Nursing & Assisted Living Facility *Professional*

"NEWS AND VIEWS YOU CAN REALLY USE"

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SENT EACH MONTH TO YOU AS A MEMBER OF THE HEALTHCARE HEROES

THE HAT ADVANTAGE

HAIL TO THE VICTORS VALIANT – SCOTUS RULES ON ARBITRATION

No "Disfavored Treatment" for Arbitration Agreements

By Special Guest Contributor – Whitney Goode, Esq.

I work with a Michigan Wolverine fan with a key chain that plays the Michigan fight song. We hear "Hail to the Victors Valiant" at all times in the office. On May 15, 2017, the Supreme Court of the United States decided *Kindred Nursing Centers, L.P. v. Clark* and I "played" the key chain to celebrate the holding that state courts may not single out arbitration agreements with "disfavored treatment."

Recall in February, Rebecca's newsletter provided an overview on various arbitration regulations and laws developing in the long-term care industry. She reported that on October 28, 2016, the United States Supreme Court granted a review petition in a case in which the Kentucky Supreme Court refused to enforce arbitration agreements in a nursing home case. Oral argument before the Supreme Court were held on February 22, 2017 and the Court issued its favorable opinion on May 15, 2017.

The case, *Kindred Nursing Centers Limited Partnership v. Clark*, involved to nursing homes attempting to compel arbitration of wrongful death and personal injury claims by estates of deceased residents. In the consolidated cases, someone with a power of attorney for a deceased resident signed admission documents that included an arbitration agreement. However, Kentucky required that a power-of-attorney specifically authorize the agent to waive a jury or court trial in order to validly form an arbitration agreement, and these two POAs did not have that language. The Kentucky court refused to infer the agent's "authority to waive his principal's constitutional right to access the courts and to trial by jury" unless that power was "unambiguously expressed" in the power-of -attorney document.

*The question before the Supreme Court was "Whether the FAA preempts a state-law **clear statement rule** that singles out arbitration by requiring a power of attorney to expressly refer to the waiver of the right to a jury trial before the attorney-in-fact can bind the principal to an arbitration agreement."*

The Federal Arbitration Act requires state courts to place arbitration agreements on an "equal footing" with other contracts and invalidates defenses that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."

Applying the rule summarized above, the Supreme Court held that the Kentucky decision must fail because the state court "adopt[ed] a legal rule hinging on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial." As the opinion puts it, "[s]uch a rule is too tailor-made to arbitration agreements—subjecting them, by virtue of their defining trait, to uncommon barriers."

In the end, the Supreme Court reversed the Kentucky Supreme Court's opinion as to the power of attorney which specifically provided for the ability to institute legal proceedings and deprive of all assets. As to the second POA, the Supreme Court remanded the case to the trial court to determine whether the court would have enforced the power of attorney, which did not have specific language to dispose of legal matters, as the lower court did not take specifically state that the arbitration was denied based on the clear statement rule. It will be up to the Kentucky trial court to make a determination whether the arbitration will move forward.

The Supreme Court now forbids not only a law "prohibiting outright the arbitration of a particular type of claim," but also "any rule that *covertly* accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." The opinion represents a strongly worded warning to the states—and especially state judiciaries—that formalistic attempts to invalidate arbitration agreements will not be tolerated.

While public policy pursuant to the FAA favors contractual arbitration provisions, courts have been more reluctant to enforce them in a healthcare lawsuit. However, the Supreme Court's decision shows its support of the FAA and arbitration as a practice in the long-term care industry. If the Supremes' decision is an indicator of how the Supreme Court may decide the challenge to the CMS prohibition on mandatory arbitration, the decision will be positive for the long-term care industry.

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Pathway to Rehabilitation Excellence

By Gina Tomcsik
Director of Compliance
Privacy Officer

What's the Secret Code?

What is the difference between a medical diagnosis and a treatment diagnosis? How do we select the correct medical diagnosis on therapy evaluations? These are questions that therapists ask all the time. Why do therapists struggle in this area? Because therapists are not coders. Therapists receive little to no training in school and in clinical affiliations. So why is everyone concerned about therapy coding? The answer is plainly simple! Skilled nursing facilities are under extreme scrutiny. Defending against technical denials, which occur at the time of claim submission, due to coding edits is imperative to avoid the extensive time and resources and possible revenue cycle implications of the appeals process.

Let's look at the difference between medical and treatment diagnoses.

