

TO ARBITRATE OR NOT TO ARBITRATE? THERE IS NO QUESTION.

Recently, the Supreme Court has held arbitration agreements to be valid in many consumer contracts. The Court opined that the Federal Arbitration Act (FAA) establishes liberal federal policy favoring arbitration agreements, and such agreements may only be overridden when there is a contrary Congressional command. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012). Whereas the *CompuCredit Corp.* decision involved a dispute over a mandatory arbitration clause in credit card applications, the most recent high court decision evaluating the validity of arbitration agreements centers on tort claims. *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1204, (2012).

In *Marmet*, Clayton Brown, Jeffrey Taylor, and Sharon Marchio each brought negligence suits against nursing homes in West Virginia. Each party signed a contract with the nursing homes on behalf of a family member who required extensive nursing care. Brown and Taylor's agreements included a clause that required the parties to arbitrate all disputes except late payment claims. Marchio's agreement also included an arbitration clause, but made no exceptions. Each claim was based on the negligence of the nursing homes for causing injuries or harm that resulted in the death of each party's respective family member. A West Virginia state court dismissed the lawsuits by Brown and Taylor based on the agreements to arbitrate contained in the contracts.

On appeal, the West Virginia Supreme Court of Appeals (hereinafter, the State Supreme Court) reversed the decision. The State Supreme Court ruled that the Federal Arbitration Act did not apply to personal injury or wrongful death claims because those types of claims do not result from a written agreement evidencing a transaction affecting interstate commerce. The court believed that the FAA only forces parties to arbitrate those issues that were agreed upon via a "clear and unmistakable writing." This does not occur in tort claims, the court reasoned, since they are not typically bargained for because no one expects to commit a tort or have a tort committed upon them. The State Supreme Court attempted to distinguish between a "conflicting" provision and an "exception", holding that personal injury and wrongful death claims were an exception to the FAA. By coming to this conclusion, the State Supreme Court did not believe there to be a conflict between state and federal law, so there should not be a federal preemption issue.

The United States Supreme Court disagreed. The high court concluded that the State Supreme Court's interpretation was incorrect because the text of the FAA statute does not provide for a personal injury or wrongful death exception, it "reflects an emphatic federal policy in favor of arbitral dispute resolution," and it "requires courts to enforce a bargain of the parties to arbitrate". Furthermore, it is well settled law, as the Supreme Court was quick to point out, that when state law prohibits arbitration in certain "classes" or "types" of disputes, here personal injury and wrongful death, the conflicting provision is displaced by the FAA. The Court deemed West Virginia's categorical prohibition against enforcing pre-dispute arbitration agreements for personal injury or wrongful death claims against nursing homes to be in conflict with Federal law, and the prohibition was therefore preempted by it.

In a proposed "alternate" holding, the State Supreme Court reasoned that nothing in the FAA overrides traditional rules of contract interpretation. *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250, 281 (2011) cert. granted, judgment vacated

sub nom. *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 182 L. Ed. 2d 42 (U.S. 2012). Therefore contract defenses, such as laches, estoppel, waiver, fraud, duress, or unconscionability may be used to vitiate an arbitration agreement. The State Supreme Court opined that pre-dispute arbitration agreements regarding personal injury and wrongful death claims are unconscionable and therefore unenforceable. But in the State Supreme Court's advocacy of unconscionability, the court cited West Virginia's public policy rule of not enforcing pre-dispute arbitration agreements in personal injury or wrongful death cases; the same rule that the U.S. Supreme Court found earlier in the opinion to be in conflict with the FAA and therefore displaced by FAA provisions. The U.S. Supreme Court was uncertain of how much the invalid rule influenced the State Supreme Court's determination of unconscionability, and therefore the case was remanded for a determination of whether, absent the public policy argument, the arbitration clauses were invalid for reasons that are not pre-empted by the FAA.

This decision should be closely examined by businesses and consumers alike. The U.S. Supreme Court is applying a strict interpretation of the FAA provisions by enforcing arbitration agreements on all disputes that arise out of a contract that contains an arbitration provision. In consummating such a contract, the consumer is not only vacating their right to litigate in court for disputes that arise from the contract directly, but also derivative disputes arising from the nature of the relationship created by the contract. At present, it seems that the only way out of an arbitration agreement is invalidation on the face of the agreement itself. Therefore, it becomes the consumer's responsibility to note the existence of arbitration clauses and decide whether they are willing to give up their fundamental right to litigate in court.

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