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# Mandatory Arbitration and the Federal Arbitration Act

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## Summary

Arbitration is a method of legal dispute resolution in which a neutral, private third party, rather than a judge or jury, renders a decision on a particular matter. Under a growing number of consumer and employment agreements, companies have come to require arbitration to resolve disputes. While arbitration is often viewed as an expeditious and economical alternative to litigation, consumer advocates and others contend that mandatory arbitration agreements create one-sided arrangements that deny consumers and employees advantages afforded by a judicial proceeding.

The Federal Arbitration Act (FAA) was enacted in 1925 to ensure the validity and enforcement of arbitration agreements in any “maritime transaction or ... contract evidencing a transaction involving commerce[.]” The U.S. Supreme Court (Court) has recognized the FAA as evidencing “a national policy favoring arbitration.” The application of the FAA, however, particularly in light of various state law requirements and the use of different types of arbitration agreements, has raised numerous legal questions and been the subject of several cases before the Court.

The question of whether the FAA preempts a state law or judicial rule is a subject of frequent litigation. In these cases, the Court has routinely held that the FAA supersedes state requirements that restrain the enforceability of mandatory arbitration agreements. This report examines the FAA and reviews the Court’s decisions involving the statute’s preemption of state law requirements. The report also explores the Court’s decisions involving mandatory arbitration agreements that prohibit a consumer or employee from maintaining a class or collective action. In its October 2017 term, the Court will consider three consolidated cases that challenge such agreements on the grounds that they violate the right to engage in “other concerted activities” under the National Labor Relations Act (NLRA).

Finally, concern over a perceived lack of “meaningful choice” to decide whether to submit a claim to arbitration has prompted regulatory activity, as well as legislation that would amend the FAA to render certain types of pre-dispute arbitration agreements unenforceable. The report discusses some recent examples of federal regulatory action that aim to restrict the use of mandatory arbitration in the consumer arena, and reviews bills like the Arbitration Fairness Act of 2017 (H.R. 1374/S. 537), which would prohibit the enforcement of an arbitration agreement that requires arbitration for an employment, consumer, antitrust, or civil rights dispute if the agreement was executed prior to the dispute’s occurrence.

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## Introduction

Under a growing number of consumer and employment agreements, companies are requiring disputes to be resolved through arbitration, a method of dispute resolution involving a neutral, private third party, rather than a judicial proceeding. In 2015, for example, the Consumer Financial Protection Bureau found that tens of millions of consumers use consumer financial products that are subject to arbitration clauses.<sup>1</sup> In nonunion workplaces, it is estimated that at least a quarter of all employees are now subject to mandatory arbitration agreements.<sup>2</sup> While arbitration is often viewed as a faster and less expensive alternative to litigation,<sup>3</sup> consumer advocates and others maintain that mandatory arbitration agreements create one-sided arrangements that deny consumers and employees advantages afforded by a judicial proceeding, such as the availability of a jury trial.<sup>4</sup>

The Federal Arbitration Act (FAA or the Act) was enacted in 1925 to ensure the validity and enforcement of arbitration agreements in any “maritime transaction or ... contract evidencing a transaction involving commerce[.]”<sup>5</sup> The U.S. Supreme Court (Court) has recognized the FAA as evidencing “a national policy favoring arbitration.”<sup>6</sup> The application of the FAA, however, particularly in light of various state law requirements and the use of different types of arbitration agreements, has raised numerous legal questions and been the subject of several cases before the Court. Concern over a perceived lack of “meaningful choice” to decide whether to submit a claim to arbitration has also spurred recent federal regulatory action, as well as legislation that would amend the FAA to render pre-dispute arbitration agreements unenforceable.<sup>7</sup>

This report examines the FAA and reviews the Court’s decisions involving the statute’s preemption of state law requirements. The report also explores the Court’s decisions involving mandatory arbitration agreements that prohibit a consumer or employee from maintaining a class or collective action. In its October 2017 term, the Court will consider three consolidated cases that challenge such agreements on the grounds that they violate the right to engage in “other concerted activities” under the National Labor Relations Act (NLRA).<sup>8</sup>

<sup>1</sup> CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A) 9 (2015), [http://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf).

<sup>2</sup> KATHERINE V.W. STONE AND ALEXANDER J.S. COLVIN, ECON. POLICY INST., THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS 15 (2015), <http://www.epi.org/files/2015/arbitration-epidemic.pdf>.

<sup>3</sup> See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (discussing the “simplicity, informality, and expedition of arbitration.”); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011) (“[T]he informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.”).

