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Supreme Court Endorses Nursing Home's Use of Pre-Dispute Arbitration Agreement

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The United States Supreme Court recently affirmed – in strong terms – the broad reach of the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.) as applied to pre-dispute arbitration agreements between nursing homes and residents' families. In *Marmet Health Care Center, Inc. v. Brown*, ___ S. Ct. ___, 2012 WL 538286 (Feb. 21, 2012) (per curiam), the Supreme Court sharply criticized a decision by West Virginia's Supreme Court of Appeals that had refused to enforce such arbitration agreements on the ground that they violated state public policy. The Supreme Court's decision should encourage health care providers to consider pre-dispute arbitration agreements as a risk management strategy.

The FAA generally requires both federal and state courts to enforce arbitration agreements in transactions with a sufficient nexus to interstate commerce. Despite the FAA, and a long line of federal court cases upholding the validity of arbitration agreements, numerous state courts and state legislatures have been openly hostile toward arbitration. While state courts have used various rationales for disregarding arbitration agreements, many courts, including the West Virginia court in this case, have asserted that the enforcement of arbitration agreements – signed before a dispute arises between the parties to the arbitration agreement - is against the state's "public policy." That rationale, however, is not a legitimate basis for courts to reject arbitration agreements. The FAA reflects federal policy in favor of arbitration, and the FAA preempts state law to the contrary, except when the arbitration agreement is invalid under principles of law that apply to contracts generally. Thus, for example, an arbitration agreement, like any other type of contract, would be invalid if someone is fraudulently induced to sign the agreement. There will be future disputes about whether arbitration agreements are unenforceable under

state law contract principles. However, state courts cannot refuse to enforce a valid contract simply because the contract requires arbitration.

That is where the West Virginia court went wrong. It had ruled that "as a matter of public policy under West Virginia law, an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforced…." The Supreme Court firmly rebuked the West Virginia court's decision: "[t]he West Virginia court's interpretation of the FAA was both incorrect and inconsistent with clear instruction in the precedents of this Court …. West Virginia'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." The Supreme Court also rejected the West Virginia court's assertion that pre-dispute agreements to arbitrate negligence and wrongful death claims were outside the reach of the FAA. The Supreme Court stated that such agreements are not exempt from the FAA. The Supreme Court remanded the case to the West Virginia court to evaluate whether – independent of the state's public policy against arbitration – there was a general principle of state contract law that could invalidate the agreement.

Hopefully, the Supreme Court's strong rejection of this state-court hostility to arbitration will facilitate the enforcement of arbitration agreements going forward. The health care industry – particularly the nursing home community – can benefit from the consistent enforcement of arbitration agreements, which avoid the expense and potential volatility of jury trials. Many nursing homes have used an arbitration clause in their admission agreements with residents. Some state courts have incorrectly ruled that pre-dispute arbitration agreements violate state law. The Supreme Court's Marmet decision underscores the important principle that the FAA, as federal law, preempts contrary state law and public policy. Most nursing home arbitration agreements would be covered by the FAA because they meet the FAA's interstate commerce requirement by virtue of nursing homes' receipt of federal Medicare payments and reliance on an interstate network of vendors and suppliers. Moreover, as the Supreme Court's *Marmet* decision indicates, the signing of an arbitration agreement by a patient's or resident's representative –

before a dispute arises – does not in and of itself render the agreement unenforceable under the FAA. Nonetheless, providers still must comply with Medicare and Medicaid standards regarding the use of arbitration agreements. For example, CMS has stated that nursing homes may not discharge, or otherwise retaliate against, residents who decline to sign an arbitration agreement.

Providers that are considering the use of arbitration agreements should consult with legal counsel to assure that the agreements are drafted and signed in a manner that renders them valid under general principles of state contract law. When properly utilized, arbitration agreements can serve as an important component in a provider's overall risk management strategy.