Supreme Court on nursing home arbitration: watch what we do, not what we ask

By Christopher M. Mason and Edward Clancy

Despite commentators’ reports that characterized oral argument in *Kindred Nursing Centers, L.P. v. Clark* as “unusually hostile” to arbitration clauses “embedded in nursing home contracts,”1 the United States Supreme Court yesterday upheld the continuing validity of such clauses under the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (the FAA). See *Kindred Nursing Ctrs., L.P. v. Clark*, No. 16-32 (May 15, 2017). The decision was not even close: only Justice Thomas dissented (on his usual grounds that the FAA does not apply in state courts, which no other justice has accepted). As a result of its decision, the Court completely reversed one of the two appeals it had consolidated for consideration and remanded the other for further proceedings.

The 7 to 1 decision in *Kindred* falls squarely within the Court’s existing arbitration precedents in its rejection of the Kentucky Supreme Court’s conclusion that a general power of attorney, even if broad enough to authorize the execution of contracts generally by the agent who was given the power of attorney, nonetheless does not permit that agent to enter into an arbitration agreement for the relevant principal. Instead, the state court had held that, in order “to form such a contract, the representative must possess specific authority to ‘waive his principal’s fundamental constitutional rights to access the courts [and] to trial by jury.’” No. 16-32, slip op. at 1. According to Justice Kagan, writing for the majority, that the “clear-statement” of authority rule “singles out arbitration agreements for disfavored treatment” and, as a result “violates the FAA.” Id., slip op. at 2.

The “singling out” was obvious because the Kentucky Supreme Court “did exactly what *Concepcion [AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)] barred: adopt a legal rule hinging on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial.” No. 16-32, slip op. at 5 (citing, e.g., *Concepcion*, 563 U.S. at 341–42). The state’s attempt to broaden the rule beyond arbitration agreements to other “fundamental constitutional rights” failed to convince the Supreme Court otherwise. In fact, the Court found those attempts somewhat ludicrous:

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The state court hypothesized a slim set of both patently objectionable and utterly fanciful contracts that would be subject to its rule: No longer could a representative lacking explicit authorization waive her “principal's right to worship freely” or “consent to an arranged marriage” or “bind [her] principal to personal servitude.” . . . Placing arbitration agreements within that class reveals the kind of “hostility to arbitration” that led Congress to enact the FAA . . . . And doing so only makes clear the arbitration-specific character of the rule, much as if it were made applicable to arbitration agreements and black swans.

No. 16–32, slip op. at 7 (footnote omitted).

This is not the first time the United States Supreme Court has overturned state efforts directed at nursing home arbitration clauses. As aficionados of the Court’s arbitration decisions will recall, in 2012 it had harsh words for Kentucky’s sister state, West Virginia, on this subject.

In Marmet Health Care Center, Inc. v. Brown, West Virginia had forbidden, on state public policy grounds, pre-dispute arbitration clauses covering wrongful death claims against nursing homes. See 132 S. Ct. 1201, 1202 (2012) (per curiam). The Court reversed, holding that “[t]he West Virginia court’s interpretation of the FAA was both incorrect and inconsistent with clear instruction in the precedents of this Court.” Id. at 1203. As the Court went on to explain, the state’s “prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA.” Id. at 1204.

Perhaps the most surprising thing to us about the decision in Kindred is that it did not start with a citation to Marmet Health Care, but ended with it and, then, only to support a decision to remand one of the appeals for a determination of whether the Kentucky court’s interpretation of the possibly less-broad power of attorney in that appeal was wholly independent of that court’s defective arbitration analysis, or whether “an impermissible taint” of anti-arbitration bias had affected that interpretation as well. No. 16–32, slip op. at 9.

The Kindred case attracted a large amount of amicus curiae interest, including briefs favoring the state from AARP Foundation Litigation, the American Association for Justice, the Kentucky Justice Association and Public Citizen Litigation Group, and briefs favoring the nursing home from the U.S. Chamber of Commerce (with useful data about arbitration speed, costs and outcomes) and The American Health Care Association. The last of these is also notable because the decision in Kindred will likely have a strong effect on the appellate proceedings in American Health Care Association v. Burwell, No. 17–60005 (5th Cir. Jan. 5, 2017).

The AHCA v. Burwell case involves a so-far successful challenge to the 2016 rule promulgated by the Centers for Medicare and Medicaid Services (CMS) that “[a] facility [such as a nursing home] must not enter into a pre-dispute agreement for binding arbitration with any resident or resident’s representative nor require that a resident sign an arbitration agreement as a condition of admission to the LTC [long-term care] facility.” 42 C.F.R. § 483.70(n) (2016). The United States District Court for the Northern District of Mississippi preliminarily enjoined any application of that rule on November 7, 2016. See Am. Health Care Assn. v. Burwell, No. 3:16-cv-00233-MPM-RP, 2016 LEXIS [number] (Nov. 7, 2016) (refusing, among other things, “to play a role in countenancing the incremental ‘creep’ of federal agency authority beyond that envisioned by the U.S. Constitution,” and therefore not treating the CMS rule as having congressional weight when compared to the
That is the decision currently on appeal to the Fifth Circuit. The Kindred case would tend, we believe, to support affirmance of the injunctive relief granted to date against the CMS rule.

We continue to believe that arbitration clauses, while receiving substantial attention in cases such as Kindred, are somewhat underutilized in the health care industry. While resolution of the AHCA v. Burwell case may be important to the continued viability of such clauses for certain nursing home purposes, there are many other circumstances in which arbitration already can and should play a role beyond what the industry sometimes imagines. For further information on that subject, or on the content of this alert, please contact your regular Nixon Peabody attorney or

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