Kindred Nursing v. Clark: U.S. Supreme Court Continues to Support Arbitration

By Christopher Hopkins

In recent years the U.S. Supreme Court has issued a series of decisions upholding the enforcement of arbitration agreements in the context of nursing home litigation. This article summarizes those recent decisions and explains some of their implications for defense practitioners.

In May 2017, the United States Supreme Court issued its ninth opinion in six years regarding the enforcement of arbitration agreements.[1] Notably, in more than half of those cases, the Court sent a repeated and increasingly stark message: state courts which are "misreading and disregarding" the pre-emptive and pro-arbitration effect of the Federal Arbitration Act (FAA) will see their rulings vacated.[2]

In *Kindred Nursing Centers Ltd. v. Clark*, the Court held that the Kentucky Supreme Court wrongly "single[d] out arbitration agreements for disfavored treatment" when it ruled that state law required a power-of-attorney (POA) had to receive "specific" and "express" authority in the POA instrument in order to agree to arbitration regardless of whether the POA was otherwise empowered by the principal to sign contracts and bring or settle claims.[3] The U.S. Supreme Court reversed and vacated that judgment and held that the FAA: (a) "preempts any state rule discriminating on its face against arbitration" and (b) "displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements."[4]

The *Kindred* opinion arises out of a challenge to the enforcement of a nursing home arbitration agreement argued below by two Florida-based firms experienced in long term care litigation. *Kindred* is particularly noteworthy for Florida litigators because of similarities between the Kentucky and Florida constitutional rights to access to the courts and the frequency of arbitration-related appellate decisions in Florida.[5]

This article discusses the recent swath of Supreme Court cases vacating state laws which were found to be hostile to arbitration; explains the arguments and ruling in *Kindred;* and provides strategies for defense counsel seeking to enforce arbitration in Florida courts.

Recent Trend of Reversing Anti-Arbitration Rules Based Upon FAA Preemption

Arbitration-related issues which have recently reached the Supreme Court include class action waivers and state laws hostile towards arbitration. The latter issue has occupied five out of nine Supreme Court arbitration decisions in the last six years.[6] This section will discuss the Court's recent, unbroken chain of decisions preempting and vacating anti-arbitration state rules.

Dating back to 1925, the FAA embodies a "liberal federal policy favoring arbitration" in contrast to "widespread judicial hostility to arbitration agreements."[7] It states that a contract involving interstate commerce which includes a "written provision... to settle by arbitration a controversy thereafter arising out of such contract… shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of such contract."[8]

The Supreme Court's tone of increased aggravation with anti-arbitration state statutes and court rulings is reflected over the course of several recent opinions. At first, there was little sign of friction when, in the mid-1990s, the Court charitably concluded that the Montana Supreme Court must have

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"misread" the Supreme Court's precedent interpreting the FAA.[9] In *Doctor's Associates v . Casarotto*, the Court confronted a Montana statute which imposed a unique requirement that an underlined notice be placed on the front page of any contract which included an arbitration clause. The Court reversed the state supreme court and struck the law, insisting that "[c]ourts may not… invalidate arbitration agreements under state laws applicable *only* to arbitration provisions."[10] Justice Ginsburg, writing for the majority, used a neutral, if not understanding, tone when tracing the lower court's misstep back to a simple misinterpretation. Over the next two decades, the *Casarotto* holding was distilled down to the concept that the FAA requires that arbitration be placed "on equal footing" with other contracts and could not be burdened with arbitration-specific requirements.

The timing of *Casarotto* was important because it coincided with an increased use of arbitration clauses in consumer and financial services contracts during the 1990s.[11] As businesses more frequently inserted arbitration provisions in contracts, there was a corresponding rise in state rules resisting the spread of arbitration, particularly when there was a nationwide company on one side and consumers on the other. This led to tension between lower courts, which often ruled in favor of consumers seeking to avoid arbitration, and the Supreme Court, which steadfastly imposed the FAA's national preference for arbitration. Beginning in 2011, five consecutive opinions reflect the Supreme Court's increasing suspicion of lower courts' misinterpretation of FAA precedent.

