In The

Supreme Court of Pennsylvania

No. 19 WAP 2015

DANIEL E. TAYLOR and WILLIAM TAYLOR, AS CO-EXECUTORS OF THE ESTATE OF ANNA MARIE TAYLOR, DECEASED,

Appellees,

v.

EXTENDICARE HEALTH FACILITIES, INC. d/b/a HAVENCREST NURSING CENTER; EXTENDICARE HOLDINGS, INC.; EXTENDICARE HEALTH FACILITY HOLDINGS, INC.; EXTENDICARE HEALTH SERVICES, INC.; EXTENDICARE REIT; EXTENDICARE, L.P.; and EXTENDICARE, INC.,

Appellants.

Allowance of Appeal granted by the Supreme Court of Pennsylvania on September 23, 2015, No. 161 WAL 2015 from the April 2, 2015 Opinion of the Superior Court, No. 2028 WDA 2013, affirming the Order of the Court of Common Pleas of Washington County entered November 20, 2013 at No. 2012 of 6878

AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

STATEMENT OF IDENTITY AND INTEREST OF AMICUS

The American Association for Justice is a voluntary national bar association whose member trial lawyers represent those who have been wrongfully injured. Some American Association for Justice members represent plaintiffs in Pennsylvania, including those with claims against nursing homes alleging negligent or abusive treatment leading to death. The American Association for Justice believes that those seeking legal remedies are entitled to their day in court and that transparency and accountability, which are the hallmarks of the civil justice system, promote investment in safety.

Where an agreement to arbitrate wrongful death and survival claims in a single arbitral proceeding is not enforceable according to its terms, a court may order the claims to be tried in a single judicial proceeding.

The American Association for Justice feels strongly that the families and beneficiaries of the deceased residents of long-term care facilities are entitled to access to the civil justice system. The policy favoring arbitration should not displace state procedural rules of general applicability and burden both claimants and courts with the requirement that they try their case twice.

SUMMARY OF ARGUMENT

1. The Federal Arbitration Act ("FAA") does not guarantee that every agreement to arbitrate future disputes shall be enforced. Nor does a court's denial of a motion to compel necessarily proceed from hostility to arbitration. The FAA requires only that courts place arbitration agreements on an equal footing with other contracts. To that end, § 2 permits courts to invalidate such agreements on grounds that are generally applicable to contracts.

In this case, the courts below denied Extendicare's motion to compel arbitration because to do so would require the court to sever the survival claim from the wrongful death claim arising out of the death of a resident at Extendicare's nursing home, in violation of Pennsylvania's compulsory joinder rule. Contracts generally may be denied enforcement where performance would violate a governmental regulation. Moreover, as the lower court correctly determined, the governmental regulation at issue in this case is a generally applicable, facially neutral rule of procedure. Extendicare can point to no decision preempting such a procedural rule under the FAA.

It is true that a court may not refuse to enforce an arbitration agreement on the basis of a substantive state policy against arbitration, such as unconscionability. But that is not this case. The superior court did not rely on any substantive policy ground adverse to arbitration. Indeed, the court below acknowledged Pennsylvania's public

policy in favor of arbitration. The basis of the decision below was a procedural rule that was not rooted in the merits of the claims, but in the Commonwealth's concern for the proper operation of its courts. The objective of avoiding waste of judicial resources, duplication of legal proceedings, and unnecessary expense to the parties is entirely consistent with the overarching purpose of the FAA to allow parties to agree to streamlined procedures. Indeed, Extendicare's own arbitration agreement required that wrongful death and survival claims be resolved in a single ADR proceeding. It was Extendicare's failure to obtain the agreement of the wrongful death beneficiaries, not the court's hostility, that prevented arbitration of the survival and wrongful death claims in a single proceeding.

Nevertheless, Extendicare complains not only that the superior court erred in this case, but that Pennsylvania courts, at the behest of the plaintiff's bar, have systematically denied enforcement of arbitration agreements drafted by nursing homes. In fact, none of the nine decision cited by Extendicare was based on hostility to arbitration or on a state rule or policy targeting arbitration in the nursing home context. Examination of the facts confirms that in every case, the arbitration agreement failed because of sloppy contracting procedures on the part of the nursing home and its legal counsel.

2. Three United States Supreme Court decisions have held that FAA § 4 affords U.S. district courts no discretion to delay or deny a motion to compel

arbitration pursuant to a valid arbitration agreement, even if the result is "piecemeal" resolution of arbitrable and nonarbitrable claims arising out of the same facts. Section 4 is a procedural rule that is expressly addressed solely to district courts of the United States. The Supreme Court has twice indicated that section 4 does not apply to state courts. Indeed, Congress lacks the constitutional authority to prescribe rules of procedure for state courts deciding state law causes of action.

Whether Pennsylvania's arbitration statute would require the same result reached by the U.S. Supreme Court as a matter of federal law is a question this Court has not addressed. Extendicare has not raised that issue in this case and so has waived it as a ground for reversal.

3. Nor does the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* support a determination that Pennsylvania's compulsory joinder rule is preempted by the FAA. Extendicare's reliance on the Court's statement that the FAA displaces any state law that "prohibits outright the arbitration of a particular type of claim" is misplaced. The compulsory joinder rule is a facially neutral rule of general applicability. The fact that its application may result in denying enforcement of some arbitration agreements is not a ground for preemption. The FAA expressly permits courts to invalidate arbitration agreements on generally applicable grounds.

Concepcion also ruled that a facially neutral state law may be impliedly preempted if it "stands as an obstacle" to the purposes and objectives of the FAA.

Extendicare has not raised this ground for reversal, and so has waived it. If this Court addresses this issue, it is clear that Pennsylvania's compulsory joinder rule is not subject to implied conflict preemption.

At the outset, the Court's "stands as an obstacle" reasoning gained the support of only four justices and so is not binding on this court.

On the merits, the plurality made clear that a facially neutral state law is not impliedly preempted merely because it results in the nonenforcement of some arbitration agreements. Rather, a state law stands as an obstacle to the purposes and objectives of the FAA when it imposes requirements that are wholly incompatible with the fundamental attributes of arbitration. In making this assessment, the plurality in *Concepcion* considered three factors: whether the state rule increased the costs or complexity of the process, whether it increased the procedural formality of arbitrations, and whether it increased the risk to defendants of costly errors.

