Missouri Health Care Association Annual Convention

Reports From Two Branches of Government

2023 LEGISLATION and Recent U.S. Supreme Court Decisions

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1

TABLE OF CONTENTS
I. 2023 Legislation

1. Health Professional Loan Repayment Program– Sections 191.430-191.450, Section 335.203
2. County Commission Authority To Establish a Nursing Home – Sections 205.375-205.377
3. Cash Grant– Section 208.030
4. Collaborative Practice Agreement and Scheduled Pharmaceuticals– Sections 334.104, 334.375, 334.747, 335.016, & 335.076

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2

TABLE OF CONTENTS (cont'd.)

5. Scheduled Pharmaceuticals – Section 195.070
6. Physical Therapists – Sections 334.506, & 334.613
7. Out-of-State Providers – Section 208.186
8. MO HealthNet Eligibility Redeterminations – Section 208.239
9. Expanded Scope of Practice of Pharmacists – Sections 338.010 and 338.012

3

TABLE OF CONTENTS (cont'd.)

10. Interstate Compact for Physicians – Sections 334.043 through 334.1720
11. Interstate Compact for Social Workers – Sections 337.615 through 337.1075

4

TABLE OF CONTENTS (cont'd.)
II. Recent U.S. Supreme Court Decisions

1. Health Professional Loan Repayment Program – Sections 191.430-191.450, Section 335.203

- The "Health Professional Loan Repayment Program" is established within the Department of Health and Senior Services (DHSS), offering forgivable loans to pay off existing student loans and other education expenses for health care, mental health, and public health professionals.
- The DHSS is the chief administrative agency and is responsible for oversight and rulemaking of the Program. the Director of DHSS shall be in charge of determining who will receive forgivable health professional loans.
- The professionals or disciplines that receive funding in any given year are contingent on consultation with the Department of Mental Health and the Department of Higher Education and Workforce Development.
- DHSS will enter into a written contract with each qualifying individual for a forgivable loan, the provisions of which are specified in the bill. The contract shall include an agreement that the individual serve for a period equal to at least two years in an area of defined need, for the loan to be forgiven. DHSS will designate counties, communities, or sections of areas in the state as "areas of defined need" for health care, mental health, or public health services.

1. Health Professional Loan Repayment Program – Sections 191.430-191.450, Section 335.203 (cont'd.)

- Among other requirements, all health professional loans shall be made from funds appropriated to the Health Professional Loan Incentive Fund by the General Assembly, which also includes funds from an individual and/or funds generated by loan repayments.
- Any individual who enters into a written contract but fails to maintain acceptable employment is liable for any amount awarded by the state that has not yet been forgiven. If the individual engages in a breach of contract, they are liable to the state for an amount specified plus interest, damages and attorney fees.
- The new law repeals both the Nursing Student Loan Program and the Nursing Student Loan Repayment Program.
- The "Nursing Education Incentive Program" within the State Board of Nursing is a program that awards grants to eligible institutions of higher education based on criteria jointly determined by the Board and the Department of Higher Education and Workforce Development.

1. Health Professional Loan Repayment Program – Sections 191.430-191.450, Section 335.203 (cont'd.)

There is currently a $150,000 cap on the grants, the new law removes that cap. It also creates a new nursing education incentive program surcharge for initial license applications and renewal applications for nurses. Practical nurses will pay a $1 fee per year and registered professional nurses will pay $5 per year, to be deposited in the State Board of Nursing Fund.

2. County Commission Authority To Establish a Nursing Home – Sections 205.375-205.377

- These provisions authorize a county commission or township board which already has established a county nursing home (which includes the four categories specified in Chapter 198, RSMo.) within its jurisdiction to rent or lease it to others to operate or operate any other health care facility located within the county or township providing nursing care or other medical services to patients, including, but not limited to, residents of the county or township.
- Additionally, the bill authorizes county commissions to sell county-owned nursing homes. The proceeds of the sale shall be used to pay any outstanding indebtedness incurred in the purchase, construction, additions, or renovation of the nursing home. If the proceeds of the sale are insufficient to pay the outstanding debt, the county commission shall continue to provide for the collection of an annual tax on tangible property sufficient to pay the principal and interest of the debt. Any remaining proceeds from the sale shall be placed to the credit of the county's general fund to be used to provide health care services in the county. Any purchasers of the nursing home shall be limited to those who plan to offer medical services in the community for a period of not less than 10 years.

