

Blog Entry: Supreme Court Reinforces the Primacy of the Federal Arbitration Act, Even Over a “Divine God-Given Right”

MAY 16, 2017

Source: Array

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Kentucky law speaks of the right to jury trial in theological terms. The Kentucky Constitution provides that “[t]he ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution.” Expounding on that, the Kentucky Supreme Court noted in an opinion that “the drafters of our Constitution deemed the right to a jury trial to be inviolate, 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.” And no, that opinion did not issue in 1815; it issued 200 years later.

On May 15, 2017, that opinion was undone by the United States Supreme Court.

The case involves the collision between Kentucky’s reverence for the right to jury trial, on one hand, and the applicability of the decidedly less religious Federal Arbitration Act, on the other. It began as two separate negligence lawsuits brought by decedents’ estates in Kentucky state courts against the nursing homes in which decedents last resided. The cases were filed by decedents’ attorneys-in-fact acting under broad powers of attorney.

The nursing homes moved to dismiss, claiming that when those same attorneys-in-fact originally submitted paperwork to have decedents admitted to the nursing homes, they signed arbitration agreements broad enough to cover the negligence cases.

The trial court denied the motion, and the intermediate appeals court and Kentucky Supreme Court affirmed. In so holding, the latter reasoned that even though the powers of attorney conferred broad authority upon the attorneys-in-fact, the right to enter into arbitration agreements on decedents’ behalf was not *specifically* one of them. And because the right to jury trial is “sacred” and “inviolate” in Kentucky, the attorneys-in-fact were constitutionally forbidden to relinquish that right through an arbitration agreement. Doing so would apparently be blasphemous.

The Kentucky Supreme Court’s decision was 4 to 3, and the dissenting opinions were robust. From one of them, this: “Relying on a ‘God-given right’ to a jury trial, the majority announces a new rule that contravenes the United States Constitution and controlling precedent from the Supreme Court of the United States. To posit that the right to a jury trial is the preeminent right in our Kentucky Constitution (apparently superior to the rights that precede it in that document including, for example, the rights to life, liberty, religious freedom, assembling for the common good, and

acquiring property) and, accordingly, prohibit an agent acting under an unrestricted general ‘power to contract’ from entering into an arbitration agreement is at best seriously misguided. For the reasons stated herein, I strongly dissent.”

SCOTUS accepted certiorari, and on May 15, 2017, in a 7 to 1 decision, reversed in part and vacated in part the Kentucky Supreme Court’s judgment. In so holding, it invoked its prior ruling in *AT&T Mobility LLC v. Concepcion*, where it stated that “[a] court may invalidate an arbitration agreement based on ‘generally applicable contract defenses’ like fraud or unconscionability, but not on legal rules that ‘apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.’” The Kentucky courts, it held, “did exactly what *Concepcion* barred: adopt 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.” As for the Kentucky Supreme Court, it “specially impeded the ability of attorneys-in-fact to enter into arbitration agreements” and therefore “flouted the FAA’s command to place those agreements on an equal footing with all other contracts.” And where in the FAA is that “command” codified? At 9 U.S.C. § 2, which provides 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.” (Emphasis added.)

So SCOTUS held that Kentucky’s fervent devotion to the right to jury trial does not override the FAA: *express* grants of authority to enter into arbitration agreements were not required to confer such authority upon the attorneys-in-fact, “God-given right” notwithstanding. Rather, as with any contract, it is the POA’s construction that determines the extent of the authority being conferred, and construction begins with the instrument’s language. Consequently, upon reversing the Kentucky Supreme Court, SCOTUS also remanded the case so that the Kentucky courts could consider the limited issue of whether one of the two POAs was broad enough to vest the attorney-in-fact with authority to enter into the arbitration agreement (the other POA unquestionably was). Justice Thomas was the lone dissent, reiterating his oft-stated view that “the Federal Arbitration Act ... does not apply to proceedings in state courts.” Justice Gorsuch did not participate.

The case is *Kindred Nursing Centers Limited Partnership v. Clark*, United States Supreme Court, case no. 16-32, and the decision can be found at <https://goo.gl/4MYYZv>.