In 2011, the Court rendered a 5–4 decision in *AT&T Mobility v. Concepcion*, where a phone carrier contract required arbitration but denied class arbitration relief.[12] Could a state court decline to enforce arbitration because a collateral clause (preventing class arbitration relief) was deemed unconscionable under California state law?

The divided Supreme Court framed the legal quandary this way: "when state law prohibits outright the arbitration of a particular claim, the analysis is straightforward… [b]ut the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress… or unconscionability, is alleged to have been applied in a fashion that disfavors arbitration."[13] Under the latter circumstance, the Court would have to look for signs of "hostility towards arbitration" which could "manifest[] itself in a great variety of devices and formulas declaring arbitration against public policy."[14] The Court found hostility in *Concepcion*, at least in part, because, "California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts."[15]

The *Concepcion* majority did not cite to the prior *Casarotto* case but both opinions harmoniously acknowledged that state law contract defenses were "saved" by the FAA however lower courts could neither (a) directly invalidate arbitration agreements through special application of those defenses nor (b) indirectly deny arbitration through state law rules that "hinder the speedy resolution of the controversy" and "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of [the FAA]."[16]

The Court's frustration with the lower court was detectable in *Concepcion* but, in the following term, the tone rose to near seismic levels in response to two lower courts' refusals, through "devices and formulas," to concede the preemptive power of the FAA.[17] The result was two terse 2012 *per curiam* decisions in *Marmet Health Care Center, Inc. v. Brown* and *Nitro-Lift Technologies, L.L.C. v. Howard*.

In *Marmet Health*, the Supreme Court accused the West Virginia Supreme Court of "misreading and disregarding" precedent and missing the "basic principle" of the FAA.[18] The lower court had selectively concluded that injury and death claims against nursing homes could not be arbitrated as a matter of state public policy. Reversing, the Court concluded that such a policy "is a categorical rule prohibiting the arbitration of a particular type of claim and that rule is contrary to the terms and coverage of the FAA."[19] The lower court's policy barring arbitration of specific claims involving (only) nursing homes ran afoul of *Concepcion*'s holding that, "when state law prohibits outright the arbitration of a particular claim, the analysis is straightforward…"[20]

Nine months later, in November 2012, the *per curiam* decision in *Nitro-Lift* was even shorter than *Marmet Health* and more direct. In *Nitro-Lift*, the Oklahoma Supreme Court invalidated noncompete agreements on state law grounds despite the presence of valid arbitration clauses. The Supreme Court reversed with a jab that the state court clearly "chose to discount… controlling precedent."[21] The Supreme Court reaffirmed that the question about the validity of a noncompete agreement should have been for the arbitrator, not the court, since "attacks on the validity of the contract, as distinct from attacks on the validity of the arbitration clause itself, are to be resolved by the arbitrator."[22]

At the top of the *Nitro-Lift* opinion, the Court sent a message to state courts that it did not want to repeatedly revisit FAA preemption: "state courts rather than federal courts are most frequently called upon to apply [the FAA]" and thus "[i]t is a matter of great importance that state supreme courts adhere to a correct interpretation…"[23] In short, the Court issued a remedial decision instead of breaking new legal ground in order to reiterate a nearly thirty year old holding: when federal grounds are invoked, the FAA is substantive law in state courts which control over conflicting state rules which were not "laws of equivalent dignity."[24]

Three years later, in December 2015, the Court issued *DirecTV v. Imburgia*. In a case interpreting the phrase "law of your state" in DirecTV's contract, a majority of 6-3

voted that the FAA still preempted state laws.