3. Cash Grant– Section 208.030

Currently, certain persons may be eligible for up to $156 a month in supplemental welfare assistance for home care in licensed residential care facilities. This bill removes that monthly cap and makes such assistance subject to appropriations.

4. Collaborative Practice Agreement and Scheduled Pharmaceuticals– Sections 334.104, 334.375, 334.747, 335.016, & 335.076

- The licensing and collaborative practice arrangements for advanced practice registered nurses (APRNs) are modified. They now allow an APRN to prescribe Schedule II controlled substances for hospice patients so long as the APRN is employed by the hospice and the collaborative practice agreement designated the certified hospice as the location where the APRN is authorized to practice and prescribe. Collaborative practice arrangements between the APRN and the collaborating physician may waive geographic proximity requirements when the arrangement outlines the use of telehealth and when the APRN is providing services in a correctional center and practicing within two hundred miles by road of his or her collaborating physician. Waiver for any other reason shall require application to be reviewed by the board of nursing and the state board of registration for the healing arts.
- For clinical situations where a APRN provides services that include the diagnosis and initiation of treatment for acutely or chronically ill or injured persons, the collaborating physicians or other designated physicians shall be present with the APRN for sufficient periods of time, at least once every two weeks, to participate in chart reviews and provide necessary medical direction, medical services, consultations, and supervision.

4. Collaborative Practice Agreement and Scheduled Pharmaceuticals– Sections 334.104, 334.375, 334.747, 335.016, & 335.076 (cont'd.)

- Currently, an APRN is required to practice with the collaborating physician continuously present for a one-month period when entering into an arrangement with the physician. This bill waives that requirement when a primary care or behavioral health physician enters into an arrangement with a primary care or behavioral health APRN, the physician is new to the patient population, and the APRN is familiar with the patient population.
- Currently, a nurse may be licensed to practice professional or practical nursing. This bill adds a license to practice advanced practice nursing and modifies the definitions of APRN and the practice of professional nursing. The bill specifies the requirements for the advanced practice nursing license, including the requirement that an applicant first hold a current registered professional nurse license, and have completed certain graduate-level programs and certifications, or hold a document of recognition to practice as an APRN that is current as of August 28, 2023. License renewals for APRN licenses and registered professional nurse licenses must occur at the same time and failure to renew and maintain the registered professional nurse license or failure to provide evidence of an active required certification shall result in the expiration of the APRN license.

4. Collaborative Practice Agreement and Scheduled Pharmaceuticals– Sections 334.104, 334.375, 334.747, 335.016, & 335.076 (cont'd.)

- This bill modifies the names of the specific certifying organizations for nursing specialties and specifies that the State Board of Registration for the Healing Arts, within the Department of Insurance and Commerce, shall make information publicly available about which physicians and other health care providers have entered into collaborative practice arrangements.

5. Scheduled Pharmaceuticals – Section 195.070

- APRNs can prescribe Schedule II pharmaceuticals for hospice patients so long as the APRN is employed by the hospice and the collaborative practice agreement designated the certified hospice as the location where the APRN is authorized to practice and prescribe

6. Physical Therapists – Sections 334.506, & 334.613

- The laws regarding physical therapists are amended so that physical therapists no longer need a prescription or referral from a doctor in order to evaluate and initiate treatment on a patient, so long as the physical therapist has a doctorate of physical therapy degree or has five years of clinical practice as a physical therapist.
- A physical therapist is required to refer to an approved health care provider any patient whose condition is beyond the physical therapist's scope of practice, or any patient who does not demonstrate measurable or functional improvement after 10 visits or 30 days, whichever first occurs.

6. Physical Therapists – Sections 334.506, & 334.613 (cont'd.)

- The physical therapist must also consult with an approved health care provider before continuing therapy if after 10 visits or 30 days, whichever occurs first, the patient has demonstrated measurable or functional improvement from the physical therapy and the physical therapist believes that continuation of physical therapy is necessary. Continued physical therapy must be in accordance with any direction of the health care provider. The physical therapist must notify the health care provider of continuing physical therapy every 30 days.
- Physical therapy services performed within a primary or secondary school for individuals within ages not in excess of 21 years are exempt from this requirement.
- This bill removes a provision that allows the State Board of Registration for the Healing Arts to file a complaint against a physical therapist who provides physical therapy without a prescription.

