

Impact of Recent Supreme Court Arbitration Decisions on Enforceability of Health Care Arbitration Provisions in California

By Neil R. Bardack and Lori C. Ferguson



Hanson Bridgett Litigation Practice Group

HANSONBRIDGETT.COM

The Supreme Court's landmark decision in *AT&T Mobility v. Concepcion*¹ has ushered in complete federal preemption over the enforceability of arbitration agreements even in the face of state public policy arguments to the contrary. In *Concepcion*, the high Court struck down a California Supreme Court decision (based on a California statute that codified the unconscionability defense) that prohibited class action waivers from being included in an arbitration clause in a consumer contract. Although the contract in question clearly involved interstate commerce and was governed by the Federal Arbitration Act², the Supreme Court's decision portended a broader implication—that 9 U.S.C. § 2 (FAA) embodies a strong liberal federal policy favoring arbitration *notwithstanding any state substantive or procedural policies to the contrary*.

The central theme of the majority opinion is an interpretation of the FAA as preempting the field of state law contract formation and enforcement rules as applied to arbitration contracts. State law governing the enforceability of contracts cannot overrule the parties' privately agreed terms on how the arbitration shall be conducted. Arbitration is a matter of contract, and the FAA requires courts to honor the parties' expectations.

The Supreme Court next applied *Concepcion*'s FAA federal preemption to a labor and employment agreement to arbitrate in *Sonic-Calabasas A, Inc. v. Moreno*³ when it vacated and remanded a California Supreme Court decision⁴ directing that court to reconsider its invalidation of a contractual waiver of a right to a statutory Berman hearing before the Labor Commissioner in advance of proceeding to contractual arbitration. The California Supreme Court's decision in *Sonic-Calabasas A*, had pre-

dated *Concepcion*, and the United States Supreme Court directed that state high court to reconsider its opinion in light of *Concepcion*.

Very recently, the United States Supreme Court directed FAA preemption in the health care context in *Marmet Health Care Center, Inc. v. Brown*⁵. In *Marmet*, the Court overturned a West Virginia Supreme Court of Appeals decision which, on public policy grounds, categorically refused to enforce a pre-dispute agreement to arbitrate personal injury or wrongful death claims against nursing homes. In a per curiam decision, the United States Supreme Court stated that “When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established.”⁶ The Supreme Court showed its willingness to strike down any state law whose purpose is to refuse enforcement of an arbitration clause based on public policy when that policy is not uniformly applied to all agreements.

Although state law may not forbid enforcing arbitration agreements on grounds unique to such agreements, *Concepcion* does not, however, forbid a court finding an arbitration clause unenforceable on unconscionability grounds so long as the unconscionability defense is not applied in a fashion that disfavors arbitration. Since unconscionability had been raised in *Marmet* but not fully explored independent of the public policy analysis, the Supreme Court remanded the case to determine if the clause would be unenforceable based on unconscionability.

The Supreme Court’s liberal application of FAA preemption is not new. The Supreme Court’s recent rejection of arbitration-specific public policy defenses and its application of that principle in a health care context, however, renews questions about the enforceability of California’s limitations on the enforcement of arbitration agreements in the health care field, including California Code of Civil Procedure Section 1295 and California Health and Safety Code Sections 1363.1, 1430(b), and 1599.81.

Code of Civil Procedure § 1295

California Code of Civil Procedure Section 1295 applies to contracts for provision of medical services that require arbitration of medical malpractice claims. Section 1295 requires such agreements to contain the arbitration provision as the first article of the contract, and the arbitration provision must be expressed in statutorily-mandated language. Section 1295 also requires a special notice immediately before the signature line in bold red font of at least 10-point size. Additionally, Section 1295 imposes a thirty-day rescission period on the arbitration agreement.

