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Case Note

Kindred Nursing Centers v. Clark:

United States Supreme Court Decisions on Mandatory Arbitration Provisions

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I. Introduction

On February 22, 2017, the U.S. Supreme Court heard arguments regarding *Kindred Nursing Centers v. Clark*¹ on writ of certiorari from the Kentucky Supreme Court.² The Kentucky Supreme Court found that an arbitration agreement executed by a principal's agent under a power of attorney was invalid because the power of attorney document did not specifically include a *clear statement* that the agent could enter into an arbitration agreement.³ The U.S. Supreme Court reversed the Kentucky Supreme Court's decision, holding that the "clear-statement rule violates the Federal Arbitration Act by singling out arbitration agreements for disfavored treatment."⁴ The opinion is consistent with the U.S. Supreme Court's trend of promoting the enforceability of arbitration agreements.

II. Background

Beverly Wellner held a power of attorney for her husband, Joe Wellner.⁵ Janis Clark held a power of attorney for her daughter, Olive Clark.⁶ Joe's power of attorney provided Beverly with the ability to "institute legal proceedings" and make "contracts of every nature in relation to both real and personal property."⁷ Olive's power of attorney provided Janis with the "full power . . . to transact, handle, and dispose of all matters affecting [Olive] and/or [Olive's] estate in any possible way," including the ability to enter into agreements.⁸

In 2008, Beverly placed her husband and Janis placed her daughter in the Winchester Centre, an assisted living facility operated by Kindred Care Nursing Centers.⁹ As part of the placement process, agents Beverly and Janis entered into arbitration agreements with the facility, which were included in the admission contracts on behalf of their family members.¹⁰ Specifically, the agreements provided that any claim related to Joe's or Olive's stay at the facility would be resolved through arbitration.¹¹

III. Decision of the Kentucky Supreme Court

In 2009, both residents died and their estates brought lawsuits against Kindred Care Nursing Centers in Kentucky state court, alleging that Kindred Care Nursing Centers provided the residents with substandard care.¹² Kindred attempted to dismiss the cases, arguing that the agreements that the plaintiffs signed precluded them from resolving their disputes in court.¹³ The Kentucky trial court denied their motion, and the Kentucky Court of Appeals affirmed the trial court's decision.¹⁴ The Kentucky Supreme Court affirmed the decision of the Kentucky Court of Appeals but did so on somewhat different grounds.¹⁵

The Kentucky Supreme Court's analysis began by evaluating the language in each power of attorney document. In Joe's document, the Court found that Beverly could not enter into an arbitration agree-

1 137 S. Ct. 1421 (2017).

2 *Kindred Nursing Ctrs. L.P. v. Clark*, 478 S.W. 206 (Ky. 2017).

3 137 S. Ct. at 1429.

4 *Id.* at 2.

5 *Id.*

6 *Id.*

7 *Id.* (citing app. 10-11).

8 *Id.*

9 137 S. Ct. at 1425.

10 *Id.*

11 *Id.* (citing app. at 14, 21).

12 137 S. Ct. at 1425.

13 *Id.*

14 *Id.* (citing app. to pet. for cert. 125a-126a, 137a-138a).

15 137 S. Ct. 1421.

ment on her husband's behalf. However, the Court found that Olive's document did authorize Janis to enter into an arbitration agreement. Nonetheless, the Court held that both arbitration agreements were invalid because an agent under power of attorney cannot enter into an arbitration agreement without a clear statement expressly providing for such authority.¹⁶ In essence, the Kentucky Supreme Court held that the power to enter into an arbitration agreement is what is commonly known as a "hot power," meaning that a grant of such a power must be expressly provided for in a power of attorney document. The Court's holding hinged on the belief that the Kentucky Constitution declares the right to a jury trial as "sacred" and "inviolable."¹⁷

In reaching its conclusion, the Kentucky Supreme Court recognized that federal law provides that arbitration agreements cannot be treated differently from other types of agreements. However, the Court justified its opinion on the grounds that its holding would apply to any agreement that implicates such fundamental and constitutional rights, not only arbitration agreements.¹⁸

IV. Decision of the U.S. Supreme Court

The U.S. Supreme Court focused its analysis on its interpretation of the Federal Arbitration Act (FAA) in *AT&T Mobility LLC v. Concepcion*.¹⁹ The FAA states that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."²⁰ State

laws that disfavor arbitration agreements are displaced by the FAA.²¹

The U.S. Supreme Court found that the "Kentucky Supreme Court's clear-statement rule [i.e., that the power to enter into an arbitration agreement must be explicitly provided for in a power of attorney document] fails to put arbitration agreements on an equal plane with other contracts."²² Based on the sacred and inviolate nature of the right to a jury trial, the Court quickly disposed of the argument that such an explicit provision is necessary, and the Court found that creating such a rule "did exactly what [*AT&T Mobility LLC v. Concepcion* barred]."²³ Ultimately, the Court found that the clear statement rule demonstrates hostility toward arbitration agreements.