Those considerations strongly indicate that it is Extendicare's proposal to sever wrongful death from survival claims, rather than consolidation for a single trial, that is inconsistent with the purposes of the FAA. Clearly a separate arbitration and trial for claims arising out of the death of Mrs. Taylor would add to the costs to the litigants, especially to the plaintiffs who must put on their case, including expert testimony, twice.

Secondly, separate dispositions would raise questions concerning the collateral estoppel effect of the arbitral award in the judicial proceeding. The current state of the law regarding issue preclusion in this context is uncertain. The prevailing view is that preclusion is a matter within the discretion of the court, to be decided on a case-by-case basis. Courts are generally more likely to accord preclusive effect to arbitrations that were accompanied by formal procedural safeguards similar to those in judicial proceedings. Consequently, an arbitration to resolve survival claims and a separate trial for wrongful death claims will induce arbitrators and those who design arbitration procedures to adopt more formal, judicial-like procedures to obtain court recognition, undermining a chief advantage of arbitration.

Third, compulsory joinder of wrongful death and survival claims does not deter arbitration; it provides an incentive for nursing homes to obtain the consent of the statutory beneficiaries. However, one purpose of the rule is to protect defendants from the risk of erroneous duplicative damage awards. By removing that protection, the Extendicare proposal undermines the incentive to pursue arbitration. In short, it is not Pennsylvania's compulsory joinder rule, but Extendicare's proposal to sever claims for separate disposition that stands as an obstacle to the objectives of the FAA.

ARGUMENT

I. The Superior Court's Denial of Extendicare's Motion to Compel Arbitration Was Not Based on Hostility to Arbitration, But on a Generally Applicable State Procedural Rule.

A. The FAA does not require courts to enforce all arbitration agreements, but only to place such agreements on an equal footing with contracts generally.

The superior court in this case denied Extendicare's motion to compel arbitration because to do so would result in the arbitration of the survival claim by Mrs. Taylor's estate and a separate trial on the wrongful death claim by her beneficiaries, who were not parties to the arbitration agreement. That result is precluded by Pennsylvania's compulsory joinder rule regarding wrongful death and survival actions. This procedural rule is embodied in Pennsylvania Rule of Civil Procedure 213(e):

> A cause of action for the wrongful death of a decedent and a cause of action for the injuries of the decedent which survives his or her death may be enforced in one action, but if independent actions are commenced they shall be consolidated for trial.

It is also expressed in Pennsylvania's wrongful death statute, where the legislature has required that survival actions to recover for harm to an individual "are [to be] consolidated with the wrongful death claim so as to avoid a duplicate recovery." 42 Pa. C.S. § 8301(a). The court below found "both the rule and the

statute applicable." *Taylor v. Extendicare Health Facilities, Inc.*, 113 A.3d 317, 322 (Pa. Super. Ct. 2015).

Defendant Extendicare and its supporting amicus, Pennsylvania Healthcare Assn. et al. ("Pa. Healthcare"), contend that the lower court did not simply err in denying Extendicare's motion to compel arbitration. They complain that the court acted out of hostility toward arbitration, in violation of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*. They further contend that Pennsylvania lower courts generally, at the instigation of plaintiffs' lawyers, have systematically denied enforcement of valid arbitration agreements entered into by nursing homes. *See* Appellant Extendicare Br. 18 (complaining of the "hostility to arbitration shown by the state courts in Pennsylvania"); Amici Pa. Healthcare Br. 19 (Upholding the superior court "will empower the lower courts to put their own interests, and perhaps agendas, above that of the consumer community.").

Extendicare purports to discern the hand of the plaintiff's bar behind the adverse decisions by Pennsylvania lower courts:

> Even though [attorneys representing plaintiffs] never directly request a ruling invalidating all nursing home arbitrations, they are accomplishing the same result – that is – a legal landscape in Pennsylvania where arbitration agreements in the long term care industry are not enforced.

Extendicare Br. 16. Extendicare further asserts that, "The plaintiff's bar seeks to accomplish this result despite Pennsylvania's well-established public

policy that favors arbitration," *Id*. at 17, and "even though the Pennsylvania courts are bound to follow the FAA to the same extent as the federal courts"). *Id*. at 18 (citing *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984)).[1]

In the view of Extendicare and its supporting amicus, Pennsylvania's compulsory joinder rule is just another of the "devices and formulas [for] declaring arbitration against public policy," which prompted Congress to enact the FAA in 1925. *Id*. at 15 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342 (2011)). *See also* Pa. Healthcare 9 (same).

Extendicare appears to take the view that the FAA guarantees that all arbitration contracts must be enforced at all costs and that a court's failure to do so necessarily proceeds from hostility. To the contrary, the FAA requires enforcement of arbitration agreements, "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. That savings clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses,' . . . but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339 (internal quotation omitted). *See also Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987)

[1] As the American Association for Justice explains in Part II, below, *Southland* held that § 2 of the FAA, which requires courts to enforce written agreements to arbitrate, "save upon such grounds as exist at law or in equity for the revocation of any contract," applies to state and federal courts. The Court made clear that it did *not* include FAA § 4, which is a procedural rule directed at "any United States district court," as applicable to state courts. 465 U.S. at 16 n.10.

(arbitration agreements may be held unenforceable under state law "*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally."). Essentially, the FAA serves as an equal protection guarantee for arbitration contracts. *See also* *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (FAA § 2 "preclude[s] States from singling out arbitration provisions for suspect status."). Such agreements are "as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).[2]

Thus a court may decline to enforce an arbitration agreement on state law grounds, "*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). In this case, even Extendicare's supporting amicus acknowledges that the compulsory joinder rule is "facially neutral" and does "not prohibit arbitration per se." Pa. Healthcare 23. It is a rule that applies generally.[3]

[2] Extendicare states that the instruction in *Moses H Cone Mem. Hosp. v. Mercury Const. Corp*., 460 U.S. 1, 24-25 (1983), that courts have "a healthy regard for the federal policy favoring arbitration," suggests that arbitration agreements should be even more enforceable that other contracts. Extendicare Br at 13 n.5. To the contrary, the U.S. Supreme Court has steadfastly insisted that the FAA directs courts to place arbitration agreements only "on equal footing with all other contracts." *Directv, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015); *Hall St. Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).

[3] Extendicare argues, "The need to consolidate claims in litigation is not a 'ground as exists at law or in equity for the revocation of any contract.'" Extendicare Br. 32. Similarly, supporting

B. Pennsylvania's compulsory joinder rule for wrong death and survival claims is a procedural rule of general applicability and is not based on a state policy against the arbitration of such claims.

