

Do Arbitration Agreements Between Nursing Homes and Patients Violate Public Policy—or Are They Enforceable Under the FAA?

CASE AT A GLANCE

The Federal Arbitration Act (FAA) provides for enforcement of arbitration agreements in a “contract evidencing a transaction involving commerce” in the district court. A nursing home sought to enforce arbitration agreements signed by the (now deceased) residents’ family members as the residents’ attorneys-in-fact. The Kentucky Supreme Court’s conclusion in the first case that the power of attorney did not confer that authority on the attorney-in-fact and, in the second case, that the patient’s intent to confer that specific authority could not be reasonably inferred from the document due to overriding policy considerations are the subjects of this certiorari proceeding.

Kindred Nursing Centers v. Clark Docket No. 16-32

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From: The Supreme Court of Kentucky

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ISSUE

Is the Kentucky Supreme Court’s refusal to enforce these arbitration agreements a departure from United States Supreme Court law, which preempts state rules that are “restricted to the [field] of arbitration” and which do not “place ... arbitration contracts on an equal footing with all other contracts?”

FACTS

Before Olive Clark and Joe Paul Wellner were both admitted to the Winchester Center for Health and Rehabilitation in 2008, they signed powers of attorney appointing Janis Clark and Beverley Wellner, respectively, as their attorneys-in-fact.

Mrs. Clark’s power of attorney gave her daughter, Janis, the unqualified right to make contracts and agreements and “to do and to perform for me in my name all that I might do if present.”

Mr. Wellner’s power of attorney granted his wife, Beverley, the authority “to make, execute and deliver ... contracts of every nature in relation to both real and personal property.” Janis Clark and Beverley Wellner as attorneys-in-fact signed the admission documents required by the nursing facility when their family members were admitted as patients. They also signed separate arbitration agreements in the same capacities. The arbitration agreements required all disputes arising out of their family members’ “stay at the facility” to be arbitrated.

Janis Clark and Beverley Wellner subsequently brought civil actions in the Kentucky courts arising out of their family members’ deaths

at the facility—which were met with Winchester’s efforts to compel arbitration.

The trial court refused to enforce the arbitration agreements under reasoning also adopted by the Kentucky Court of Appeals to the effect that the powers of attorney were insufficient to invoke the arbitration agreements. The trial court relied on *Ping v. Beverly Enterprises, Inc.*, 376 S.W. 3d (Ky, 2012), where the Supreme Court of Kentucky in a 4-3 decision held that the Wellner power of attorney was insufficient to bind the deceased principal to arbitration. While it ruled that the Clark power was broad enough to do so, the Kentucky court carved out an exception to enforcement keying its findings to the idea that Mrs. Clark’s power could not be construed to waive her fundamental civil rights, including her constitutional right to access the courts, and that it would be “strange” to believe otherwise.

Indeed, the Kentucky Supreme Court majority concluded that the Kentucky Constitution created an “inviolable” right to a jury trial, a “right that cannot be taken away; and indeed a right that is sacred, thus denoting that right and that right alone as a divine God-given right.” Since the power did not contain an express provision by which Mrs. Clark gave up her “God-given right to a jury/court trial” the arbitration provision was not enforced. The jury trial waiver for which enforcement was denied was equated with freedom of religion, prenatal rights, abortion, consent to an arranged marriage, personal servitude, and other similar cataclysmic concessions. Three dissenters concluded that the four-member majority had singled out arbitration agreements for disfavored treatment in violation of *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015).

CASE ANALYSIS

This case tracks directly to the core of the Supreme Court's Federal Arbitration Act (FAA) preemption rulings because, based on *Ping*, the Kentucky Supreme Court appears to have created a general agency law principle that relies on constitutional doctrine to reject enforcement of alternative dispute resolution agreements. The Kentucky Supreme Court's invocation of a constitutional rights waiver exclusion in arbitration agreements, partially on theological grounds, seems to have a strained quality. This is obviously not without controversy; one of the Kentucky Supreme Court dissenters wrote, the court's ruling "fl[ies] in the face of federal law and is preempted by the Supremacy Clause because it [is] not clearly a . . . state-law principle applicable to 'any contract' but rather one that singles out arbitration agreements for disfavored treatment." The petitioner nursing home argues, with some force, that upholding the Kentucky ruling would result in states having "virtual carte blanche authority to impose discriminatory barriers to the enforcement of arbitration agreements."

The two powers of attorney produced two different judicial insights. The Clark power was found not susceptible of a reading that included the power to execute alternative dispute resolution contracts on behalf of the principal prior to the dispute arising. Viewing the Clark power narrowly, the Kentucky Supreme Court appeared to base its ruling on the intentions of Mrs. Clark when she signed the power and could not find within the four corners of the power an expression that Mrs. Clark had authorized her attorney-in-fact to "remove" her from the judicial system. The Wellner power of attorney was engrafted with the newly created common-law "God-given rights" exclusion cited earlier.