<sup>4</sup> Jessica Silver-Greenburg and Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES, Oct. 31, 2015, at A1; STONE AND COLVIN, *supra* note 2 at 26.

<sup>5</sup> 9 U.S.C. § 2.

<sup>6</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

<sup>7</sup> See, e.g., Arbitration Fairness Act of 2017, S. 537, 115th Cong. (2017); Arbitration Fairness Act of 2017, H.R. 1374, 115th Cong. (2017).

<sup>8</sup> *Murphy Oil USA, Inc. v. Nat’l Labor Relations Bd.*, 808 F.3d 1013, 1015 (5th Cir. 2015), *cert. granted*, 85 U.S.L.W. 3341 (U.S. Jan. 13, 2017) (No. 16-307); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1150 (7th Cir. 2016), *cert. granted*, 85 U.S.L.W. 3343 (U.S. Jan. 13, 2017) (No. 16-285); *Morris v. Ernst & Young LLP*, 834 F.3d 975, 979 (9th Cir. 2016), *cert. granted*, 85 U.S.L.W. 3344 (U.S. Jan. 13, 2017) (No. 16-300).

## The Federal Arbitration Act

Section 2 of the FAA provides:

[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.<sup>9</sup>

By enacting Section 2, Congress sought generally to promote the enforcement of arbitration agreements.<sup>10</sup> Historically, American courts viewed arbitration with judicial hostility.<sup>11</sup> It is believed that this hostility flowed from a similar enmity displayed by English courts.<sup>12</sup> Arbitration infringed on the livelihood of English judges who were paid fees based on the number of cases they decided.<sup>13</sup> English courts were also generally unwilling to surrender their jurisdiction over various disputes.<sup>14</sup>

The hostility toward arbitration subsided as industrialization led to an increased number of business disputes.<sup>15</sup> In 1924, the Court upheld a New York law that compelled arbitration in a dispute involving a maritime contract.<sup>16</sup> The Court's decision in *Red Cross Line v. Atlantic Fruit Company* is believed to have opened the door for federal legislation that recognized the validity of arbitration agreements.<sup>17</sup>

President Calvin Coolidge signed the United States Arbitration Act (commonly referred to as the Federal Arbitration Act) on February 12, 1925.<sup>18</sup> The enactment of the new law “declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”<sup>19</sup> While Congress's primary motivation for drafting the FAA reflected its interest in protecting the enforcement of arbitration agreements as agreed to by the contracting parties, it also understood the potential benefits that would be provided by the law's enactment:

It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be

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<sup>9</sup> 9 U.S.C. § 2.

<sup>10</sup> See, e.g., H.R. REP. NO. 96, 68th Cong., 1<sup>st</sup> Sess., 1 (1924) (noting that the FAA was designed to place arbitration agreements “upon the same footing as other contracts”).

<sup>11</sup> *Id.* at 2.

<sup>12</sup> See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (“[The Federal Arbitration Act’s] purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts[.]”); See also Preston Douglas Wigner, *The United States Supreme Court’s Expansive Approach to the Federal Arbitration Act: A Look at the Past, Present, and Future of Section 2*, 29 U. RICH. L. REV. 1499 (1995).

<sup>13</sup> WIGNER, *supra* note 12 at 1502.

<sup>14</sup> H.R. REP. NO. 96, *supra* note 10 at 1-2.

<sup>15</sup> WIGNER, *supra* note 12 at 1502.

<sup>16</sup> *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 124 (1924).

<sup>17</sup> WIGNER, *supra* note 12 at 1503.

<sup>18</sup> Pub. L. No. 68-401, 43 Stat. 883 (1925).

<sup>19</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable.<sup>20</sup>

Although Section 2 of the FAA requires the enforcement of arbitration agreements in maritime transactions and contracts “evidencing a transaction involving commerce,” the precise scope of this latter group of contracts has not always been certain. Congress provided a definition for the term “commerce” in Section 1 of the FAA, but it did not identify the extent to which a contract must “evidenc[e] a transaction involving commerce” before the FAA would apply.<sup>21</sup>

Prior to 1995, there was a split among courts interpreting Section 2. Some courts concluded that the FAA applied only to those contracts where the parties “contemplated” an interstate commerce connection.<sup>22</sup> In *Burke County Public Schools Board of Education v. Shaver Partnership*, for example, a North Carolina court stated that where performance of the contract “necessarily involves, so that the parties to the agreement must have contemplated, substantial interstate activity the contract evidences a transaction involving commerce within the meaning of the Federal Arbitration Act.”<sup>23</sup>