Extendicare's "hostility" argument highlights two law review articles, which Justice Scalia in *Concepcion* also cited, which accused California courts of relying on the state substantive policy of unconscionability to evade enforcement of arbitration provisions. Extendicare Br. 15. Extendicare also relies on *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012), in which the Supreme Court summarily reversed a decision by the Supreme Court of Appeals of West Virginia that agreements to arbitrate personal injury or death cases were unenforceable as violative of state public policy. Extendicare Br. 16.

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amicus contends that the court below "did not find the arbitration agreement to be voidable under traditional contract defenses." Pa. Healthcare 12.

Strictly speaking, the arbitration agreement is unenforceable because performance "is made impracticable by having to comply with a . . . governmental regulation." *Restatement (Second) of Contracts* § 264 (1981). This is a ground for nonenforcement of contracts generally. *See, e.g., Hart v. Arnold*, 884 A.2d 316, 337 (Pa. Super. Ct. 2005) (fact that "performance was made impracticable by having to comply with a governmental regulation," "constituted a valid defense to performance" of the contract (citing *Restatement (Second) of Contracts* § 264)). The agreement may also be deemed voidable on grounds of mutual mistake i.e., the mistaken belief that William Taylor's signature was sufficient to bind the beneficiaries to the arbitration agreement, making possible a single ADR proceeding to resolve both the wrongful death and survival claims. *See Restatement (Second) of Contracts* § 152 ("When Mistake of Both Parties Makes a Contract Voidable"); *id*. § 151 cmt. b ("mistake" includes mistakes of law); *see also Step Plan Servs., Inc. v. Koresko*, 12 A.3d 401, 412 (Pa. Super. Ct. 2010) (indicating that Pennsylvania courts have adopted the contract defenses set out in *Restatement* § 152 and § 264).

The court below and the parties correctly focus on whether the underlying state compulsory joinder rule is preempted by the FAA. American Association for Justice will do so as well.

That, of course, is not this case. The superior court below did not deny Extendicare's motion to compel on unconscionability grounds, or indeed on any substantive policy grounds. The court below acknowledged that "Pennsylvania has a well-established public policy that favors arbitration, and this policy aligns with the federal approach expressed in the FAA." 113 A.3d at 324. The court's denial of Extendicare's motion was not based on any substantive policy but on a purely procedural ground, as both Extendicare and its supporting amicus acknowledge. *See* Extendicare Br. 27 ("The Superior Court permitted the application of state procedural rules to act as a barrier to enforcement."); Pa. Healthcare 9 (Rule 213 is "a simple state procedural rule.").

Procedural rules, unlike rules based on substantive public policy, do not address the merits of the dispute, but rather how the court should go about deciding it. *See Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 394 (2010) (A rule of procedure "regulates only the process for enforcing those rights, and not the rights themselves, the available remedies, or the rules of decision for adjudicating either."); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) (Rules of procedure "speak to the power of the court rather than to the rights or obligations of the parties") (internal citations and quotations omitted).

The result in this case was based on no substantive policy – certainly not a substantive state policy against arbitration. It was instead a straightforward

application of a procedural rule based on Pennsylvania's own concern for the proper operation of its courts. *See* Pa. Healthcare 16 ("[T]he Superior court never undertook a public policy analysis, [but] simply applied Rule 213."). Extendicare and supporting amicus suggest that the rule aims to prevent the waste of judicial resources, inconsistent decisions, and the unnecessary expense to the parties of separate actions arising out of the same alleged negligence. *See* Extendicare Br. 24; Pa. Healthcare 15-16. Such concerns are hardly inconsistent with arbitration. "The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. *Concepcion*, 563 U.S. at 344. Indeed, Extendicare's own arbitration agreement requires:

> All claims based in whole or in part on the same incident, transaction, or related course of care or services provided by the Center to the Resident shall be addressed in a single ADR process.

R. 84a, ¶ 4. It is only Extendicare's failure to obtain the consent of the wrongful death beneficiaries, not the court's hostility toward arbitration, that prevented the court from enforcing this provision.

It is true, as Extendicare argues, that *Marmet Health Care Ctr., Inc., v. Brown*, 132 S. Ct. 1201 (2012), "held that a categorical prohibition of pre-dispute agreements to arbitrate personal injury or wrongful death claims was contrary to the terms and coverage of the FAA." Extendicare Br. 16. The Court has on several

occasions held that the FAA preempts "categorical rules" that expressly prohibited enforcement of arbitration agreements. *See, e.g.*, *Preston v. Ferrer*, 552 U.S. 346, 356 (2008) (California law requiring employment dispute covered by arbitration agreement be brought before Labor Commissioner); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56 (1995) (New York prohibition against arbitral awards of punitive damages); *Perry*, 482 U.S. at 491 (California Labor Code requirement that employees bringing wage collections actions be provided a judicial forum regardless of any agreement to arbitrate); *Southland Corp. v. Keating*, 465 U.S. at 10 (California statute requiring judicial consideration of claims brought under the Franchise Investment Law).

This is not such a case. Contrary to Extendicare's assertions, the compulsory joinder rule set out in Pa. Rule Civ. Pro. 213(e) and 42 Pa. C.S. § 8301(a) is not a "categorical prohibition" of arbitration. Nor does it "prohibit[] outright the arbitration of a particular type of claim." *See* Extendicare Br. 28 (quoting *Concepcion*, 563 U.S. at 341). It is a rule that applies generally to judicial actions as well as to arbitration agreements. This Court explained the origins of Rule 213(e) in *Pezzulli v. D'Ambrosia*, 26 A.2d 659 (Pa. 1942). In that case, a wrongful death action and separate survival action had been consolidated and tried together. Affirming, this Court stated that, while wrongful death and survival suits "are entirely dissimilar," it was "important that the two actions . . . should not overlap or result in

a duplication of damages and thereby compel the tort feasor to pay more than the maximum damage caused by his negligent act." *Id*. at 661. The Court added, "An appropriate rule of civil procedure to that end will be duly promulgated." *Id*. at 662. *See also Hopkins v. Pa. Power & Light Co.*, 112 F. Supp. 136, 137 (E.D. Pa. 1953) (noting the compulsory joinder rule was "a matter of procedure" first applied to judicial actions.)

