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SCOTUS Grant in Nursing Home Arbitration Case 'Mystifying'

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The U.S. Supreme Court's recent decision to review a nursing home case is a bit of a head-scratcher for experienced attorneys who follow arbitration issues (*Kindred Nursing Ctrs. LP v. Clark*, U.S., No. 16-32, *review granted* 10/28/16).

The case presents the question whether state contract law can prevent nursing homes from forcing arbitration on relatives of former residents who bring wrongful death claims and other allegations.

The top court's Oct. 28 grant of review comes one month after a federal agency issued a final rule that will regulate nursing home contracts, effectively making cases like this moot, attorneys tell Bloomberg BNA.

An intriguing possible explanation for the court's interest in a case that will soon be trumped is that it wants to address contract formation issues, a strategy some plaintiffs and state courts have used to get around mandatory arbitration clauses.

If so, the attorneys said, the case might give the justices a chance to begin walking back their strong pro-arbitration decisions of recent years.

The case, brought by Kindred Nursing Centers, challenges a Kentucky Supreme Court decision that found a resident's representative can't agree to an arbitration clause and give up the right to a jury trial unless the resident expressly gave the representative that right.

The case is one battleground in an ongoing war between nursing homes and consumer groups about whether pre-admission arbitration agreements are enforceable.

Odd Timing. Plaintiffs' attorney Deepak Gupta called the grant ''pretty mystifying.'' He's the founding principal of Gupta Wessler PLLC, a Washington public interest law firm representing consumers and workers.

Last month, the Centers for Medicare & Medicaid Services (CMS) issued a final rule that prohibits nursing homes from including arbitration clauses in their admission agreements. The rule is set to take effect Nov. 28.

That means that *Kindred* and cases like it are about to become a thing of the past.

Gupta said it's puzzling that the court would choose to weigh in after CMS issued its rule. ''The Court was informed of the new rule (and litigation challenging the rule) and decided to grant the case anyway,'' he said.

Even the nursing homes didn't really seem to want the court to review the case, Gupta said. Their pitch was for the court to reverse the decision below in light of the Supreme Court's decision last term in *DIRECTV Inc. v. Imburgia*, 136 S.Ct. 463 (2015).

There, the court reinforced its earlier pro-arbitration rulings and held that the Federal Arbitration Act preempted the California Court of Appeal's interpretation that state law rendered a class-action waiver in a satellite television contract unenforceable.

Defense attorney Liz Kramer agreed that the grant was odd, but said the court may have wanted to address a ''lag-time issue'' that created by the new rule

The rule will only affect new nursing home agreements entered after Nov. 28. ''There will be a lot of wrongful death or negligence cases in nursing homes that still arise out of previous admission documents,'' Kramer said. ''I bet we still have even five years of those.''

Kramer represents businesses in complex litigation for Stinson Leonard Street LLP in Minneapolis, and writes for her firm's blog Arbitration Nation.

Contract Formation, Other Explanations. Broader possible explanations also exist.

Kramer said several state courts have found ways not to enforce arbitration agreements in nursing home admission documents, so this issue may be of particular interest to the court.

A recent spate of similar rules banning arbitration, from agencies such as the Consumer Financial Protection Bureau and the Department of Education, are starting to be challenged in court. The court may be thinking, ''If this CMS rule doesn't stick, maybe we should have something out there about this,'' Kramer said.

Another possibility Kramer floated is that the court will use this case to address a trend among state supreme courts—finding a contract was never formed to avoid enforcing the arbitration clause.

Basically, Kramer said, these courts ''shoehorn the plaintiffs' argument into a formation bucket and use that as a way of saying the courts get to decide.''

The nursing home case raises the question of whether a valid arbitration agreement was formed if the residents' representatives never had the authority to bind the residents to arbitration.

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But Kramer said the line delineating what constitutes an issue of contract formation is slippery.

Kramer's formation hypothesis would help explain why the court hasn't acted yet on a certiorari petition in *TAMKO Bldg. Prods. Inc. v. Hobbs*, U.S., No. 15-1318.

That case asks the court to decide whether an arbitration clause printed on a product's packaging created a binding agreement—another contract formation question.

The Supreme Court has relisted the petition for consideration twice, which is often a signal that the court will agree to review a case.

But it wasn't relisted after the court's most recent conference. That may indicate that the court will hold the petition until it has made a decision in the nursing home suit.

Predictions? Kramer said she would be surprised if the court sided with the plaintiffs here because it has taken a pro-arbitration hard line recently. ''They haven't found any arena in which it isn't appropriate to have an arbitration agreement.''

But Kramer conceded that this case may present an opportunity for the top court to buck this trend.

More of a consensus may exist in the nursing home context that arbitration isn't appropriate, she said. She pointed to a 2009 American Bar Association resolution against arbitration agreements in nursing home admission documents.

Gupta added that the justices may not fall along the usual party lines in this case because Justice Clarence Thomas's vote isn't really in play.

Thomas takes the view that the FAA doesn't apply in state court, Gupta said. ''So, even if he might otherwise be inclined to agree with his fellow conservative justices that the state-law rule here is preempted, he would not take that position in this case.''

With Thomas out of the picture and Justice Antonin Scalia no longer on the court, the nursing homes need a vote from one of the four liberal justices to uphold the arbitration clause in this case, Gupta said.

He said this raises two possibilities. Either the court is using the case as ''an opportunity to curtail circumvention of the Court's arbitration decisions (as in *DIRECTV*),'' which would be a win for the nursing home.

Or the court is using it as ''an opportunity to clarify the FAA's application to state law on consent, and hopefully give more leeway to the states,'' which is positive for the plaintiffs, he said.

Wrongful Death Claims at Issue. In the case before the court, representatives of two former residents of the nursing home sued it for the residents' wrongful deaths.

The representatives signed arbitration agreements on behalf of the residents when they were admitted, but their powers of attorney from the residents didn't contain express authority to do so.

A Kentucky trial court found that state contract law required such authority before the representatives could be bound by the arbitration agreements. It then denied the nursing home's motion to compel arbitration. The state supreme court agreed and the nursing homes then asked the Supreme Court for review.

Robert E. Salyer of Wilkes & McHugh P.A. in Lexington, Ky., represents the residents' representatives.

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