At the time the parties formed the contract at issue in *Imburgia*, the law in California invalidated arbitration agreements which barred class action relief (the so-called *Discover Bank* Rule). However, the Supreme Court later issued *Concepcion*, which invalidated "state rules that render class-arbitration bans unenforceable."[25] DirecTV's contract stated that "if the law of your state permit agreements barring class arbitration, then the entire agreement to arbitrate becomes unenforceable…"[26] The Supreme Court was tasked with interpreting whether "the law of your state" meant either "law of your state to the extent it is not preempted" or "the law of your state without considering the preemptive effect… of the FAA."[27]

Writing for the majority, Justice Breyer indicated that the issue was not so much whether the lower court properly interpreted state law regarding rescission but whether it properly interpreted FAA preemption, starting with the underlying question whether arbitration was treated "on equal footing with all other contracts."[28] The Supreme Court concluded that, in non-arbitration situations, the state court would have interpreted the phrase, "law in your state," to mean "its ordinary meaning: *valid* state law."[29] The Supreme Court held that, by concluding otherwise, the lower court was not placing arbitration "on equal footing with all other contracts."[30] Similar to the *Casarotto* opinion, the Supreme Court recognized that lower courts could invalidate arbitration agreements under regular contract law but could not void arbitration under state laws only applicable to arbitration provisions.[31] In the end, like *Nitro-Lift*, the Supreme Court emphasized that *Imburgia* should be nothing new to the lower courts since it "goes no further than… present well-established law."[32]

U.S. Supreme Court's Latest Word on FAA Preemption: *Kindred v. Clark*

In a short opinion with limited citations, the *Kindred* opinion announced, with an impatient tone, that "[a]s we did just last Term, we once again reach a conclusion that falls well within the confines of (and goes no further than) present well-established law."[33]

The Court squarely took aim at the Kentucky Supreme Court for "imped[ing] the ability of attorneys-in-fact to enter into arbitration agreements" and "thus flout[ing] the FAA's command to place those agreements on an equal footing with other contracts."[34] The *Kindred* opinion has a specific effect on plaintiff strategies to avoid arbitration in the nursing home context but also re-confirms the Supreme Court's commitment to persistently accept writs of certiorari, even if the ultimate opinion is repetitive or remedial, in order to invalidate anti-arbitration state rules.

In the underlying cases, family members of two nursing home residents, Mr. Wellner and Mr. Clark, executed admission agreements based upon their respective power of attorney which designated the signing family member as the resident's "attorney-in-fact" with "broad authority to manage [the residents'] affairs."[35] Mr. Wellner's POA document gave his wife the authority "in my name, place, and stead" to do a number of acts including "institute legal proceedings" and make "contracts of every nature in relation to both real and personal property."[36] Mr. Clark's POA document provided his daughter with "full power… to transact, handle, and dispose of all matters affecting me and/or my estate in any way… [including the ability to] draw, make, or sign in my name any and all… contracts, deeds, or agreements."[37] Lawsuits were filed over the residents' care and the defendants unsuccessfully sought to compel arbitration.

Announcing a new rule, the Kentucky Supreme Court held that, when it came to arbitration, a power of attorney could not rely on standard, broad language typically found in POA documents. The state court held that, in Mr. Wellner's case, the POA language was not broad enough to include the power to consent to arbitration but, in Mr. Clark's case, his POA document would include the ability to agree to arbitration. However, both arbitration agreements were still invalid because of a new requirement: "a power of attorney could not entitle a representative to enter into an arbitration agreement without *specifically* saying so."[38] This holding relied upon the state constitutional right of access to the courts and to a jury trial which were deemed "sacred" and "inviolate."[39] In short, the broad language typically found in a POA instrument granting full power to "institute legal proceedings" or sign contracts was insufficient when it came to arbitration agreements. The court concluded that an agent could only waive the right to a jury trial if the POA document expressly stated that authority (the so-called "clear statement rule"). The lower court took the position that its analysis was consistent with the FAA directive since it did not single out arbitration and that the clear statement rule must be met before any POA could waive a fundamental constitutional right.

