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How does a violation of the Nursing Home Care Act affect a facility's right to recover unpaid amounts?

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Introduction

The Illinois Nursing Home Care Act (the "Act") states that: "[b]efore a person is admitted to a facility…a written contract shall be executed between a licensee and [a patient or patient's representative]." Though observance of this provision may not seem terribly burdensome, many nursing homes have loosely complied. Sometimes signatures cannot practically be obtained prior to admittance; sometimes patients withhold signature despite otherwise agreeing to and accepting the terms of their care; and sometimes signatures are never obtained due to simple administrative carelessness.

After rendering care for months or even years to a patient who fails to pay the tab, a nursing home that wishes to sue may find itself haunted by its technical non-compliance with the Act. Surely there are consequences for failing to "execute" a "written contract" as required by the Act, but what are they? Is a nursing home barred from seeking recovery of unpaid amounts on the contract? Can it, at the very least, maintain an equitable action in quantum meruit and try to prove the reasonable value of its services? Or are the sanctions for violating the Act limited to those specified in the Act itself?[2]

Thirty years after the Act's passage, we now have a partial answer. In May of 2010, the First District of the Illinois Appellate Court, in *Carlton at the Lake, Inc. v. Barber*, held that nursing homes seeking to recover amounts due on unsigned contracts could seek equitable relief under a theory of quantum meruit, but that public policy, as expressed by the Act, required dismissal of breach of contract claims predicated on these unsigned documents.[3] This article will first explore the legal and statutory arguments at issue on appeal in *Carlton*, and the contours of the decision itself. Next, it will explain how, in spite of the *Carlton* decision, there is still hope for nursing homes to maintain breach of contract claims without the signed contract mandated by the Act, in light of a recent Illinois Supreme Court decision addressing the appropriate penalty for the violation of a comprehensive consumer protection statute that, within its own provisions, sets forth sanctions.

Background of the *Carlton* case

The facts of *Carlton* are simple. A man named Robert became a resident of Carlton at the Lake's nursing home facility.[4] Carlton tendered a contract to Robert's daughter and attorney-in-fact.[5] The contract set forth the terms and conditions of Robert's care. Robert's daughter physically accepted the contract, and although she did not affix her signature to that document, she signed a host of ancillary admission documents, fourteen in total,[6] which unequivocally indicated acceptance of the terms of the contract on Robert's behalf. Robert became and remained a resident of Carlton's facility for approximately two years. He received all services and benefits outlined in the contract.[7] Robert was eventually involuntarily discharged from the facility, leaving behind a hefty unpaid bill.[8]

Carlton filed suit to recover the amount owed, naming Robert and his wife, Jean[9] as defendants, alleging breach of contract and quantum meruit in the alternative. Defendants moved to dismiss all counts, arguing that because Carlton failed to "execute" a "written contract" under the Act, it could not state a claim for breach of contract or quantum meruit. Their arguments were straightforward. The contract was unenforceable because Carlton did not obtain signatures and since Carlton was at fault in committing an act in violation of the public policy expressed by the Act (admitting Robert to its facility without first obtaining a signature on the contract), Carlton could not circumvent the Act and receive safe haven in equity. The trial court agreed,[10] sending a dramatic message to nursing homes: no signed contract, no possibility of recovery. Carlton appealed.

Breach of Contract and Quantum Meruit—The Arguments on Appeal

Carlton took one overarching position on appeal, namely that the appropriate sanctions for failing to "execute" a "written contract" under the Act were found in the "Violations and Penalties" section of the Act,[11] and that the judicial imposition of dismissal of the breach of contract cause of action was not mandated by the statutory scheme. Since the Illinois legislature did not contemplate stripping a non-compliant nursing home of the ability to sue to recover amounts owed to it, dismissal solely on the basis of the statutory violation was unwarranted.

