

Responding to a Motion to Compel Arbitration in a Nursing Home Negligence Case

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Elderly citizens of Nebraska, sick and incapacitated enough to require 24-hour nursing care, should never be asked to consider surrendering their basic constitutional right to a jury trial on the very day they are so ill they need to be admitted to a nursing home. Yet, this is exactly what is happening in Nebraska and every other state in the country on a daily basis.

The Seventh Amendment to the United States Constitution states:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law. *U.S. Const. amend. VII.*

The Constitution of the State of Nebraska declares:

The right of trial by jury shall remain inviolate, but the Legislature may authorize trial by a jury of a less number than twelve in courts inferior to the District Court, and may by general law authorize a verdict in civil cases in any court by not less than five-sixths of the jury. *Neb. Const. art. I, sec. 6 (1875);*

I have never talked to an injured nursing home resident or a bereaved heir that remembers the document that gave away their constitutional right to a jury trial. They recognize their signature and don't deny they signed the document. They simply can't recall the form or the circumstances of signing that particular document.

Universally, they remember a "stack" of paperwork. They recall a nursing home employee handing them paper after paper. They remember being confused, but trusting the documents they signed were needed for Medicare, health insurance plans, meal requests, religious preferences, visitation lists, etc.

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Try to remember a time when you admitted your child to a hospital for any type of surgical procedure or inpatient care. Did you read every page of every document you signed that day? Do you think you could remember what you signed, even a few days later? Where was your focus?

In the past, state legislatures have protected citizens from pre-dispute arbitration agreements in medical care environments. Nebraska's Uniform Arbitration Act (UAA) specifically prohibits arbitration of a "claim arising out of personal injury based on tort." *Neb Rev Stat § 25-2602.01(f)(1).*

It would seem impossible for a nursing home in Nebraska to ever successfully motion a Court to dismiss a negligence or wrongful death lawsuit and compel arbitration for any type of personal injury case, including nursing home negligence or a wrongful death claim. A one page brief citing *Neb Rev Stat § 25-2602.01(f)(1)*

should dispose of the Motion to Compel Arbitration for the rest of the case.

Unfortunately, in the words of ESPN's Lee Corso, "Not so fast, my friend!"

Preemption and the Federal Arbitration Act

Each time I file a negligence or wrongful death case against a nursing home I don't wait for an Answer, I wait to receive "Defendant's Motion to Compel Arbitration and Stay Proceedings" with the language "COMES NOW, Defendant, pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 3. . ."

The trend is clear: Nursing home care involves interstate commerce. If interstate commerce is involved, the FAA preempts any and all state law banning arbitration.

The United States Supreme Court in *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012), unanimously held, using incredibly strong language, "when state law prohibits outright the arbitration of a particular

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type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA (Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*)” *Id.*

Marmet is interesting because West Virginia had an even more specific anti-arbitration statute than Nebraska. West Virginia had a plainly worded anti-arbitration statute banning arbitration of personal injury claims in nursing home negligence cases. *W. Va. Code* § 16-5C-15(c).

Three separate plaintiffs brought actions against Marmet Health Care Center, a West Virginia nursing home, claiming Marmet’s negligence resulted in the injury and death of their family members at the nursing home. All three residents had been admitted to the nursing home through a process that included situations wherein each resident and/or a family member signed an arbitration agreement as part of the admission.

The trial courts dismissed the plaintiffs’ claims and compelled arbitration based on the FAA and the individually signed arbitration agreements. The highest appellate court of West Virginia reversed, holding West Virginia’s

public policy barred a pre-occurrence arbitration agreement in a nursing-home admission contract that required arbitration of a negligence claim that results in personal injury or death. In arriving at this holding, the West Virginia Supreme Court rejected the United States Supreme Court’s interpretation of the FAA, holding that Congress could not have possibly intended the FAA to apply to state court personal injury or wrongful death suits that are only tangentially related to interstate commerce, particularly where a necessary service like health care is involved.

The West Virginia Supreme Court seemed absolutely aware their contrary opinion would be reviewed by the US Supreme Court. The West Virginia opinion was 99 pages long and included a detailed historical examination of West Virginia’s absolute opposition through legislation and case law of all previous attempts to prohibit or limit a West Virginian’s constitutional right to a jury trial in personal injury cases.