At the Supreme Court, the plaintiffs made two arguments in support of the state supreme court ruling. First, plaintiffs argued that the lower court was correct and that the "clear statement rule" did not single out arbitration but would apply to any attempted waiver of a fundamental right without specific and express authority (the "Constitutional Waiver Argument").[40] Second, plaintiffs argued the clear statement rule was viable because it went to contract *formation* and not *enforcement*, and thus the FAA had no application (the "Wilkes Argument," after the law firm advancing this theory).[41] In a 7–1

opinion, the Supreme Court firmly disagreed with both anti-arbitration theories.

As to the Constitutional Waiver Argument, the Supreme Court held that the clear statement rule violated *Concepcion*'s equal treatment principle that a court could invalidate an arbitration provision on "generally applicable contract defenses" but the court could not use rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."[42] Condensing the prior *Concepcion* holding, the Supreme Court held that the "FAA thus preempts any state rule discriminating on its face against arbitration" and the FAA: (a) "preempts any state rule discriminating on its face against arbitration" and (b) "displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements."[43] The Supreme Court concluded that the lower court violated *Concepcion* by "adopt[ing] a legal rule hinging on the primary characteristic of an arbitration agreement -- namely, a waiver of the right to go to court and receive a jury trial."[44]

As to the Wilkes Argument, the Supreme Court disagreed that the FAA did not reach contract formation questions because "[i]nstead, FAA's text and our case law interpreting it say otherwise."[45] The FAA's "key provision" states that arbitration clauses must be deemed "valid, irrevocable, and enforceable," which the Court interpreted to mean that the FAA "cares not only about the enforcement of arbitration agreements but also about their initial validity."[46] A lower court could decide issues such as duress, which relate to contract formation, but could not apply such a contract defense in a way that discriminates against arbitration. If the FAA was not able extend to contract formation, the Court suggested that states might wrongfully assert that all POAs were incapable of signing arbitration agreements or, worse, all people are incapable of agreeing to arbitration (under such situations, the "FAA would then mean nothing at all").[47]

The Supreme Court held that the Clark arbitration agreement was enforceable because the Kentucky court held it was broad enough but for the application of the invalid clear statement rule. However, the lower court would need to "evaluate the [Wellner POA's] meaning anew" since the Supreme Court "could not tell to what degree an alternative holding was influenced by the state court's erroneous, arbitration-specific rule."[48]

Will Justice Gorsuch Alter FAA Preemption Precedent?

Based upon the recent Supreme Court decisions vacating anti-arbitration state rules, it is unlikely that the addition of Justice Gorsuch will alter future outcomes.

As discussed above, the Court has been relatively united in recent years on the issue of FAA preemption. As an outlier, Justice Thomas frequently dissents (alone) on the ground that he disagrees that the FAA is substantive law in state courts.[49] It is for this reason that *Kindred* was one vote shy of an unanimous opinion.

While *Concepcion* was a 5–4 split, the four dissenting justices (Breyer, Ginsburg, Sotomayor, and Kagan) were focused on state law and case-specific issues; moreover, they have been in the majority for subsequent opinions vacating anti-arbitration state rules. All of those dissenting judges agreed in the 7–1 *Kindred* decision despite that opinion's heavy reliance on the tenets of the 5–4 *Concepcion* opinion. Likewise, *Imburgia* was a 6–3 split; however, aside from Justice Thomas, the two dissenting Justices (Ginsburg and Sotomayor) were concerned about issues collateral to the enforcement of arbitration. The Supreme Court has otherwise been nearly unified with two *per curiam* decisions (*Marmet Health* and *Nitro-Lift*) and, most recently, *Kindred*. At least one commentator reviewed then-Judge Gorsuch's arbitration cases while he was on the Tenth Circuit and concluded that Justice Gorsuch will likely follow precedent and join the majority in FAA preemption cases.[50]

