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Civil Litigation UPDATE

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What Litigators Need to Know About the Arbitration "Juggernaut"

By Hon. Stephanie H. Klein (Ret.)

"Resistance is futile," said the Borg drones as they assimilated a new species in their cyborg collective in the iconic television series "Star Trek." Both Justice Wecht of the Pennsylvania Supreme Court in *Taylor v. Extendicare* 147 A. 3d 490 (Pa. 2016), cert. denied, 137 S. Ct. 1375 (2017) and Justice Elena Kagan in *Kindred Nursing Centers L.P. v. Janis Clark et al.*, ____ U.S. ____, 137 S. Ct. 1421 (2017) echoed the Borg drones in their cautionary opinions to state courts who seek to circumvent the U.S. Supreme Court's jurisprudence enforcing arbitration contracts.

Why should litigators care about *Kindred* and *Taylor*? These cases represent the death knell of state court attempts to mitigate what some view as the harsh effect of mandatory arbitration clauses that preclude litigants from seeking redress in court. For plaintiffs' attorneys, there is a world of difference between litigating before a judge and jury in a public process with possibility of appeals and litigating before one or three arbitrators in a confidential process with limited opportunity to appeal. Many critics question the fairness of these arbitration contracts that appear in everyday agreements like banking, credit card, consumer, employment and even car repair contracts. Many critics also view arbitrations as potentially one-sided, benefiting the company more than the consumer, while businesses find arbitration efficient, predictable and streamlined.

Judge Klein

The Pennsylvania Supreme Court in *Taylor* upheld a mandatory arbitration clause in a nursing home contract, holding that the Federal Arbitration Act, 9 U.S.C. §2 *et seq*. ("FAA"), preempted Pennsylvania Rule of Civil Procedure 213(a), which requires joinder or consolidation of wrongful death and survival action suits.

The decedent in *Taylor* had executed an arbitration contract with her nursing home upon admission. When she died from medical complications after her admission into an Extendicare facility, her executors filed suit in court alleging wrongful death and survival claims. The executors filed the survival action on the decedent's behalf for her personal injuries while they filed the wrongful death action on their own behalf for their own economic loss. They tried to consolidate the two cases under Rule 213(a), notwithstanding the decedent's arbitration contract with Extendicare.

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Even though adjudicating the similar cases in two different forums raised the possibility of inconsistent decisions, Justice Wecht's opinion held that the FAA and Supreme Court precedents required enforcement of the arbitration contract.

In so doing, he discussed at length the Supreme Court's decisions preempting state law in favor of the FAA and quoted critics calling the FAA a "preemption juggernaut." *Id.* at 504. He further stated that the FAA is now perceived as applying to almost every arbitration agreement. Although the FAA reserves courts' power to refuse to enforce arbitration agreement under generally accepted state defenses to contracts, the "savings clause" (9 U.S.C. §2), U.S. Supreme Court decisions raise the question as to whether these defenses exist anymore. *See, e.g., AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740 (2011) (California Supreme Court rule finding class action waivers in contracts unconscionable violates the FAA).

Justice Wecht's decision foretold the clash between the Kentucky Supreme Court and the U.S. Supreme Court in *Kindred.* Justice Kagan, writing for the court, considered the Kentucky Supreme Court's refusal to compel arbitration under two nursing home contracts. Both contracts had been signed by their respective powers of attorney but contained different language.

Beverly Wellner's power of attorney gave her expansive authority to take care of her decedent's estate, including filing legal proceedings and making contracts of "every nature in relation to both real and personal property." *Kindred*, 137 S. Ct. at 1425. In contrast, the other power of attorney gave Olive Clark " full power … to transact, handle and dispose of all matters affecting me and/or my estate in any possible way," including the right to draw, sign and make … contracts …" *Id.*

The Kentucky Supreme Court acknowledged that Clark's power of attorney would grant authority to enter into an arbitration contract while the Wellner grant of authority was not sufficiently expansive to include that authority. *Id., citing Extendicare Homes, Inc. v. Whisman,* 478 S.W.3d 306, 327 (Ky. 2015).

