



## Supremes Rebuke West Virginia's Highest Court

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This was the message the U.S. Supreme Court made clear in its *per curiam* opinion in last month's *Marmet Health Care Center v. Brown*, in which the court rebuffed West Virginia's attempt to carve out an exception to the FAA.

*Marmet* involved three separate negligence suits brought by family members of nursing home residents. The residents had required extensive nursing care and ultimately died, and the family members claimed the deaths were caused by the nursing homes' negligence. In all three cases, the family members had signed admission agreements with the nursing homes on behalf of the patient, requiring the parties to arbitrate all disputes except for claims to collect late payments.

A state trial court dismissed two of the suits, and the Supreme Court of Appeals of West Virginia (the state's highest court) consolidated the two on appeal with a third that was before the court on other issues. The West Virginia court held that an arbitration clause in a nursing home admission agreement that is adopted *before* any acts of negligence that result in a personal injury or wrongful death, "shall not be enforced to compel arbitration of a dispute concerning the negligence." The state court based its decision on West Virginia public policy.

The court's explanation for its holding was a shot across the bow of U.S. Supreme Court FAA jurisprudence. According to the West Virginia court, the FAA did not preempt West Virginia's public policy against these types of nursing home pre-dispute arbitration agreements because the U.S. Supreme Court's interpretation of the FAA was "tendentious" and "created from whole cloth."

Perhaps anticipating a less-than-favorable review of its decision, the West Virginia court included an alternative justification for its holding. That is, that the particular arbitration clauses at issue were unconscionable and therefore unenforceable as a matter of law.

The U.S. Supreme Court predictably rebuked the West Virginia court's decision, calling it "both incorrect and inconsistent with clear instruction in the precedents of this Court." The Court concisely noted the FAA's provision that arbitration agreements in a contract "evidencing a transaction involving commerce...shall be invalid, irrevocable, and enforceable..." with no exceptions for personal injury or wrongful death claims.

The Court pointed out that it affirmed this rule as recently as last term in *AT&T Mobility LLC v. Concepcion*, when it held that state law cannot prohibit parties from agreeing to arbitrate a particular type of claim – such a rule will always be displaced by the FAA.

The FAA, the Court went on, “requires the courts to enforce the bargain of the parties to arbitrate,” and it “reflects an emphatic federal policy in favor of arbitral dispute resolution.” As for the alternative holding, the Court questioned its validity as well, noting it rested, in part, on the same reasoning as the primary holding.

Ultimately the holding was vacated and the case remanded for the West Virginia court to consider whether the arbitration clauses were unenforceable based on principles not preempted by the FAA.