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'Kindred' Case Highlights SCOTUS' Clash With States Over Arbitration

By Charles Toutant

The U.S. Supreme Court has declared its frustration with state courts that fail to share its views on arbitration, but opinions differ on whether its latest ruling on the subject will compel the New Jersey Supreme Court to change directions.

The justices' May 15 decision in *Kindred Nursing Centers v. Clark* was seen as a rebuke to state courts that strike down arbitration agreements. New Jersey's Supreme Court finds itself squarely in the middle of the conflict with a series of decisions limiting application of arbitration clauses in recent years.

In the *Kindred Nursing* case, the justices overturned a ruling by the Kentucky Supreme Court that invalidated arbitration agreements in connection with two suits filed against a nursing home operator. Rejecting the Kentucky Supreme Court's holding that an arbitration clause is invalid without a clear statement by two nursing home residents that they authorized their representatives to waive the right to a jury trial, the justices said the Federal Arbitration Act pre-empts any state rule that discriminates on its face against arbitration.

For some, the ruling brought to mind the New Jersey Supreme Court's widely cited September 2014 ruling in *Atalese v. U.S. Legal Services Group*, which held that an arbitration provision in a consumer contract was unenforceable because it failed to state plainly that the plaintiff was giving up her right to take her dispute to court.

U.S. SUPREME COURT

PHOTO BY DIEGO M. RADZINSCHI

The Supreme Court ruling has already had an impact in New Jersey—a bill pending in the General Assembly that included a ban on mandatory arbitration agreements in employment had that portion removed before it was voted out of the Assembly Judiciary Committee on May 18 in light of the *Kindred Nursing* decision. The bill, A-4173, seeks to codify the New Jersey Supreme Court's June ruling in *Rodriguez v. Raymours Furniture* that makes it illegal for employers to require employees to forego the two-year statute of limitations for workplace discrimination claims. But a portion of the bill, as introduced, would have made it illegal for an employer to require employees to waive the rights to a jury trial and submit employment disputes to arbitration.

The bill's sponsor, Assemblywoman Marlene Caride, D-Bergen, said she removed the portion of the bill banning arbitration agreements based on the *Kindred Nursing* decision and on a warning from the Attorney General's

Office that that portion of the bill was subject to a challenge.

Caride consented to a removal of the arbitration clause portion of the bill because changing it to address a wider range of circumstances would change its focus. The statute of limitations provision was the primary purpose of the measure, she said. Caride said she would continue to study possible means to address arbitration clauses in employment.

The ruling in *Kindred Nursing*, written by Justice Elena Kagan, suggested the court is frustrated that state courts are not following its directives on arbitration clauses, said Alida Kass, chief counsel at the New Jersey Civil Justice Institute. The message from *Kindred Nursing* is that any rules on arbitration have to be applied in a neutral way, Kass said.

"You'd really hope that, seeing the Kentucky Supreme Court smacked down like that, that the New Jersey Supreme Court wouldn't have to learn the hard way. The theory of *Kindred* seems so on point to invalidate the *Atalese* approach—it's hard to see how *Atalese* can be read to be consistent with the Supreme Court at this point," Kass said.

The Civil Justice Institute and other parties petitioned for Supreme Court review of the *Atalese* decision, which was denied, said Kass. But she thinks the justices would strike down a similar ruling in the future.

"Whatever you think of it, you've got a body of U.S. Supreme Court case law that's being flouted on a regular basis by a number of state courts," Kass said.

Timothy Hegarty
Partner
Zetlin & De Chiara LLP

Timothy Hegarty, who practices construction and commercial law at Zetlin & De Chiara in Caldwell, believes the recent line of cases setting limits on arbitration from New Jersey courts "have it wrong," but he thinks the *Kindred Nursing* case will be limited in application. Still, the justices sent a message in the case about the right to a jury trial being singled out, he said.

"The U.S. Supreme Court, I think, does a great job of saying, look, Kentucky or New Jersey, if you're going to go along this line of reason, you should also pull out other constitutional rights," he said.

Ty Hyderally, a plaintiff-side employment lawyer in Montclair, likewise sees a limited impact in New Jersey from the *Kindred Nursing* case. He remarked on the dissent by Justice Clarence Thomas, who reiterated his belief that the FAA has no application in interpretation of state law or state contracts. Hyderally concurs with that position, which he calls interesting because Thomas "has not appeared to be a friend of employees."

Neil Mullin of Smith Mullin in Montclair, a plaintiff-side employment lawyer, sees the ruling as limited in application to the context of nursing home residents who grant power of attorney to another person.

Mullin said New Jersey's Supreme Court would be bound by the holding in *Kindred Nursing* that the FAA has preemptive effect, but he said *Atalese* is good law because it exists in one of the "nooks and crannies" of arbitration law where states are allowed to issue their own rules.

The *Kindred Nursing* decision was driven by the justices' "insincere mantra" that there is a national policy favoring arbitration, said Mullin. There is no such policy in the FAA, or the Declaration of Independence or the Constitution, he said. Mullin likened the court's position on arbitration to its support for many years of the separate but equal doctrine for blacks and whites in education. "You see states rising up, trying to resist this stripping away of a constitutional right to a jury trial, but in case after case the Supreme Court has struck down these efforts. What's really sad and what will be remembered in history is that the so-called liberal members of the Supreme Court have joined the conservatives to strip away the right to a jury trial," he said. ■

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