Medical Diagnoses	Treatment Diagnoses
Part A: Admitting diagnosis to the hospital and the reason for the admission to the SNF. Usually assigned by the facility prior to/upon admission to the facility	Determined by the evaluating therapist based off evaluation/assessment
Part A: All disciplines use the facility selected primary medical diagnostic code(s) that will be used to bill Medicare for the SNF services	Should clearly relate to the identified functional limitations the resident is presenting with that was identified during the evaluation process
Is the medical condition (disease or condition) that has caused the impairment in function (signs and symptoms)	Best presents the signs, symptoms, condition, and/or co-morbidities therapy will be treating
Part B: Event causing diagnosis- the diagnosis representing the change in condition that warranted a referral to rehab services. Therapist selected primary medical code(s) which is linked to the need for the skilled services. May vary from one discipline to another	Often, there will be more than one treatment diagnosis since more than one underlying impairment and/or functional deficit is being treated
Important to add any other pertinent medical ICD-10 codes which directly relate to the therapy. These reflect the medical complexity	Include all treatment diagnoses that reflect the signs and symptoms and resulting impairment that therapy will be working to improve

Physical and occupational therapists often use the underlying impairment of muscle weakness for a treatment diagnosis because muscle weakness causes many functional deficits and impacts every aspect of the physical and occupational therapy plan of treatment. Even though muscle weakness is a major player, it's not alone. Therapists treat a multiple of underlying impairments and functional deficits such as lack of coordination, difficulty walking, joint stiffness, low back pain, spasm of muscle, contracture, neuralgia, laxity of ligament, pain in limb, kyphosis, abnormality of gait, facial weakness, edema, vertigo, dysphagia, pressure ulcer, and aphonia to name a few.

Therapists will need to enhance their knowledge of the treatment diagnoses that are available to them under ICD-10 and realize there is not one secret code to use. On the contrary, there are multiple.

For more information, please contact Gina Tomcsik, Director of Compliance, Functional Pathways at gtomcsik@fprehab.com or call 865-531-2204. You may also discover more at www.functionalpathways.com

Getting on the Same Page by Paige Hector, LMSW

Does Your Facility Have a Vision?

Perhaps you've heard this fable. A man approaches a bricklayer and asks what he is building to which the bricklayer replies, "a wall." He approaches the next bricklayer, poses the same question and receives the answer, "I'm building a cathedral to honor God." This is not a religious story but a story of vision. How is it that one person is building "a wall" whereas another person on the same job, doing the same task, is building a place of worship?

To me, this fable applies to our nursing homes.

What is the vision of your home? I'm not talking about the vision statement that's posted on the wall and the obligatory admission materials, the statement that no staff member can recall or explain how it applies to them. I'm talking about identifying the purpose, the heart, of the staff that show up every day and devote their energy, their time, and their work in this very special place. If you asked each staff member what they do, you'll likely hear "I work in the kitchen," "I'm a nursing assistant*," "I'm a nurse," "I'm a social worker," "I'm the head of maintenance" or "I order supplies." Sure, all that is true. That's. What. They. DO. But, what is the common vision or purpose of their labors, the reason for all that *doing*?

"What is the vision?" is not solely for leadership to answer or one that necessarily requires time in a retreat. What it does require is leadership asking the question and then listening to what staff says. Find the commonalities, involve staff in a larger dialogue to identify that common vision that brings them to work every day. What is it about your facility that's special, that makes people want to work *and* live there? From the first tour, to the midday snack to the wounds being dressed, air conditioners fixed, floors waxed, meetings attended, dishes washed, bodies cleaned, orders written, orders noted, laundry folded, shelves stocked, contracts negotiated, movies shown, payroll submitted, hands held, med lists reconciled, appointments made, pain relieved, therapy provided, death honored and so much more.

Here's my vision. I would love to walk into a nursing home and ask ***any*** staff member, no matter their job description, what they do there and hear something like this, "I'm taking care of some of the most vulnerable people in my community and providing a loving home for them." Or, "I'm part of a great team that takes care of people who need my help."

Those words speak volumes to me but they must be true and seen in action. To say those words and not understand the connection between the actions that make them come true will render them hollow and result in cynicism from staff, residents and families. What we are talking about is the culture of your facility. What does it look like? What does it sound like (think about how staff greets guests, interacts with families and answers the phone)? What does it FEEL like?

I'm reading a book with my 11 year old son called The Secret Life of Lincoln Jones by Wendelin Van Draanen. It's a story about a kid around that same age who with his mother moves to a different city to escape an awful home situation and both have to start over in school and work. The mom happens to work in a nursing home and much to my surprise, a great deal of the story takes place in the nursing home. So cool! Although I cringe at the term Lincoln uses to describe the residents, he calls them oldies, I also marvel at the life lessons he learns from them as well. The story has hilarious moments when my son and I are laughing out loud (in fact, so hard one time that I couldn't continue reading!) and then other times when I have to pause reading to him to wipe my eyes.

