THE DAILY RECORD

Friday, May 25, 2018 / Volume 110 / Number 102 / $2.00 • Western New York's trusted source for legal and real estate news

Civil LITIGATION

Binding arbitration on the job and in nursing home admissions

Binding arbitration remains on the rise. Indeed, there is a high likelihood that only a small percentage of the readers of this article will have not already, in some area of their life, consented and otherwise agreed to private, binding, predispute arbitration. Those who have not will have made various affirmative decisions to live without a credit card, a cellphone and cable or internet services, and to refrain from online shopping.

Just this month, the Supreme Court ruled in a 5-4 decision that employers can block employees from joining together to take legal action over workplace issues via an arbitration clause in employment contracts. The decision is another in a line of cases giving favorable treatment to predispute arbitration agreements. This article discusses recent challenges to arbitration provisions in employment contracts, consumer contracts and nursing home admissions.

High court upholds class waivers in employment contracts

On May 21, the Supreme Court ruled that companies may prohibit workers from class actions through employment contracts and insist that employee disputes be resolved in arbitration rather than in court. In recent years, workers had argued that the National Labor Relations Act prohibits class waivers in arbitration language in employment agreements. After three federal courts split on the issue, the Supreme Court heard argument on appeals in all three cases: Epic Systems Corp. v. Lewis, Ernst & Young v. Morris and NLRB v. Murphy Oil USA.

Epic Systems, a health care software provider, sought enforcement of the arbitration provisions, and argued that employers and employees need to know whether class waivers in arbitration clauses will be enforced. In turn, the workers argued that the labor relations statute confirmed the right of workers to pursue joint legal claims and, therefore, class waivers are illegal and unenforceable. The ruling in Lewis, Morris and Murphy Oil is consistent with several decisions endorsing arbitration provisions in contracts with consumers.

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Arbitration in consumer contracts

In AT&T Mobility LLC v. Concepcion (2011), the Supreme Court ruled that the Federal Arbitration Act (FAA) permits businesses to avoid class actions by insisting on individual arbitrations in customer contracts. In Concepcion, a couple who objected to a $30 charge relating to what was originally marketed as a free cellphone, was blocked from joining with other unhappy customers to form a class.

Arbitration in nursing home agreements

In 2012, the Supreme Court, in Marmet Health Care Center v. Brown, Clarksburg Nursing Home & Rehab Ctr, LLC, added another FAA decision enforcing an arbitration clause in a nursing home contract. The dispute in Marmet arose from claims contending that patient deaths were attributable to nursing home negligence. The nursing homes moved to refer the cases to arbitration, relying on arbitration language in admission agreements. The state court adopted a rule holding that as a matter of public policy, it was unacceptable for disputes about personal injury or wrongful death to be covered by a pre-dispute arbitration agreement. The Supreme Court reversed. The Mamet Court held that federal law preempts any state law that purports to prevent the arbitration "of a particular type of claim."

The 2016 Rule (banning mandatory arbitration in LTC admission agreements) and the 'New' Rule (reversing the ban)

In the final year of the Obama administration, the Center for Medicare and Medicaid (CMS) issued a new rule prohibiting participating long-term care (LTC) facilities from entering into "pre-dispute binding arbitration agreements with their residents or their representatives." The rule, which was made effective Nov. 28, 2016, was immediately challenged and enforcement was blocked by an injunction. During the pendency of the appeal, the current administration took office and, shortly thereafter, published a proposed revised rule effectively reversing the 2016 Rule banning nursing home arbitration.

In May 2017, the Supreme Court rejected a Kentucky rule that invalidated arbitration agreements signed under a power of attorney. At issue in Kindred Nursing Centers Ltd Partnership v. Clark, was the binding arbitration language of a

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nursing home admissions contract. The Court reviewed and then rejected a rule which was adopted by the Kentucky Supreme Court that required "an explicit statement before an attorney-in-fact… could relinquish [the right to a jury trial] on another's behalf." The decision confirms the Supreme Court's distaste for a state law or rule that might prevent arbitration of a particular claim.

Most recently, the U.S. District Court in Massachusetts in GGNSC Chestnut Hill LLC v. Schrader (Mar. 31, 2018) considered a similar fact pattern, under which the resident's power of attorney (POA) signed a nursing home agreement, but then challenged the nursing home's effort to compel arbitration of a wrongful death claim, notwithstanding language in the admissions agreement providing for arbitration. The POA argued that that the arbitration provision was unenforceable. In rejecting that argument, the Schrader Court concluded that such a ruling would be inconsistent with the FAA. In ruling for the LTC facility, the District Court noted the Supreme Court has consistently held that state laws that "impede the ability… to enter into arbitration agreements… flout[] the FAA's command to place those agreements on an equal footing with all other contracts."

Arbitrations in New York nursing home admissions

In New York, the Appellate Division, First Department, reached a similar conclusion in Friedman v. Hebrew Home for the Aged at Riverdale (2015), in which the appellate court declared that the FAA preempts Public Health Law section 2801-d ("private actions by patients of residential health care facilities"). The nursing home defendant in Friedman sought to stay a negligence action pending arbitration, pursuant to the admission agreement's arbitration clause. The trial court had denied the facility's motion to stay. The Appellate Division, First Department unanimously reversed, declaring that "the arbitration clause is not unconscionable, either procedurally or substantively."

The debate over enforceability of mandatory arbitration in nursing home admissions is likely to continue, and the likelihood of a legal challenge to the enforcement of final rules from CMS on arbitration in nursing home admission agreements remains high. Still, in light of the most recent ruling in Lewis, Morris and Murphy Oil, the law continues to favor arbitration, and it appears that binding arbitration agreements are here to stay for the foreseeable future.

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