Why *Kindred* Is Important: Strategies for Defense Counsel

Long term care suits involving injuries or deaths at assisted living and skilled nursing facilities often begin with a dispute over the enforcement of arbitration. In the long term care context, many admission agreements contain arbitration provisions; the admission documents are frequently signed by family members (typically holding a POA or acting as legal guardian) on behalf of the aging resident. Over the course of years, and somewhat through trial and error, many companies have wisely honed and refined their arbitration provisions to fit language that has previously been approved by the courts. This makes it difficult for plaintiffs' counsel to attack the arbitration language itself. In response, some plaintiffs' lawyers have sought to avoid arbitration either by arguing that arbitration is contrary to public policy or by disputing the authority of the agent signing the agreement. The *Kindred* case involves, and substantially quashes, both arguments based upon improper waiver of fundamental rights and/or lack of authority under a POA document.

In seeking to enforce arbitration, defense counsel should consider invoking the FAA in light of its pro-arbitration effect, particularly under recent Supreme Court precedent. The *Kindred* case should defeat the argument that a state constitutional right to access the courts and/or for a jury trial somehow prohibits arbitration.[51] The recent FAA preemption cases firmly conclude that, while state law can invalidate arbitration provisions under standard contract defenses, courts cannot apply contract law in a way that

voids an agreement simply because it involves arbitration. To this end, the trend discussed above reflects the fact that the Supreme Court has a wary eye on how state courts that treat arbitration negatively.

Defense counsel should anticipate the argument that a POA document does not empower a family member of an elderly person to waive trial in favor of arbitration. This argument is case-specific since POA documents are typically drafted by probate lawyers who may not specifically include the word "arbitration" and may be using forms of varying language. This is particularly an issue in Florida where many elderly people had their estate documents drafted in other states before retiring to the Sunshine State. Careful review of the POA document is in order before moving to compel arbitration to ensure that it either specifically mentions arbitration or has sufficiently broad language that courts have previously held to include the right to waive trial in favor of arbitration.

The strategy of attacking the scope of the power of attorney in order to avoid arbitration is not limited to *Kindred*. In fact, the plaintiff firm in that case has, with varying degrees of success, sought to avoid arbitration using the identical argument in Florida.[52] Generally, courts are looking for either arbitration-specific language or POA language which "unambiguously make[s] a broad, general grant of authority" to the attorney-in-fact.[53]

For defense counsel, the case of *Jaylene, Inc. v. Moots* is particularly instructive because the POA in that case did not contain an arbitration-specific provision, but "the grant of authority to the attorney-in-fact under the POA [was] extremely broad and unambiguous" such that the court held that the POA-signed arbitration provision was enforceable.[54] Be mindful, however, that plaintiffs' counsel will still argue that a POA is insufficient if it includes some, but not all, of the provisions of the POA at issue in *Jaylene.* In the event there is some ambiguity in the POA documents, defense counsel should present sufficient facts for the trial court to interpret its language and intent.[55]

Conclusion

The U.S. Supreme Court has consistently upheld the preemptive power of the Federal Arbitration Act and reversed lower courts which have sought to enforce anti-arbitration state rules. The decision in *Kindred v. Clark* re-confirms the pro-arbitration effect of the FAA and that the Supreme Court will accept cases, even if they appear remedial, in order to enforce preemption and the nationwide policy in favor of arbitration. Defense counsel, however, should be prepared for attacks on the scope of a power of attorney document if an attorney-in-fact executes an agreement containing an arbitration provision.

