

PRACTICE POINTS

What Will They Think of Next?

By Mitchell L. Marinello – February 27, 2019

The United States Supreme Court has issued several recent decisions stating that the Federal Arbitration Act (FAA) preempts state laws that discriminate against arbitration agreements by placing special conditions or limitations on their enforceability. E.g., [*Kindred Nursing Home Centers v. Clark*](#), 137 S. Ct. 1421, 1426 (May 15, 2017). But, in some quarters, those decisions are not so popular and state legislatures and courts keep coming up with new ways to avoid them. The latest effort comes from Kentucky. [*Northern Kentucky Area Development District v. Snyder*](#), 2018 WL 4628143 (September 27, 2018) (*Northern District*).

In *Northern District*, the Northern Kentucky Area Development District (Northern) required plaintiff Snyder to enter into an arbitration agreement before hiring her. Snyder signed Northern's arbitration agreement but, when her employment was terminated, she refused to arbitrate and instead filed suit. The Kentucky trial court denied Northern's motion to compel arbitration and both the Kentucky appellate court and the Kentucky Supreme Court affirmed. All three courts relied on a Kentucky statute that prohibits an employer from requiring an employee to sign an arbitration agreement as a condition of employment.

The Kentucky statute provides that:

. . . no employer shall require as a condition or precondition of employment that any employee or person seeking employment waive, arbitrate, or otherwise diminish any existing or future claim, right, or benefit to which the employee or person seeking employment would otherwise be entitled under any provision of the Kentucky Revised Statutes or any federal law.

[KRS 336.700\(2\)](#) (KRS 336)

The Kentucky Supreme Court said that it found the “broad preemptive effect of the FAA . . . undeniable” but nonetheless said that “we fail “to see how a law . . . that does not actually attack, single out, or specifically discriminate against arbitration agreements must yield to the FAA.” *Id.* at 4.

The court held that KRS 336 did not prevent Northern from agreeing to arbitration, “it simply prevents [Northern] from *conditioning employment* on the employee's agreement to arbitration.” According to the court, this was the “key distinction.” *Id.* Explaining its position another way, the court said:

This is not an attack on the arbitration agreement—it is an attack on the employer for basing employment decisions on whether the employee is willing to sign an arbitration agreement.

Id. at 5.

American Bar Association, Section of Litigation Alternative Dispute Resolution

Those sympathetic to anti-arbitration protests may find the *Northern District* holding legitimate and even somewhat ingenious. The Kentucky Supreme Court pointed out that KRS 336 does not discriminate against arbitration alone but rather outlaws any attempt by an employer to condition the hiring or continued employment of an employee on the employee's agreement to relinquish any rights the employee may have against his or her employer; presumably, this would include the employee's right to sue the employer in a court of law. Whether that reasoning stands up to analysis, however, is questionable. Is the right to bring a lawsuit, which would seem to be a procedural mechanism for vindicating rights, in the same category as a substantive right, such as the protection afforded by state wage and hour laws? And isn't arbitration a substitute for a civil lawsuit and, in fact, the very substitute that the FAA says state law may not discriminate against?

Of course, whether Northern will seek review and whether SCOTUS will grant any such review are unknown at this time. Ultimately, the question may well be one of priorities if not stamina. Given all of the other important legal issues it faces in a given year, does SCOTUS have the time and energy to supervise every state court that comes up with a new way to distinguish (if not get around) its arbitration rulings?

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