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US Supreme Court Rules That Power of Attorney Need Not Specifically Provide the Representative With Authority to Enter Into Arbitration Agreement

By Andrew Esler

In *Kindred Nursing Centers Ltd. Partnership v. Clark*, No. 16-32 (U.S. May 15, 2017), the Supreme Court once again gave full-throated support to arbitration, siding with a Kentucky nursing home in a case challenging the enforceability of compulsory arbitration agreements in the nursing home's admission documents. In a 7-1 decision, the justices found the Kentucky Supreme Court's decision invalidating the arbitration agreements violated the Federal Arbitration Act (FAA). Kentucky's highest court had declined to give effect to the arbitration agreements, which relatives of two former residents of a nursing home signed under powers of attorney.

During the admission process, the two representatives acting under powers of attorney agreed that all claims arising from the residents' stay at the nursing home would be resolved through binding arbitration. When the former residents died, their estates (through those representatives) brought state court claims against the nursing home, alleging that a substandard level of care led to the residents' untimely deaths. The nursing home moved to dismiss the lawsuits, arguing that the arbitration agreements prohibited the representatives from suing in court.

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Accepting Third-Party Funding of a Legal Dispute: Key Considerations

By Joseph W. Catuzzi

As the cost of dispute resolution continues to rise, parties with significant claims are seeking innovative ways to fund their cases and mitigate litigation risk. One result is the increased use of third-party investors to finance domestic and international legal disputes. *See* Victoria Shannon Sahani, Judging Third-Party Funding, 63 UCLA L. Rev. 388, 392-95 (2016). It is now a multibillion-dollar industry, with one commentator pegging it as a $3 billion business. *See* Joshua Hunt, What Litigation Finance is Really About, *The New Yorker* (Sept. 1, 2016).

With third-party funding, a nonparty investor provides a litigant with nonrecourse funding for legal expenses in return for a share of litigation proceeds if that party prevails. A funding agreement typically addresses subjects such as confidentiality, the percentage payout to the funder in the event of litigation success, priority of the payout, selection of counsel and consultants, and control over settlement. Of course, counsel for the funded party must comply with applicable rules of professional responsibility. *See* American Bar Association Commission on Ethics 20/20 Informational Report to the House of Delegates at p. 15-30 (Feb. 2012) (discussing third-party funding and the model rules of professional responsibility).

Third-party funding provides access to the civil justice system for parties with claims that

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Arbitration Agreement … *continued from page 1*

The Kentucky Supreme Court consolidated the matters and declared that both arbitration agreements were invalid because neither power of attorney specifically entitled the representative to enter into an arbitration agreement. The court primarily based its decision on the language of the Kentucky Constitution that declares the rights of access to courts and trial by jury to be "sacred" and "inviolate." The Kentucky Supreme Court thus concluded that an agent can deprive her principal of such rights only if a power of attorney expressly so provides.

The Supreme Court disagreed, holding that Kentucky's "clear-statement rule," requiring an explicit statement in a power of attorney that the attorney-in-fact has authority to waive the principal's state constitutional rights to access the courts and to a jury trial, disfavors arbitration agreements and is therefore preempted by the FAA. Indeed, in delivering the majority opinion, Justice Elena Kagan stated that the clear-statement rule "singles out arbitration agreements for disfavored treatment" and "fails to put arbitration agreements on an equal plane with other contracts."

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In a dissenting opinion, Justice Clarence Thomas argued that the FAA does not apply to proceedings in state courts. In his view, in state court proceedings "the FAA does not displace a rule that requires express authorization from a principal before an agent may waive the principal's right to a jury trial." No Supreme Court precedent has ever accepted this view of the FAA.

Newly appointed Justice Neil Gorsuch took no part in considering or deciding the case. ▪

Superior Court Confirms Commitment to Binding Arbitration

By William H. Ellerbe

As mistrust of mandatory arbitration clauses in contracts between consumers and businesses grows in the popular press and among consumer advocates, courts are still applying state law favoring the enforcement of such provisions in a straightforward manner. The Pennsylvania Superior Court's recent decision in *Fellerman v. Peco Energy Corp.*, — A.3d —, 2017 WL 1175434 (Pa. Super. March 30, 2017) shows a deep commitment to the enforceability of arbitration agreements, even in consumer transactions and in the face of sympathetic facts.

In *Fellerman*, Stanley and Carol Fellerman filed a lawsuit after Mr. Fellerman Next, the Fellermans argued that the Agreement's limitation of Historic's liability to the cost of its services meant that the Agreement as a whole unreasonably favored Historic and was therefore unenforceable. In rejecting this argument, the Superior Court differentiated the Fellermans' case from *Carll v. Terminix International Co., L.P.*, 793 A.2d 921 (Pa. Super. 2002), where the court voided a similar arbitration provision and liability limitation in a consumer pest control contract. The Superior Court found the Fellermans' case was different because a home inspection is not inherently dangerous and thus did not implicate the same public policy concerns as the application of insecticides. The Superior Court also found that the arbitration provision in the Fellermans' Agreement was severable from the liability limitation.

