

# U.S. Supreme Court Rebuffs Challenge to Nursing Home Arbitration Agreements

Article

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The U.S. Supreme Court on Monday issued a ruling which further demonstrates the Court's view that federal law trumps efforts in the states to attack nursing home arbitration agreements.

Monday's ruling overturned the Kentucky Supreme Court, which had declined to enforce two arbitration agreements executed by residents' family members who held powers of attorney. In the view of the Kentucky court, the agreements were invalid because the powers of attorney did not specifically grant the representative the power to waive the resident's right to a jury trial.

Because that rule specifically targets arbitration agreements, the U.S. Supreme Court held Monday that the rule violates the Federal Arbitration Act, or FAA. The FAA requires courts to treat arbitration agreements as they would any other contract.

The Kentucky case consolidated two negligence lawsuits brought by the families of residents of a nursing home in that state. In one case the arbitration agreement was signed by the resident's wife, who held a power of attorney granting authority to make "contracts of every nature." In the other case the agreement was signed by the resident's daughter, who held a power of attorney providing "full power" to "dispose of all matters affecting me and/or my estate in any possible way," including the power to make all "contracts, deeds or agreements."

The Kentucky Supreme Court held that the right to a jury trial is the only right that the Constitution declares "sacred" and "inviolable." Therefore, the state court reasoned, a power of attorney cannot allow a resident to enter into an arbitration agreement without specifically saying so (the "clear-statement rule").

In overturning the Kentucky ruling, the U.S. Supreme Court held that the FAA preempts any state rule discriminating against arbitration, whether that discrimination is explicit or covert. Illustrating covert discrimination, the Court referred to rules "disfavoring contracts that (oh so coincidentally) have the same defining features of arbitration agreements." The Court overturned the Kentucky rule because it hinges on the waiver of the right to a jury trial, which is the primary characteristic of an arbitration agreement.

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In a footnote, the Court reiterated that state courts can set new rules of law in arbitration cases, as long as the rules apply generally and do not single out arbitration.

The vote in Monday's decision in *Kindred Nursing Centers L.P. v. Clark* was 7-1, with Justice Clarence Thomas dissenting. Newly confirmed Justice Neil Gorsuch did not participate.

Separately, it appears questionable whether a regulation, proposed under President Barack Obama's administration to prohibit pre-dispute arbitration agreements in nursing homes, will become law. In November, a federal judge granted a preliminary injunction against the rule proposed by the U.S. Centers for Medicare and Medicaid Services (CMS). The rule is still on hold, and President Donald Trump's administration, which has vowed to reduce regulations generally, is signaling that it might repeal the rule. As reported in *Modern Healthcare*, the White House's Office of Management and Budget conveyed that message in a recent meeting with consumer organizations.

With the Supreme Court ruling and the questionable status of the CMS rule, nursing homes may continue to offer pre-dispute arbitration agreements that meet the standards for substantive and procedural fairness.

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