Don't worry, I won't be a spoiler in case you want to read the book but I am going to include a very special passage that made me choke up last night when I read to my son. There was a particularly crazy scene at the Thanksgiving meal when all heck broke lose. Enough said! The son witnessed his mother handling the chaos with grace and bringing dignity to the situation. The next day, he struggled with the words to tell his mom how he felt and when he was able to find his voice blurted this out to his mom. "You get up in the dark and don't come home 'til after dark. You work all day at makin' other folks comfortable and dignified, which leaves you tired to the bone and feelin' undignified. And I know the reason you work so hard isn't just to give oldies dignity. It's 'cause of me. 'Cause you want me to have a life where I'm safe and don't have to hide under the bed. And if that means changin' big ol' messy diapers, that's what you're willing to do. What I should have said last night was that I'm proud of you. I think you're a wonder."

Nursing home staff, I'm proud of all of you. I'm thankful for the jobs you do and for the passion you do them with. May we all continue to find new ways to work together as an inclusive team and stay true to our vision.

*NOTE: I used to organize an awards ceremony to honor nursing assistants. Each year I had the keynote speaker read a poem called "I'm Only a CNA: The Value of Being a Nursing Assistant." I just read it again and it will always be one of my favorites. Here's a link, http://www.spiritlakeconsulting.com/SLC/sharedfiles/library/books/onlyaCNA.pdf.

Editor's Note: Paige Hector presents a brand-new webinar: "Information Sharing with Families: An Art or a Skill?' on Thursday June 22. This educational offering has been reviewed by the National Continuing Education Review Service (NCERS) of the National Association of Long Term Care Administrator Boards (NAB) and approved for 1.25 clock hours and 1.25 participant hours. Two presentations will be offered. Discover more and register at WebinarLTC.com or at 800-807-4553. Space is limited to the first 110 registrants for each session so act now.

Paige Hector is a clinical educator, who gives workshops and seminars across the country on diverse topics including clinical operations for the inter-professional team, meaningful use of data, advance care planning, refusal of care, documentation and care plans. She is skilled at inspiring staff to critically evaluate their own organizations and then gives them the resources and guidance to make necessary changes. Contact Paige at 520-955-3387 or at paigehector@gmail.com plus you more discover more about her at www.paigeahead.com.

The HAT Advantage continued from page 1

The Supreme Court also pointed out that the Kentucky rule was clearly meant to impact only arbitration agreements as Kentucky's clear statement rule did not suggest explicit authorization as needed before an attorney-in-fact can sign a settlement agreement or consent to a bench trial or her principal's behalf.

Respondents had argued the FAA had no application to contract formation, that only state law controlled that question. The Supreme Court quickly disabused the respondents, and all state courts, of that notion, reasoning that the purpose of the FAA would be completely undercut by the rule: "If the respondents were right, States could just as easily declare *everyone* incompetent to sign arbitration agreements.

The Court's decision to clearly state that courts cannot invalidate arbitration agreements based on their (necessary) waiver of the right to a jury trial also cuts off a trendy argument in state courts. New Jersey courts, for example, have invalidated arbitration agreements in recent years based on their failure to clearly advise consumers they are waiving their rights to jury trials.

"If the respondents were right, States could just as easily declare *everyone* incompetent to sign arbitration agreements. (That rule too would address only formation.)" In doing so, the Court cut off another avenue for avoiding the FAA. (In my view, though, the slippery slope argument relied on by the Supreme Court also cuts against the formation/validity distinction used to separate which issues are decided in court and which by arbitrators.)

How will this opinion affect the long-term care industry at the facility level?

This opinion should significantly affect the ability of nursing homes to enforce arbitration agreements in litigation. In many states, nursing homes are met with hostility when attempting to enforce the arbitration agreements. However, the Supreme Court, the law of the land, has stated, once again, that under federal law, the fact that the contract pertains to arbitration cannot, even covertly, be the reason for enforcing the arbitration agreement. Furthermore, the Supreme Court emphasized the importance of the FAA and the strong stand the Supreme Court will take in support of arbitration, even in the healthcare context. In addition, the opinion further supports the application of arbitration agreements in the nursing home context.

At the facility level, this opinion indicates that a power of attorney does not have to include specific language regarding waiver of a jury trial for the person to have authority to sign the arbitration agreement. While most states do not require such a provision, the court's opinion gives insight into the Supreme Court's view on attempts by state government to affect the ability to enforce arbitration by enacting a law that affects only arbitration agreements. If the Supreme Court had ruled in the alternative, the impact in the long-term care industry would have been felt far and wide as enforcement of the arbitration agreement would have become much more difficult.

