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US Supreme Court Declines Brusque Invitation to Redefine Scope of Federal Pre-emption

Steven Caplow

Like the gambit of a clumsy teen asking for a date from a more glamorous schoolfellow, the High Court of West Virginia issued a provocative decision in a failed effort to tempt the US Supreme Court to rethink its purportedly unpersuasive and "tendentious" interpretation of federal pre-emption under the Federal Arbitration Act (FAA).[1] The US Supreme Court, not charmed by the assertion that its long-standing analysis of this issue had been "created from whole cloth", swiftly granted review and, in a terse per curiam decision, vacated the lower court's decision and remanded for proceedings "not inconsistent with this opinion".[2]

1. FAA Section 2 Defines the Scope of Federal Pre-emption

The first part of FAA s.2 pre-empts state statutes and common law doctrines that impede the right of private parties to agree to arbitration.[3] No matter how well intended, state laws that uniquely apply to agreements to arbitrate are pre-empted and invalid. The US Supreme Court has issued a string of recent decisions, collected again in this decision, instructing lower courts to pre-empt offending state laws that impose restrictions or prohibitions that apply to the arbitration, but not the judicial adjudication, of a party's claims. The second part of FAA s.2, the so-called "savings clause", provides that general state contract principles, such as fraud and unconscionability, still apply to assess the validity and enforceability of arbitration agreements.

2. By Statute, West Virginia Invalidates Arbitration Provisions for Nursing Home Residents

A West Virginia state statute called the Nursing Home Act creates a civil cause of action for injuries caused to nursing home residents and provides that purported waivers of this right by the patient or their representatives are invalid.[4] An agreement to arbitrate is deemed a waiver of a patient's right to bring a civil cause of action. *Marmet* involved unrelated personal injury claims asserted by three elderly or disabled nursing home residents that had died because of alleged neglect at the nursing home facility. The admission agreement for each patient provided for the arbitration of patient claims against the nursing home. In disregard of the arbitration provision, the estate for each patient filed a claim against the nursing home in the state court. Applying basic pre-emption principles, West Virginia's highest court held that FAA s.2 pre-empted West Virginia's Nursing Home Act because it did not put the arbitration provisions on "equal footing with other contractual clauses".[5] The West Virginia High Court held that contrary to the FAA, the state statute

> "singles out for nullification written arbitration agreements with nursing home residents, and does not apply to any other type of contractual agreements".[6]

[1] *Brown v Genesis Healthcare*, 724 S.E.2d 250, 278 (W.Va. 2011).
[2] *Marmet Health Care Center, Inc v Brown*, 132 S. Ct. 1201, 1203–1204 (2012).
[3] FAA s.2 makes written arbitration agreements in transactions involving interstate commerce "[1] valid, irrevocable, and enforceable, [2] save upon such grounds as exist at law or in equity for the revocation of any contract".
[4] W. Va. Code 16–5C–15(c) [1997].
[5] *Brown*, 724 S.E.2d 250, 281 (W.Va. 2011).
[6] *Brown*, 724 S.E.2d, 281.

3. The West Virginia High Court's Unusual Savings Clause Analysis

Having addressed the FAA s.2 pre-emption issue, the West Virginia High Court undertook a detailed analysis of procedural and substantive unconscionability under West Virginia law. Procedurally, the court expressed reservations about the ability of a "vulnerable" nursing home patient to evaluate an arbitration provision during the intake process:

> "The process of signing paperwork … for admission to a nursing home … is often fraught with urgency, confusion, and stress. People seek medical care in a nursing home for long-term treatment to heal; they rarely view the admission process as an interstate commercial transaction with far-reaching legal consequences."[7]

Substantively, the court voiced public policy concerns about applying the arbitration provision contained in an admission agreement to a subsequent act of negligence that "results in personal injury or wrongful death".[8] The court observed in this regard that the American Arbitration Association was no longer willing to arbitrate such claims.

But what makes this case interesting is that the West Virginia High Court extended its analysis beyond a traditional discussion of unconscionability under the state law of the jurisdiction and undertook an examination of the US Supreme Court's interpretation of federal pre-emption under the FAA. The High Court of West Virginia laid the groundwork by reviewing dissenting opinions from US Supreme Court opinions interlaced with the analysis of legal commentators. But this was not the traditional desiccated tour of Supreme Court precedent. The lower court unreservedly accused the US Supreme Court of "tendentious reasoning", of "stretch[ing] the application of the FAA" to apply in state courts (as opposed to just federal courts) and openly suggested that the US Supreme Court's interpretation of the FAA was "neither supported by the law nor likely to be sustained in the future".[9]

The state court went so far as to suggest that the inevitable course correction merely awaited "an intrepid litigant carr[ying] a coherent appeal of the question from a lower court to the Supreme Court".[10] Apparently believing that the time was ripe for such a challenge, the West Virginia High Court presumed to limit the scope of FAA federal pre-emption:

> "Congress did not intend for arbitration agreements, adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, and which require questions about the negligence be submitted to arbitration to be governed by the Federal Arbitration Act."[11]

4. The US Supreme Court Declines to Re-evaluate the Scope of FAA Section 2 Pre-emption

In what cannot have been a surprise, the West Virginia High Court's decision failed to provoke the hoped for re-examination of the proper scope for FAA s.2 pre-emption. Instead, the US Supreme Court speedily issued a per curiam opinion dashing the lower court's analysis:

> "The West Virginia court's interpretation of the FAA was both incorrect and inconsistent with clear instruction in the precedents of this Court."[12]

[7] *Brown*, 724 S.E.2d, 268.
[8] *Brown*, 724 S.E.2d, 282–283.
[9] *Brown*, 724 S.E.2d, 278.
[10] *Brown*, 724 S.E.2d, 280.
[11] *Brown*, 724 S.E.2d, 297.
[12] *Marmet Health Care Center*, 132 S. Ct., 1203–1204.

In remanding the case, the US Supreme Court insisted that the West Virginia High Court also revisit its unconscionability analysis based on the alternative saving clause to ensure that its determination of state common law principles was not similarly contaminated by factors "specific to arbitration" and therefore "pre-empted by the FAA".[13]

On remand, the West Virginia High Court promptly issued a new opinion that excised the offending section of its analysis and remanded the cases to the lower state courts to assess the unconscionability of the applicable arbitration provisions.[14] In dutifully carrying out the US Supreme Court's mandate on remand, however, the West Virginia High Court apparently could not resist including a statement that the US Supreme Court had "summarily" reached its decision

> "without elucidating how and why the FAA applies to negligence actions that arise subsequently and only incidentally to a contract containing an arbitration clause".[15]

Surely, the US Supreme Court will not begrudge the exercise of one of the lower court's few prerogatives, to have the last word.

[13] *Marmet Health Care Center*, 132 S. Ct., 1202.
[14] *Brown*, 729 S.E.2d 217, 231 (W.Va. 2012).
[15] *Brown*, 729 S.E.2d 217, 225 (W.Va. 2012).