For believers in “state’s rights” it couldn’t have been clearer: West Virginia wanted the US Supreme Court to know its citizens, public officials and judicial branch were all standing up against any attempt to limit access to a jury trial in the state of West Virginia for personal injury cases.



The United States Supreme Court reversed. In a four page decision the Court held its interpretation of the FAA preemption was controlling and the state court was not free to disregard its precedent.

“Therefore, if you are going to handle a nursing home negligence or wrongful death case in Nebraska, be prepared to fight the arbitration contract under Nebraska’s common law contract principles because fighting against federal preemption under the Federal Arbitration Act, 9 U.S.C. §§ 1-3 is fruitless.”

The decision was *per curiam* and was issued before any briefing on the substantive merits or oral arguments. The Court based its decision solely on the parties’ arguments as to why the case should be heard in the *certiorari* proceedings. Thankfully, the Court was forced to remand all three cases to the state courts for the inquiry of whether the arbitration

provision was unenforceable under state common law contract principles that were not specific to arbitration and thus not pre-empted by the FAA.

Therefore, if you are going to handle a nursing home negligence or wrongful death case in Nebraska, be prepared to fight the arbitration contract under Nebraska’s common law contract principles because fighting against federal preemption under the Federal Arbitration Act, 9 U.S.C. §§ 1-3 is fruitless.

Attack the Contract

The Nebraska Supreme Court has shown us the way to fight arbitration agreements in a nursing home setting. In *Koricic v. Beverly Enterprises-Nebraska, Inc.*, 773 NW2d 145, 278 Neb 713 (Neb 2009), the Court held “because arbitration is purely a matter of contract, we first determine whether an agreement to arbitrate exists under basic contract principles.” *Id* at 150, 717.

If there is no agreement to arbitrate, there is no contract. If there is no contract, the Federal Arbitration Act is meaningless. The way to defeat a Motion to Stay Proceedings and Compel Arbitration is to fight the contract, not FAA preemption.

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Discovery, Discovery, Discovery

When served with a Nursing Home's "Motion to Compel Arbitration" your response should be to immediately file your own "Plaintiff's Motion for Limited Discovery on Issue of Arbitration" to be heard by the Court at the same hearing as the Defendant's Motion to Compel Arbitration. Provide the Court with all possible arguments against the enforceability of the contract. Seek from the Court the time necessary to discover the evidence that invalidates or confirms the arbitration contract.

Capacity of the Nursing Home Resident to Contract

Ask the Court for permission to conduct discovery necessary to determine the capacity of the nursing home resident at the time the arbitration agreement was signed. Many nursing home residents are admitted because a family physician has already made a determination the resident can no longer make sound judgments necessary to keep them safe in their own home. In addition, many nursing homes conduct assessments in the first 24 hours of admission to quantify the level of care each resident requires. More needs and less capacity can result in a higher payment received from the government. Initial assessments by the nursing home tend to confirm incapacity. You must ask the Court for time to discover medical records necessary to determine capacity.

Lack of Agency or Authority

In the zeal to get arbitration agreements signed, nursing home employees will often have whoever is present with the resident sign all admission documents on behalf of the new resident. On many occasions, the family member who signs the agreement will have no legal authority to contract for the resident. You must ask the court for time to discover agency issues including general and medical powers of attorney. Some facilities will even have their own "power of attorney" forms that may or may not create agency in a contractual sense. You must ask the Court for time to discover issues of agency in cases where the arbitration agreement was signed by someone other than the resident.

Unconscionability

Unconscionability is generally divided into a procedural element and a substantive element. Procedural unconscionability will generally focus on the circumstances surrounding the signing. Facts that need to be discovered include the time allowed to read each document, the location of the signing, the noise level in the area, the eyesight of the signee, physical condition of the signee, misleading "paraphrasing" of the nursing home employee, etc. Without discovery, proving procedural unconscionability is nearly impossible.

Substantive unconscionability focuses on the onerous terms of the arbitration clause, therefore it's more difficult to argue discovery is needed to develop these facts.

Conclusion

When faced with a Motion to Compel Arbitration, avoid the temptation to fight over whether Nebraska's Uniform Arbitration Act or the Federal Arbitration Act applies. A lawyer must look at the Motion for what it is at its core: a dispute over whether the signed arbitration agreement was ever a binding contract under basic contract principles of Nebraska law.

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