

STATE COURTS MUST PLACE ARBITRATION AGREEMENTS ON EQUAL FOOTING WITH ALL CONTRACTS, JUST LIKE FEDERAL COURTS

In *Kindred Nursing Ctrs. P'ship v. Clark*, 581 U.S. --, 2017 U.S. LEXIS 2948 (May 15, 2017), the Supreme Court reiterated its long-standing position that any laws that single out arbitration agreements for disfavored treatment run afoul of the Federal Arbitration Act's requirement, at 9 U.S.C. § 2, that courts must place such agreements "on equal footing with all other contracts" and reversed the decision of the Kentucky Supreme Court.

The case before the Court was a consolidation of two separate cases that had been decided in Kentucky state court. Beverly Wellner and Janis Clark were the wife and daughter, respectfully, of Joe Wellner and Olive Clark, two deceased former residents of a nursing home owned by Kindred. Both held a power of attorney for their respective relatives and both of those powers of attorney granted them broad powers. The Wellner POA gave Beverly the authority to, among other things, institute legal proceedings and make "contracts of every nature in relation to both real and personal property." The Clark POA provided Janis with full power to transact, handle and dispose of all matters affecting Olive's estate and to "draw, make, and sign in my name any and all . . . contracts, deeds or agreements." When both Joe and Olive moved into the Kindred facility in 2008, Beverly and Janis both signed the necessary paperwork pursuant to their POAs, including identically-worded arbitration provisions that stated: "any and all claims or controversies arising out of or in any way relating to . . . the Resident's stay at the Facility" would be resolved through binding arbitration.

Both Joe and Olive died in the next year and Beverly and Janis filed separate suits in Kentucky state court making the same basic claim, that is, that Kindred's substandard care had

caused both deaths and Kindred filed motions to dismiss citing the arbitration agreements. The trial court denied the motions and the Kentucky Court of Appeals agreed, allowing both suits to go forward.

The Kentucky Supreme Court consolidated the cases and affirmed the lower court decisions. The court initially examined the language of both POAs and determined that the Wellner POA did not permit Beverly to enter into an arbitration agreement. Conversely, it determined that the Clark POA was broad enough to allow Janis to enter into such an agreement. However, it held that both the agreements were invalid because it determined that a POA could not entitle a representative to enter into an arbitration agreement without specifically saying so. It explained the ruling by stating that the Kentucky Constitution protected its citizen's rights to access its courts and trial by jury and, as such, it could be waived only if such power was specifically stated in the POA, the so-called "clear-statement rule." The court attempted to explain its way around the FAA's clear mandate by stating that the clear-statement rule would also apply in the future to other contracts that implicated "fundamental constitutional rights." Three Kentucky justices filed a dissent in which they concluded that the new rule ran afoul of the FAA. The U.S. Supreme Court granted certiorari.

The Supreme Court began its analysis by reiterating its long-standing rule, recently restated in *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333 (2011) and *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463 (2015), that the FAA mandates that arbitration agreements must be on an equal plane with all other contracts and that while a court may invalidate arbitration agreements based on general contract defenses such as fraud or unconscionability, it may not do so on legal rules that apply only to arbitration agreements, even when such rules coyly avoid using the word "arbitration" and substitute phrases like "right to trial by jury" and "access to courts" like the

Kentucky high court did. It determined that the clear-statement rule tried to accomplish precisely what *Concepcion* bars, that is, adopting a legal rule “hinging on the primary characteristic of an arbitration” – waiving the right to go to court and receiving a jury trial. To illustrate the Kentucky court’s thinly-veiled pretextual reasoning, the Supreme Court noted, for example, that nothing in the clear-statement rule prevented a representative from signing a settlement agreement or consent to a bench trial on the principal’s behalf, stating “[m]ark that as another indication that the court’s demand for specificity in powers of attorney arises from the suspect status of arbitration rather than the sacred status of jury trials.” Based on its long-standing FAA jurisprudence, the Court determined that the Kentucky court’s clear-statement rule “flouted the FAA’s command to place those agreements on an equal footing with all other contracts.”

As to the specific cases before it, the Court reversed the Clark decision since the Kentucky court had determined that that POA was broad enough to allow entry into an arbitration agreement but invalidated it based on the clear-statement rule that the Supreme Court determined violated the FAA. By contrast, the Court vacated and remanded the Wellner decision. As noted, that decision was based on the Kentucky Supreme Court’s ruling that the POA was not broad enough to allow Beverly to enter into an arbitration agreement. The Supreme Court stated if the Kentucky court’s interpretation of the agreement is “wholly independent” of the clear-statement rule, “then nothing we have said disturbs it.” However, it went on to state “[b]ut if the rule at all influenced the construction of the Wellner power of attorney, then the court must evaluate the document’s meaning anew.”

In this 7-1 decision, with Justice Thomas dissenting based on his belief that the FAA does not apply to the states, the Court left little doubt that the FAA’s mandate that arbitration agreements must be placed on equal footing with all contracts remains inviolate.