7. Out-of-State Providers – Section 208.186

- Under this new act, the state shall not provide any payments, add-ons, or reimbursements to health care providers through MO HealthNet for medical assistance services to persons who are not considered Missouri residents under federal regulations.

8. MO HealthNet Eligibility Redeterminations – Section 208.239

- Within 30 days of the effective date of this act (August 28, 2023), the Department of Social Services shall resume annual MO HealthNet eligibility redeterminations, renewals, and post-enrollment verifications.

9. Expanded Scope of Practice of Pharmacists – Sections 338.010 and 338.012

- This new law modifies several provisions relating to the administration of medications by pharmacists. In its main provisions, it:

(1) Modifies the definition of a medication therapeutic plan by repealing language defining it by the prescription order so long as the prescription order is specific to each patient for care by a pharmacist.

(2) Repeals language from current law defining the practice of pharmacy as including the administration of specific vaccines by written physician protocol for specific patients and adds language defining the practice of pharmacy as including the ordering and administering of certain FDA-approved or authorized vaccines to persons at least 7 years of age or the CDC-approved age, whichever is older, pursuant to rules promulgated by the Board of Pharmacy and the Board of Registration for the Healing Arts or rules promulgated under a state of emergency.

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9. Expanded Scope of Practice of Pharmacists – Sections 338.010 and 338.012 (cont'd.)

(3) Repeals the provisions requiring any pharmacist who accepts a prescription order for a medication therapeutic plan to have a written protocol from the referring physician.

(4) Permits a pharmacist with a certificate of medication therapeutic plan authority to provide medication therapy services pursuant to a written physician protocol to patients with an established physician-patient relationship with the protocol physician.

(5) Allows a licensed pharmacist to order and administer vaccines approved or authorized by the FDA to address a public health need, as authorized by the state or federal government, during a state or federally-declared public health emergency.

9. Expanded Scope of Practice of Pharmacists – Sections 338.010 and 338.012 (cont'd.)

(6) Allows a pharmacist with a certificate of medication therapeutic plan authority to provide influenza, group A streptococcus, and COVID-19 medication therapy services pursuant to a statewide standing order issued by the Director of the Department of Health and Senior Services or a physician licensed by the Department.

10. Interstate Compact for Physicians – Sections 334.043 through 334.1720

- This new law allows any person who holds a valid current physician and surgeon license issued by another state, a branch or unit of the military, a territory of the United States, or the District of Columbia, who has been licensed for at least one year in that location, to apply for a physician or surgeon license in Missouri.
- The Board of Healing Arts can waive any examination, educational requirements, or experience requirements for the licensure if the Board determines that the applicant met the minimum education and work experience in the other territory.

10. Interstate Compact for Physicians – Sections 334.043 through 334.1720 (cont'd.)

- The Board will not waive the requirements if:

  (1) The applicant had his or her license revoked by an oversight committee;

  (2) The applicant is currently under investigation;

  (3) The applicant has a complaint pending;

  (4) The applicant is currently under administrative disciplinary action;

  (5) The applicant does not hold a license in good standing with an Oversight body outside of Missouri; or

  (6) The applicant has a criminal conviction that would disqualify him or her for licensure in Missouri.

10. Interstate Compact for Physicians – Sections 334.043 through 334.1720 (cont'd.)

- The new law adopts the "Interstate Medical Licensure Compact". The Compact allows a physician who meets the eligibility requirements to receive an expedited license. The state must perform a criminal background check on an applicant and the state cannot require any additional verification beyond primary-source verification of medical education or results of medical or licensing examinations by the state of principal license. A physician may renew his or her expedited license as a member of the Compact.
- The Compact establishes a confidential database of all physicians who have been granted an expedited license or who have applied for an expedited license, for the purpose of allowing member states to report disciplinary or investigatory information. Member states may participate in joint investigations of physicians with other member states, and any disciplinary action taken by one member state may subject the physician to discipline with other member states. If a physician's license is revoked, surrendered, or relinquished in one state, it shall automatically be placed on the same status in the other member states.

