BREAKING THROU

NURSING HOMES' FORCED ARBITRATION

In recent years, the U.S. Supreme Court has swung the pendulum in favor of enforcing mandatory arbitration clauses, but successful challenges are still possible. Philadelphia attorney Martin Kardon spoke to **John Vail**—a Washington, D.C.-based lawyer with years of experience combatting these clauses before the Court—about their prevalence in nursing home admission contracts, how to navigate around them, and what the future holds.

|| Interview By Martin S. Kardon

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Q Let's talk about the Federal Arbitration Act (FAA) as it was originally passed in 1925. What did it say, and to whom was it intended to apply?

A The Federal Arbitration Act was designed by lawyers for wealthy businesses so they could get specific enforcement of predispute agreements to arbitrate. It was really about the remedy of specific enforcement. It's often said that courts wouldn't enforce arbitration agreements. Courts often said they would enforce them, but that there were no damages. They would not specifically enforce them. So Congress passed the FAA.

It's important to remember that the FAA was passed at a time when Congress didn't believe it had power under the Commerce Clause to impose this law on state courts. The language and history of the FAA both indicate that it was written as a set of procedural rules for use in federal court cases. That's where the cases that the drafters were worried about—cases involving big corporations, one against the other—were winding up.

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Q How and when did the axis begin to tilt toward individual consumers versus business-to-business disputes?

A The watershed case is *Southland Corp. v. Keating* from 1984. The Court held that Section 2 of the FAA is a substantive provision of law that applies in state court adjudication. That case, I think, was wrongly decided. There's academic writing, in particular the writing of David Schwartz of the University of Wisconsin, establishing that the case was wrongly decided.

There was a time when five sitting justices on the Supreme Court said that it was wrongly decided, and in *Allied Bruce Terminix Companies, Inc. v. Dobson*, Justice Scalia wrote that "adherence to *Southland* entails a permanent, unauthorized eviction of state court power to adjudicate a potentially large class of disputes."

Q Since *Southland*, what theories or arguments have been advanced by consumers to avoid being bound by arbitration agreements? Which have been successful?

A *Southland* leaves open the idea that generally applicable defenses to state contract claims can defeat arbitration clauses. The key is that they have to be generally applicable doctrines. In *Doctor's Associates, Inc. v. Casarotto*, the Montana legislature allowed arbitration clauses but required they be written in big, bold type in the front of agreements, so people would know what they agreed to. The Court found that requirement was preempted by the FAA because the legislature was treating arbitration differently from anything else.

The most important doctrine, particularly in the nursing home context, involves questions about contract formation. Recent cases have clarified that when analyzing the enforceability of an arbitration agreement, you have to focus on the arbitration agreement itself, not on the contract in which it is embedded. That is a very important concept.

For example, defendants in nursing home cases often argue that by staying in the nursing home but rejecting the arbitration agreement, a resident is trying to take the benefits of a contract while trying to selectively avoid one part they think is a burden. That's analytically incorrect because the broader agreement—the nursing home agreement itself—is not at issue. The only thing at issue is the arbitration agreement, and it's either to be enforced or rejected, regardless of the contract that surrounds it.

In the nursing home context, one of the most important questions is authority to enter the agreement. There can be basic questions about whether a resident who signs an agreement had sufficient capacity to make a binding contract at the time he or she signed the agreement. If not, that's a valid defense to the agreement.

A broader class of cases deals with an agent who actually signs an agreement on behalf of someone coming into a nursing home. Is the agent authorized by the resident—the principal—to sign the arbitration agreement? The authority to sign someone into a nursing home or to make health care agreements is not necessarily the authority to sign an arbitration agreement covering disputes arising from residency in the home.

Q Since we're focusing on nursing home arbitration agreements, can you talk about the *Marmet Health Care Center, Inc. v. Brown* case out of West Virginia, which is the most recent Supreme Court decision to

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directly address nursing home arbitration agreements?

A *Marmet* dealt with a West Virginia ruling that said nursing home arbitration agreements could not be enforced as a matter of public policy. The Supreme Court very readily held that was preempted under its FAA jurisprudence. After *Doctor's Associates*, that was an obvious result. It was not permissible to treat that class of cases differently. After *Marmet*, it's important to focus on general contract law doctrines—like authority—that can lead to the non-enforceability of arbitration agreements.

