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US Supreme Court Continues to Nurse Along FAA Pre-emption: *Kindred Nursing Centers v Clark*

Steven Caplow

> "You are likely to keep repeating the same mistake all over again if you do not agree it's a mistake."[1]

Under US law, a court may invalidate an arbitration agreement based on generally applicable contract defences like fraud or unconscionability, but not on legal rules that apply only to arbitration. To ensure arbitration agreements receive treatment equal to all other contracts, the Federal Arbitration Act (FAA)[2] pre-empts any state rule that discriminates on its face against arbitration. The Act also displaces any rule that covertly disfavours agreements to arbitrate. Over the years, the US Supreme Court has repeatedly invoked FAA pre-emption to stamp out state courts' creative efforts to invalidate arbitration agreements.[3] Most recently, the US examined a decision in which the Kentucky Supreme Court asserted that its citizen's "divine", "sacred" and "inviolate" right to trial by jury precluded enforcement of an agreement to arbitrate.[4]

The Kentucky case arose from the claims of two elderly people who lived at a nursing home called Winchester Centre, operated by Kindred Nursing Centers LP. The residents, who are not related, both moved into Winchester in 2008 after their relatives, a wife and daughter respectively, signed the paperwork using powers of attorney designating them as "attorney-in-fact". In their capacity as attorney-in-fact, they executed a contract in which they each agreed to resolve any claims arising from the resident's stay at Winchester Centre through binding arbitration.

Both residents died the next year, and their estates brought separate suits against Kindred in Kentucky state court alleging that substandard care had caused their deaths. Kindred moved to dismiss the cases from state court on the basis that the claims were subject to arbitration. In each case, Kindred's motion was denied at the trial court and the intermediate court of appeals. The Kentucky Supreme Court consolidated the cases and in a divided vote held that the powers of attorney did not authorise the representatives to execute an arbitration agreement. Finding that the Kentucky state constitution grants a "divine God-given right" to access the courts and to trial by jury, the Kentucky Supreme Court held that an attorney-in-fact, even if possessing broad delegated powers, could not relinquish that right on another's behalf unless expressly provided in the power of attorney. Applying this new so-called "clear statement rule", the Kentucky Supreme Court held that a power of attorney must explicitly confer authority to enter into contracts implicating constitutional guarantees. The US Supreme Court granted certiorari to review the decision, and reversed in a 7–1 decision (newly appointed Justice Gorsuch did not participate).[5]

[1] Israelmore Ayivor, *Become a Better You* (CreateSpace Independent Publishing Platform: 2016) at *https://www.createspace.com* [Accessed 8 September 2017].

[2] Federal Arbitration Act 9 U.S.C. §2.

[3] e.g. in *Marmet Health Care Ctr Inc v Brown* 565 U.S. 530, 531 (2012), the US Supreme Court held that the FAA pre-empted West Virginia's rule that arbitration provisions could not be enforced on public policy grounds in personal injury and wrongful death actions in the nursing home setting.

[4] *Extendicare Homes Inc v Whisman* 478 S.W.3d 306 (Ky. 2015), cert. granted, *Kindred Nursing Ctrs Ltd P'ship v Clark* 137 S.Ct. 368 (2016).

[5] *Kindred Nursing Centers LP v Clark* 581 U.S. (2017).

The Supreme Court rejects state rules tailor-made to "arbitration agreements and black swans"

At the outset, the US Supreme Court dashed the Kentucky Supreme Court's contention that a clear statement rule in no way singles out arbitration agreements for disfavoured treatment. Relying on *reductio ad absurdum*, the US Supreme Court observed that applying the Kentucky Supreme Court's logic, based on the Kentucky State Constitution's grant of "inherent and inalienable" rights to "acquire[e] and protect[] property", a valid power of attorney under the clear statement rule would now require specific authorisation to authorise the sale of the principal's furniture. The US Supreme Court wryly observed that were it in the business of giving legal advice, it would tell the agent not to worry that a power of attorney would in fact require this level of detail.

In fact, no one had been able to identify an actual case in which a Kentucky court had demanded that a power of attorney explicitly confer authority to enter into a contract that implicated constitutional guarantees. Instead, the Kentucky Supreme Court had merely hypothesised that this rule would equally apply if a representative sought to waive her "principal's right to worship freely", or "consent to an arranged marriage" or "bind [her] principal to personal servitude". The US Supreme Court dismissed these examples as "utterly fanciful contracts" and concluded that the Kentucky Supreme Court's selection of such improbable contracts revealed that its true target was arbitration agreements. The use of such "patently objectionable" examples "makes clear the arbitration-specific character of the rule, much as if it were made applicable to arbitration agreements and black swans".

The FAA's equal footing principle applies to both contract formation and contract enforcement

The estates of the two nursing home residents correctly anticipated that the US Supreme Court was unlikely to uphold the Kentucky Supreme Court's decision on the basis that a power of attorney must explicitly authorise the waiver of any right protected under the state constitution. Instead, the estates argued that the decision below should be upheld based upon the distinction between contract formation and contract enforcement. Under the estates' proposed reading of FAA §2, states could decide matters of contract validity without reference to the FAA's equal-footing principle, and the FAA pre-emption would apply only after a court determined that a valid arbitration agreement was formed. The US Supreme Court held that this narrow reading contravened both the FAA's text and the case law interpreting it. As to the text, the Act itself refers to both "valid[ity]" and "enforce[ment]" and therefore equally addresses both formation and enforcement.[6] With respect to common law, the US Supreme Court discussed recent decisions in which it had ruled that defences like duress, which involve unfair dealing at the contract formation stage, fall under the FAA's statutory framework. This case law further corroborated that the Act applied to both formation and enforcement. The Court also observed that adopting the estates' view would make it "trivially easy" for states to undermine the Act, since states could simply declare everyone incompetent to sign and thereby form arbitration agreements. "The FAA would then mean nothing at all—its provisions rendered helpless to prevent even the most blatant discrimination against arbitration".

[6] The FAA makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract", 9 U.S.C. §2.