10. Interstate Compact for Physicians – Sections 334.043 through 334.1720 (cont'd.)

- The Compact establishes the "Interstate Medical Licensure Compact Commission" to act as a corporate and joint agency of the member states and to oversee and maintain administration of the Compact.
- The Compact outlines procedures for any member state that fails to perform its obligations of the Compact. The Compact will only be effective once seven states have enacted legislation to join the Compact.
- The Compact outlines the procedure to withdraw from the Compact.
- The Compact supersedes all other laws that conflict with provisions of the Compact.

11. Interstate Compact for Social Workers – Sections 337.615 through 337.1075

- This new law allows any person who holds a valid current social worker license issued by another state, a branch or unit of the military, a territory of the United States, or the District of Columbia, who has been licensed for at least one year in that location, to apply for a social worker license in Missouri. The State Committee for Social Workers can waive any examination, educational requirements, or experience requirements for the licensure if the State Committee for Social Workers determines that the applicant has met the minimum education and work experience in the other territory.

11. Interstate Compact for Social Workers – Sections 337.615 through 337.1075 (cont'd.)

- The State Committee for Social Workers will not waive the requirements if:

  (1) The applicant had his or her license revoked by an oversight body;

  (2) The applicant is currently under investigation;

  (3) The applicant has a complaint pending;

  (4) The applicant is currently under administrative disciplinary action;

  (5) The applicant does not hold a license in good standing with an oversight body outside of Missouri; or

  (6) The applicant has a criminal conviction that would disqualify him or her for licensure in Missouri.

27

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27

11. Interstate Compact for Social Workers – Sections 337.615 through 337.1075 (cont'd.)

- This bill establishes the "Social Work Licensure Compact".
- The Compact allows a social worker who meets the eligibility requirements to receive an expedited license. A social worker may renew his or her expedited license as a member of the Compact. The Compact establishes a confidential database of all social workers who have been granted an expedited license or who have applied for an expedited license, for the purpose of allowing member states to report disciplinary or investigatory information.
- Member states may participate in joint investigations of social workers with other member states, and any disciplinary action taken by one member state may subject the social worker to discipline by other member states. If a social worker's license is revoked, surrendered, or relinquished in one state, the social worker's multistate authorization to practice in all other member states will be deactivated until all encumbrances have been removed from the multistate license.

28

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28

11. Interstate Compact for Social Workers – Sections 337.615 through 337.1075 (cont'd.)

- The Compact establishes the "Social Work Licensure Compact Commission" to act as a corporate and joint agency of the member states and to oversee and maintain administration of the Compact. The Compact outlines procedures for any member state that fails to perform its obligations under the Compact.
- The Compact will only be effective once seven states have enacted legislation to join the Compact.
- The Compact outlines the procedure to withdraw from the Compact.
- The Compact supersedes all other laws that conflict with provisions of the Compact.

12. *Glenhaven Healthcare, LLC v. Saldana*

- This is a case of negligence growing out of COVID-19.
- It represents the end of a long road which finally terminated before the United States Supreme Court.
- The issue is the same as exists in a number of other cases pending throughout the United States, that is, whether the Public Readiness and Emergency Preparedness ("PREP") Act creates exclusive federal jurisdiction for garden-variety state-wrongful death and personal injury claims arising out of the pandemic.

12. *Glenhaven Healthcare, LLC v. Saldana* (cont'd.)

- Throughout the United States, all federal courts, including courts of appeals, have been unanimous in rejecting arguments by nursing facilities that these cases could only be litigated in federal courts because of the language of the PREP Act.
- This is the first case to get to the United States Supreme Court on a petition for certiorari.

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12. *Glenhaven Healthcare, LLC v. Saldana* (cont'd.)

- The position of the nursing homes has been that the PREP Act applies once a federal official declares a public health emergency, and it provides for a federal defense, which is immunity from suit and immunity from liability for injuries allegedly caused by a "covered countermeasure" taken in association with the emergency. COVID-19 was declared a public emergency in March of 2020. The facts in this particular case arose after that date.

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12. *Glenhaven Healthcare, LLC v. Saldana* (cont'd.)

- All federal courts of appeals have held that the immunity defense, by itself, does not transform the case into a federal one.
- The rejection of the Petition for Certiorari, itself, does not rule the substantive issue of whether the PREP Act provides an immunity defense, but leaves it to state courts to rule that issue.