Other courts held that the Section 2 phrase “involving commerce” reached to the limits of Congress’s power under the Commerce Clause.<sup>24</sup> In *Snyder v. Smith*, for example, the U.S. Court of Appeals for the Seventh Circuit (Seventh Circuit) maintained that the courts should take into account Congress’s broad power to regulate under the Commerce Clause when deciding which contracts involve commerce.<sup>25</sup> Because Congress may reach activities “affecting” interstate commerce under its Commerce Clause authority, the Seventh Circuit reasoned that it was logical to conclude that any contract affecting interstate commerce falls under Section 2 of the FAA.<sup>26</sup>

In 1995, the Supreme Court determined that a broad interpretation of “involving commerce” is appropriate. In *Allied-Bruce Terminix Companies, Inc. v. Dobson*, the Court held in a 7-2 opinion authored by Justice Breyer that the phrase “involving commerce” signaled the full exercise of Congress’s power under the Commerce Clause.<sup>27</sup> The Court concluded that the FAA’s legislative history “indicates an expansive congressional intent.”<sup>28</sup> For example, the House Report that accompanied the FAA stated that the Act’s “control over interstate commerce reaches not only the actual physical interstate shipment of goods but also contracts relating to interstate commerce.”<sup>29</sup> In addition, remarks in the *Congressional Record* indicated that the FAA “affects contracts relating to interstate subjects and contracts in admiralty.”<sup>30</sup> The Court maintained that

<sup>20</sup> H.R. REP. NO. 96, *supra* note 10 at 2.

<sup>21</sup> See 9 U.S.C. § 1 (“commerce” ... means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation ...”).

<sup>22</sup> See, e.g., *Burke Cty. Pub. Schs. Bd. of Educ. v. Shaver P’ship*, 279 S.E.2d 816 (N.C. 1981); *R.J. Palmer Constr. Co. v. Wichita Band Instrument Co.*, 642 P.2d 127 (Kan. 1982); *Lacheney v. Profitkey Int’l, Inc.*, 818 F.Supp. 922 (E.D. Va. 1993).

<sup>23</sup> *Burke*, 279 S.E.2d at 822.

<sup>24</sup> See, e.g., *Foster v. Turley*, 808 F.2d 38 (10th Cir. 1986); *Snyder v. Smith*, 736 F.2d 409 (7th Cir. 1984).

<sup>25</sup> *Snyder*, 736 F.2d at 418.

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

<sup>27</sup> *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 273-74 (1995).

<sup>28</sup> *Id.* at 274.

<sup>29</sup> *Id.* (citing H.R. REP. NO. 96, *supra* note 10 at 1).

<sup>30</sup> *Id.* (citing 65 CONG. REC. 1931 (1924) (remarks of Rep. Graham)).

the word “involve” should be read as the functional equivalent of the word “affect.”<sup>31</sup> Because the phrase “affecting commerce” normally signals Congress’s intent to exercise its Commerce Clause powers to the fullest extent, the Court reasoned that the use of the phrase “involving commerce” should be given a similar reading.<sup>32</sup>

After concluding that the phrase “involving commerce” should be interpreted broadly, the *Dobson* Court further determined that the FAA applies to all contracts that involve commerce and does not require the contemplation of an interstate commerce connection by the parties.<sup>33</sup> The Court found that a “contemplation of the parties” requirement was inconsistent with the FAA’s basic purpose of helping parties avoid litigation.<sup>34</sup> Such a requirement invited litigation about what was or was not contemplated by the parties.<sup>35</sup> Any congressional recognition of an expedited dispute resolution system at the time the FAA was drafted would be undermined by this additional litigation.<sup>36</sup>

In 2001, the Court confirmed that the FAA also covers employment agreements that require arbitration to resolve work-related disputes. In *Circuit City Stores, Inc. v. Adams*, the Court held in a 5-4 opinion authored by Justice Kennedy that an employment application that included a mandatory arbitration provision was not excluded from the FAA’s coverage pursuant to the statute’s exemption clause.<sup>37</sup> Section 1 of the FAA provides that it will not apply to “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”<sup>38</sup>

The Court concluded that the Section 1 exemption clause should be given a narrow construction, and interpreted it to apply only to contracts with seamen, railroad employees, and other transportation employees.<sup>39</sup> According to the Court, a reading of the phrase “any other class of workers engaged in foreign or interstate commerce” to exclude all employment contracts from the FAA’s coverage would undermine the statute’s specific enumeration of the “seamen” and “railroad employees” categories.<sup>40</sup> The Court observed:

Construing the residual phrase to exclude all employment contracts fails to give independent effect to the statute’s enumeration of the specific categories of workers which precedes it; there would be no need for Congress to use the phrases “seamen” and “railroad employees” if those same classes of workers were subsumed within the meaning of the “engaged in ... commerce” residual clause.<sup>41</sup>

The Court also noted that the FAA’s exclusion of contracts involving seamen and rail employees was reasonable given the adoption of federal legislation, such as the Shipping Commissioners Act of 1872 and the Transportation Act of 1920, that provided for the arbitration of their disputes.<sup>42</sup> In

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<sup>31</sup> *Id.* at 273-74.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 278.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001).

