

# *The Arbitration Newsletter*

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(John Allen Chalk, Sr., Editor)

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The Arbitration Newsletter is published periodically by Whitaker Chalk Swindle & Schwartz PLLC, Fort Worth, Texas, to explore the rapidly developing law and practice of commercial arbitration both in the U.S. and other countries.<sup>1</sup>  
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## **FAA PREEMPTION—One Win, One Loss! Kindred Nursing Ctrs. L.P. v. Clark, 137 S. Ct. 1421 (2017)<sup>2</sup>**

In 2008, Joe Wellner and Olive Clark moved to a nursing home operated by Kindred Nursing Centers.<sup>3</sup> Beverly Wellner and Janis Clark, acting as their respective family member's attorney-in-fact, executed all of the intake documents.<sup>4</sup> The intake documents included an arbitration agreement.<sup>5</sup> Beverly and Janis, representing their respective family member's estate, sued Kindred when Joe and Olive died.<sup>6</sup> In both cases, the Kentucky trial court denied Kindred's motion to dismiss in favor of arbitration, and the Kentucky Court of Appeals affirmed.<sup>7</sup>

The Kentucky Supreme Court analyzed the text of both powers of attorney.<sup>8</sup> The Clark power of attorney was very broad and gave Janis Clark the ability to "dispose of all matters affecting Olive."<sup>9</sup> Thus, the power of attorney gave Janis the ability to enter into an enforceable arbitration agreement.<sup>10</sup>

Kindred relied on two provisions in the Wellner power of attorney to support its argument that Beverly could bind Joe to arbitration: "1) the power to demand, sue for, collect, recover and

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<sup>1</sup> Nothing in The Arbitration Newsletter is presented as or should be relied on as legal advice to clients or prospective clients. The sole purpose of The Arbitration Newsletter is to inform generally. The application of the comments in The Arbitration Newsletter to specific questions and cases should be discussed with the reader's independent legal counsel. My thanks to Aimee Kline, a third-year law student at Texas A&M University School of Law, for her research and drafting assistance.

<sup>2</sup> Note that the Kentucky Supreme Court consolidated three cases. The appellants in each of the cases filed motions for interlocutory relief after Kentucky Court of Appeals did not compel arbitration. Kindred appealed the Kentucky Supreme Court's refusal to compel arbitration to the United States Supreme Court, but the other appellant did not appeal. *See* Kindred Nursing Ctrs. L.P. v. Wellner, 2017 Ky. LEXIS 446, \*2-3 (Ky. Nov. 2, 2017).

<sup>3</sup> Kindred Nursing Ctrs. L.P. v. Clark, 137 S. Ct. 1421, 1425 (2017).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306, 323 (Ky. 2015).

<sup>9</sup> Kindred Nursing Ctrs. L.P. v. Clark, 137 S. Ct. at 1425 (internal quotation marks omitted).

<sup>10</sup> *Id.*

receive all debts, monies, interest and demands whatsoever now due or that may hereafter be or become due to me (including the right to institute legal proceedings therefor); and, 2) the power to make, execute and deliver deeds, releases, conveyances and contracts of every nature in relation to both real and personal property, including stocks, bonds, and insurance.”<sup>11</sup> The Kentucky Supreme Court determined that the Wellner power of attorney did not give Beverly the power to bind Joe to an arbitration agreement.<sup>12</sup>

Beverly’s ability to initiate a legal proceeding under the first power did not include the power to execute a pre-dispute arbitration agreement according to the Kentucky Supreme Court.<sup>13</sup> The Kentucky Supreme Court also held that the arbitration agreement did not relate to a personal property claim because it “was made in relation to Joe’s constitutional right to access the courts and to trial by jury[,]” and constitutional rights are not “personal property.”<sup>14</sup>