13. *SuperValu Inc.* and *Safeway* Cases Taken by U.S. Supreme Court

- There was a split among the Federal Circuit Courts of Appeals in the standard to determine whether a claim was "knowingly" false at the time it was filed.
- The Seventh Circuit Court of Appeals had held in each of these cases that the defendants were not liable because the misconduct reflected reasonable views of compliance obligations in good faith.

13. *SuperValu Inc.* and *Safeway* Cases Taken by U.S. Supreme Court (cont'd.)

- The petitions to the U.S. Supreme Court seeking certiorari presented the question of "whether and when a defendant's contemporaneous subjective understanding or beliefs about the lawfulness of its conduct are relevant to whether it knowingly violated the False Claims Act." The False Claims Act scienter standard allows liability only when fraud occurs knowingly.

13. SuperValu Inc. and Safeway Cases Taken by U.S. Supreme Court (cont'd.)

- On June 1, 2023, the United States Supreme Court issued a unanimous decision overturning the Seventh Circuit's Judgments in favor of SuperValu and Safeway.
- In doing so, it found that the pharmacies operated by both of the defendants could have violated the False Claims Act ("FCA") when submitting claims for payment to Medicare and Medicaid for reimbursement.
- In this case, the pharmacies had discounted the price of drugs to match their competitors, but submitted claims at times for the full price of the drugs, arguing that these prices were "usual and customary" under the requisite statute. The Court disagreed, finding that, under the facts presented, the ambiguity of what is "usual and customary" did not preclude a finding of scienter (i.e., knowledge) under the FCA.

13. SuperValu Inc. and Safeway Cases Taken by U.S. Supreme Court (cont'd.)

- The underlying facts were that a whistleblower brought *qui tam* suits alleging the pharmacy operators knowingly submitted false claims to the government health programs when they reported their "retail" price for certain drugs as their usual and customary price when many of the customers received discounts.
- The Seventh Circuit had affirmed the decisions of the lower courts in favor of the pharmacies, finding that the interpretation of provisions in another statute concerning scienter in the case of *Safeco Insurance Company of America v. Burr* applied with equal force to the FCA's contemporaneous subjective understanding or beliefs about the lawfulness of conduct are relevant to whether a person "knowingly" violated the FCA.

13. *SuperValu Inc.* and *Safeway* Cases Taken by U.S. Supreme Court (cont'd.)

- The Court in its decision did not review the meaning of the term "usual and customary." Instead, the Court noted that it took the case ". . . to resolve that legal question: if respondents' claims were false and they actually thought that their claims were false – because they believed that their reported prices were not actually their 'usual and customary' prices – then would they have 'knowingly' submitted a false claim within the FCA's meaning? Or, is the Seventh Circuit correct – that respondents could not have 'knowingly' submitted a false claim unless no hypothetical, reasonable person could have thought that their reported prices were their 'usual and customary' prices?"

13. *SuperValu Inc.* and *Safeway* Cases Taken by U.S. Supreme Court (cont'd.)

- The pharmacies in defending the Seventh Circuit decision argued that the phrase "usual and customary" was ambiguous, so they could not have "known" that their claims were inaccurate because they could not have "known" what the phrase "usual and customary" actually means.
- The Court disagreed finding the scienter element refers to the pharmacy's knowledge and subjective beliefs, not to what an objectively reasonable person may have known or believed. Even though the phrase "usual and customary" may have been ambiguous on its face, that facial ambiguity alone was not sufficient to preclude a finding that respondents knew their claims were false.

13. *SuperValu Inc.* and *Safeway* Cases Taken by U.S. Supreme Court (cont'd.)

- The Court rejected reliance on the *Safeco* decision because the FCA is different and has a different *mens rea* standard which is "willfully;" and *Safeco* did not purport to set forth the purely objective safe harbor.
- The Court outlined the elements of scienter, noting that it can be established by showing that respondents (1) actually knew that their reported prices were not their "usual and customary" prices when they reported those prices, (2) were aware of a substantial risk that their higher, retail prices were not their "usual and customary" prices and intentionally avoided learning whether their reports were accurate, or (3) were aware of such a substantial and unjustified risk, but submitted the claims anyway.

