her payment obligation to

the nursing home, and that she did not receive equivalent value in return. The nursing home also claimed that the trust would be unjustly enriched if it were permitted to keep the property.

The Court's decision includes a lengthy discussion of the facts and certain procedural matters arising from the nursing home's motion for partial summary judgment and the trust's motion for leave to amend its answer to assert the statute of limitations as an affirmative defense. Of particular note is the Court's finding that the nursing home's fraudulent conveyance claim is barred by the statute of limitations. The Court explained that the Massachusetts Uniform Fraudulent Transfers Act (G.L. c. 109A, §§ 1, et seq.) provides that a claim must be brought within four years following the transfer or obligation, or within one year after the transfer or obligation was or could have been reasonably discovered by the claimant, and that a claim based on constructive fraud must be brought within four years after the transfer or obligation, regardless of the claimant's knowledge. Here, the Court found the nursing home's claim to be time-barred, because the claim was based on constructive fraud and more than four years had passed. Accordingly, the Court did not address the substance of the allegedly fraudulent transfer to the trust.

This update was authored by [Mark Swirbalus](#), a Director in the firm's [Probate & Fiduciary Litigation](#) group. For questions or additional information on this topic, please contact Mark at mwirbalus@goulstonstorrs.com or contact any member of the [Probate & Fiduciary Litigation](#) group.

This newsletter should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own lawyer concerning your situation and any specific legal questions you may have.

Pursuant to IRS Circular 230, please be advised that, this communication is not intended to be, was not written to be and cannot be used by any taxpayer for the purpose of (i) avoiding penalties under U.S. federal tax law or (ii) promoting, marketing or recommending to another taxpayer any transaction or matter addressed herein.

©2014 Goulston & Storrs PC All Rights Reserved