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Kindred Nursing Centers v. Clark: A Glimmer of Hope for Those Displeased with Federal Preemption of State Limitations on Arbitration?

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Over the past decade, the United States Supreme Court has repeatedly held that the Federal Arbitration Act ("FAA") preempts state laws on arbitration. For example, in 2011 the Supreme Court struck down California law regarding the unconscionability of class-arbitration waivers in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). Similarly, the Supreme Court concluded in 2015 that parties could not contract around FAA preemption regarding class-arbitration waivers. *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015).

In February, the Supreme Court heard oral argument in a case out of Kentucky that might give hope to those who would like to see the Court buck the trend toward federal preemption of state laws limiting arbitration. In *Kindred Nursing Centers Limited Partnership v. Clark*, residents of a Kentucky nursing home signed general power of attorney forms. The forms gave family members broad authority over all future business affairs involving the residents, including the ability to sign contracts as well as the ability to institute or defend suits. However, the documents did not specifically mention arbitration. The individuals given power of attorney then signed arbitration agreements, as attorneys-in-fact, with the nursing home on behalf of the residents.

Disputes arose when some of the residents died in allegedly sub-standard conditions. The attorneys-in-fact for the residents' estates sought to avoid arbitration in the wrongful death cases that ensued. The Kentucky Supreme Court held that the arbitration agreements were unenforceable because the powers of attorney were not specific enough to bind the residents to arbitration. Of particular concern to the Kentucky Court was that the residents would be unwittingly giving up their constitutional right to a jury trial. *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306, 328 (Ky. 2015), cert. granted sub nom., *Kindred Nursing Centers Ltd. P'ship v. Clark,* 137 S. Ct. 368 (2016).

The nursing home now argues that the Kentucky Supreme Court, by adopting a requirement that power of attorney agreements must explicitly reference arbitration agreements, improperly singles out arbitration and would enable other states to impose additional burdens on arbitration under the guise of fundamental constitutional rights – e.g., the right to a jury trial. The representatives of the residents, on the other hand, argue that the case is not really about the FAA, but rather limitations on power of attorney/agency authority.

In light of past precedent favoring arbitration, it is unclear what the Supreme Court's intention was in accepting certiorari. If oral argument is any indication, it does not appear that all of the Justices are overly sympathetic to the residents' ability to escape arbitration. For example, Justice Stephen Breyer said during the argument that he saw Kentucky's decision as "discriminat[ing] against arbitration." A primary area of concern appears to be that attorneys-in-fact would be able to enter into contracts subjecting them to litigation or mediation, but not arbitration. After all, under Supreme Court precedent, courts must place agreements to arbitrate "on equal footing" as other contracts. *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440 (2006).

It is uncertain how the Court will ultimately rule. But if the past is any indication, we can expect a split decision. It may also be a safe bet to expect that the Court will ultimately strike down Kentucky's limit on arbitration.

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