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Arbitration

Expert Analysis

Is State Law Rule About Power of Attorney Agreements Preempted by the FAA?

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In *Kindred Nursing Centers Limited Partnership v. Clark*,[1] the U.S. Supreme Court is poised to decide whether the Federal Arbitration Act (FAA), 9 U.S.C. §1 et seq., preempts a state rule that requires a power of attorney agreement to expressly refer to arbitration agreements, rather than contracts generally, before the agent can bind the principal to a predispute arbitration agreement. Section 2 of the FAA makes arbitration agreements "valid, irrevocable, and enforceable" except on "such grounds as exist … for the revocation of any contract."[2] Congress enacted the FAA "to reverse the longstanding judicial hostility to arbitration agreements" and "to place arbitration agreements upon the same footing as other contracts."[3]

Numerous Supreme Court decisions have held that the FAA preempts state law rules that disfavor arbitration agreements or otherwise fail the "same" or "equal footing" principle. More than 20 years ago, in *Doctor's Associates v. Casarotto*,[4] the court held that the FAA preempted a state statute that required notice of an arbitration commitment to appear on the first page of a contract. The court explained that the FAA "preclude[s] States from singling out arbitration provisions for suspect status."[5] Just last year, the court reversed a decision of a California court finding an arbitration agreement unenforceable, based on an interpretation it would not have had "in any other context other than arbitration."[6] These decisions are not outliers. The court has not hesitated to strike down state rules that hamper arbitration.[7] Kindred Nursing Centers presents the court with an opportunity either to reinforce that arbitration agreements are to be enforced to the same extent as other agreements or to take a different tack, permitting state courts to make decisions that limit the enforceability of arbitration agreements, perhaps giving special recognition to the nursing home context and the limits of powers of attorney agreements in that context.

Underlying Facts

Kindred Nursing Centers operates nursing homes and rehabilitation centers. Before residents are admitted to Kindred Nursing facilities, they execute power of attorney agreements empowering their attorneys-in-fact with, among other powers, authority to enter into contracts relating to their principals' affairs. When their principals are admitted to a facility,

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the attorneys-in-fact are given agreements (not required as a condition of admission to the facility) that provide that all disputes arising between the principal and the facility are to be resolved through arbitration. Clark and Wellner, attorneys-in-fact for two Kindred Nursing residents, signed the arbitration agreements. After their principals' deaths, Clark and Wellner sued Kindred Nursing in Kentucky state court, alleging state statutory violations and tort claims on behalf of the estates of their principals. The court initially dismissed the cases, based on the arbitration agreement. However, after the Supreme Court of Kentucky held that broad language in a power of attorney agreement did not include the ability to bind the principal to an arbitration agreement in *Ping v. Beverly Enterprises*,[8] the trial court reconsidered its decisions and held that the arbitration agreements were unenforceable. Those decisions were ultimately consolidated on appeal to the Supreme Court of Kentucky. The state high court held that an express grant of authority to the attorney-in-fact is required to bind a principal to an arbitration agreement. The decision was based on the court's view that a principal should not be able to unknowingly waive fundamental constitutional rights, such as the right to a jury trial, which the court referred to as "inviolate," "sacred," and "divine God-given."[9]

The Parties' Arguments

Kindred Nursing argues that the Kentucky supreme court's decision is contrary to numerous U.S. Supreme Court decisions holding that §2 of the FAA preempts state-law rules that do not "place[] arbitration contracts on equal footing with all other contracts."[10] The FAA violation, according to Kindred Nursing, is the requirement that a power of attorney agreement explicitly set forth the attorney-in-fact's power to enter into an arbitration agreement for the arbitration agreement to be enforceable, while not requiring similarly express language for other types of agreements. In addition, the nursing homes contend that affirmance of the Kentucky ruling would open the floodgates for new state-law rules to hinder enforcement of arbitration agreements. In opposition, Clark and Wellner argue that prior FAA preemption cases are distinguishable because the question in this case involves contract formation rather than contract interpretation. Moreover, they argue, the Kentucky court was right to rule that the power to waive fundamental constitutional rights, such as the right to a jury trial, must be "unambiguously expressed in the power of attorney."

Conclusion

At oral argument before the court, some justices appeared doubtful that the decision could be viewed as non-discriminatory against arbitration as such, rather than as part of a set of fundamental decisions that would ordinarily not be included in a general power of attorney agreement even in the nursing home context. Similarly, since the explicit-reference rule was not stated in a statute but came about as a result of a prior state court decision, it may not be clear to all of the justices whether Kentucky has singled out arbitration in violation of the court's equal-footing FAA doctrine. If the court affirms the Kentucky decision, the case could provide an opening for rulings that could render arbitration agreements more difficult to enforce. That result seems unlikely in light of the court's consistent and longstanding pro-arbitration jurisprudence.

1. No. 16-32 (argued Feb. 22, 2017).
2. 9 U.S.C. §2.
3. *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20, 24 (1991). See also *DIRECTV v. Imburgia*, 136 S. Ct. 463, 468-69 (2015), *AT&T Mobility v. Concepcion*, 563 U.S. 333, 339 (2011); *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996), *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).
4. 517 U.S. at 687-88.
5. Id. at 687.
6. *Imburgia*, 136 S. Ct. at 469.
7. See *Marmet Health Care Center v. Brown*, 132 S. Ct. 1201 (2012); *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52 (1995), *Perry*, 482 U.S. 483; *Southland v. Keating*, 465 U.S. 1 (1984).
8. 376 S.W.3d 581 (Ky. 2012).
9. See generally *Clark, et. al. v. Kindred Nursing Centers, et al.*, 478 S.W.3d 303 (Ky. 2015).
10. *Imburgia*, 136 S. Ct. at 468-69. See supra note 2.

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