Even before *Concepcion* and *Marmet*, similar statutory requirements have been invalidated because of FAA preemption.⁷ Assuming the FAA applies to a particular transaction (and FAA application is not difficult in the health care field where, among other potential elements of interstate commerce, federal reimbursement and interstate health insurance payments as well as use of supplies and equipment purchased from out-of-state are common), a challenge of Section 1295 on FAA preemption grounds will likely succeed.

Health and Safety Code § 1363.1

Health and Safety Code Section 1363.1 requires health care service plans that include a binding arbitration provision to contain particular disclosures in a particular format and, in substantial part, to use the wording required by Code of Civil Procedure Section 1295. One California court of appeal has already applied the FAA preemption analysis in *Doctor's Associates v. Casarotto*⁸ to find these specialized arbitration requirements unenforceable. In *Erickson v. Aetna Plans of California, Inc.*⁹, the court found that the FAA preempted the arbitration requirements of Health and Safety Code Section 1363.1, reversing the trial court's refusal to compel arbitration because the arbitration clause violated the statutory requirements to be enforced. The *Erickson* decision held that Section 1363.1 was preempted by the FAA, noting that this statute imposed a special notice requirement only on health care agreements with arbitration clauses, not on contracts—or even health care contracts—generally.

But as prescient as *Erickson* now appears, several California courts refused to follow the *Erickson* analysis because it failed to discuss the application of a specific federal statute, The McCarran-Ferguson Act, that gave the states jurisdiction to regulate insurance.¹⁰ Those courts found that FAA preemption was not implicated because of the preclusive effect of this specific federal statute over the general purpose of the FAA, holding that in the field of insurance regulation, the McCarran-Ferguson Act precluded the application of normal federal preemption principles.

Health and Safety Code § 1430(b)

Health and Safety Code Section 1430(b) invalidates as against public policy any agreement by a resident of a skilled nursing facility or an intermediate care facility to waive his or her rights to sue for violations of the Patients Bill of Rights, 22 Cal. Code Reg. § 72527, “or any other right provided for by federal or state law or regulation.” This statute has been relied upon to evade enforcement of arbitration agreements with respect to lawsuits that include claims of elder abuse under the California Welfare and Institutions Code. There is a currently a conflict among the courts on the nonarbitrability of claims for statutory elder abuse under Section 1430(b). In *Fitzhugh v. Granada Healthcare & Rehabilitation Center, LLC*¹¹, the court held the claims to be nonarbitrable. In *Laswell v. AG Seal Beach, LLC*, however, the court noted that nothing in the statute supported the conclusion that the policies favoring the enforcement of arbitration agreements conflicted with the policies of the statute, and the court refused the concept in *Fitzhugh* that elder abuse and custodial neglect claims were nonarbitrable *per se*.¹² The court pointed to two other decisions that enforced arbitration clauses that included elder abuse claims.

Although FAA preemption was not raised in either *Fitzhugh* or *Laswell*, the Supreme Court's *Marmet* decision seems to validate the *Laswell* approach. As the Court made clear in *Marmet*, if the FAA applies, public policy considerations cannot invalidate an agreement to arbitrate claims.

Health and Safety Code § 1599.81

Health and Safety Code Section 1599.81 sets forth strict statutory format and language requirements in order to enforce arbitration clauses contained in long-term care facility admission agreements. It requires arbitration provisions pertaining to medical malpractice claims to be segregated and separately signed and to comply with Code of Civil Procedure Section 1295. Health and Safety Code Section 1599.81 also requires the arbitration provision to state that an agreement to arbitrate may not be a precondition for medical treatment or for admission to the facility and that under Health and Safety Code Section 1430, residents cannot waive their rights to file suit over violations of the Patients Bill of Rights. In cases in which the FAA applies, Section 1599.81 is likely to succumb to federal preemption.¹³

Practical Implications

In recent years, on both the state and federal level, there has been much debate about the use of pre-dispute arbitration agreements in the health care context, particularly with respect to nursing home residents. The fact that *Marmet* invalidated a public policy defense to enforcement of a pre-dispute binding arbitration agreement with a nursing home is significant and punctuates the point that, absent Congressional action, state-imposed obstacles to enforcement of arbitration agreements in the healthcare setting are unenforceable.