It will be interesting to see how state courts interpret the Supreme Court's view that the FAA does apply to the formation of the contract, as this issue was normally governed by state law. Since this portion of the opinion was not detailed, it is unclear how the Supreme Court intended for State courts to apply this new provision. Does this mean that a nursing home does not have to overcome state law claims about the formation of the contract for enforcing the arbitration agreement? That question remains to be answered but if so, nursing homes will likely be more successful in pursuing arbitration as an alternative form of dispute resolution. In addition, the Kentucky lower court must now address whether in light of the Supreme Court's ruling, the arbitration agreement will be enforced or not.

Despite this favorable opinion, it is still of the utmost importance for any facility to pay close attention to the procedures for presenting arbitration agreements and making sure that the person who signs has authority. Training staff on what "arbitration" actually means is key to employees properly informing families or residents.

As an update on the CMS arbitration ban, the Department of Health and Human Services appealed the preliminary injunction granted by the Northern District of Mississippi. The parties are currently submitting documents to the Fifth Circuit Court of Appeals for their review prior to an oral argument. We expect that an opinion will not come out on this case until the fall of this year. The Supreme Court's ruling will likely impact the Fifth Circuit's opinion on this arbitration ban and hopefully the Fifth Circuit will rule in favor of the long term care industry.

We will keep you updated on the impact of this momentous opinion.

Whitney E. Goode *is a senior attorney in the Memphis, Tennessee office of Hagwood Adelman Tipton. She is a member of the Medical Malpractice and Long-Term Care & Aging Services Practice Groups where she concentrates her practice on insurance defense litigation. She represents health care providers including nursing homes, assisted living facilities, independent living, physicians, and hospitals in matters involving claims of abuse and neglect, negligence, violation of resident's rights, wrongful death, and breach of contract. Additionally, she practices in the defense of medical professionals against claims of professional malpractice and insurance contract disputes. Whitney routinely advises healthcare clients in Alternative Dispute Resolution (ADR) proceedings on matters relating to the scope and enforceability of ADR Agreements. She works collaboratively with clients providing arbitration agreement training, developing arbitration agreement protocols, and writing Alternative Dispute Resolution Agreements.*

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Ohio Nursing Facility Shooting Claims Four Lives

Tragedy struck Pine Kirk Care Center in Kirksville, OH Friday, May 12 when an Active Shooter killed two staff members, Marlina Medrano (a nurse) and CNA Cindy Krantz, inside the building. Also found dead were Kirksville Police Chief Steven Eric DiSario and the gunman Thomas Hartless. The Active Shooter reportedly died of a self-inflicted gunshot wound. Fortunately no residents were physically harmed during the attack.

"This is a very sad situation," says Joseph Murray, whose guidance and direction has helped nursing and assisted living facility staff nationwide become better prepared to deal with Active Shooter scenarios. "There are things employees in our healthcare centers can do to be in the best position possible to survive such an attack, and to help potentially save their residents' lives as well."

Mr. Murray knows whereof he speaks. He is a former New York City policeman and has received certification from the U.S. Department of Homeland Security on Incident Command and Active Shooter. His Active Shooter DVD and Resource Guide Program has been praised for its depth of knowledge and advice to facility staff members.

"Many facilities have staff attend a webinar or a seminar on the subject," Mr. Murray explains, "however after a while what they learned goes away, plus any new employees never received this training in the first-place."

Joseph Murray says that much like doing fire drills, regular on-going training via his DVD program is the answer, and that any new employees should receive this training as part of their orientation.

For more information on Joe Murray's Active Shooter DVD and Resource Guide Program and to watch sample footage, please visit ExtendedCareProducts.com. You may also call 800-807-4553 to discover more.

"There are warning signs to help you know ahead of time that an Active Shooter may strike your building," says Mr. Murray. "But you have to learn and remember what these are before you can do anything to help save lives, including your own."

What is Ransomware?

Ransomware programs are a type of malware. They work by encrypting files on your computer and they are locked to you. The hackers ask you to send money in order to unlock those files. The ransom is typically paid via bitcoin online to a certain location.

Many of these files are disguised as an email attachment that appears to be normal, but they are not. Some are in the form of an email link, asking you to unsubscribe from a mailing list, which leads you to the attachment and then your system being compromised. The worst of all are the ones that use Java plugins with advertisements that run on popular websites like Facebook and Disney. The ransomware enters the computer almost silently and scans the hard drive for files. Once it determines what files to lock, it will make itself known.

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