<sup>38</sup> 9 U.S.C. § 1.

<sup>39</sup> *Circuit City Stores*, 532 U.S. at 119.

<sup>40</sup> *Id.* at 114.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 121.

light of these laws, the Court opined that the exclusion would allow “established or developing statutory dispute resolution schemes” to remain undisturbed.<sup>43</sup>

## Preemption and the FAA

### Background

Historically, states have played an active role in the regulation of arbitration agreements, and all fifty states currently maintain statutes that operate alongside the FAA and govern the validity of arbitration agreements and awards.<sup>44</sup> However, state legislatures and state courts have also sought to place various restrictions on the enforcement of mandatory arbitration clauses and proceedings, particularly in situations where there may be unequal bargaining power between the contracting parties.<sup>45</sup> These restrictions have included state requirements that mandate a judicial forum for certain kinds of legal disputes, as well as those that impose special conditions or procedural safeguards on the arbitration process.<sup>46</sup>

As the Supreme Court has noted, Section 2 of the FAA “limits the grounds for denying enforcement of ‘written provision[s] in ... contract[s]’ providing for arbitration,” and because of these limits, courts commonly find that the FAA preempts state laws or judicial rules that interfere with these contracts.<sup>47</sup> Nevertheless, some state legislatures and state courts have attempted to invalidate certain mandatory arbitration agreements, commonly in instances where there is a perception that requiring the parties to settle their disputes through arbitration would be unfair, contrary to public policy, or would somehow not protect the interests of vulnerable individuals.<sup>48</sup> The question of whether the FAA preempts a state law or judicial rule is a subject of recurring litigation that has come before the Court more than a dozen times.<sup>49</sup> In these cases, the Court has routinely held that the FAA supersedes state requirements that restrain the enforceability of mandatory arbitration agreements.

The preemption doctrine originates from the Supremacy Clause of the Constitution, which establishes that the laws of the United States “shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”<sup>50</sup> In general terms, federal preemption occurs when a validly

<sup>43</sup> *Id.*

<sup>44</sup> See Kristin M. Blankley, *Impact Preemption, A New Theory of Federal Arbitration Preemption*, 67 FLA. L. REV. 711, 728 (2016).

<sup>45</sup> See generally Brian Farkus, *The Continuing Voice of Dissent: Justice Thomas and the Federal Arbitration Act*, 22 HARV. NEGOTIATION L. REV. 33, 41-43 (2016).

<sup>46</sup> See *id.* at 42.

<sup>47</sup> *Coventry Health Care of Mo., Inc. v. Nevils*, 137 S. Ct. 1190, 1199 (2017).

<sup>48</sup> See generally Salvatore U. Bonaccorso, *State Court Resistance to Federal Arbitration Law*, 67 STAN. L. REV. 1145 (2015).

<sup>49</sup> See, e.g., *Kindred Nursing Ctrs. Ltd. P’ship v. Clark*, 137 S. Ct. 1421 (2017); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012); *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17 (2012); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Preston v. Ferrer*, 552 U.S. 346 (2008); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, (1995); *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, (1996); *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52 (1995); *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468 (1989); *Perry v. Thomas*, 482 U.S. 483 (1987); *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

<sup>50</sup> U.S. CONST., ART. VI, cl. 2. For a general discussion of the Supremacy Clause and federal preemption, see CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION (2012), <http://www.crs.gov/conan/details.aspx?mode=topic&doc=Article06.xml&t=1|2|1&c=2>.



enacted federal law supersedes an inconsistent state law.<sup>51</sup> As a result, where federal and state laws are in conflict, the state law is generally supplanted, leaving it void and without effect.<sup>52</sup> Courts frequently recognize that in analyzing the preemptive effect of federal law, the “purpose of Congress is the ultimate touch-stone.”<sup>53</sup>

There are two general categories of preemption: express preemption and implied preemption.<sup>54</sup> With respect to the first category, a federal statute may be deemed to displace existing state law through express language in a congressional enactment, often called an express preemption clause.<sup>55</sup> Additionally, the Court has recognized certain implied forms of preemption, under which state law must give way to federal law if, for example, implementation of state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>56</sup>

