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Justices See Federal Pre-emption in Nursing Home Dispute

Max Mitchell, The Legal Intelligencer

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A string of Pennsylvania Superior Court decisions have drifted away from nearly automatic application of arbitration agreements in nursing home litigation, but a state Supreme Court decision may change that, according to at least one attorney who practices in the long-term care litigation arena.

In a split decision authored by Justice David N. Wecht in *Taylor v. Extendicare*, the Supreme Court determined that a state rule mandating that wrongful death and survival actions be consolidated for trial was pre-empted by the Federal Arbitration Act. With the court split 4-2, the decision reversed a Superior Court ruling, and remanded the case back to the trial court to determine whether the arbitration agreement is enforceable.

Wecht's opinion expressed concern about whether the application of the arbitration agreement might impinge on the plaintiff's right to trial, and even questioned whether applying the arbitration agreement would further the FAA's goals of efficiency, saying, "The [U.S.] Supreme Court has made clear that bifurcation and piecemeal litigation is the tribute that must be paid to the congressional intent."

However, Wecht said precedent from the U.S. Supreme Court is clear that the FAA should pre-empt the state rule.

"Nursing home defendants have reaped significant benefit from channeling medical malpractice claims into arbitration to the detriment of medical malpractice victims. We cannot, however, disregard or defy controlling precedent from the United States Supreme Court in order to redress these inequities and deficiencies," he said.

The Superior Court determined in *Taylor* that the wrongful death beneficiaries' constitutional right to a jury trial, the state's interest in litigating the claims together, and the FAA's mandate to "achieve streamlined proceedings and expeditious result" mandated that the claims be consolidated for trial.

The ruling, coupled with the Superior Court's decision in *Wisler v. Manor Care*, which held that an arbitration agreement signed by the patient's son as power of attorney was not valid to compel arbitration in a survival claim by the patient's estate, and *Bair v. Manor Care*, where the court said an arbitration agreement was unenforceable because a representative for the nursing home had not signed it, fit what some attorneys have pointed to as a pattern of determining the agreements to be unfair.

Litchfield Cavo attorney Joel I. Fishbein, who represented the defendant in *Taylor*, said the Superior Court might have to start applying the federal precedent when it comes to arbitration issues.

"To the extent that the Superior Court has been, in cases directly on point, refusing to follow federal precedent about applying the Federal Arbitration Act, the Superior Court will have to rethink whether that's the appropriate thing to do given the broad and sweeping language in Wecht's opinion," Fishbein said.

Wecht's opinion noted several decisions from federal district courts in Pennsylvania that went against the Superior Court's reasoning in *Taylor*, finding that the FAA pre-empted Rule 213(e)—the state rule mandating consolidation of the survival and wrongful death actions that is at issue in *Taylor*.

In finding that the FAA pre-empts state law, Wecht relied on the 2011 U.S. Supreme Court decision in *AT&T Mobility LLC v. Concepcion*, in which the court said the FAA pre-empted California's common-law rule of unconscionability.

The only exception, according to Wecht, was the "savings clause," which allows for the applicability of state contract law defenses, like fraud, duress, or unconscionability, to determine if a valid contract exists.

Wilkes & McHugh attorney Stephen Trzcinski, who represents the plaintiff in *Taylor*, said the decision was clearly limited to the application of Rule 213(e) when it comes to the FAA, and issues such as the conscionability considerations of the specific arbitration agreement and whether the state's Wrongful Death Act, which also requires consolidation, should not be pre-empted.

"If you conclude that the FAA requires pre-emption, then you need to follow that the FAA trumps state rules. But we already knew that," Trzcinski said. "I don't think there are any general takeaways from this."

Trzcinski said pre-emption considerations are extremely fact-specific, and the broad language in Wecht's opinion showed that reasonable minds can differ on pre-emption.

"I get the impression that the majority felt its hands were tied, and that, although it might not agree with the U.S. Supreme Court's jurisprudence, and there are a lot of commentators critical of that jurisprudence, that it's really up to the U.S. Supreme Court, or Congress to change that," Trzcinski said.

Both Fishbein and Trzcinski, however, agreed that although nursing home litigation is on the rise, these arbitration issues will likely see a drop-off in the courts, given a new rule issued by the Center for Medicare and Medicaid Services that will prohibit the use of predispute arbitration agreements.

"Going forward, it may be very limited," Fishbein said.

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