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Supreme Court Confirms Federal Arbitration Act's Broad Preemption of State Law

By Michael P. Daly and Mark D. Taticchi

On May 15, the United States Supreme Court issued a nearly unanimous opinion that rejected a state's attempt to subject arbitration agreements to a heightened "clear statement" standard. *See Kindred Nursing Ctrs. L.P. v. Clark*, --- U.S. ---, No. 16-0032, 2017 WL 2039160 (May 15, 2017). In doing so, it confirmed that the Federal Arbitration Act (FAA) will preempt not only a state law that "discriminat[es] on its face against arbitration," but also a state law that "covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Id.* at *4.

The plaintiffs in *Kindred Nursing Centers* filed suit in Kentucky state court, alleging that their relatives—whose estates they represented—had died due to substandard care at a nursing home. The defendant moved to compel arbitration pursuant to the arbitration agreements that the plaintiffs had signed on behalf of their relatives when they were admitted to the nursing home. Both provisions stated that any "claims or controversies arising out of or in any way relating to" a resident's stay at the nursing home would be resolved through arbitration rather than litigation. *Id.* at *3.

The trial court denied that motion, and the Kentucky Court of Appeals and Kentucky Supreme Court both affirmed. As the Kentucky Supreme Court acknowledged, one of the powers of attorney at issue afforded its holder the power to "draw, make, and sign in [the principal's] name any and all ... contracts, deeds, or agreements." *Id.* Despite conceding that this language, naturally construed, would authorize an agent to enter into an arbitration agreement on the principal's behalf, the Kentucky Supreme Court nevertheless refused to give effect to the arbitration agreements plaintiffs signed. The court did so based on its conclusion that access to courts and juries are "fundamental constitutional rights" that are "sacred" and "inviolable" under Kentucky law. *Id.* at *4. Given the sanctity of those rights, the court reasoned, a principal's intent to allow an agent to waive them must be clearly and specifically stated. *Id.* at *7.

In a 7-1 decision authored by Justice Kagan, the Supreme Court vacated that decision because its reasoning was preempted by federal law. It began by defining the preemptive scope of the FAA:

A court may invalidate an arbitration agreement based on "generally applicable contract defenses"

like fraud or unconscionability, but not on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." The FAA thus preempts any state rule discriminating on its face against arbitration—for example, a "law prohibit[ing] outright the arbitration of a particular type of claim." And not only that: The Act also displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements. In *Concepcion*, for example, we described a hypothetical state law declaring unenforceable any contract that "disallow[ed] an ultimate disposition [of a dispute] by a jury." Such a law might avoid referring to arbitration by name; but still, we explained, it would "rely on the uniqueness of an agreement to arbitrate as [its] basis"—and thereby violate the FAA.

Id. at *4 (citations omitted). It then found that the state court's "clear statement" rule ran afoul of the FAA:

The Kentucky Supreme Court's clear-statement rule ... fails to put arbitration agreements on an equal plane with other contracts. By the court's own account, that rule (like the one *Concepcion* posited) serves to safeguard a person's "right to access the courts and to trial by jury." ... So it was that the court required an explicit statement before an attorney-in-fact, even if possessing broad delegated powers, could relinquish that right on another's behalf. And so it was that the court did exactly what *Concepcion* barred: adopt a legal rule hinging on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial. Such a rule is too tailor-made to arbitration agreements—subjecting them, by virtue of their defining trait, to uncommon barriers—to survive the FAA's edict against singling out those contracts for disfavored treatment.

Id. at *5 (citations omitted). In short, the state court's decision "flouted the FAA's command to place [arbitration] agreements on an equal footing with all other contracts." *Id.* at *7.

The Supreme Court also rejected the plaintiffs' argument that, because the Kentucky Supreme Court's decision concerned contract *formation* rather than contract *enforcement*, the FAA was wholly

inapplicable. Justice Kagan’s opinion first dismantled plaintiffs’ premise, concluding that the FAA’s direction that arbitration agreements be treated as “valid” means that “[a] rule selectively finding arbitration contracts invalid because improperly formed fares no better under the Act than a rule selectively refusing to enforce those agreements once properly made.” *Id.* at *6. Adopting a pragmatic view of the FAA and its preemptive scope, Justice Kagan also reasoned that placing contract-formation rules wholly outside the ambit of FAA preemption “would make it trivially easy for States to undermine the [FAA]—indeed, to wholly defeat it.” *Id.* Such circumvention, the Court concluded, could not be countenanced.

Although the specific result in this case was not unexpected, the Court’s opinion remains notable for at least three reasons. First, it was a nearly unanimous decision in an area of the law that has proved deeply divisive in prior cases. (Indeed, the lone dissenter was

Justice Thomas, who dissented based on his view that the FAA does not apply to state court proceedings. *Id.* at *8 (Thomas, J., dissenting)). Second, the opinion represents a strongly worded warning to the states—and especially state judiciaries—that formalistic attempts to invalidate arbitration agreements will not be tolerated. Third, the fact that that warning was delivered by Justice Kagan (one of the dissenters in *Concepcion*) and, indeed, was joined by *all* of the *Concepcion* dissenters, should give serious pause to courts and counsel who would be tempted to employ a similar circumvention strategy in future cases. In light of *Kindred Nursing Centers*, such attempts likely will not fare well.

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