The FAA does not contain an express preemption clause.<sup>57</sup> However, the Court has held, pursuant to implied preemption principles, that the FAA supersedes state laws that “undermine the goals and policies of [the Act].”<sup>58</sup> As the Court has noted, the FAA “was designed ‘to overrule the judiciary’s longstanding refusal to enforce agreements to arbitrate,’” and “[t]he overarching purpose of [the FAA] ... is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”<sup>59</sup>

Additionally, a key factor in the Court’s FAA preemption analysis has been a state’s treatment of arbitration clauses compared to other contractual provisions. The Court has repeatedly indicated that Section 2 of the FAA compels courts to place arbitration agreements “on equal footing with all other contracts.”<sup>60</sup> Accordingly, state requirements that “single out” arbitration clauses for

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<sup>51</sup> Federal preemption may also apply to state regulations and common law. *See id.*

<sup>52</sup> *See* *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (finding state laws that conflict with federal law are “without effect.”); *Wickard v. Filburn*, 317 U.S. 111, 124 (1942) (“[N]o form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress.”). *See also generally* *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2473 (2013) (“Under the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.”).

<sup>53</sup> *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996).

<sup>54</sup> *See, e.g., Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 97 (1992) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)) (“Pre-emption may be either expressed or implied, and ‘is compelled whether Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.’”).

<sup>55</sup> *See, e.g., Chamber of Commerce of United States of America v. Whiting*, 563 U.S. 582, 592 (2011).

<sup>56</sup> *Arizona v. United States*, 567 U.S. 387, 399 (2012) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). This is commonly referred to as “obstacle preemption.” Implied preemption may also be found if it is “impossible for a private party to comply with both state and federal requirements” (so-called “impossibility preemption”). *See, e.g., Bartlett*, 133 S. Ct. at 2473 (quoting *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990)). The Supreme Court has also recognized implied “field preemption” in instances where a “scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it....” *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). With respect to the FAA and field preemption, the Court has stated that the Act does not “reflect a congressional intent to occupy the entire field of arbitration.” *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 477 (1989).

<sup>57</sup> *See Volt Info. Scis.*, 489 U.S. at 477.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 478 (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-220 (1985)); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). Cf. *Volt Info. Scis.*, 489 U.S. at 477 (“While Congress was no doubt aware that the Act would encourage the expeditious resolution of disputes, its passage was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered.” (citations omitted)).

<sup>60</sup> *See, e.g., Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).

hostile treatment or do not apply to contracts generally have been held to be preempted by the FAA.<sup>61</sup>

## FAA Preemption and the Supreme Court

The Supreme Court has addressed the relationship between the FAA and state law in a variety of different contexts. However, certain common principles articulated in these cases may arguably demonstrate the broad parameters of when the FAA preempts a particular state requirement. Among these principles, the Court has repeatedly held that the FAA will displace state laws or judicial rules that prohibit the arbitration of a particular kind of claim. In one of the first of its FAA preemption cases, *Southland Corporation v. Keating*, the Court held that the Act superseded a state provision that effectively compelled resolution of a dispute exclusively through the courts.<sup>62</sup> In *Keating*, several franchisees of 7-Eleven convenience stores filed a class action lawsuit in California state court against the corporate owner and franchisor, alleging, among other things, violations of a state statute governing franchise investment.<sup>63</sup> The corporation sought to compel arbitration of these claims pursuant to an arbitration clause in the franchise agreement.<sup>64</sup> On appeal, the California Supreme Court held that (1) the state statute compelled judicial review of the claims because the statute voided provisions “purporting to bind a [franchisee] ... to waive compliance with any provision of [state] law”; and (2) the FAA did not supplant this state provision.<sup>65</sup>

In a 7-2 opinion written by Chief Justice Burger, the Court reversed the lower court, concluding in relevant part that the FAA applied in state courts and preempted the state statute’s prohibition on the arbitration of claims.<sup>66</sup> The Court stated that “in enacting §2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims” that parties choose to resolve through arbitration.<sup>67</sup> Prior to *Keating*, it was unclear whether the FAA applied in state courts, where a large proportion of contractual disputes between private parties are heard.<sup>68</sup> In clarifying the reach of the FAA, the Court focused on the language in Section 2 and its application to contracts “involving commerce” as evidence that Congress did not intend to limit the Act’s reach to enforcement of arbitration clauses solely to federal courts.<sup>69</sup> The Court further reasoned that adopting the state court’s decision would promote forum shopping, and that Congress did not intend for enforcement of an arbitration clause to vary depending on whether the case arose in federal or state court.<sup>70</sup> Finally, the Court explained that in passing the FAA, “Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.”<sup>71</sup> In subsequent decisions, the

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<sup>61</sup> See, e.g., *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

<sup>62</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 17 (1984).