As to the breach of contract claim specifically, Carlton urged that because the Act does not provide that unsigned contracts are unenforceable, Carlton should be permitted to state a claim for breach of contract, and be given the opportunity to demonstrate the traditional elements of a valid and binding contract (offer, acceptance, consideration),

performance by Carlton, breach by Robert, and resulting injury. Carlton argued that "a party named in a contract may, by his acts and conduct, indicate his assent to its terms and become bound by its provisions even though he has not signed it."[12] This is especially true, Carlton argued, when the conduct relates specifically to the written terms of the contract. So, while Carlton's failure to obtain Robert's signature prior to admitting him to its facility was a violation of the Act, such a violation did not preclude Carlton from having the opportunity to present the existence of a valid, enforceable contract.

Carlton's quantum meruit appeal was somewhat more nuanced. The trial court had ruled that Carlton could not "allege a claim in quantum meruit when the contract has been determined to be unenforceable as a violation of public policy…[w]here enforcement of an illegal contract is sought, the courts will aid neither party but will leave them where they have placed themselves since the parties are *pari delicto* and can recover nothing under the contract."[13]

On appeal, Carlton challenged this reasoning by explaining that, while it is true that parties to an illegal contract should not be aided in equity, there is a key distinction between contracts that violate public policy due to the illegality of their subject matter (e.g. fee splitting arrangements), and contracts whose subject matter is perfectly legal, but some "public policy" (such as formation or execution requirements) renders the contract unenforceable. When individuals enter a contract to perform an illegal act, it is intuitive that equity will give refuge to no one. But when a contract is unenforceable on technical grounds alone, that logic dissolves. Indeed, it is precisely when a contract is unenforceable due to deficiencies in formation or execution, that a party looks to quantum meruit to be made whole.

After arguing that the doctrine of *pari delicto* did not apply to its situation, Carlton stressed that the legislature did not "clearly and plainly express" an intent to abrogate the common law doctrine of quantum meruit, and pointed out that "such an intent will not be presumed from ambiguous or doubtful language."[14] In other words, if the legislature sought to preclude a non-compliant nursing home's ability to seek equitable relief, it would have done so with clarity.

The *Carlton* Appellate Decision

The appellate court agreed that Carlton's quantum meruit claim was wrongfully dismissed. It first noted that "it does not appear that any Illinois appellate court has addressed what impact, if any, a violation of the provisions of the Act has on the rights of a nursing home to recover in equity…."[15] It also recognized the "distinction between the availability of quantum meruit where the *subject matter* of an underlying contract makes it unenforceable, and a situation where only some issue with *formation* or *execution* makes the underlying contract unenforceable."[16]

The court then expressly adopted the reasoning contained in *K. Miller Construction Co., Inc. v. McGinnis,*[17] which was then in its appellate stage, but ultimately went to the Illinois Supreme Court some months after the *Carlton* decision. As more fully discussed below, the appellate court in *McGinnis* allowed quantum meruit to remain an available remedy to violators of the Home Repair and Remodeling Act, because the legislature did not clearly and plainly state otherwise.[18] The *Carlton* court extended this reasoning to the Nursing Home Care Act concluding that a nursing home that fails to comply with the Nursing Home Care Act's contract provisions may still maintain an action in quantum meruit to recover the reasonable value of its services.[19] Currently, that remains good law, and nursing homes are free to pursue this equitable avenue for recovery.

The breach of contract dismissal, however, was upheld by the *Carlton* court. It echoed the trial court's reasoning, essentially reiterating that courts will not "enforce a private agreement which is contrary to public policy" and agreeing " with the circuit court that the unsigned contract was unenforceable under the Act."[20] Carlton walked away with only a partial victory, and, under this decision, Illinois nursing homes that violate the contract provisions of the Nursing Home Care Act may not recover on the contract, but may only prove at trial the reasonable value of services pursuant to a theory of quantum meruit.

