Supreme Court Reiterates Arbitration Agreements Must Be Placed on Equal Footing with Other Contracts

by Lori C. Ferguson

On May 15, 2017, the U.S. Supreme Court reaffirmed the long-standing federal policy favoring arbitration agreements. In a lawsuit brought against skilled nursing provider Kindred Nursing Centers, LP, the Court held that states cannot single out arbitration clauses for "disfavored treatment," because doing so violates the Federal Arbitration Act (FAA).

The case involved two wrongful death lawsuits that were consolidated in the Kentucky Supreme Court. In each case, the holder of a power of attorney signed an arbitration agreement with one of Kindred's Kentucky-based nursing homes. Each power of attorney gave the agent of the nursing home resident the right to broadly manage the resident's personal affairs.

Following the residents' deaths, their estates sued Kindred in state court. Kindred sought to have the lawsuits dismissed, arguing that the arbitration agreements prohibited bringing lawsuits in state court. Kentucky's courts (from the trial court through the state supreme court) disagreed, reasoning that access to the courts is "sacred" and "inviolate" and, therefore, can only be waived if the power of attorney clearly grants the agent the right to bind the principals to arbitration. Even though the language was broad enough for the representatives to manage most of the residents' other personal affairs, the Kentucky courts held that the powers of attorney were not sufficiently specific to allow the agents to enter into arbitration agreements.

The Supreme Court flatly rejected what it called Kentucky's "clear-statement rule," noting that Kentucky's rule created a different and more restrictive standard for arbitration that did not apply to other contractual matters. The Court explained that under the FAA, states cannot scrutinize arbitration agreements by developing rules that apply only to arbitration or, even if ostensibly more broadly applicable, have the effect of disfavoring arbitration agreements. The Supreme Court rejected the argument that the clear-statement rule would restrict agents from waiving all fundamental constitutional rights, such as the freedom of religion and freedom from personal servitude, since such other contracts were either patently objectionable or fanciful. The Supreme Court also rejected attempts to distinguish Kentucky's clear-statement rule as a rule impacting the formation rather than the enforcement of arbitration agreements since this purported

distinction was contrary to the text of the FAA and to the Supreme Court's prior precedent.

The *Kindred* holding will have ripple effects far beyond invalidating Kentucky's clear-statement rule. The decision reiterates that states must place arbitration agreements on equal footing with other contracts. Agencies antagonistic to arbitration agreements in the nursing home context may need to reevaluate their stance. CMS may have already been influenced by the Supreme Court's ruling. In 2016, CMS issued a rule prohibiting skilled nursing providers from using pre-dispute binding arbitration in their admission agreements. CMS was forced to postpone enforcement of the arbitration ban in December 2016 after a federal court issued a preliminary injunction regarding the ban. Perhaps not coincidentally, CMS dropped its appeal of the federal court ruling and rescinded its arbitration ban on June 5th, three weeks after the *Kindred* ruling. CMS also issued new proposed rules that will generally allow arbitration under certain conditions.[1]

Similarly, state agencies have also applied heightened scrutiny to arbitration language in ways that, in the Supreme Court's words, arguably "fail to put arbitration agreements on an equal plane with other contracts." In some cases, agencies have pressed providers to adapt their agreements to narrow the scope of arbitrable disputes, limit enforceability of arbitration, or add more resident-friendly arbitration provisions. Agencies should consider *Kindred* to be a clear indication that regulations that do not comply with the FAA's equal-footing requirement will not hold up in court.

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[1] Hanson Bridgett will publish a follow-up client alert discussing the new CMS arbitration rule shortly.

For more information, please contact:

Lori C. Ferguson, Partner
916-551-2813
lferguson@hansonbridgett.com