The rule is facially neutral. As the superior court has pointed out, nothing in the rule would "preclude wrongful death and survival actions from proceeding together in arbitration when all of the parties, including the wrongful death beneficiaries, have agreed to arbitrate." *Taylor* at 325; *Tuomi v. Extendicare, Inc.*, 119 A.3d 1030, 1033 (Pa. Super. Ct. 2015). One might also posit a nursing home contract that provided that any lawsuit on behalf of the estate of a deceased resident be brought in the county where the nursing home is located, but that any wrongful death suit may be brought in the county where the statutory beneficiaries reside. There is no doubt that in such a case, involving only judicial actions and no arbitration agreement, a Pennsylvania court would apply the compulsory joinder rule and order the civil actions consolidated.

Neither Extendicare nor its supporting amicus has cited a single case in which a state procedural rule of general applicability has been held to violate the FAA.

C. The FAA does not guarantee enforcement of arbitration agreements that lack basic elements of enforceable contracts.

Extendicare and supporting amicus complain that "the trial court and the Superior Court abdicated their responsibility . . . to ensure that arbitration agreements are enforced in accordance with their terms." Extendicare Br. 22; Pa. Healthcare 14 (the lower court's application of Rule 213(e) "amounts to a violation of private contractual rights.").

However, Extendicare's own actions made enforcement of the agreement according to its terms impossible. The agreement called for arbitration of claims involving "negligence; gross negligence; malpractice; death or wrongful death." R. 84a ¶ 4. As noted earlier, the agreement also required that all claims based on the same incident or related course of care or services "shall be addressed in a single ADR process." *Id*.

Yet, because the nursing home failed to obtain the agreement of the statutory beneficiaries, the agreement could not be enforced according to its terms. As Extendicare admits, the wrongful death claim cannot be arbitrated and "must be litigated in court." Extendicare Br. 11.

Nevertheless, Extendicare points to ten published opinions involving long term care facilities as evidence of the superior court's consistent hostility to arbitration. In nine of those cases, Extendicare complains, the superior court failed

to enforce arbitration agreements. Extendicare Br. 15, n.6.[4] Indeed, Extendicare accuses the superior court of handing down, at the insistence of plaintiffs' attorneys, "a critical mass of decisions" which "will, in the end, result in the inability of long term care providers to enforce any of their arbitration agreements in Pennsylvania." *Id*. 16-17.

In fact, none of the nine decisions turned on the court's hostility to arbitration or a public policy adverse to arbitration or a rule targeting arbitration. In every case, the arbitration agreement failed because of sloppy contract procedures on the part of the nursing home and its legal counsel.

For example in *Wisler v. Manor Care of Lancaster PA, LLC*, 124 A.3d 317 (Pa. Super. Ct. 2015), *alloc. denied*, __ A.3d ___ (Pa. Dec. 1, 2015), the arbitration agreement was unenforceable because H. Randall Wisler lacked express authority to sign the arbitration agreement on his father's behalf. The nursing home failed to ask him for evidence of an express power of attorney and failed to ask the father whether he had authorized his son to sign the admission papers. *Id*. at 324-25.

In *Washburn v. N. Health Facilities, Inc.*, 121 A.3d 1008 (Pa. Super. Ct. 2015), the nursing home insisted that Mrs. Washburn sign the arbitration agreement

[4] In the tenth case, *MacPherson v. Magee Mem'l Hosp. for Convalescence*, __ A.3d ___, 2015 WL 7571937 (Pa. Super. Ct. Nov. 25, 2015), the superior court en banc held the nursing home's arbitration agreement was enforceable.

for Mr. Washburn, despite the fact that she had informed the admitting staff that she did not have power of attorney to sign on behalf of her husband. *Id*. at 1012.

Tuomi v. Extendicare, Inc., 119 A.3d 1030 (Pa. Super. Ct. 2015), like the decision below in this case, held that, where the nursing home failed to obtain the consent of the wrongful death beneficiaries, making it impossible to comply with Rule 213(e) by consolidating claims into a single arbitration, the compulsory joinder required the claims be consolidated for trial. *Id*. at 1033.

The court in *Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651 (Pa. Super. Ct. 2013), *cert. denied*, 134 S. Ct. 2890 (2014), held that the wrongful death beneficiaries of a deceased nursing home resident could not be bound by an arbitration agreement because the nursing home failed to obtain their consent. *Id*. at 661.

In *Setlock v. Pinebrook Personal Care & Retirement Center*, 56 A.3d 904 (Pa. Super. Ct. 2012), *alloc. denied*, 74 A.3d. 127 (Pa. 2013), the court found an agreement to arbitrate disputes involving the financial options and obligations of residents was drafted too narrowly to include claims arising out of medical care and equipment provided by the nursing home. *Id*. at 912.

The Court in *Stewart v. GGNSC-Cannonsburg, L.P.*, 9 A.3d 215, 221 (Pa. Super. Ct. 2010), held that an agreement that required arbitrations to be administered exclusively by the National Arbitration Forum was unenforceable because NAF has

ceased administering nursing home arbitrations, a result this Court upheld in *Wert v. Manorcare of Carlisle PA, LLC*, 124 A.3d 1248, 1263 (Pa. 2015).

Walton v. Johnson, 66 A.3d 782 (Pa. Super. Ct. 2013) was not a death action, nor a suit against a nursing home, but a personal injury lawsuit against a hospital. The court held that the signature of the mother of a 36-year-old patient on an arbitration agreement did not bind the patient, who had not given her power of attorney or authority to act on her behalf and where the hospital made no inquiry into whether the mother had any such authority. *Id*. at 787.

In *Bair v. Manor Care of Elizabethtown, PA, LLC*, 108 A.3d 94 (Pa. Super Ct.), *alloc. denied*, 125 A.3d 775 (Pa. 2015), the court held that the nursing home's arbitration agreement was not enforceable because the nursing home itself failed to sign the contract, which also lacked other essential elements. *Id*. at 97.

The American Association for Justice submits that none of the holdings in these cases was based on hostility to arbitration, and that the arbitration agreements in these cases would have been fully enforced if the agreements were properly drafted and the nursing home had secured the consent of the parties sought to be bound, or their designated agents.

II. U.S. Supreme Court Decisions Requiring Arbitration Even If "Piecemeal" Proceedings Result Are Based on Section 4 of the FAA, Which Is Not Applicable in State Courts.

