HALL RENDER
KILLIAN HEATH & LYMAN

HEALTH LAW NEWS

MAY 17, 2017

U.S. SUPREME COURT STRIKES DOWN KENTUCKY'S EFFECTIVE BAN ON ARBITRATION AGREEMENTS IN LONG-TERM CARE SETTING

In a May 15, 2017 7-1[1] decision authored by Hon. Justice Kagan, the U.S. Supreme Court held that the Kentucky Supreme Court's "clear statement rule" - that an agent can deprive her principal of the rights of access to the courts and trial by jury through an arbitration agreement only if expressly provided in the power of attorney - violates the Federal Arbitration Act ("FAA") by singling out arbitration agreements for disfavored treatment.

In the underlying case, Respondents Beverly Wellner and Janis Clark, wife and daughter, respectively, of Joe Wellner and Olive Clark, each held a power of attorney affording her broad authority to manage her family member's affairs. Each of the Respondents had used their powers of attorney to complete all necessary paperwork when their family members had moved into a nursing home. As part of that process, each power of attorney signed an arbitration agreement on her relative's behalf providing that any claims arising from the relative's stay at the facility would be resolved through binding arbitration. After the residents' deaths, their estates filed suits alleging that the nursing home's substandard care had caused their deaths. The nursing home moved to dismiss the cases, arguing that the arbitration agreements prohibited bringing the disputes to court. The trial court denied the nursing home's motions, and the Kentucky Court of Appeals affirmed the trial court. The Kentucky Supreme Court consolidated the cases and affirmed. The Kentucky Supreme Court held that both arbitration agreements were invalid because neither power of attorney contained a "clear statement" authorizing the representative to enter into an arbitration agreement. The U.S. Supreme Court decision clearly and distinctly evaluated its prior rulings in conjunction with the FAA to decide that the Kentucky Supreme Court's "clear statement rule" failed to put arbitration agreements on equal footing with other contracts and, as such, violated the FAA.

The FAA makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U. S. C. §2. The FAA establishes an equal treatment principle: A court may invalidate an arbitration agreement based on "generally applicable contract defenses" but not on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue," *AT&T Mobility LLC v. Concepcion*, 563 U. S. 333, 339. The U.S. Supreme Court notes that its interpretation of the FAA specifically preempts any state rule that discriminates on its face against arbitration or that covertly accomplishes the same objective by disfavoring contracts that have the defining features of arbitration agreements. By requiring an explicit statement before an agent can relinquish her principal's right to go to court and receive a jury trial, the Kentucky Supreme Court adopted a legal rule hinging on the primary characteristic of an arbitration agreement. Such a rule was in clear violation of the ruling set forth in *Concepcion.*

The U.S. Supreme Court further rejected the Respondents' position that the "clear statement rule" affected only contract formation and that the FAA does not apply to contract formation questions by referring to the language of the FAA itself. The FAA cares not only about the "enforce[ment] of arbitration agreements but also about their initial "valid[ity]" - that is, about what it takes to enter into them, 9 U.S. C. §2. The opinion referred to *Concepcion,* in which the Court noted the impermissibility of applying a contract defense like duress "in a fashion that disfavors arbitration," 563 U. S., at 341. As noted in the opinion, that discussion would have made no sense if the FAA had nothing to say about contract formation because duress itself involves unfair dealing at the contract formation stage.

Beginning with the *Mermet Health Care Ctr., Inc. v. Brown*[2] decision in 2012 and now with this decision, the U.S. Supreme Court continues to affirm the validity of arbitration agreements under the FAA in the long-term care setting despite the ups and downs in various state courts. This opinion will likely give state courts pause in choosing not to enforce arbitration agreements, so long as such agreements are properly drafted and executed in a manner acceptable for all types of contracts. The landscape for nursing home arbitration agreements continues to improve for providers and cause disappointment for those who believe arbitration deprives nursing home residents and their families of their rights, including CMS, who, in November 2016, attempted to ban all pre-dispute arbitration agreements. For now, that roller coaster ride has stopped. Post-acute providers should continue to use their arbitration agreements with cautious optimism that perhaps these agreements will remain untouched by the courts…at least for now.

Should you have any questions, please contact your regular Hall Render attorney.

[1] Justice Thomas dissented on the opinion that the FAA does not apply to proceedings in state court. Justice Gorsuch took no part in the consideration or decision of the case.

[2] 132 S.Ct. 1201 (2012).