Beverly and Janis advanced that the FAA does not apply to issues of contract formation but rather to contract enforcement.²⁴ The U.S. Supreme Court disposed of this argument by looking at the text of the FAA and relevant case law, writing 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."²⁵ The Court essentially found that such a finding would undermine the intent of the FAA and provide states with carte blanche to disfavor arbitration agreements.²⁶

The U.S. Supreme Court reversed the Kentucky Supreme Court's judgment with respect to Olive's estate. With respect to Joe's estate, the Court articulated that if

16 *Id.* (citing 478 S.W.3d 306, 313 (Ky. 2015)).

17 137 S. Ct. at 1427 (citing 478 S.W.3d at 328–329).

18 137 S. Ct. at 1428.

19 563 U.S. 333 (2011).

20 9 U.S.C. § 2 (2018).

21 563 U.S. at 343 (citing *Preston v. Ferrer*, 522 U.S. 346, 353 (2008)).

22 137 S. Ct. 1423–24.

23 *Id.*

24 *Id.* at 7.

25 *Id.* at 8.

26 *Id.*

the finding that the power of attorney was not broad enough to give Beverly the authority to enter into the arbitration agreement and was made independent of the clear statement rule, the Court's opinion would not have any effect. However, the U.S. Supreme Court found that if the clear statement rule did influence the finding that the document was not broad enough to cover arbitration agreements, the Kentucky courts must re-evaluate the document consistent with the Court's opinion.

A. Implications of the Decision

During the past 10 years, the U.S. Supreme Court's decisions reveal a strong distaste for state law that interferes with the enforceability of arbitration agreements.²⁷ In *Marmet Health Care Center, Inc. v. Brown*, the Court invalidated a state law prohibiting agreements to arbitrate personal injury claims against nursing homes, holding that such a rule is incompatible with the FAA.²⁸ In *Concepcion*, the Court deemed that the FAA pre-empts a California law providing that class action waivers in arbitration agreements are unenforceable in certain circumstances.²⁹

The U.S. Supreme Court's opinion affirms *Concepcion* and *Marmet Health Care Center* and promotes the enforceability of arbitration clauses, at least to the same extent as any other contractual provision. However, the Court appears particularly unsympathetic to the argument that the right to enter into an arbitration clause in a power of attorney document may be determined to be a hot power as a matter of state law.

Pursuant to the Uniform Power of Attorney Act,³⁰ which has been adopted by several states, the power to create a trust, make a gift, change rights of survivorship, delegate authority, and disclaim property, among other powers, must be expressly and specifically provided for.³¹ Such powers must be expressly provided for because "of the risk those acts pose to the principal's property and estate plan."³² An arbitration requirement in a nursing home contract, or any contract for that matter, may certainly pose a risk to the value of a principal's property or the property of his or her estate. The right to waive a jury trial and enter into an arbitration agreement would seem, logically, to be exactly the type of power that requires express authorization by a principal.

On the other hand, arbitration clauses frequently appear in consumer contracts, which are commonly executed by agents pursuant to a power of attorney. Making the power to waive a jury trial a hot power would essentially disable an agent under power of attorney from entering into routine consumer contracts without the express consent of the principal.

Under the U.S. Supreme Court's logic, a state's decision to require that certain powers be expressly provided for in a power of attorney, even for the purpose of preserving a fundamental constitutional right, such as the right to a trial by jury, may be subject to scrutiny by the federal courts.

B. Practical Considerations

The U.S. Supreme Court's position that the FAA pre-empts state law cannot be clearer. Arbitration agreements are en-

27 *E.g.* 563 U.S.; *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 559 U.S. 662 (2010); *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013).

28 565 U.S. 530 (2012).

29 563 U.S. at 352.

30 Unif. Power of Atty. Act (2006).

31 *Id.* at art. 2, § 201.

32 *Id.* at art. 2, *General Comment*.

forceable to the same extent as any other agreement. If a principal does not want his or her agent to be able to enter into an arbitration agreement, a practitioner can draft the power of attorney accordingly. However, in doing so, the practitioner should be aware that many routine consumer contracts include binding arbitration agreements, which often waive the right to participate in a class action and the right to a trial by jury.

Thus, if a power of attorney expressly disallows an agent from entering into an

arbitration agreement, the power of attorney may be ineffective for entering into many, if not most, types of contracts that the principal may expect his or her agent to enter. A principal's decision to prohibit an agent from entering into an arbitration agreement should be weighed extremely carefully with the assistance of counsel because such a prohibition would likely prevent the agent from entering into necessary contracts for the benefit of the principal, including contracts related to health care, investments, and financial affairs.