The U.S. Supreme Court’s *Marmet* Decision and Its Potential Impact Upon Personal Injury Claims Against New York Nursing Homes

By Keith L. Kaplan

On February 21, 2012, in *Marmet Health Care Ctr., Inc. v. Brown,* the U.S. Supreme Court invalidated West Virginia’s “public policy” prohibition against predispute arbitration agreements as to personal injury and wrongful death claims against nursing homes. The Court held that such prohibition is inconsistent with, and preempted by, the Federal Arbitration Act (“FAA”), and thus contrary to the FAA’s “terms and coverage.”

This article examines the *Marmet* decision and its potential impact upon the resolution of bodily injury and wrongful death claims against nursing homes in New York, concluding that the state’s statutory prohibition against the arbitration of Public Health Law §2801-d claims, as set forth in Sub-section (8) of the statute, is preempted and invalidated by *Marmet*. This article also concludes that notwithstanding *Marmet*’s repudiation of state law “public policy” prohibitions against pre-litigation agreements to arbitrate, such agreements will be deemed unenforceable by New York courts in certain instances, based upon principles of contract and agency law.

The *Marmet* Decision

*Marmet* stemmed from three personal injury/wrongful death suits against nursing homes in West Virginia. All three cases involved admission agreements containing identical clauses requiring the parties to arbitrate all disputes, except claims as to collecting late payments owed by the patient. Two of the three cases were dismissed at the trial court level, and the third case, involving other issues, was consolidated with those cases before the Supreme Court of Appeals of West Virginia. The West Virginia court held that as a matter of public policy, arbitration clauses in nursing home admission agreements “adopted prior to an occurrence of negligence or wrongful death shall not be enforced to compel arbitration of a dispute concerning the negligence.” The West Virginia court also determined that Congress did not intend the FAA to apply to personal injury or wrongful death lawsuits that “only collaterally derive from a written agreement affecting interstate commerce, particularly where the agreement involves a service that is a practical necessity for members of the public.”

In reversing, the Supreme Court held the West Virginia court’s interpretation of the FAA to be “both incorrect and inconsistent” with precedent. Citing the FAA’s text declaring arbitration agreements to be “valid, irrevocable, and enforceable,” the Court noted that “[t]he statute’s text includes no exception for personal-injury or wrongful-death claims,” requires “courts to enforce the bargain of the parties to arbitrate,” and “reflects an emphatic federal policy in favor of arbitral dispute resolution.”

Additionally, the *Marmet* decision also addressed the West Virginia court’s “alternative” holding that the arbitration clauses were “unconscionable.” In that regard, the Supreme Court noted it was unclear as to what degree the West Virginia court based its “unconscionability” determination upon its incorrect conclusion the arbitration agreement ran afoul of public policy in requiring bodily injury and wrongful death claims to be submitted to arbitration. Accordingly, the Court remanded the cases to permit the West Virginia court to consider whether the arbitration clauses are unenforceable under state common law principles that are not specific to arbitration and preempted by the FAA.

**Marmet’s Potential Impact Upon New York Law**

*Marmet*’s preemption of state law prohibitions against predispute arbitration agreements of personal injury and wrongful death claims against nursing homes will likely alter New York law significantly. The decision eliminates all substantive restrictions against the arbitration of such claims, including those derived by statute or deemed to exist by state common law.

In New York nursing home litigation, plaintiffs have increasingly sought recovery for bodily injury and wrongful death by asserting causes of action for violations of PHL §2801-d, in addition to common law negligence and medical malpractice claims. The PHL §2801-d cause of action permits recovery for “deprivations” of resident “rights or benefits” conferred by any applicable state or federal statute, code, rule, regulation or contract provision. If a nursing home resident is determined to have sustained injury secondary to a PHL §2801-d violation, the statute calls for the awarding of compensatory damages of no less than 25% of the daily per patient rate of payment established under PHL §2807, or if no such rate exists, the average daily total charges per patient for the facility. Furthermore, if an alleged deprivation is determined to be “willful,” or committed with “reckless disregard” of the rights and benefits conferred upon the resident, punitive damages may be imposed.
Critically, Sub-section (8) of PHL §2801-d prohibits the enforceability of predispute arbitration agreements, as it states that “[a]ny party to an action brought under this section shall be entitled to a trial by jury and any waiver of the right to a trial by jury, whether oral or in writing, prior to the commencement of an action, shall be null and void, and without legal force or effect.”21 In light of this statutory prohibition against the arbitration of PHL §2801-d claims, New York nursing homes have generally not included predispute arbitration clauses in their admission agreements, as such clauses would not be deemed enforceable as to PHL §2801-d claims pursuant to the statute’s very text.

The Marmet decision, however, seemingly preempts and invalidates PHL §2801-d(8), as the High Court determined that the FAA preempts state law “public policy”-based prohibitions against arbitration in situations in which the FAA does not prohibit such claims, or similar claims, from being resolved by arbitration. New York courts have headed Marmet, as the Appellate Division, First Department very recently held, in Ayzenberg v. Bronx House Emanuel Campus, Inc.,22 that General Business Law §399-c(2)(a)’s prohibition against arbitration clauses in contracts for the sale of consumer goods is preempted by federal law with respect to transactions “involving commerce” within the meaning of the FAA. Accordingly, New York courts should similarly hold that the FAA likewise preempts and invalidates PHL §2801-d(8)’s prohibition against arbitration of PHL §2801-d claims.