<sup>63</sup> *Id.* at 4-5.

<sup>64</sup> *Id.* at 4.

<sup>65</sup> *Id.* at 5.

<sup>66</sup> See Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 400 (2004).

<sup>67</sup> *Southland Corp.*, 465 U.S. at 10.

<sup>68</sup> See *id.* at 15.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* See also *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995) (“In *Southland Corp. v. Keating* ... this Court decided that Congress would not have wanted state and federal courts to reach different outcomes about the validity of arbitration in similar cases.”).

<sup>71</sup> *Southland Corp.*, 465 U.S. at 16.

Court has reaffirmed the idea that when a state law or judicial interpretation bars mandatory arbitration of a specific type of dispute, the FAA preempts the state requirement.<sup>72</sup>

Following *Keating*, the Court has determined that Section 2 of the FAA also preempts state requirements that prescribe special conditions on the enforcement of mandatory arbitration agreements or the arbitration process.<sup>73</sup> Under the Court's current construction of the FAA, these types of state requirements conflict with Section 2, which prevents states from singling out arbitration provisions for "suspect status."<sup>74</sup>

In *Doctor's Associates, Inc. v. Casarotto*, the Court evaluated a Montana state law that rendered arbitration clauses unenforceable if the agreement failed to state on the first page, in underlined and capital letters, that the agreement was subject to arbitration.<sup>75</sup> At issue in *Casarotto* was an agreement between a franchisor of Subway sandwich shops and a franchisee.<sup>76</sup> The agreement called for mandatory arbitration of disputes arising from the agreement, but lacked this state-required notice concerning arbitration.<sup>77</sup> In an 8-1 opinion authored by Justice Ginsburg, the Court held Montana's law preempted, as it placed arbitration agreements in "a class apart" from other contracts and "singularly limit[ed] their validity."<sup>78</sup> Because the state law conditioned enforcement of an arbitration agreement on compliance with a notice requirement that was inapplicable to contracts generally, the Court concluded that the FAA overrode the state requirement.<sup>79</sup>

In a more recent case, *Preston v. Ferrer*, the Court held that the FAA preempted a state law that initially referred certain state law claims to a state administrative agency before parties could arbitrate questions arising out of a contract.<sup>80</sup> This case involved a dispute between Alex Ferrer, a television personality, and Arnold Preston, an entertainment industry attorney, and an agreement that contained a mandatory arbitration clause.<sup>81</sup> Preston sought to recover fees allegedly due under the contract and moved to compel arbitration.<sup>82</sup> In response, Ferrer petitioned the California Labor Commissioner to determine whether the contract was invalid and unenforceable under California law, claiming that Preston acted without the proper license required for talent agents.<sup>83</sup> The state law at issue conferred "exclusive original jurisdiction" in the state's Labor Commissioner.<sup>84</sup>

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<sup>72</sup> See, e.g., *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012) ("West Virginia's prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA."); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011) ("When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.")

<sup>73</sup> See generally Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 394 (2004).

<sup>74</sup> *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)).

<sup>75</sup> *Casarotto*, 517 U.S. at 683.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 684.

<sup>78</sup> *Id.* at 688.

<sup>79</sup> *Id.* at 687.

<sup>80</sup> *Preston v. Ferrer*, 552 U.S. 346, 349-350 (2008).

<sup>81</sup> *Id.* at 350.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 351.

The Court ruled, in an 8-1 decision written by Justice Ginsburg, that the FAA preempted the state law. In its opinion, the Court relied on an earlier FAA case, *Buckeye Check Cashing, Inc. v. Cardegna*, in which the Court determined “challenges to the validity of a contract providing for arbitration ordinarily ‘should ... be considered by an arbitrator, not a court.’”<sup>85</sup> The Court stated that “*Buckeye* largely, if not entirely resolves the dispute” in the case, and that granting primary jurisdiction over the dispute to an administrative agency conflicted with the FAA.<sup>86</sup> The Court also found the state law preempted because it “impose[d] prerequisites to enforcement of an arbitration agreement that are not applicable to contracts generally.”<sup>87</sup> Ferrer had argued that the California law can be reconciled with the FAA because it “merely postpones arbitration until the Labor Commissioner has exercised her primary jurisdiction.”<sup>88</sup> However, the Court rejected this argument, concluding that requiring the Labor Commissioner to first hear the dispute would “hinder the speedy resolution of the controversy” and frustrate a primary objective of arbitration.<sup>89</sup>