Often, the nursing home will argue that the resident is a third-party beneficiary of an arbitration agreement, and therefore the agreement can be enforced against the resident. But there are two problematic steps in reaching the nursing home's desired conclusion. First, this issue usually arises after it's found that a putative agent had no authority to make an agreement on a resident's behalf. If the agent had no authority, there's no contract to which someone could be a third-party beneficiary.

The second problem arises when there is a valid agreement to arbitrate between the home and somebody else. Third-party beneficiary doctrine is a way for the beneficiary, who is not privy to a contract, to enforce the duty of a promisor. There is nothing in third-party beneficiary doctrine that gives a promisor the capacity to enforce an ostensible benefit against an ostensible beneficiary. It just doesn't work in that direction. There are some troublesome state and federal cases that hold otherwise, but they're absolutely wrongly decided.

Q Let me loop back to this question of authority. In Pennsylvania and some other states, courts have ruled that a valid contract with the decedent can bind the estate—however, because wrongful death beneficiaries are not all parties to the contract, they cannot be bound by it. This potentially bifurcates a wrongful death claim (a direct claim by the survivors against the defendant) from a survival claim (the claim on behalf of the estate). Do you think that doctrine has legs? Will it survive closer scrutiny by the Supreme Court?

A I have been very involved with this issue. I think the doctrine survives scrutiny because it deals with property interests, and it depends on where they lie as a matter of state law. The Court has at least twice declined to take up the issue, and I think that's because it is very solidly doctrinally based.

In some states, as in Ohio, statutory wrongful death beneficiaries' right to bring a claim is their property. It is not the decedent's property. So the decedent has the power to bind his or her estate to an arbitration clause, but has no power to bind other people's property. It's as if the decedent left a will and said, "I leave to the nursing home the Brooklyn Bridge." If the decedent didn't have any property interest in the Brooklyn Bridge, the will doesn't pass any property interest to the nursing home. It's the same basic analysis of property law.

So I do think that survives scrutiny—I think it has already. Last September, in *ExtendiCare Homes, Inc. v. Whisman*, the Kentucky Supreme Court held that you need a formal power of attorney to authorize an agent to waive a constitutional right. Every arbitration clause waives the constitutional right of access to courts and the right to a jury trial.

The Kentucky court said that, if you're going to do that through an agent, you need to very specifically give that agent authority. The question is whether that is a rule of general applicability in Kentucky or whether it applies to arbitration clauses only.

Q Would you agree that a rule directed solely at arbitration agreements, giving them undue emphasis, is not going to be allowed, whereas a rule of general application has a much better chance of surviving preemption?

A I think that's right. There is a question outstanding about the breadth of preemption under the FAA. There is some potentially troublesome language in the *AT&T Mobility LLC v. Concepcion* decision, with which Justice [Antonin] Scalia perhaps broadened preemption. He wrote that the saving clause of Section 2 does not suggest "an intent to preserve state law rules that stand as an obstacle to the accomplishment of the FAA's objectives."

Q The bifurcation of cases—where some claims are heard in court, others in an arbitration proceeding—runs against the concept of judicial

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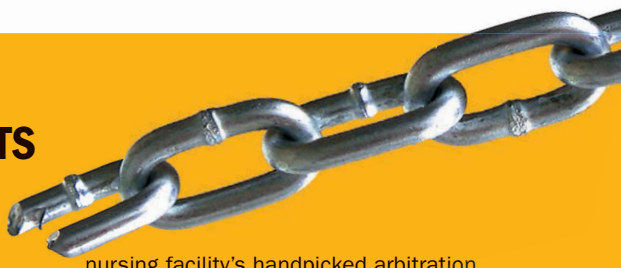
economy. Where has the Supreme Court come down on the relative importance of enforcing an arbitration clause versus judicial economy and avoiding multiple proceedings in the same case?

A The Court very early came down in favor of multiple forums and against judicial economy. In *Moses Cone Memorial Hospital v. Mercury Construction Corp.*, the Court said that Congress knew what it was doing and that bifurcated proceedings were a potential cost of enforcing arbitration clauses. In a practical sense, many

TAKING ACTION
ON NURSING HOME ARBITRATION AGREEMENTS

A proposed federal rulemaking seeks to address forced arbitration clauses in nursing facility contracts that curb residents' right to access the civil justice system.