New York’s common law prohibition against the awarding of punitive damages in arbitration proceedings, as espoused in Garrity v. Lyle Stuart, Inc.,23 will not likely invalidate an enforceable agreement to arbitrate PHL §2801-d claims, notwithstanding the potential availability of punitive damages under Sub-section (2) of the statute. In Mastrobuono v. Shearson Lehman Hutton, Inc.,24 the U.S. Supreme Court held that if contracting parties to an arbitration agreement agree to be bound by New York law, without any provision excluding the arbitration of punitive damages claims, the FAA preempts and invalidates the Garrity rule and permits the awarding of punitive damages award at arbitration.25 Accordingly, assuming an arbitration provision contains no restriction on the arbitrator’s authority to award punitive damages, all claims against a nursing home, including claims for punitive damages, can be resolved at arbitration.

Obstacles to the Enforceability of Arbitration Clauses under New York Contract and Agency Law

Notwithstanding the removal of blanket state law prohibitions against pre-suit arbitration agreements, New York nursing homes will still need to establish that a valid, enforceable agreement to arbitrate was effectuated under New York law to compel arbitration, as the question of whether parties are bound to proceed to arbitration is governed by state law.26 The determination as to whether the parties entered into an enforceable agreement to arbitrate is largely fact sensitive and involves the application of state contract law and agency principles. The question of whether the parties entered into enforceable arbitration agreements will be the “battleground” issue before New York courts, as has been the case in other states.

Under New York law, parties will not be compelled to arbitrate absent a “clear, explicit, and unequivocal agreement to do so.”27 In the wake of Marmet, agreements to arbitrate between a nursing home and a mentally competent resident will likely be deemed enforceable, assuming the substantive requirements governing contract formation have been met. Furthermore, if a mentally competent resident assents to an arbitration provision, but subsequently dies, the arbitration provision will nevertheless be binding upon and enforceable against his/her estate representative pursuant to CPLR 7512.28

In many instances, however, nursing home admission agreements are signed by individuals other than the actual resident, such as family members, due to the resident’s lack of mental capacity/legal competency to enter into an enforceable agreement. Occasionally, the individual who signed the nursing home admission agreement is the resident’s legal guardian or attorney in fact, with broad legal authority to act on the resident’s behalf. Very often, however, the person signing the admission agreement is not empowered by a legal document executed by the resident, or by court order, to act on the resident’s behalf. Under such circumstances, New York courts may nevertheless enforce arbitration provisions, upon concluding that the resident was a third-party beneficiary of the agreement, or upon principles of agency, waiver and estoppel,29 among others.

In other instances, nursing home residents of questionable legal competence will sign the admission agreement, thus raising the question of whether an arbitration clause is binding against them and/or their personal/estate representative(s) in future litigation.

Courts in other states have grappled with the above-mentioned factual scenarios and legal issues in deciding upon the enforceability of agreements to arbitrate bodily injury and wrongful death claims against nursing homes, deriving varying results.30 New York courts will likewise need to address these and other fact-sensitive situations in determining whether the parties entered into a valid and enforceable arbitration agreement. Such enforceability issues can only be decided by the courts, not the arbitrators, under New York law.31 Since arbitration clauses have generally not been used in New York nursing home admission agreements, and have been statutorily prohibited as to the resolution of PHL §2801-d claims, there are no reported cases to date as to their enforceability.
Conclusion

Although arbitration appears to offer many advantages to nursing homes, such as the potential for lower damages awards from arbitrators, as compared to juries, as well as streamlined discovery and reduced defense costs, the issue as to the enforceability of arbitration agreements will likely be vigorously contested, requiring litigation in the traditional court system to resolve such issues. Although Marmet removes blanket state statutory and public policy prohibitions against the arbitration of bodily injury and wrongful death claims against nursing homes, New York courts will nevertheless have to decide whether enforceable agreements to arbitrate were effectuated under the specific facts before them, in conformity with principles of contract and agency law. This will likely result in differing results, with the courts directing the parties to arbitration in some instances, while invalidating the contractual arbitration provisions in others.

Endnotes

2. 9 U.S.C. §1
5. Id.
6. Id.
7. 9 U.S.C. §2
12. Id.
13. Id.
14. PHL §2801-d(1).
15. Id.
16. Id.
17. PHL §2801-d(2).
18. Id.
19. Id.
20. Id.
21. PHL §2801-d(8).
22. 93 A.D.3d 607, 608, 941 N.Y.S.2d 106, 108 (1st Dep’t 2012); see also, Trial Health Mgmt of Georgia III, LLC v. Johnson, 298 Ga. App. 204, 679 S.E.2d 785 (Ga. App. 2009), cert. den., Nov. 9, 2009. In this case, the court invalidated a Georgia statute, OCGA §9-9-62, which prohibited pre-arbitration agreements for medical malpractice claims, as preempted by the FAA.
28. See, Jalas v. Halperin, 85 A.D.3d 1178, 1181, 927 N.Y.S.2d 659, 662 (2d Dep’t 2011) (“The issue of whether there is a clear, unequivocal agreement to arbitrate is for the court and not the arbitrator to determine” (citations omitted)).

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