A. *Moses H Cone, Dean Witter,* and *KPMG* are based on FAA § 4, which applies only to federal courts.

Extendicare's core argument is that the holdings in *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1 (U.S. 1983); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985); and *KPMG LLP v. Cocchi*, 132 S. Ct. 23 (2011), as well as *Concepcion*, "resolve the question presented" in this case and require that the lower court's refusal to compel arbitration be reversed. Extendicare Br. 28. They do not. The first three decisions do not bind state courts, and *Concepcion*, it will be demonstrated in Part III, does not support preemption of Pennsylvania's compulsory joinder rule.

In *Moses H. Cone*, the hospital's claims in federal district court against a construction company were subject to an arbitration agreement, while claims against an architect, who was not party to the agreement, were not. The construction company sought an order from a federal district court compelling arbitration under § 4 of the FAA.[5] 460 U.S. at 4-5.

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[5] A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any *United States district court* which, save for such agreement, would have jurisdiction . . . for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . [U]pon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in

The district court stayed the federal action pending the state court's decision. The Supreme Court reversed, holding that § 4 affords the federal district court no discretion to deny or delay arbitration, even if the result would be "piecemeal resolution" of the dispute. *Id*. at 20. No state procedural rule was involved; the question was whether § 4 affords a district court the discretion to deny such an order.

Most importantly, for present purposes, FAA § 4 is a procedural section that, by its terms applies only to "United States district court[s]." Thus, in *Southland Corp. v. Keating* the Court held that § 2 of the FAA rests on "Congress' broad power to fashion substantive rules under the Commerce Clause," and that such substantive rights "are enforceable in state as well as federal courts." 465 U.S. at 12. The *Southland* Court made clear, however, that federal rules of procedure "do not apply in such state court proceedings." *Id*. at 16 n.10. The Court expressly declared, "we do not hold that §§ 3 and 4 of the Arbitration Act apply to proceedings in state courts." *Id*. The Court reemphasized this limitation in *Volt Info. Sciences, Inc. v. Bd. of Tr. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 477 n.6 (1989) ("[W]e have never held that §§ 3 and 4, which by their terms appear to apply only to proceedings in federal court, . . . [are] applicable in state court."). *See also* Ian R. MacNeil,

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> issue, the court *shall make an order directing the parties to proceed to arbitration* in accordance with the terms of the agreement.

9 U.S.C. § 4 (emphasis added).

American Arbitration Law: Reformation, Nationalization, Internationalization 103 (1992) (Sections 3 and 4 "are explicitly limited to federal courts.").

Similarly, in *Dean Witter*, an investor sued the brokerage, asserting federal securities violations, which were not arbitrable, and state law claims that were subject to an arbitration agreement. Defendant petitioned a federal district court under § 4 for an order compelling arbitration of the arbitrable claims. The federal district court declined to sever the claims, stating that trying the "intertwined" claims together was desirable to preserve federal exclusive jurisdiction over federal securities law claims as well as to avoid redundant litigation. 470 U.S. at 215-17.

The Supreme Court reversed, again holding that § 4 leaves "no place for the exercise of discretion *by a district court*, but instead mandates that district courts *shall* direct the parties to proceed to arbitration" even at the cost of efficiency. *Id*. at 218 (first emphasis added). Again, no state procedural rule was preempted. The Court held only that a federal procedural rule that is addressed solely to federal district courts, required the claims to be severed and resolved separately.[6]

Nor does *KMPG* resolve the issue before this Court. Investors in that case asserted four claims against the accounting firm. The Florida appellate court upheld

[6] Extendicare's supporting amicus suggests that "piecemeal litigation" has "always been favored to avoid conflict with the FAA," Pa. Healthcare at 16-17, citing only a federal case, *Nationwide Mut. Fire Ins. Co. v. George V. Hamilton, Inc.*, 571 F.3d 299 (3d Cir. 2009). Amicus also points to federal decisions rejecting the position taken by the superior court as "an ongoing conflict between the state and federal courts." Pa. Healthcare 27. In fact, the divergent outcomes result from the application of FAA § 4, which expressly binds only federal courts.

the trial court's denial of a motion to compel arbitration, finding that two of the claims were not arbitrable. The Supreme Court granted KPMG's petition for certiorari, vacated, and remanded the case without briefing or argument. The Court's per curiam opinion stated that under *Dean Witter*, when a complaint contains both arbitrable and nonarbitrable claims, the Act requires courts to compel arbitration of pendent arbitrable claims. 132 S. Ct. at 25-26. That statement is arguably dicta: judgment was vacated not because the lower court failed to sever the nonarbitrable claims, but because the court "failed to determine whether the other two claims in the complaint were arbitrable." *Id*. at 24.

Nevertheless, Extendicare suggests that *KPMG* extended *Dean Witter's* holding as binding on state courts as well, quoting the Court's statement that the FAA "mandates that district courts *shall* direct the parties to proceed to arbitration." Extendicare Br. 25. Of course, neither *KPMG* nor this case involves a federal district court. Moreover, the *KPMG* per curiam opinion Court cited only § 2 of the FAA; it did not address the applicability § 4, the basis of *Dean Witter's* holding, to a state court. As noted, the Court issued its decision in *KPMG* without the benefit of briefing or argument.[7] The Supreme Court's practice of summary reversal accompanied by a per curiam opinion is usually reserved for those situations in

[7] Significantly, the Petition for Certiorari, which the Court granted, relied solely on FAA § 2 and *Southland*, and did not even cite § 4. *See*, Petition for Writ of Certiorari, *KPMG LLP v. Cocchi*, 132 S. Ct. 23 (2011), 2011 WL 2441700 (No. 10-1521), at *14 & *19-20.

which the law is settled and the decision below clearly departs from the Court's controlling precedents. Robert L. Stern, et al., *Supreme Court Practice* 321-22 (8th ed. 2002). If the Court had intended to break new ground by extending § 4 to state courts, it would not have done so by this means. *See Wyrick v. Fields*, 459 U.S. 42, 52 (1982) (Marshall, J., dissenting) (summary reversal is not proper "in a case that involves a significant issue not settled by our prior decisions.").

B. Congress does not have authority to impose procedural rules on state courts involving state law cause of action.

Quite apart from the text of § 4 of the FAA, that procedural rule is not binding on Pennsylvania courts because Congress lacks the constitutional authority to prescribe the rules of procedure for state courts in state law causes of action.