13. *SuperValu Inc.* and *Safeway* Cases Taken by U.S. Supreme Court (cont'd.)

- Finally, the Court found that for scienter under the FCA, "it is enough if respondents believed that their claims were not accurate."

14. *Molina Healthcare of Ill. Inc. v. Prose*

- In the underlying case, a whistleblower had brought a False Claims Act claim against Molina Healthcare of Illinois, Inc., a managed care company, claiming that it had misrepresented to Medicaid its performance of a skilled nursing facility services contract.
- The Complaint which initiated the case generally pled no specific facts nor recited any specific claims.
- As a result, the District Court sustained the Molina's Motion to Dismiss.

14. *Molina Healthcare of Ill. Inc. v. Prose* (cont'd.)

- The whistleblowers appealed to the Seventh Circuit Court of Appeals. That court held that the whistleblowers' Complaint has sufficient detail to satisfy the federal pleadings standards.
- Molina sought certiorari before the United States Supreme Court. Its main argument was that the Seventh Circuit's ruling was inconsistent with rulings in the First, Sixth, Eighth, and Eleventh Circuits, which require strict adherence to the Civil Rules requiring the pleading of fraud with particularity. Those other circuits have held that a defendant's False Claim for payment must either explicitly misrepresent compliance with a rule or contract requirement or make specific representations that are rendered misleading by undisclosed noncompliance.

14. *Molina Healthcare of Ill. Inc. v. Prose* (cont'd.)

- In this case, the whistleblower stated that "pleading a fraud scheme with sufficient particularity is a fact-bound issue that doesn't warrant review."
- Although there appeared to be a split in the Circuits, the United States Supreme Court denied the request by Molina to take the case, leaving providers to determine what the law is by looking at the opinions from the Circuit Courts of Appeals in which they are located. Happily, Missouri is in the Eighth Circuit of Appeals which has a strict pleading standard.

15. *Health and Hospital Corporation of Marion County v. Talevski*

- On June 8, 2023, the United States Supreme Court issued its decision affirming the Seventh Circuit which had reversed the District Court, finding that a governmentally-operated nursing home can be sued under 42 U.S.C. § 1983 for violations of the Federal Nursing Home Reform Act (FNHRA).
- In the underlying case, representative for a resident of a county-owned nursing home, sued the facility under 42 U.S.C. § 1983 alleging that its use of chemical restraints and persistent transfer attempts violated the FNHRA.

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15. *Health and Hospital Corporation of Marion County v. Talevski* (cont'd.)

- The plaintiff argued that the FNHRA establishes the minimum standards of care that nursing homes must follow to receive Medicaid funds.
- It cited 42 U.S.C. §§ 1395i-3(c) and 1396r(c) that require nursing homes accepting federal funds "must protect and promote the rights of each resident." The allegation was that a nursing facility must ensure freedom from "chemical restraints imposed for purposes of discipline or convenience" and "must not transfer or discharge the resident" without notice and consent, except in specific circumstances.

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15. *Health and Hospital Corporation of Marion County v. Talevski* (cont'd.)

- While the District Court dismissed the case, the Seventh Circuit reversed, finding that §§ 1396r(c)(1)(A)(ii) and (2)(A) unambiguously confer individually enforceable rights on nursing home residents.
- The nursing facility argued before the Supreme Court that the Court should reexamine its prior holdings that Spending Clause legislation gives rise to privately enforceable rights under Section 1983 because contracts were not generally enforceable by third-party beneficiaries of common law when Section 1983 was enacted.

15. *Health and Hospital Corporation of Marion County v. Talevski* (cont'd.)

- The Court rejected this argument, holding that to do so would require rejection of "decades of precedent" and require rewriting § 1983's plain text to limit it only to laws resting on the Spending Power of Congress. The Court held that the term "laws" in Section 1983 "means what it says."
- The Court further found that the FNHRA provisions satisfy the test in the case of *Gonzaga University v. Doe* because the text of the unnecessary-restraint and predischarge-notice provisions unambiguously confers rights on the residents of nursing home facilities.

15. *Health and Hospital Corporation of Marion County v. Talevski* (cont'd.)