Finally, having rejected the Fellermans' argument that the arbitration provision was unenforceable, the Superior Court found

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the Fellermans' claims were subject to the arbitration provision – even though they were pursuing solely tort theories of liability rather than contract claims. In so ruling, the Superior Court emphasized that the arbitration provision required all the parties to submit all disputes to arbitration and that Mr. Fellerman's injuries ultimately stemmed from Historic's purported inspection failure. As the Agreement created Historic's duties to provide those services, the Fellermans' tort claims fell within the Agreement's arbitration provision.

In short, at every conceivable turn, the Pennsylvania Superior Court's *Fellerman* opinion demonstrates a strong commitment to binding arbitration. It shows that the Pennsylvania Superior Court is an unlikely source of relief for consumers who wish to avoid arbitration in these kinds of cases. The lesson is that the Superior Court plainly will enforce these provisions, even in sympathetic circumstances. ▪

Third-Party Funding … *continued from page 1*

they might not be willing or able to fund themselves. Yet, while the legal landscape has long accommodated contingent fee agreements in a personal injury case, many have criticized third-party funding of commercial cases. The English common law made illegal the practice of a nonparty paying for the litigation of someone else's case and sharing in the proceeds of a successful outcome, called "champerty." Most states in the U.S. adopted this prohibition. Yet today, many American and international jurisdictions have liberalized their restrictions on traditional champerty to permit the third-party funding of legal claims. *See* American Bar Association Commission on Ethics 20/20 Informational Report to the House of Delegates at p. 11-13 (Feb. 2012).

However, the Pennsylvania Superior Court recently warned litigants that champerty remains a viable contract defense in Pennsylvania, available to a party seeking to invalidate third-party funding agreements. *See* WFIC, LLC v. LaBarre, 148 A.3d 812, 819 (Pa. Super. 2016). In *WFIC* the court explained that the investment by third-party funders in a lawsuit constituted champerty where the funders were (a) unrelated to the litigant; (b) invested their own money; and (c) agreed to share in the lawsuit's proceeds. The court therefore invalidated a fee agreement that purported to establish priority to a lawsuit's proceeds among investors and the party's attorney.

In making a sound decision about whether to fund a case, a third-party funder will seek to maximize its understanding course, counsel for the funded party must comply with applicable rules of professional responsibility. *See* American Bar Association Commission on Ethics 20/20 Informational Report to the House of Delegates at p. 15-30 (Feb. 2012) (discussing third-party funding and the model rules of professional responsibility).

Third-party funding provides access to the civil justice system for parties with claims that they might not be willing or able to fund themselves. Yet, while the legal landscape has long accommodated contingent fee agreements in a personal injury case, many have criticized third-party funding of commercial cases. The English common law made illegal the practice of a nonparty paying for the litigation of someone else's case and sharing in the proceeds of a successful outcome, called "champerty." Most states in the U.S. adopted this prohibition. Yet today, many American and international jurisdictions have liberalized their restrictions on traditional champerty to permit the third-party funding of legal claims. *See* American Bar Association Commission on Ethics 20/20 Informational Report to the House of Delegates at p. 11-13 (Feb. 2012).

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In making a sound decision about whether to fund a case, a third-party funder will seek to maximize its understanding of the merits and litigation risks of the dispute. The investor's due diligence communications with the client and its attorney, however, raise concerns about whether sharing information will result in a waiver of privilege. *See* Meriam Alrashid, Jane Wessel & John Laird, Impact of Third-Party Funding on Privilege in Litigation and International Arbitration, Dispute Resolution International at p. 109-110. Indeed, both "New Jersey and Pennsylvania legal ethics boards have issued advisory opinions cautioning practitioners to ensure their clients understand that they risk waiver of privilege in providing attorney–client and work–product privileged documents to third parties." Id. While the common interest doctrine might preserve privilege for some communication in certain jurisdictions, parties must carefully consider and understand the ramifications of sharing information with funders.

Parties must also examine whether conflicts exist between and among funders, the parties, their law firms and, in nonjudicial forums, the arbitrators. Although the obligation to disclose the identity of third-party funders will depend on the applicable procedural rules and governing law, assessing conflicts upfront may help avoid costly disputes that could disrupt or delay a proceeding or even impact an award. *See* Jennifer A. Trusz, Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration, 101 *Georgetown L.J.* 1649, 1652 (2013). As the third-party funding industry develops, new regulations, legal ethics rules and opinions, and developments in case law will impact such funding's use in domestic and international jurisdictions. Outside of contingent-fee personal injury cases, third-party funding of dispute resolution is still in its infancy, and parties considering its use must understand its risks and proceed with caution. ▪

Stradley at Work

Senior Counsel **Ben Picker** was selected by the National Law Journal as one of the publication's "ADR Champions." The annual supplement honors individuals who show a deep passion and perseverance in pursuit of their mission, having achieved remarkable successes along the way and continue to make their mark in various aspects of alternative dispute resolution.

