

CELEBRATING OUR 25TH ANNIVERSARY

What Litigators Need to Know About the Arbitration "Juggernaut"



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(Ret.)

"Resistance is futile," said the Borg drones as they assimilated a new species in their cyborg collective in the iconic television series "Star Trek." Both Justice Wecht of the Pennsylvania Supreme Court in *Taylor v. Extendicare* 147 A.3d 490 (Pa. 2016), cert. denied, 137 S. Ct. 1375 (2017) and Justice Elena Kagan in *Kindred Nursing Centers L.P. v. Janis Clark et al.*, ____ U.S. ____, 137 S. Ct. 1421 (2017) echoed the Borg drones in their cautionary opinions to state courts who seek to circumvent the U.S. Supreme Court's jurisprudence enforcing arbitration contracts.

Why should litigators care about *Kindred* and *Taylor*? These cases represent the death knell of state court attempts to mitigate what some view as the harsh effect of mandatory arbitration clauses that preclude litigants from seeking redress in court. For plaintiffs' attorneys, there is a world of difference between litigating before a judge and jury in a public process with possibility of appeals and litigating before one or three arbitrators in a confidential process with limited opportunity to appeal. Many critics question the fairness of these arbitration contracts that appear in everyday agreements like banking, credit card, consumer, employment and even car repair contracts. Many critics also view arbitrations as potentially one-sided, benefiting the company more than the consumer, while businesses find arbitration efficient, predictable and streamlined.

The Pennsylvania Supreme Court in *Taylor* upheld a mandatory arbitration clause in a nursing home contract, holding that the Federal Arbitration Act, 9 U.S.C. §2 et seq. ("FAA"), preempted Pennsylvania Rule of Civil Procedure 213(a), which requires joinder or consolidation of wrongful death and survival action suits.

The decedent in *Taylor* had executed an arbitration contract with her nursing home upon admission. When she died from medical complications after her admission into an *Extendicare* facility, her

executors filed suit in court alleging wrongful death and survival claims. [READ MORE](#)

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