Despite the fact that the language in the Clark power of attorney implicitly authorized<sup>15</sup> Janis to execute an arbitration agreement, the Kentucky Supreme Court held that both of the arbitration agreements were invalid.<sup>16</sup> The Kentucky Supreme Court noted that the right to a jury trial is an “inviolable and sacred” right under the Kentucky Constitution.<sup>17</sup> Due to the importance of the right to jury trial, “the power to waive generally such fundamental constitutional rights must be unambiguously expressed in the text of the power-of-attorney document in order for that authority to be vested in the attorney-in-fact.”<sup>18</sup> The United States Supreme Court called this rule the “clear-statement rule.”<sup>19</sup>

The FAA preempts rules that “apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.”<sup>20</sup> The United States Supreme Court held that the FAA preempted the clear-statement rule because it subjected arbitration agreements to unfair treatment vis-à-vis all other contracts.<sup>21</sup>

Beverly and Janis tried to save the clear-statement rule by asserting that the clear-statement rule “affects only contract formation.”<sup>22</sup> According to Beverly and Janis, the FAA should not preempt the clear-statement rule because the FAA “has no application to formation issues.”<sup>23</sup> The United States Supreme Court rejected this argument because the FAA addresses both initial validity and enforcement of arbitration agreements.<sup>24</sup> Additionally, if this rule were adopted any

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<sup>11</sup> *Id.* at 325 (internal quotation marks omitted).

<sup>12</sup> *Extendicare Homes, Inc.*, 478 S.W.3d at 325-326 (Ky. 2015).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 326.

<sup>15</sup> *Id.* at 327.

<sup>16</sup> *Id.* at 332.

<sup>17</sup> *Id.* at 330.

<sup>18</sup> *Id.* at 328.

<sup>19</sup> *Kindred Nursing Ctrs. L.P. v. Clark*, 137 S. Ct at 1426.

<sup>20</sup> *Id.* at 1426 (quoting *AT&T Mobility LLC v. Conception*, 563 U.S. 333,339 (2011)).

<sup>21</sup> *Id.* at 1426-27.

<sup>22</sup> *Id.* at 1428.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

state could “undermine” the FAA by “declar[ing] everyone incompetent to sign arbitration agreements[,]” and the FAA would not bar the state from doing so.<sup>25</sup>

The United States Supreme Court reversed the Kentucky Supreme Court’s judgment concerning the Clark power of attorney because the Kentucky Supreme Court relied solely on the clear-statement rule to invalidate the Clark arbitration agreement.<sup>26</sup> The Court directed the Kentucky Supreme Court to determine whether the Kentucky Supreme Court’s reading that the Wellner power of attorney was not broad enough to encompass the power to enter into an arbitration agreement was independent of the clear-statement rule.<sup>27</sup>

On remand, the Kentucky Supreme Court held that its interpretation of the Wellner power of attorney was wholly independent of the clear-statement rule.<sup>28</sup> According to the Kentucky Supreme Court, “not a scintilla of [the Kentucky Supreme Court’s] original analysis of the Wellner POA rested upon the premise that the authority to waive constitutional rights . . . must be clearly stated.”<sup>29</sup> The language in the Wellner power of attorney was “insufficient to vest Beverly Wellner with the power to execute a pre-dispute arbitration agreement.”<sup>30</sup> Thus, there was not a valid arbitration agreement.<sup>31</sup>

### OBSERVATIONS

1. This case was a victim of a continuing federalism struggle.
2. The powers-of-attorney in question suffered from ambiguity.
3. A nursing home doing intake of patients should carefully analyze the authority of the admitting family members.

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<sup>25</sup> *Id.* at 1428-29.

<sup>26</sup> *Id.* at 1429.

<sup>27</sup> *Id.*

<sup>28</sup> *Kindred Nursing Ctrs. L.P. v. Wellner*, No. 2013-SC-000432-I, 2017 Ky. LEXIS 446, \*12 (Ky. Nov. 2, 2017).

<sup>29</sup> *Id.* at \*11.

<sup>30</sup> *Id.* at \*12.

<sup>31</sup> *Id.*