An interesting claim by the deceased patients' attorneys-in-fact, as respondents, is that state court decisions that attempt to determine the state of mind of deceased principals are entitled to deference, and that the Kentucky Supreme Court was not attempting to deflect enforcement of the FAA. Raising the specter of federal judicial interference with traditional state law functions, respondents maintain that "federalizing American power of attorney law in order to show deference to federal policy choices is unwarranted by FAA and threatens to federalize the state law on agency."

The rules governing the implementation of an arbitration agreement under the FAA are clear; it is their application that can create challenges.

Section 4 of the FAA requires the district court to order an arbitration to proceed once the court is satisfied the making of the agreement for arbitration or the failure to comply is not in issue. Respondents maintain that the Kentucky court was well within its prerogatives to decide whether or not an arbitration agreement existed in the first place. This is all well and good, according to petitioner, but for the fact that Kentucky appears to have created a common-law exception to the authority of an attorney-in-fact, which derives from a mélange of new Kentucky constitutional doctrine and theology.

Three cases emanating from the Supreme Court are claimed by the nursing facility to be dispositive but are sharply distinguished by the respondents. *Doctor's Associates vs. Casarotto*, 517 U.S. 681 (1996), validated a Montana statute that required a contract to contain

underlined capital letters that it was subject to arbitration. Without such designation, the contract was not enforceable.

AT&T Mobility LLC vs. Concepcion, 563 U.S. 333 (2011), involved a class action waiver embedded in an arbitration clause. Based on a California law that prohibited such waivers, the Court of Appeals for the Ninth Circuit refused to enforce the arbitration clause as being unconscionable. The Supreme Court found that the unconscionability standard would have a disproportionate impact on arbitration proceedings and was preempted by the FAA. This ruling appears to implicate both the question of whether an agreement existed and whether or not it should be enforced as opposed to *Casarotto*, which could be said to be focused solely on the question of enforcement.

DIRECTV, Inc. also involved an arbitration clause that excluded class action arbitration. The California court in *DIRECTV, Inc.* based its ruling on the California common-law rule that had been thrown out in *Concepcion*. The U.S. Supreme Court concluded that the revival of an obsolete law that would frustrate arbitration was also preempted by FAA. *Concepcion* took the preemption rule even further, however, by negating state laws "that stand as an obstacle to the accomplishment of the FAA's object." Consequently, even if it is correct to limit *Casarotto* and *DIRECTV* to the issue of enforceability, as opposed to contract formation, did the Kentucky Supreme Court establish any obstacles to enforcement?

It was acceptable, respondents maintain, for the Kentucky court to parse the Wellner power of attorney to divine the principal's intention within the agreement; the Kentucky court did not do so with respect to the Clark power because it found no grant of authority.

Petitioner notes a problem with respondents' approach in that a general power of attorney that excludes nothing from the attorney-in-fact's purview can become a bit of a legal taffy pull when public policy considerations are imported. And petitioner questions whether it is reasonable to include religious beliefs and marriage within the public policy desiderata applicable to alternative dispute resolution. Individuals may be free to disdain arbitration when executing powers. However, petitioner asks the Court whether it is permissible for courts to do so when the signatory offered no basis to so conclude.

One other issue posed by respondents is whether overturning the Kentucky Supreme Court would amount to an imposition by the U.S. Supreme Court of its authority to interpret state statutes—a role typically the prerogative of state courts. This analysis turns on whether the state court ruling is reasonable or a created FAA hurdle—to some degree requiring subjective head scratching about intent that the petitioners challenge on the part of the Kentucky court here.

Finally, amicus Imre S. Szalai, Wessel Distinguished professor of Social Justice at Loyola University New Orleans College of Law, asserts that Section 2 of the FAA makes it clear that the FAA does not comprise personal injury claims, the basis of respondents' cases here. Given that Kentucky's state courts have expressed similar views in non-FAA arbitration cases, this distinction may offer the Supreme Court a helpful route to avoid extending FAA preemption

doctrine while respecting state court prerogatives to construe contracts.

SIGNIFICANCE

This case may significantly impact nursing home admission contract arbitration clauses, which are increasingly common in the industry and are objectionable to ombudsmen and senior groups. *Kindred Nursing* could also open a truck-wide gap in FAA doctrine if state courts' rulings importing strict scrutiny and public policy—if not religious-parsing of arbitration agreements—is sanctioned.

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PREVIEW of United States Supreme Court Cases, pages 155–157.
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