

Westlaw Journal Nursing Home
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Arbitration Agreement

W.VA. HIGH COURT FINDS RESIDENTS' ARBITRATION CONTRACTS UNENFORCEABLE

Brown v. Genesis Healthcare Corp.

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The West Virginia Supreme Court of Appeals has ruled that arbitration agreements signed by nursing home residents prior to any act of alleged negligence may not be used to resolve wrongful-death and personal injury claims in three consolidated suits.

Brown v. Genesis Healthcare Corp. et al., No. 35494; *Taylor v. MHCC Inc. et al.*, No. 35546; *Marchio v. Clarksburg Nursing & Rehabilitation Center Inc. et al.*, No. 35635, [2011 WL 2611327 \(W. Va. June 29, 2011\)](#). The state's highest court said the Federal Arbitration Act, [9 U.S.C. § 1](#), preempts a clause in the West Virginia Nursing Home Act, [W. Va. Code § 16-5C-15](#), that voids any arbitration agreement in a written contract but that the agreement still may be unenforceable where it is substantively and procedurally unconscionable.

The ruling stemmed from three consolidated lawsuits that alleged violations of Nursing Home Act due to negligent acts or omissions by a facility.

In each case a resident or representative had signed an admissions contract that required the resident or survivors to arbitrate all future disputes involving care.

Clarence Brown, a disabled resident of Marmet Health Care Center, signed a new admissions agreement with an arbitration clause eight years after he entered the facility, according to the opinion.

Brown's brother Clayton later sued Marmet for allegedly causing Clarence to develop pressure sores, pneumonia and other injuries that led to his 2008 death. The Kanawha County Circuit Court dismissed the action, ruling that Clayton was required to arbitrate his claims.

Plaintiff Jeffrey Taylor brought wrongful-death and negligence claims against Marmet on behalf of his deceased father, Leo, for injuries including pressure sores and falls at the facility.

The Kanawha County court also dismissed his suit and granted the facility's bid to compel arbitration.

In the third lawsuit, Sharon A. Marchio alleged that Clarksburg Continuous Care Center caused her mother to suffer severe urinary tract infections, dehydration and pneumonia before her 2006 death.

Clarksburg moved to dismiss the suit in favor of arbitration, but the Harrison County Circuit Court declined to rule on the motion and certified a question to the Supreme Court of Appeals regarding whether the Federal Arbitration Act preempts the state's Nursing Home Act.

The state law provides that a waiver of a resident's rights to commence an action under the statute shall be null and void as contrary to public policy.

The Supreme Court of Appeals granted the plaintiffs' bid to review the question.

The high court agreed that Section 2 of the FAA preempts state laws and doctrines that deliberately impede the rights of private parties to agree to arbitration. However, the savings clause in Section 2 permits generally applicable contract defenses such as fraud and unconscionability, the court said.

“Congress did not intend for the FAA to be ... applicable to personal injury or wrongful-death suits that only collaterally derive from a written agreement that evidences a transaction affecting interstate commerce,” Justice Menis Ketchum wrote in the opinion.

Because nursing home arbitration agreements plainly involve a public service, they should not compel arbitration of a dispute involving negligence where the contract was adopted prior to the allegedly negligent occurrence, the court said.

The high court reversed the lower court orders in the Brown and Taylor suits, finding the agreements were unconscionable. The agreements exceed the reasonable expectations of an ordinary person admitting himself or a loved one to a facility, the court said.

The arbitration clause in a nursing home admissions contract is not a commercially reasonable contract term; a person would not expect the agreement to contain a waiver of his or her right to a civil action, the opinion says.

The high court remanded Marchio's suit to the trial court for a ruling consistent with the opinion.

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Company: Marmet Health Care Center
Company: Clarksburg Continuous Care Center Inc.
Judge: Menis Ketchum

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