[1] *Marmet Health Care Center, Inc.*, v. *Brown,* 132 S. Ct. 1201 (2012) (*per curiam*); *see also AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012); *Nitro-LIft Techs. L.L.C. v. Howard*, 133 S. Ct. 500 (2012) (*per curiam*); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 786 (2012); *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013); *BG Group PLC v. Republic of Argentina*, 134 S. Ct. 1198 (2014); *DirecTV v. Imburgia*, 136 S. Ct. 463 (2015); *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421 (2017).
[2] *Marmet*, 132 S. Ct. at 1202; *see generally Concepcion*, *Nitro-Lift*, *Imburgia*, and *Kindred*.
[3] *Kindred*, 137 S. Ct. at 1425-27.
[4] *Id.* at 1426 (parenthetical comment is from the original).
[5] *Compare* Ky. Const. § 14 *with* Art. I, § 21-22, Fla. Const.
[6] *See* supra note 1.
[7] *Concepcion*, 131 S. Ct. at 1745 (citations omitted).
[8] 9 U.S.C. § 2.
[9] *Doctor's Assocs. v . Casarotto*, 116 S. Ct. 1652, 1653 (1996).
[10] *Id*. at 1656 (emphasis in original).
[11] *CompuCredit*, 132 S. Ct. at 672.
[12] *Concepcion*, 131 S. Ct. at 1745.
[13] *Id*. at 1747.
[14] *Id.*
[15] *Id.*
[16] *Id.* at 1753.
[17] *Id.* at 1747.
[18] *Marmet*, 132 S. Ct. at 1202.
[19] *Id.* at 1204 (citations omitted).
[20] *Concepcion*, 131 S. Ct. at 1747.
[21] *Nitro-Lift*, 133 S. Ct. at 503.
[22] *Id.*
[23] *Id.* at 501.
[24] *Id.* at 504.
[25] *Imburgia*, 136 S. Ct. at 472.
[26] *Id.* at 466 (quotations omitted).
[27] *Id.* at 470.
[28] *Id.* at 471 (citations omitted).
[29] *Id*. at 469.
[30] *Id.* at 471 (citations omitted).
[31] *Kindred*, 137 S. Ct. at 1426 (citations omitted).
[32] *Imburgia*, 136 S. Ct. at 471.
[33] *Kindred*, 137 S. Ct. at 1429 (citation omitted).
[34] *Id.*
[35] *Id.* at 1425.
[36] *Id.*
[37] *Id.*
[38] *Id.* at 1426 (emphasis in original).
[39] *Id.*
[40] *Id*. at 1427.
[41] *Id.* at 1428.
[42] *Id.* at 1423 (citation omitted).
[43] *Id.* at 1426 (parenthetical comment is from the original).
[44] *Id.* at 1427.
[45] *Id.* at 1428.
[46] *Id.*
[47] *Id.*
[48] *Id.* at 1429.
[49] *Id.*
[50] Roberts, Edith, *Judge Gorsuch's Arbitration Jurisprudence*, SCOTUSBlog.com (Mar. 6, 2017), http://www.scotusblog.com/2017/03/judge-gorsuchs-arbitration-jurisprudence/.
[51] *See supra* n.5.
[52] *See, e.g., Moen v. Bradenton Council on Aging,* 210 So. 3d 213 (Fla. 2d Jan. 27, 2017); *Dea v. PH Fort Myers, LLC.*, 208 So. 3d 1204 (Fla. 2d DCA 2017); *Carrington Place of St. Pete, LLC v. Est. of Milo*, 19 So. 3d 340 (Fla. 2d DCA 2009); *Jaylene v. Moots*, 995 So. 2d 566 (Fla. 2d DCA 2008); *Est. of MicKibbon v. Alterra*, 977 So. 2d 612 (Fla. 2d DCA 2008); s*ee also Perry v. Sovereign Healthcare of Metro West*, 100 So. 3d 146 (Fla. 5th DCA 2012).
[53] *Carrington Place of St. Pete v. Milo*, 19 So. 3d at 341 (citation omitted).
[54] *See Jaylene*, 995 So. 2d at 566.
[55] *See Santa Rosa Investors, Inc. v. Wilson*, 171 So. 3d 826 (Fla. 1st DCA 2015).