The Impact of the Illinois Supreme Court's Decision In *McGinnis*

Shortly after the *Carlton* decision, the Illinois Supreme Court reviewed the *McGinnis* case. In doing so, it possibly breathed vitality into the breach of contract claims that appeared dead in the wake of *Carlton*. The *McGinnis* case involved interpretation of the Home Repair and Remodeling Act, which states that "[p]rior to initiating home repair or remodeling work for over $1,000, a person engaged in the business of home repair or remodeling shall furnish to the customer for signature a written contract or work order."[21] The issue before the Illinois Supreme Court was whether a home remodeling contractor who entered into an oral contract for work over $1,000, rather than furnishing the customer for signature a written contract, could enforce the oral contract or seek recovery in quantum meruit against a homeowner who had refused to pay for the completed project. Like the appellate court in *Carlton*, the appellate court in *McGinnis* concluded that statutory violators could recover under quantum meruit, but that the non-complying contract was unenforceable.[22] The Illinois Supreme Court reversed that part of the appellate decision striking down the breach of contract remedy, holding that "recovery is available under *both theories*."[23]

Without belaboring the details of the *McGinnis* court's analysis, a few points are worth noting. First, the court identified an important analytical distinction. On the one hand, "if a statute explicitly provides that a contractual term which violates the statute is unenforceable…the term is unenforceable… Conversely, if it is clear that the legislature did not intend for a violation of the statute to render the contractual term unenforceable, and that the penalty for a violation of the statute lies elsewhere, then the contract may be enforced."[24] But, when the statute is silent, the court endorsed a balancing between the public policy of the statute and the countervailing policy in enforcing agreements.[25]

The court then classified the Act as falling within the last category, requiring a balancing test.[26] Typically, the case would have been remanded in order to allow the lower court to apply the standards set out on appeal. However, after the *McGinnis* appellate decision, the Illinois General Assembly had amended the Home Repair Act by removing all references to the word "unlawful" in an apparent attempt to make clear that it did not intend for the Act to render contracts *ipso facto* unenforceable.[27] The Illinois Supreme Court thus reached its decision based, in large part, on this amendment and clarification of legislative intent. It is unclear how the court would have ruled if the statute remained unchanged throughout, but the decision contains some clues. "[A]ccording to the appellate court, because there was a

statutory violation…the contract was, *ipso facto*, unenforceable. This was error. The General Assembly is capable of stating when a contractual term that violates a statute is unenforceable."[28] The court observed that "it was not the legislature that said any violation of the Home Repair Act*, ipso facto*, renders the contract unenforceable; it was some judges."[29]

The Home Repair Act at issue in *McGinnis*, and the Nursing Home Care Act, are similar. Both Acts require that the provider of a particular service, prior to providing services, execute (or, "provide for signature") a written contract to the recipient of that service. Also, penalty provisions are provided for in both Acts, which comprehensively address what consequences flow from violations of the Act. Neither Act provides for the elimination of a contract-based remedy just because there was a statutory violation in the execution of the contract between the parties. Although the clarifying amendment to the Home Repair Act gave guidance to the Illinois Supreme Court in *McGinnis* in addressing the penalty scheme within the Home Repair Act, there is strong language in the *McGinnis* opinion that suggests that the *Carlton* decision should not have excluded a breach of contract remedy, because the Act did not provide for that sanction.

What remains unclear is what effect, if any, the *McGinnis* decision will have on future litigation involving facts similar to those in *Carlton*. The Illinois Supreme Court's reasoning in *McGinnis* is inherently at odds with the *Carlton* decision. Logically, the reasoning in *McGinnis* should apply to the Nursing Home Care Act because that Act is analogous to the Home Remodeling Act. Perhaps the scope of *McGinnis* is narrow, given the legislative amendment which clarified the enforceability of contracts in violation of the statute. However, the arguments in favor of extending the *McGinnis* reasoning to the Nursing Home Care Act are compelling ones.