With this in mind, can health care providers in California safely disregard state statutory requirements in arbitration agreements? Perhaps not so fast. As the *Marmet* Court noted, unconscionability remains a valid defense to the enforceability of arbitration agreements. Courts can and have refused to enforce arbitration agreements on unconscionability grounds. It appears that some courts may even be scrutinizing unconscionability more harshly in arbitration agreements than in other types of contracts. In fact, in *Concepcion* the Supreme Court noted data showing that California courts have been more likely to hold arbitration agreements unconscionable more often than other contracts.¹⁴

While probably not enforceable by virtue of FAA preemption, an argument can be made that current California law that requires certain notices and formatting in arbitration clauses reflects elements of fairness necessary to overcome an unconscionability challenge.

Under an FAA preemption analysis, challenges to the enforcement of an arbitration agreement based on failure to follow California's statutory requirements specific to arbitration agreements will likely fail. However, to the extent practicable, to avoid unconscionability claims, health care providers may be wise to continue to incorporate in their arbitration agreements the notice language and formatting that state law currently requires.

Endnotes

- 1 131 S. Ct. 1740 (2011).
- 2 9 U.S.C. § 1 *et seq.*
- 3 132 S. Ct. 496 (2011).
- 4 51 Cal. 4th 659 (2011).
- 5 Nos. 11-391 & 11-394, 2012 U.S. LEXIS 1076 (Feb. 21, 2012) (*per curiam*).
- 6 It may not have helped that the state court called the Supreme Court's interpretation of the Federal Arbitration Act's blanket preemption of state public policy as "tendentious."
- 7 *Doctor's Assocs. v. Casarotto*, 517 U.S. 681 (1996) (holding Montana's notice and format requirements for arbitration agreements preempted by FAA); *see also Hedges v. Carrigan*, 117 Cal. App. 4th 578 (Cal. Ct. App. 2004) (holding notice and format requirements of real estate arbitration agreements under California Code of Civil Procedure Section 1298 preempted by FAA).
- 8 517 U.S. 681 (1996).
- 9 71 Cal. App. 4th 646 (cal. Ct. App. 1999).
- 10 *See, e.g., Malek v. Blue Cross of California*, 121 Cal. App. 4th 44 (Cal. Ct. App. 2004); *Pagarigan v. Superior Ct.*, 102 Cal. App. 4th 1121 (Cal. Ct. App. 2002).
- 11 150 Cal. App. 4th 469 (Cal. Ct. App. 2007).
- 12 189 Cal. App. 4th 1399, 1409 n.3 (Cal. Ct. App. 2010).
- 13 As a practical matter, there may be limited application of Section 1599.81 in the future as facilities adopt the mandatory Standard Admission Agreement, which lacks an arbitration clause. Facilities that choose to enter into arbitration agreements with residents will likely present them as agreements separate from the admission agreement, rendering Section 1599.81 inapplicable.
- 14 131 S. Ct. at 1747.

SAN FRANCISCO

425 Market Street, 26th floor
San Francisco, CA 94105
TEL 415-777-3200
FAX 415-541-9366

NORTH BAY

Wood Island
80 E. Sir Francis Drake Blvd., Ste. 3E
Larkspur, CA 94939
TEL 415-925-8400
TEL 707-546-9000
FAX 415-925-8409

SACRAMENTO

500 Capitol Mall, Ste. 1500
Sacramento, CA 95814
TEL 916-442-3333
FAX 916-442-2348

SILICON VALLEY

950 Tower Lane, Ste. 925
Foster City, CA 94404
TEL 650-349-4440
FAX 650-349-4443

EAST BAY

1676 N. California Blvd., Ste. 620
Walnut Creek, CA 94596
TEL 925-746-8460
FAX 925-746-8490