Yet the Kentucky Supreme Court found both agreements invalid because they failed to include a "clear statement" that the principal granted the authority to waive "adjudication by judge or jury." *Kindred,* 137 S. Ct. at 1426, *quoting Extendicare,* 478 S.W. 3d at 329. These rights, ensured by the Kentucky Constitution, cannot be relinquished without a "clear statement" specifically waiving them. *Id.* at 329-29. Without such a "clear statement," the power of attorney lacked the authority to enter into an arbitration contract waiving these rights.

The U.S. Supreme Court soundly rejected this argument. The court stated that under the FAA, arbitration agreements are "valid, irrevocable and enforceable, save upon any grounds as exist in law or in equity for the revocation of any contract." *Id.* at 1426-27, *citing* 9 U.S.C. §2. It further stated that "[t]he FAA … preempts any state rule discriminating on its face against arbitration…." *Id.* at 1426. In addition, the FAA "also displaces any rule that covertly accomplishes the same objective by disfavoring contracts "that… have the defining features of arbitration contracts." *Id.* The Kentucky Supreme Court's "clear statement rule" disfavors arbitration contracts by creating a legal rule that specifically applies to arbitration, whose very definition is a trial without jury. *Id*.

As a result, the court reversed the Kentucky Supreme Court's decision in the *Clark* case. However, it remanded the *Wellner* case. Before applying the "clear statement rule," the court stated that the Wellner power of attorney failed to grant authority to enter into an arbitration contract. *Id*. at 1425, *citing Extendicare,* 478 A.3d 325-26. If the court maintained that position independent of the "clear statement rule," then its position regarding the invalidity of the contract could be sustained. *Id.* at 1429.

Not surprisingly, on remand, in an opinion representing a clash of federalism, the Kentucky Supreme Court once again found the *Wellner* arbitration contract invalid. *Kindred Nursing Centers Ltd P'ship v. Wellner,* 2017 WL 5031530 (Ky. Nov. 2, 2017).

Taking great pains to demonstrate the court's decision was "[pure] from the taint of anti-arbitration bias," (Slip op. at 5), the court once again reviewed the language of the *Wellner* power of attorney. It zeroed in on two grants of authority: the power to "demand, sue for, collect, recover and receive all debts monies, interest and demands… whatsoever" and the power to "institute legal proceedings." *Wellner,* Slip op. at 7. It viewed these authorizations as permitting arbitration or mediation of a pending suit, but not authorizing arbitration pre-dispute. *Wellner,* Slip op. at 8.

Yet there was another grant of author-

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ity: "the power to make 'contracts … in relation to both real and personal property.'" *Kindred,* 137 S. Ct. at 1425. Here the court found that the pre-dispute contract had nothing to do with any property rights of the decedent. While the power of attorney might have had the right to arbitrate any personal injury claim for the decedent, she would have no right to enter into a pre-dispute arbitration agreement, relinquishing his constitutional rights.

The dissent noted that the majority opinion had created a false distinction between pre-dispute and post-dispute agreements. An arbitration agreement is entered into, the dissent argued, contemplating that at some time a dispute might arise. As a result, most if not all arbitration contracts are pre-dispute and the majority's argument is specious. It concluded that the majority's analysis of the *Wellner* power of attorney is …"impermissibly tainted by the same anti-arbitration bias as the so-called clear statement rule." *Wellner,* Slip op. at 14. As of this writing, the Supreme Court docket does not show that Kindred LLP has filed for certiorari at the U.S. Supreme Court.

What is the clear and fast rule for litigators? *Taylor* and *Kindred* appear to be the law in Pennsylvania. However, the Third Circuit offered a glimmer of hope for non-signatories to contracts. *See White v. Sunoco, Inc.*, 2017 WL 3864616 (3d Cir. Sept. 5, 2017) (affirming district court decision refusing to grant Sunoco's motion to compel arbitration because it was not a signatory to the agreement containing arbitration clause).

Accordingly, litigators should assume most arbitration contracts will prevail. While pockets of resistance remain and some scattered efforts might prevail, the best wisdom is that resistance to arbitration contracts may be futile.

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