The Supreme Court has also addressed the preemption of state law in relation to the FAA’s “saving clause.” Under the saving clause in Section 2 of the FAA, an arbitration agreement may be invalidated “upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>90</sup> In other words, pursuant to the FAA’s saving clause, arbitration agreements may be rendered unenforceable based on factors that would invalidate the contract as a whole.<sup>91</sup> Courts have relied on the FAA’s saving clause to deny the enforcement of an arbitration agreement, sometimes in cases where it is found that enforcement would be unconscionable pursuant to state law (i.e., fundamentally unfair or oppressive to one of the bargaining parties).<sup>92</sup> However, the Supreme Court has recently held that the saving clause does not “preserve state-law rules that stand as an obstacle to the accomplishment of FAA’s objectives.”<sup>93</sup>

In *AT&T Mobility LLC v. Concepcion*, the Court examined an agreement between two consumers and a telephone company for the sale and servicing of cellular phones.<sup>94</sup> After the consumers were charged sales tax for the phones that had been advertised as free, the consumers filed a class action lawsuit against the company.<sup>95</sup> In response, the company sought to compel individual arbitration pursuant to the agreement.<sup>96</sup> The consumers maintained that the arbitration agreement was unconscionable and therefore invalid because it did not allow for classwide arbitration.<sup>97</sup> The U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) agreed with the consumers, based on a

<sup>85</sup> *Id.* at 353-54 (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 446 (2006)).

<sup>86</sup> *Id.* at 354.

<sup>87</sup> *Id.* at 356.

<sup>88</sup> *Id.* at 354.

<sup>89</sup> *Id.* at 358.

<sup>90</sup> 9 U.S.C. § 2.

<sup>91</sup> See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (“[The FAA’s] saving clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.”).

<sup>92</sup> See generally Jerett Yan, *A Lunatic’s Guide to Suing for \$30: Class Action Arbitration, the Federal Arbitration Act and Unconscionability After AT&T v. Concepcion*, 32 BERKELEY J. EMP. & LAB. L. 551 (2011).

<sup>93</sup> *Concepcion*, 563 U.S. at 343.

<sup>94</sup> *Id.* at 336.

<sup>95</sup> *Id.* at 337.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

rule established by an earlier state court decision that found class arbitration waivers to be unconscionable when they involve certain types of contractual disputes.<sup>98</sup> The appeals court maintained that the state court’s rule did not conflict with the FAA because it reflected an unconscionability analysis that is generally applicable to contracts in California, and not just contracts containing an arbitration clause.<sup>99</sup>

In a 5-4 decision penned by Justice Scalia, the Supreme Court reversed the decision of the Ninth Circuit.<sup>100</sup> While the Court noted that the FAA’s saving clause allows arbitration agreements to be invalidated by “generally applicable contract defenses” such as unconscionability, the Court generally reasoned that the clause could not be used as a mechanism for imposing restrictions on arbitration that interfere with the goals of the FAA.<sup>101</sup> In this case, the Court found that the saving clause did not immunize a state rule that required the availability of classwide arbitration, a process that interferes with the “fundamental attributes of arbitration” and creates a scheme that is inconsistent with the FAA.<sup>102</sup> In comparing class arbitration with individual arbitration, the Court observed that the former makes the process slower and more costly, requires procedural formality, and increases risks to the company.<sup>103</sup> The Court further concluded that California’s state rule was preempted because it hindered the FAA’s objectives of promoting an informal and streamlined dispute resolution process.<sup>104</sup>

In its most recent FAA preemption ruling, the Supreme Court not only reaffirmed its prior stance on FAA preemption, but also found that state law governing contract formation may also be subject to preemption under the FAA. On May 15, 2017, the Court handed down its ruling in *Kindred Nursing Centers Limited Partnership v. Clark*, upholding the validity of arbitration agreements entered into by the legal representatives of former nursing home residents.<sup>105</sup> In a 7-1 decision authored by Justice Kagan, the Court concluded that application of a Kentucky state rule that compelled an individual to explicitly waive a right to trial when executing a power of attorney agreement violated the FAA, as such a requirement “singles out arbitration agreements for disfavored treatment.”<sup>106</sup>

In *Kindred*, the estates of former nursing home residents sued the company that operated the nursing facility, alleging that the residents received improper care that led to their deaths.<sup>107</sup> The company moved to dismiss the litigation, claiming that the arbitration agreements signed by the representatives of the residents, pursuant to power-of-attorney documents, prevented the cases from being heard in court.<sup>108</sup> The Kentucky Supreme Court held that the arbitration agreements were invalid based on provisions of the Kentucky Constitution, which generally proclaim the right to trial by jury as “sacred” and “inviolable.”<sup>109</sup> Pursuant to these rights, the state court

<sup>98</sup> *Id.* at 338.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 352.