It is clear today that a nursing home that violates the contract signature provisions of the Nursing Home Care Act may still pursue recovery of unpaid amounts under a theory of quantum meruit. These nursing homes will have to prove the reasonable value of their services, rather than pursue contract damages. And, while *Carlton* remains the only appellate decision directly addressing the enforceability of unsigned contracts under the Act, it is fair to suggest that this opinion is inconsistent with the *McGinnis* decision that followed. Nursing homes that seek to recover amounts owed on unsigned contracts should consider raising *McGinnis* as they may discover that the arguments favoring the enforceability of contracts that violate the Home Repair Act likewise support the enforcement of unsigned contracts under the Nursing Home Care Act. Moving forward, nursing homes may also consider avoiding the entire headache by implementing more rigorous procedures for obtaining signatures prior to admittance. ■

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1. 220 ILCS 45/2-202(a).
2. See "Violations and Penalties" of the Act, 210 ILCS 45/3-301. Some penalties include a facility being subject to a plan of correction, issuing of a conditional license, assessment of penalties, or license suspension or revocation. The "Duties" section of the Act states that a resident "may maintain an action under this Act for any other type of relief…permitted by law." 210 ILCS 45/3-603.
3. *Carlton at the Lake, Inc. v. Barber*, 401 Ill.. App. 3d 528, 928 N.E.2d 1266 (1st Dist. 2010).
4. Id. at 529, 928 N.E.2d at 1268.
5. Id. at 530, 928 N.E.2d at 1269.
6. Robert's daughter and attorney-in-fact signed the following admission documents, to name just a few: Residents Rights and Facility Responsibilities; Assignment of Insurance Benefits and Release of Medical Records Information; Eyecare Authorization; Physical Restraint Informed Consent; Nursing Facility-Resident Rights.
7. 401 Ill. App. 3d at 530, 928 N.E.2d at 1269.
8. Id.
9. Count II of Carlton's Complaint sought recovery from Jean Barber pursuant to the Illinois Rights of Married Persons Act.
10. *Carlton at the Lake v. Barber*, 2008 WL 8029298, Ill. Cir., Dec. 18, 2009.
11. See 210 ILCS 45/3-301
12. 401 Ill. App. 3d at 531, 928 N.E.2d at 1270 (quoting *Landmark Properties, Inc. v. Architects International-Chicago*, 172 Ill.App.3d 379, 383, 526 N.E.2d 603, 606 (1st Dist. 1988)).
13. 2008 WL 8029298 (citing to *Leoris v. Dicks*, 150 Ill.App.3d 350, 354 (1st Dist. 1986) (internal quotation marks omitted).
14. 401 Ill. App. 3d at 535, 928 N.E.2d at 1273 (quoting *Maksimovic v. Tsogalis*, 177 Ill.2d 511, 518, 687 N.E.2d 21, 24 (1997).
15. 401 Ill. App. 3d at 534, 938 N.E.2d at 1272.
16. Id.
17. 394 Ill. App. 3d 248, 913 N.E.2d 1147 (1st Dist. 2009).
18. Id. at 259, 913 N.E.2d at 1156.
19. 401 Ill.App.3d at 534-536, 928 N.E.2d at 1272-1274 .
20. Id. at 533, 928 N.E.2d at 1271.
21. 815 ILCS 513/515
22. 394 Ill. App.3d at 264, 913 N.E.2d at 1161.
23. *K. Miller Construction Company, Inc. v. McGinnis*, 238 Ill.2d 284, 287, 938 N.E.2d 471, 474 (2010) (emphasis added).
24. Id. at 293-294, 938 N.E.2d at 478.
25. Id. at 297, 938 N.E.2d at 480 ("The General Assembly is capable of stating when a contractual term that violates a statute is unenforceable.") This sentiment is somewhat at odds with the balancing test the court endorsed for times when the legislature is "silent" as to enforceability. If the legislature is capable of indicating when a contract is unenforceable, isn't the silence then meaningful? If so, there is no use for a balancing test, because the legislature has spoken in its silence.
26. Id. at 298, 938 N.E.2d at 480 ("Accordingly, the appellate court should have conducted a balancing analysis and considered the relevant facts and public policies before concluding that plaintiff could not pursue other relief for breach of contract.")
27. Id. at 298-301, 938 N.E.2d at 481-82.
28. Id. at 297, 938 N.E.2d at 480.
29. Id. (quoting *Fandel v. Allen*, 398 Ill. App. 3d 177, 192, 937 N.E.2d 1124, 1135 (3rd Dist. 2010) (Schmidt, J., specially concurring) (internal quotation marks omitted).