Ivanna Yang

When regulations fail to adequately protect nursing home residents, families turn to the civil justice system to obtain answers, uncover harmful systemic practices, and hold wrongdoers accountable. For most families, filing a claim against a facility is a last resort. It is done because facilities routinely fail to provide care information and families cannot get the information they need to understand what happened to their loved one. Families also file claims to ensure that the same harm isn't repeated and that those responsible for neglect and abuse are held accountable. However, families are increasingly finding that they are unable to file a claim in court because of forced arbitration clauses in nursing facility contracts.

In response to years of public outcry and a federal report about the dangerous conditions in nursing homes, the Centers for Medicare and Medicaid Services (CMS) is revising its requirements of participation—federally mandated standards that nursing facilities must meet to begin and continue participating in Medicare and Medicaid. A 2014 Department of Health and Human Services report found that more than one-third of patients admitted to a skilled nursing facility have suffered a medication error, infection, or other serious medical injury.[1] The proposed rulemaking specifically discusses forced arbitration clauses in nursing facility contracts and presents an opportunity for CMS to fully protect nursing home residents from abusive forced arbitration clauses.

Forced arbitration provisions contained in the fine print of nursing facility contracts allow facilities to eliminate residents' rights by stating that claims for any harm to the resident—even intentional abuse, sexual assault, or injury resulting in death—must be brought in forced arbitration. Rather than a resident or a resident's family being able to file a claim in court, their claims are funneled into a nursing facility's handpicked arbitration dispute mill, whose proceedings are rigged, secretive, and final, with limited or no ability to appeal.

In recent years, the U.S. Supreme Court has taken action on forced arbitration in several cases that have dramatically curtailed the public's rights. In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, the Court rejected arbitrators' ability to allow class-wide arbitration even if the arbitration clause does not prohibit it.[2] Then, in *Rent-A-Center, West, Inc. v. Jackson*, the Court found that private arbitrators—not the courts—can decide whether arbitration is fair.[3]

After *AT&T Mobility LLC v. Concepcion*, a majority of state laws limiting the use of forced arbitration clauses are now preempted by the Federal Arbitration Act, and *American Express Co. v. Italian Colors Restaurant* denied access to the court system in favor of forced arbitration, despite the prohibitive costs of individual arbitration to plaintiffs.[4] Because federal courts rarely show regard for the constitutional right to a jury trial even when state courts recognize the imbalance in bargaining power between residents and long-term care providers, regulatory action in this area is more urgent than ever. AAJ filed amicus briefs in *Concepcion*, *Stolt-Nielsen*, *and Rent-A-Center*, and signed onto an amicus brief in *Amex v. Italian Colors*.

In October, AAJ submitted comments in response to the CMS long-term care rulemaking, advocating to restore residents' and their families' ability to enforce their rights under state and federal law by eliminating participating facilities' use of forced arbitration clauses. AAJ also

defense counsel will not want bifurcated proceedings, and many practitioners tell me that if that situation arises, the defense will simply prefer to go to court.

I'm certainly aware of situations

spearheaded a massive communications effort, which included delivering more than 50,000 signatures to CMS calling for a ban on forced arbitration and hosting a press call with Rep. Henry Waxman (D-Calif.) as a speaker. This effort culminated in a segment on NPR and coverage in a key trade publication for the nursing home industry.

Legislatively, both chambers of Congress engaged on the issue—34 senators and 27 representatives signed letters to the CMS administrator urging the agency to prohibit the use of forced arbitration clauses in long-term facility admission contracts.

As many families know firsthand, the decision to place a loved one into a nursing facility is difficult and stressful. Because nursing facility residents are among our country's most vulnerable people, dependent on others for their everyday care and safety, it is imperative that CMS act quickly on the rulemaking to bring increased transparency, disclosure, and accountability for facilities and their residents. You can help protect seniors' rights by encouraging CMS to ban predispute forced arbitration. Sign the petition here: http://tinyurl.com/jdh6aaa.

