NURSING HOME ARBITRATION: GOOD NEWS BAD NEWS

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September 28, 2016 was a whiplash-inducing day in the world of nursing home litigation. That day, the Centers for Medicare and Medicaid Services ("CMS") issued regulations that prohibit facilities that receive Medicare and Medicaid funding from using binding arbitration clauses in long-term care contracts. CMS did not mince words: in its extended discussion of its reasoning, it shared its conclusion that "predispute arbitration clauses are by their very nature unconscionable."[1] That same day, the Pennsylvania Supreme Court issued an opinion in *Taylor v. Extendicare Health Facilities, Inc.*[2] holding that the Federal Arbitration Act preempts Pennsylvania's wrongful death law mandating consolidation of survival and wrongful death claims. Under *Taylor*, an arbitration clause in a nursing home contract must be enforced even if doing so deprives the nursing home negligence victim's survivors of any remedy. Only time will reveal the net effect of these two events. Going forward, it will be important for Pennsylvania practitioners to understand *Taylor's* anatomy.

In *Taylor*, the plaintiffs' decedent died after a course of care rendered, in part, by Havencrest Nursing Center, a long-term care facility owned by defendant Extendicare. In preliminary objections to plaintiffs' wrongful death and survival complaint, Extendicare argued that plaintiffs' claims must be submitted to binding arbitration as provided in an arbitration agreement signed by the decedent's son, himself a plaintiff in the action against Extendicare.

Relying on the Superior Court's decision in *Pisano v. Extendicare Homes, Inc.*,[3] the trial court overruled Extendicare's preliminary objections, finding that plaintiffs' wrongful death claim was not derivative of the decedent's rights, and thus not barred by the decedent's agreement to arbitrate. With respect to plaintiffs' survival claim, the trial court held that Pa.R.C.P. 213(e) mandated consolidation of wrongful death and survival actions, requiring denial of Extendicare's request to sever the survival action and send it to arbitration.

On appeal, the Superior Court likewise relied on *Pisano* to sustain plaintiffs' wrongful death claim, reasoning that -- because the wrongful death claim belongs to the beneficiaries and not to the decedent -- the beneficiaries could not be compelled to abide by the decedent's arbitration agreement.[4]

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More controversially, the Superior Court found that plaintiffs' survival claim – which was derivative of the decedent's rights and was subject to the arbitration agreement – should nonetheless be consolidated with the plaintiffs' wrongful death claim, effectively rendering the arbitration agreement a nullity. The Superior Court found support for consolidation both in Pa.R.C.P. 213(e) and in the Wrongful Death Act, which provides that "any prior actions for the same injures are consolidated with the wrongful death claim so as to avoid duplicate recovery." 42 P.S. §8301(a).

The Superior Court rejected Extendicare's position that Rule 213(e) and the Wrongful Death Act, to the extent that they invalidated the arbitration agreement, were preempted by the FAA. To reach its decision, the Superior Court was required to distinguish *Marmet Health Care Ctr., Inc. v. Brown,*[5] in which the United States Supreme Court applied FAA preemption to annul a West Virginia public policy that prohibited pre-dispute agreements to arbitrate personal injury or wrongful death claims against nursing homes.

As the Superior Court reasoned, Rule 213(e) and the Wrongful Death Act -- unlike the public policy challenged in *Marmet* -- are not anti-arbitration provisions fashioned to prohibit arbitration of wrongful death and survival actions. Rather, the rule and statute are neutral with respect to arbitration and focus instead on consolidation "as a means to avoid inconsistent verdicts and duplicative damages in overlapping claims."[6] As the court pointed out, there is nothing in either the rule or the statute which prohibits wrongful death and survival actions from proceeding together in arbitration where, for example, the wrongful death action is brought not by a wrongful death beneficiary pursuant to 42 P.S. §8301(b), but by a personal representative pursuant to 42 P.S. §8301(d) (a circumstance that would later come to fruition in *MacPherson v. Magee Mem'l Hosp. for Convalescence*[7]).

Although the Superior Court in *Taylor* acknowledged that the United States Supreme Court has sanctioned piecemeal litigation in order to effectuate enforcement of arbitration agreements, the court rejected Extendicare's argument that plaintiffs' survival action could be split from their wrongful death action without creating the potential for inconsistent verdicts and duplicative damages. The court concluded that the state's interest in litigating wrongful death and survival claims together – in tandem with the constitutional right to jury trial held by the wrongful death beneficiaries – required that the wrongful death and survival claims proceed together in court rather than in arbitration.