Ben received the Sir Francis Bacon Alternative Dispute Resolution (ADR) Award at a Pennsylvania Bar Association luncheon in Harrisburg, Pennsylvania. The Sir Francis Bacon Award recognizes the individual who has made a significant impact in bringing mediation and other forms of dispute resolution to Pennsylvania.

Ben was a panelist at the Philadelphia Bar Association's "Effective Mediation Strategies" CLE. Picker and co-panelists discussed the roles of the mediator, advocate, and client during a successful mediation process.

Counsel **Karl Myers** (has been appointed to a three-year term on the Governing Council of the Pennsylvania Bar Association's Administrative Law Section. Karl was appointed on May 11, during the PBA's annual meeting in Pittsburgh. Karl has also been appointed secretary and treasurer of the Pennsylvania Bar Association's Appellate Advocacy Committee. The Appellate Advocacy Committee promotes communication and cooperation between lawyers who practice before state and federal appellate courts and members of the judiciary, and provides the opportunity to achieve quality practice in all manners of appeals.

Karl moderated the "Chancellor's Forum Decision 2017: Commonwealth Court Candidates," presented by the Philadelphia Bar Association and Pennsylvanians for Modern Courts on May 3 in Philadelphia. The candidates included Timothy Barry, Hon. Ellen Ceisler, Hon. Joseph M. Cosgrove and Todd Eagen. The Chancellor's Forum was an opportunity for members of the Bar Association and public to hear from the candidates and ask meaningful questions. The Forum aired live on Pennsylvania Cable Network on Wed., May 3. Karl served as a co-host for the Pennsylvania Cable Network's televised coverage of the Pennsylvania Superior Court's March 21 en banc argument session in Philadelphia. The presentation was broadcasted on PCN. The court heard arguments in criminal and civil cases concerning the license to carry a firearm, Megan's Law, DUI checkpoints and recorded prison phone calls.

Partner **Pat Kingsley** served as both a panelist and panel moderator at the American Bar Association's Fidelity and Surety Law Committee's Spring Meeting in Naples, Florida. Pat was a panelist for "The Parties' Obligations Under the Performance Bond Relative to a Principal's Default" which discussed what constitutes a principal's default and what actions a performance bond may require related to providing the surety with notice of a default, making a formal declaration of default and/or formally terminating the principal's contract. Kingsley also moderated the panel, "The AIA A-312 Performance Bond Revisited: A panel discussion addressing key issues, potential pitfalls and practice tips for addressing adverse case law."

Attorneys **Kevin Casey**, **Allison Gifford** and **Elizabeth O'Donoghue** presented at the Pennsylvania Bar Institute's 11th Annual Intellectual Property Law Institute in Philadelphia. Their panel, "Year in Review — Trademark," addressed, eleven "hot" trademark topics from the first quarter of 2016 through the first quarter of 2017. The Review included a summary of noteworthy cases.

Attorneys **Jana Landon** and **Adam Brown** presented at the Human Resources Council sponsored by the Chamber of Commerce of Southern New Jersey in Voorhees, New Jersey. Jana and Adam presented "Opinions, secrets, and security: Minimizing Employee Social Media and Cyber Risks," which addressed the use of technology and social media in the workplace with an emphasis on cybersecurity.

Attorneys **John Murphy** and **Samantha Kats** presented the CLE, "Senior Investors and Financial Privacy: The Challenge of Diminished Capacity and Other Senior-Related Issues" to 35 in-house attorneys and compliance staff at Primerica in Duluth, Georgia. John and Samantha discussed the challenges of diminished capacity and other senior related topics. They also covered the financial advisor's dilemma, typical scenarios that may present problems and an overview of recent industry and statutory developments.

Stradley Attorneys Recognized by Super Lawyers

Twenty Stradley Ronon attorneys were named to Super Lawyers' 2017 listing of the top-rated lawyers in the country. Six attorneys from Stradley's ADR Group were included on the list: **Jonathan F. Bloom, Kevin R. Casey, Karl S. Myers, Bennett G. Picker, Ellen Rosen Rogoff and Lee A Rosengard.**

Stradley Ronon Listed in U.S. News – Best Lawyers "Best Law Firms"

Stradley Ronon received top marks in several practice areas in the 2017 U.S. News – Best Lawyers "Best Law Firms" publication. The ADR Group was ranked in the top-tier rankings in Philadelphia for arbitration and mediation.