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Notes

1. *Adverse Events in Skilled Nursing Facilities: National Incidence Among Medicare Beneficiaries*, U.S. Dep't of Health & Human Servs., Office of Inspector Gen. (Feb. 2014), www.oig.hhs.gov/oei/reports/oei-06-11-00370.pdf.
2. 559 U.S. 662 (2010).
3. 561 U.S. 63 (2010).
4. 563 U.S. 333 (2011); 133 S. Ct. 2304 (2013).

WHEN ANALYZING THE ENFORCEABILITY OF AN ARBITRATION AGREEMENT, YOU HAVE TO FOCUS ON THE ARBITRATION AGREEMENT ITSELF, NOT ON THE CONTRACT IN WHICH IT IS EMBEDDED.

when that's not the case and when the defense chooses bifurcated proceedings. Defendants then almost always seek a stay of court proceedings in the non-arbitral claims, arguing that if proceedings are not stayed, they will not get the benefit of their arbitration agreement. That has always struck me as a ridiculous argument.

Q If there are two proceedings, and one goes first, would that be necessarily binding on the second proceeding? In other words, could you get a finding from an arbitration panel and then go and try it again, irrespective of the outcome in front of a jury? Or vice versa?

A That depends on the claim and issue preclusion law of the state in which you are litigating, and what effect the state will give to arbitral findings—particularly to unreviewed arbitral findings not yet finalized by court judgment. The court system expresses a strong preference for jury fact-finding. In *Beacon Theatres, Inc. v. Westover*, the Supreme Court held that, if there are both equitable claims and legal claims that require the same fact-finding, the court is constitutionally compelled to try the jury claims first and submit them to jury fact-finding. I think there's a powerful argument that in cases involving parallel claims, the arbitral claim should be stayed and the jury claim should be tried first, so that any preclusive findings flow from the jury's fact-finding, not from an arbitrator's fact-finding.

Q How much do courts really care, if at all, about the substantive issues and the fairness of the entire concept of predispute binding arbitration agreements?

A The courts have firmly held that Congress has said that it's fair, and "that's good enough for us." I don't think the Supreme Court would have any trouble striking down an arbitration clause as unconscionable if it required arbitration to be held, for example, in the Aleutian Islands in February, when the claim arises in Florida. But the courts have not been very sympathetic to claims about limitations on discovery, for example, and have generally said that when you agree to arbitrate, you agree to fast-tracked, limited discovery. Obviously, there is some room between the Aleutian Islands hypothetical and a hypothetical where you get only three depositions. It highly depends on the facts of the given case.

Q Let's talk about the current Centers for Medicare and Medicaid Services (CMS) proposals regarding arbitration and efforts undertaken last year both by AAJ membership and members of both houses of Congress to completely ban these agreements from nursing home admission contracts. CMS is considering such a ban. Should that happen, would the ban be enforceable, and would it survive the inevitable industry challenge?

A Well, I think the industry would challenge whether CMS was authorized by statute to condition the receipt of Medicare or Medicaid funding on the absence of predispute arbitration agreements. There's a long and complicated history of litigation under those acts about which CMS decisions are enforceable in courts, but I think the bans would and should survive. I certainly would anticipate a very aggressive litigation posture from the industry.

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Q **Although it appears unlikely considering the current makeup of both houses of Congress, would it be within the power of the legislature to carve out an exception, banning predispute binding arbitration agreements in nursing home contracts much as they did in some other sectors?**

A Absolutely. This is purely a statute of Congress. Congress can decide not to apply it to certain places. The argument for Congress not to apply it in the nursing home context is especially powerful. In the late 1990s, seeing a lot of disputes about the use of mandatory arbitration in health care agreements, three organizations—the American Bar Association, the American Medical Association, and the American Arbitration Association—created a joint-study commission to look at those issues.

The commission concluded that because of the stressful position of someone seeking health care or nursing home admission, you can never have voluntary consent to a predispute arbitration agreement, and these agreements should not be used. If people, post-dispute, decided that they wanted to arbitrate their claims, they would be free to do so. At that time, they would be in a much better position to make a truly consensual decision.

The first article I wrote about these issues is more than 15 years old. In all those years, I have asked people on the other side why they needed predispute agreements to arbitrate, why a post-dispute agreement to arbitrate was not sufficient. I have never received, and I have never read, a persuasive argument why that's so.

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