A cornerstone of our federalism is the proposition that state courts must enforce federal *substantive* rights. *Testa v. Katt*, 330 U.S. 386, 392-93 (1947). However, Congress' power to establish rules of *procedure* is limited to those "inferior" tribunals it may establish under article I, section 8 of the U.S. Constitution. U.S. Const. art. I, § 8, cl. 9 (authorizing Congress to "constitute tribunals inferior to the Supreme Court"). The Constitution nowhere grants Congress any general power to require state courts to apply federal rules of procedure to state law claims. *See Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 222 (1916) (Supremacy Clause requirement that state courts hear federal cases "in no sense implied … the state court was to be treated as a Federal Court."); David S. Schwartz, *The Federal*

Arbitration Act and the Power of Congress Over State Courts, 83 Or. L. Rev. 541, 595 (2004) ("[T]he Supremacy Clause and preemption of state law are limited to substantive law. As a corollary, preemption of state law does not imply the imposition of federal procedural codes.").

Thus, when Congress creates a federal substantive right, it does not "enlarge or regulate the jurisdiction of state courts or . . . control or affect their modes of procedure." *Howlett v. Rose*, 496 U.S. 356, 373 (1990) (quoting *Mondou v. New York, New Haven & Hartford R.R. Co.*, 223 U.S. 1, 56 (1912). Instead, the Supreme Court has recognized "the general and unassailable proposition . . . that States may establish the rules of procedure governing litigation in their own courts." *Felder v. Casey*, 487 U.S. 131, 138 (1988). *See also Jinks v. Richland County*, 538 U.S. 456, 465 (2003) ("[W]e need not (and do not) hold that Congress has unlimited power to regulate practice and procedure in state courts"); *cf. Volt Info. Sciences*, 489 U.S. at 476 ("There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate."). Thus, the Supreme Court's construction of § 4 does not require reversal of the state court decision in this case.[8]

[8] Pennsylvania's Arbitration Act contains a provision similar to § 4, which authorizes a court to order the parties to proceed with arbitration. 42 Pa. C.S. § 7304. In the appropriate case, this Court may be presented with the question whether to interpret that provision in accord with the U.S. Supreme Court's construction of § 4 in *Dean Witter*, or whether Pennsylvania law should be interpreted as the 5th, 9th, and 11th Circuits had interpreted § 4:

III. The U.S. Supreme Court's Decision in *Concepcion* Does Not Support Preemption of Pennsylvania's Compulsory Joinder Rule.

A. Pennsylvania's compulsory joinder rule is not a state law that "prohibits outright" the arbitration of claims, which would be preempted under *Concepcion*.

Extendicare also contends that this case is controlled by *Concepcion*. Specifically, Extendicare relies on the Court's statement that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." Extendicare Br. 28 (quoting *Concepcion*, 563 U.S. at 341). However, as noted earlier, Pennsylvania's compulsory joinder rule does not "prohibit[] outright" the arbitration of survival claims or of any type of claim. Nor are Rule 213(e) and 42 Pa. C. S. 8301(a) laws "that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339.

Extendicare does not dispute this conclusion, but argues that the FAA prohibits "the application of state procedural rules to act as a barrier to enforcement of an otherwise enforceable arbitration agreement." Extendicare Br. 27. *See also* Pa. Healthcare 20 (Although Rule 213 is not a "categorical prohibition" of arbitration,

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> When arbitrable and nonarbitrable claims arise out of the same transaction, and are sufficiently intertwined factually and legally, the district court, under this view, may in its discretion deny arbitration as to the arbitrable claims and try all the claims together in federal court.

470 U.S. at 216-17. Because Extendicare has not raised this issue and the parties have not briefed it, the question of the proper construction of 42 Pa. C.S. § 7304 is not before this Court.

"*application* of this otherwise neutral rule accomplishes the very same prohibited purpose.") (emphasis in original). This is not the preemption standard the U.S. Supreme Court has established in its FAA jurisprudence, and Extendicare does not cite a single case in which a facially neutral state procedural rule was held to be preempted by the FAA because its application resulted in nonenforcement of an arbitration agreement. Indeed, the savings clause Congress incorporated into § 2 would be meaningless if the FAA preempted every state law that blocked enforcement of an arbitration agreement. *See Concepcion* 563 U.S. at 339 ("This saving clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses . . . but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.") (internal quotation omitted). In addition, the Supreme Court has made clear that in some circumstances the FAA may *require* a court to deny arbitration, based on the parties' agreement. *See, e.g., Volt Info. Sciences*, 489 U.S. at 478-79 (Application of a California procedural rule to stay enforcement of an arbitration agreement was not preempted by the FAA where the choice-of-law provision of the agreement adopted California law.)

Nor does the FAA prohibit states from refusing to enforce some arbitration agreements on the basis of legitimate policy concerns. *See Concepcion*, 563 U.S. at 333 n.6 ("Of course States remain free to take steps addressing the concerns that

attend contracts of adhesion—for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted.").

B. Extendicare has waived the argument that Pennsylvania's compulsory joinder rule "stands as an obstacle" to the purposes and objectives of the FAA.

It is true that *Concepcion* also held that a facially neutral state law may be subject to implied conflict preemption if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," in enacting the FAA. 563 U.S. at 352 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). However, Extendicare has not raised this argument with respect to the compulsory joinder rule and so has waived it as a ground for reversal. *See Commonwealth v. Brown*, 943 A.2d 264, 268 n.4 (2008) ("[I]ssues are waived when not included in the appellant's brief."). Nevertheless, because amicus Pennsylvania Healthcare has raised "obstacle" preemption, American Association for Justice will address its merits.

C. Concepcion's "obstacle" preemption rationale was supported by only four justices and so is not binding on this court.

At the outset, it must be noted that *Concepcion* was a plurality decision. Lisa Tripp, *Arbitration Agreements Used by Nursing Homes: An Empirical Study and Critique of* AT&T Mobility v. Concepcion, 35 Am. J. Trial Advoc. 87, 121-22 (2011). Justice Scalia, writing for a four-Justice plurality, held that, although California's class action waiver rule was facially neutral and thus was not expressly

preempted by § 2, it was impliedly preempted because it stood as an obstacle to the purposes and objectives of the FAA. 563 U.S. at 352.

The fifth vote for reversal was provided by Justice Thomas who explicitly rejected the "purposes and objectives" preemption theory of the plurality. Justice Thomas cited to his criticism of such implied preemption in his concurrence in *Wyeth v. Levine*, 555 U.S. 555 (2009). *Concepcion*, at 353 (Thomas, J., concurring). In *Wyeth*, Justice Thomas stated:

> I cannot join the majority's implicit endorsement of far-reaching implied pre-emption doctrines. In particular, I have become increasingly skeptical of this Court's "purposes and objectives" pre-emption jurisprudence. Under this approach, the Court routinely invalidates state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law.