- For example, the unnecessary-restraint provision requires nursing homes to protect and promote the "right to be free" from physical or chemical restraints imposed for purposes of discipline or convenience and not required to treat "the resident's" medical symptoms. Likewise, the predischarge-notice provision is within a paragraph concerning transfer and discharge rights, and it repeatedly refers to the resident. Therefore, the court held that the rights in these provisions are presumptively enforceable under Section 1983.

15. *Health and Hospital Corporation of Marion County v. Talevski* (cont'd.)

- The Court stated that to rebut the presumption on enforceability under Section 1983, defendant must show a comprehensive enforcement scheme that is incompatible with individual enforcement of those provisions. The Court found no incompatibility between the FNHRA's remedial scheme and Section 1983 enforcement of the rights that the unnecessary-restraint and predischarge-notice provisions protect.
- The Court also stated that the statute lacks an express private judicial right of action or any other provision that might signify the intent to preclude Section 1983 enforcement, and the facility failed to demonstrate that enforcement through Section 1983 would thwart the operation of the administrative remedial scheme.

15. *Health and Hospital Corporation of Marion County v. Talevski* (cont'd.)

- For governmentally operated facilities, this opens up a new avenue of liability.
- For non-governmentally-operated nursing facilities, it offers a reading of the FNHRA that might give hope to plaintiffs' lawyers to bring private causes of action under state malpractice statutes.

17. *Coinbase, Inc. v. Bielski*

- On June 30, 2023, the United States Supreme Court settled a question of whether an interlocutory appeal of the denial of a motion to compel arbitration pursuant to Section 16(a) of the Federal Arbitration Act (FAA) automatically stays the District Court proceedings.
- In a five-four decision, the court ruled that it does.
- Justice Kavanaugh presented what he called the majority's "common sense" holding. This decision resolves a decades-long split in the Circuit Courts of Appeals.

17. *Coinbase, Inc. v. Bielski* (cont'd.)

- This case started with plaintiffs filing two separate class actions in the United States District Court for the Northern District of California against Coinbase.
- Under the user agreement of Coinbase, it provided for dispute resolution via binding arbitration.
- Based on that provision, Coinbase moved in each of the two cases to compel arbitration. The District Court denied each motion.
- Coinbase thereafter pursuant to FAA Section 16(a) exercised its right to appeal immediately whether the case should proceed in arbitration, but both the District Court and the 9th Circuit refused to stay the proceedings while the appeals were pending. The United States Supreme Court granted certiorari to determine whether the District Court proceedings ought to have been stayed pending the plaintiffs' interlocutory appeals, and to resolve more generally the split among the Circuits over the question of a mandatory stay rule.

17. *Coinbase, Inc. v. Bielski* (cont'd.)

- The question before the Supreme Court was: When a District Court denies a party's motion to compel arbitration, and that party takes an interlocutory appeal of that denial pursuant to FAA Section 16(a), must the District Court stay its proceedings pending resolution of that interlocutory appeal?
- Justice Kavanaugh, writing for the majority, answered "yes," holding that "Congress enacted § 16(a) against a clear background principle prescribed by this Court's precedence: an appeal, including an interlocutory appeal, 'divests the District Court of its control over those aspects of the case involved in the appeal.'"

17. *Coinbase, Inc. v. Bielski* (cont'd.)

- The decision goes on to explain that it relies on the earlier 1982 Supreme Court case of *Griggs v. Provident Consumer Discount Co.* The court applied *Griggs* to the case at hand. The court explained that "[b]ecause the question on appeal is whether the case belongs in arbitration or instead in the district court, the entire case is essentially 'involved in the appeal[,]'" and therefore the district court must stay its proceedings until the appeal is concluded.
- The court reasoned to hold otherwise would nullify the statutory right under the FAA Section 16(a) to take an interlocutory appeal, it would prevent the parties from realizing the recognized benefits of arbitration which are efficiency, lower costs and less intrusive discovery.

17. *Coinbase, Inc. v. Bielski* (cont'd.)

- Although Section 16(a) is silent as to a mandatory stay, the court holds that "[w]hen Congress wants to authorize an interlocutory appeal and to automatically stay the district court proceedings during that appeal, Congress ordinarily need not say anything about a stay."
- There was a vigorous dissent, claiming that the majority opinion would have the court exceed its jurisdiction and effectively amend a congressionally passed statute.
- This is a welcome decision for those facilities that include an arbitration provision in their admission document process.

Questions?

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