After the Superior Court decided *Taylor* in April 2015, it did some soul searching on the holding. In a January 2016 decision, the court expressed its discomfort with *Taylor's* "bright-line rule regarding consolidation of wrongful death and survival actions in these skilled nursing facility arbitration agreement disputes." *Burkett v. St. Francis Country House*[8]. Citing to contrary decisions in *Northern Health Facilities v. Batz*[9] *and Lipshutz v. St. Monica Manor*,[10] the *Burkett* panel registered its belief that wrongful death and survival claims are sufficiently different in character so that "piecemeal" litigation is not inherently

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foreclosed. Though constrained to follow *Taylor*, the *Burkett* panel implied that it would have gone the other way if it had the first crack at the issue.[11]

Burkett turns out to have been prescient. The ground is still shaking from the Supreme Court's opinion in *Taylor*, which reversed the Superior Court, holding that the FAA *does* preempt Pennsylvania Rule of Civil Procedure 213(e). The FAA's savings clause would only apply to Rule 213(e) if it were a substantive defense to a contract action, and it is not; it's merely "a procedural mechanism to effectuate the state's interest in the efficient resolution of wrongful death and survival actions in one judicial forum."[12] *Taylor* found that the U.S. Supreme Court has clearly held that an interest in efficiency – as served by consolidating two closely related claims, one arbitrable and one non-arbitrable, into one action – may not override Congress's intent to enforce arbitration agreements: "The Court expressly elevated Congress' intent to enforce arbitration agreements over any concern it bore for efficiency…"[13]

The Court acknowledged it is "striking" that "corporations are routinely stripping individuals of their constitutional right to a jury trial."[14] The Court claimed to "sympathize" with those who point out that "nursing home defendants have reaped significant benefits from channeling medical malpractice claims into arbitration to the detriment of medical malpractice victims."[15] Nonetheless, the Court held that it could not "defy controlling precedent from the United States Supreme Court in order to redress these inequities and deficiencies."[16]

The Majority Opinion carefully documents how the U.S. Supreme Court has turned the FAA into a "preemption juggernaut," as if to explain its own concession that Pennsylvania law is the juggernaut's latest victim.[17] The dissent calls the majority's analysis "apocalyptic." CMS's new regulations, whose kibosh on mandatory arbitration takes effect November 28, 2016, may signal an end to the apocalypse for some. But for people who signed in to nursing homes before then, and for their survivors, and for those in institutions to which CMS's regulations do not apply, Taylor will continue to cast a long, dark shadow.

1. CMS, "Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities," amending amends 42 CFR chapter IV, at 401 (available at https://consumermediallc.files.wordpress.com/2016/09/2016-23503.pdf (accessed October 3, 2016)).
2. No. 19 WAP 2015, slip op. (Pa. Sept. 28, 2016).
3. 77 A.3d 651 (Pa. Super. 2013).
4. 113 A.3d 317 (Pa.Super.2015).
5. 132 S. Ct. 1201, 1202-03, 182 L. Ed. 2d 42 (2012).
6. *Taylor*, 113 A.3d at 325.
7. 128 A.3d 1209, 1215, 1226-27 (Pa. Super. 2015).
8. 133 A.3d 22 (Pa. Super. 2016).
9. 993 F.Supp.2d 485 (M.D.Pa.2014).
10. 33 Pa. D. & C.5th 438, 447 (Pa.C.P.2013) (Bernstein, J.—Philadelphia County).
11. *See also, Christman v. Manor Care of W. Reading PA, LLC*, No. 1226 MDA 2013, 2016 WL 81771, at *6-8 (Pa. Super. Ct. Jan. 5, 2016) (Jenkins, J. concurring) (survival and wrongful death claims should be bifurcated to give effect to nursing home arbitration agreement).
12. *Taylor*, No. 19 WAP 2015, slip op. at 30-31 (Pa. Sept. 28, 2016).
13. *Id.* at 26.
14. *Id.* at 28.
15. *Id.* at 35.
16. *Id.* at 36.
17. *Id.* at 21.

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Having spent 10 years as a writer and editor for business and news publications, winning several journalism awards along the way, Daniel Bencivenga knew he wanted to make a more profound impact in helping people injured by corporate misconduct. He decided to do it through the law and attended Widener University School of Law in the evenings while writing for a series of medical magazines during the day.

After graduating from law school, Mr. Bencivenga began his career as a labor and employment attorney, representing both individuals and unions in complex cases. During this time, Mr. Bencivenga represented hundreds of steel workers in labor disputes resulting from the shutdown of Bethlehem Steel, where 10,000 people would ultimately be displaced as their jobs were moved overseas or to nonunion states. Working with individual clients, Mr. Bencivenga helped shape interpretations of key discrimination statutes including the Americans with Disabilities Act—establishing that the law protects those with conventional disabilities as well as protects those who don't, like burn survivors.

Several years into his career, Mr. Bencivenga began working with the firm's Martin K. Brigham, representing individuals catastrophically injured both inside and outside the workplace. The two helped bring national attention to legal issues affecting the burn community—through successful representation of seriously burned individuals and through the publication of articles relating to the rights of burn survivors.

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