555 U.S. at 583 (Thomas, J., concurring).

Instead, in *Concepcion* Justice Thomas would have found that California's *Discover Bank* rule violated FAA § 2, using a textual interpretation that had not been advanced by any party. *See* 563 U.S. at 353.

Thus, the "obstacle" preemption rationale espoused by Justice Scalia gained the support of only four justices and is not binding on this Court. *See Altria Grp., Inc. v. Good*, 555 U.S. 70, 96 (2008) (Thomas, J., dissenting) (Because a "plurality opinion . . . did not represent the views of a majority of the Court, we are not bound

by its reasoning," (quoting *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 81 (1987)); Ken Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 Cornell L. Rev. 1593, 1596 (1992) ("Absent this majority agreement, a rule should have no binding precedential effect.").

D. Pennsylvania's compulsory joinder rule is not preempted as an obstacle to the purposes and objectives of the FAA.

If this Court reaches the merits of the implied conflict preemption argument, it is clear that Rule 213(e) and 42 Pa. C.S. § 8301 do not "stand as an obstacle" to the purposes of the FAA. A state rule does not "stand as an obstacle" simply because its application may result in nonenforcement of some arbitration agreements. After all, "FAA does not confer a right to compel arbitration of any dispute at any time." *Volt Info. Sciences*, 489 U.S. at 474-75. Instead, *Concepcion* teaches that a state law is impliedly preempted as an obstacle to the FAA if it would impose "procedures that are incompatible with arbitration and would wholly eviscerate arbitration agreements," 563 U.S. at 343 (internal quotation omitted), or would "interfere[] with fundamental attributes of arbitration." *Id*. at 344.

The Court in *Concepcion* considered three factors in making this determination. The plurality found that California's class arbitration rule: (1) "makes the process slower, more costly, and more likely to generate procedural morass," (2) eliminates arbitration's primary advantage by leading arbitrators to increase procedural formality, (3) "greatly increases risks to defendants," which will "have a

substantial deterrent effect on incentives [for companies] to arbitrate." *Id*. at 348-51 & n.8.

In this case, not only is Pennsylvania's compulsory joinder rule fully compatible with the fundamental attributes of arbitration, but the rule proposed by Extendicare – requiring the parties to pursue a survival action in the arbitral forum and a separate wrongful death action in court – falls afoul of each of these factors.

1. Cost and procedural complexity.

First, as noted earlier, the plurality in *Concepcion* emphasized that the "overarching purpose" of the FAA was "to facilitate streamlined proceedings." 563 U.S. at 344. As Extendicare concedes, due to its failure to obtain the consent of the statutory beneficiaries, a single ADR proceeding to decide the wrongful death and survival claims is not possible, and so "the wrongful death claims must be litigated in court." Extendicare Br. 11. Extendicare's insistence on duplicative proceedings undermines the goal of streamlined proceedings and increases the costs to the parties, particularly plaintiffs, who bear the burden of proof and must put on their case twice.

2. Increased formality imposed on arbitral proceedings.

The *Concepcion* Court attached the greatest importance to the likelihood that California's class action rule would induce arbitrators to adopt more formal, judicial-

like procedures, defeating one of the primary advantages to choosing arbitration. *Concepcion*, at 349-50.

Extendicare gives no attention to the "challenging legal questions involving the collateral estoppel effect, if any, to be given to the first judgment." *Tuomi*, 119 A.3d at 1035. Would either party be entitled to preclude relitigation of a matter that had been decided by the arbitrator?[9]

The preclusive effect of an arbitral decision in a subsequent judicial proceeding is, in a word, uncertain. As the Court noted in *Dean Witter*, "it is far from certain that arbitration proceedings will have *any* preclusive effect on the litigation of nonarbitrable federal claims." 470 U.S. at 222 (emphasis added). *See also Local Union No. 721, United Packinghouse, Food & Allied Workers, AFL-CIO v. Needham Packing Co.*, 376 U.S. 247, 253 n.5 (1964) ("[W]e find it unnecessary to decide what effect, if any, factual or legal determinations of an arbitrator would have

[9] "*Res judicata* precludes parties or their privies whose action has reached a final judgment on the merits, from relitigating issues 'that were or could have been raised in that action.' Under collateral estoppel, on the other hand, 'once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.'" *Rider v. Commonwealth*, 850 F.2d 982, 988-89 (3d Cir. 1988) (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)).

An arbitral award generally establishes claim preclusion as to all claims heard by the arbitrators. *FleetBoston Fin. Corp. v. Alt*, 638 F.3d 70, 79-81 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 415 (2011). Because wrongful death and survival claims are different causes of action, the question facing the court presiding over the wrongful death proceeding will be "issue preclusion," that is, the collateral estoppel effect of the prior arbitral award.

on a related action in the courts."); *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 245 n.5 (1962) (same).

As the Court in *Dean Witter* pointed out, 28 U.S.C. § 1738 "requires that federal courts give the same preclusive effect to a State's *judicial proceedings* as would the courts of the State rendering the judgment." 470 U.S. at 222. (emphasis in original) "[S]ince arbitration is not a judicial proceeding . . . neither the full-faith-and-credit provision of 28 U.S.C. § 1738, nor a judicially fashioned rule of preclusion, permits a federal court to accord res judicata or collateral-estoppel effect to an unappealed arbitration award." *Id*.[10]

Although "arbitration proceedings will not necessarily have a preclusive effect on subsequent federal-court proceedings," the Court instructed that "courts may directly and effectively protect federal interests by determining the preclusive effect to be given to an arbitration proceeding." 470 U.S. at 223. *See also Alexander v. Gardner-Denver Co*., 415 U.S. 36, 60 n.21 (1974) ("We adopt no standards as to

[10] An award "enforced by a state-court judgment [would] be accorded the preclusion effects recognized by the judgment state." 18B Wright, et al., *Fed. Prac. & Proc.* Juris. § 4475.1 (2d ed.) (text accompanying n.7). "Pennsylvania follows the predominant view among the states that . . . a judicially confirmed private arbitration award will have a collateral estoppel effect . . . [if] the party against whom estoppel is invoked *had full incentive and opportunity to litigate the matter*." *Frog, Switch & Mfg. Co. v. Pennsylvania Human Relations Comm'n*, 885 A.2d 655, 661 (Pa. Commw. Ct. 2005) (emphasis added). *Witkowski v. Welch*, 173 F.3d 192, 199-200 (3d Cir. 1999) (arbitration award confirmed by federal district court is "final judgment" on the merits under FAA which can have issue preclusive effect under Pennsylvania law).

the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case.").

Courts have taken this instruction to mean that "application of collateral estoppel from arbitral findings is a matter within the broad discretion of the district court," and that courts "should use a case-by-case approach to determining the collateral estoppel effects of arbitral findings." *Universal Am. Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131, 1137 (5th Cir. 1991); *Greenblatt v. Drexel Burnham Lambert, Inc.*, 763 F.2d 1352, 1361 (11th Cir. 1985) (*Dean Witter* "indicate[s] a case-by-case approach to determining the collateral estoppel effects of arbitration on federal claims," focusing, inter alia, on "the procedural adequacy of the arbitration proceeding."); *see also* 18B *Fed. Prac. & Proc.* § 4475.1 (2d ed.) (text accompanying n.37) (characterizing the present state of the law as a case-by-case "compromise," reflecting the "often wary relationships between adjudication and arbitration").

In this case-by-case determination, the procedural adequacy of the arbitral proceeding looms large. *See Universal Am. Barge*, at 1137; *Greenblatt*, at 1361. Indeed, due process prohibits the use of collateral estoppel against a party as to issues not fully and fairly litigated in the prior proceeding. *Blonder-Tongue Lab., Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 329 (1971); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 332 (1979). Courts therefore "tend to be suspicious of relaxed

arbitration procedures, and are likely to give special meaning to the general requirement that the first proceeding afford a 'full-and-fair opportunity' to litigate." 18B *Fed. Prac. & Proc.* § 4475.1 (2d ed.) (text accompanying n.21).

As a general proposition, courts tend to accord preclusive effect to the results of an arbitral proceeding that was accompanied by the procedural formalities and safeguards that are characteristic of judicial proceedings. For example, under California law, issue preclusion may be denied if the arbitral proceeding lacked essential "procedural safeguards and legal formality," including an adversary proceeding before an impartial hearing officer, the right to subpoena witnesses and produce documentary evidence, testimony under oath subject to cross-examination. *Jacobs v. CBS Broadcasting, Inc*., 291 F.3d 1173, 1178-79 (9th Cir. 2002) (denying preclusion where arbitral proceeding lacks such safeguards); *Kulavic v. Chicago & I.M. Ry.*, 1 F.3d 507, 511-17 (7th Cir. 1993) (issue preclusion denied where arbitral procedures did not sufficiently protect the plaintiff's interests). *See generally Restatement (Second) of Judgments,* § 84 & cmt. c (1982) (Where "the arbitration procedure leading to an award is very informal, the findings in the arbitration should not be carried over through issue preclusion to another action," but an "arbitral award should have the same preclusive effect as a judgment if arbitration afforded [procedural] opportunity . . . substantially similar in form and scope to court adjudication.").

Commentators have pointed out that this uncertainty and case-by-case assessment of the procedural formality of arbitration proceedings will lead arbitrators and those who design arbitral procedural rules "to enhance the prospect of preclusion by adopting increasingly judicial modes of procedure, undermining the very values that make arbitration a desirable alternative to judicial dispute resolution." 18B *Fed. Prac. & Proc.* § 4475.1 at n.17 (2d ed.) (summarizing the critique set out in Hiroshi Motomura, *Arbitration and Collateral Estoppel: Using Preclusion to Shape Procedural Choices*, 63 Tul. L. Rev. 29, 71-73 (1988)).

Extendicare's proposal to sever wrongful death from survival claims and compel arbitration of the latter will have the effect of imposing greater formality on the arbitral proceedings for such claims, precisely the outcome condemned by the Court in *Concepcion* as an obstacle to the objectives of the FAA.

3. Risk to defendants and disincentives to arbitrate.

Third, *Concepcion* instructs courts that a rule that "will have a substantial deterrent effect on incentives to arbitrate" is fundamentally inconsistent with the purposes of the FAA. 563 U.S. at 351 n.8.

Extendicare asserts that, "if this Court does not reverse the Superior Court's decision in this case, arbitration of claims on behalf of deceased residents whose claims are subject to an arbitration agreement will be rare indeed." Extendicare Br. 21. To the contrary, affirmance in this case will serve as an incentive for nursing

homes desiring arbitration to do what Extendicare should have done here: obtain the consent of the statutory beneficiaries. This is not infeasible. Statutory beneficiaries are limited to the "spouse, children or parents of the deceased." 42 Pa. C.S. § 8301(b). Because signing the arbitration agreement was not a requirement for admission, *see* R. 86a, the nursing home had ample opportunity to locate them and obtain their consent.

On the other hand, Extendicare's proposal that separate proceedings be required will undermine incentives to pursue arbitration. It is important to note that efficiency is not the only purpose of compulsory joinder of wrongful death and survival actions. This Court has explained that the primary purpose is to prevent "a duplication of damages [which would] compel the tortfeasor to pay more than the maximum damage caused by his negligent act." *Pezzulli v. D'Ambrosia,* 26 A.2d 659, 661 (Pa. 1942); 42 Pa. C.S. § 8301(a) (requiring consolidation of wrongful death and survival claims "so as to avoid a duplicate recovery"); *Arny v. Philadelphia Transp. Co.*, 163 F. Supp. 953, 955 (E.D. Pa. 1958) (Compulsory consolidation protects defendants "against duplicating awards of damages.").

Extendicare's proposal to require separate proceedings removes that protection and exposes defendants to the risk of paying twice on the same claim. As the plurality in *Concepcion* explained, when the possibility of an erroneous liability is no longer "outweighed by savings from avoiding the courts," the "risk of an error

will often become unacceptable." *Concepcion*, at 350. The amounts involved in most cases arising out of the death of a resident are likely to be smaller than those contemplated in *Concepcion*. But they run in the same direction – undermining the incentives to pursue arbitration – so that Extendicare's motion to sever and compel arbitration was a greater obstacle to the purposes of the FAA than the path taken by the superior court below.

CONCLUSION

For the foregoing reasons, the American Association for Justice urges this Court to affirm.

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I hereby certify that on this 5th day of February, 2016, two copies of the Brief of the American Association for Justice as Amicus Curiae in Support of the Appellee, were served via United Postal Service, two day delivery to the following counsel of record:

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Pennsylvania Code 2135 because this brief contains 9,449 words, excluding the parts of the brief exempted by the rules.

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