<sup>101</sup> *Id.* at 343.

<sup>102</sup> *Id.* at 344.

<sup>103</sup> *Id.* at 348-50.

<sup>104</sup> *Id.* at 344.

<sup>105</sup> *Kindred Nursing Ctrs. Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1425 (2017).

<sup>106</sup> *Id.* Justice Neil Gorsuch had not yet taken a seat on the Court when oral arguments were heard in *Kindred*, and he did not take part in the Court’s consideration or decision of the lawsuit.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 1426 (citations and internal quotations omitted).

determined that an individual’s representative can enter into a valid binding arbitration agreement and deprive the individual of access to the courts, but only when the individual expressly consents to the arbitration agreement being entered into on his or her behalf.<sup>110</sup> Because the powers of attorney at issue in the case lacked this requisite authorization, the Kentucky Supreme Court concluded that these representatives were not permitted to waive the residents’ state constitutional rights.<sup>111</sup>

The U.S. Supreme Court reversed and vacated the judgment of the state court.<sup>112</sup> In its opinion, the Court held that by requiring an individual to make an express statement to surrender the individual’s right to a trial, Kentucky’s clear-statement rule “fails to put arbitration agreements on an equal plane with other contracts,” in violation of the FAA.<sup>113</sup> The estates of the residents argued that the FAA was inapplicable in this case, as the Kentucky state rule did not concern enforcement of existing arbitration agreements, but rather the initial formation of these agreements, something that is not covered by the federal act.<sup>114</sup> However, the Court disagreed, noting that the language of the FAA addresses not only “enforce[ment]” of arbitration agreements, but also their “valid[ity]”—that is, what is needed to enter into them.<sup>115</sup> Thus, the Court contended, “[a] rule selectively finding arbitration contracts invalid because improperly formed fares no better under the Act than a rule selectively refusing to enforce those agreements once properly made.”<sup>116</sup>

Based on the Supreme Court’s FAA jurisprudence, states appear restricted in their ability to constrain the use of arbitration agreements. While the Court has found that states may regulate arbitration agreements under laws governing the validity, revocability, and enforceability of contracts generally, state requirements that expressly target these agreements and that disfavor or interfere with arbitration are generally preempted by the federal act.<sup>117</sup> Additionally, although the FAA’s preemptive scope is broad, the Court has recognized that courts have the power to invalidate certain arbitration agreements under the Act’s saving clause.<sup>118</sup> However, after *Concepcion*, a topic of continuing debate is when the invalidation of an arbitration agreement is allowable, and when this invalidation will be found to impermissibly impede the objectives of the FAA, particularly in situations outside of the class action context.<sup>119</sup>

## Class Arbitration Waivers and the FAA

During the late 1990s, major companies began to restrict the availability of classwide arbitration in their consumer and employment-related mandatory arbitration agreements.<sup>120</sup> In 1999, for

<sup>110</sup> *Id.* at 1426.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 1429.

<sup>113</sup> *Id.* at 1426-27.

<sup>114</sup> *Id.* at 1428-29.

<sup>115</sup> *Id.* at 1428.

<sup>116</sup> *Id.*

<sup>117</sup> See *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 685 (1996).

<sup>118</sup> See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343 (2011).

<sup>119</sup> See generally E. Gary Spitko, *Federal Arbitration Act Preemption of State Public-Policy-Based Employment Arbitration Doctrine: An Autopsy and an Argument for Federal Agency Oversight*, 20 HARV. NEGOTIATION L. REV. 1, 9 (2015).

<sup>120</sup> STONE AND COLVIN, *supra* note 2 at 4.

example, ten major banks that issue credit cards reportedly formed a group to promote the use of class arbitration waivers.<sup>121</sup> The increased use of such waivers has been criticized by some who contend that they have undermined challenges to practices such as predatory lending and wage theft.<sup>122</sup> Others emphasize, however, that class arbitration waivers do not prohibit individual actions, and that employment disputes, in particular, are generally individualized and otherwise not appropriate for class or collective action.<sup>123</sup>

The Court has considered the enforcement of arbitration agreements that include class or collective action waivers in some of its most recent cases. As noted, in *Concepcion*, the Court concluded that an arbitration agreement that allowed only individual arbitration to resolve disputes was enforceable and not covered by the FAA's saving clause.<sup>124</sup> According to the Court, the FAA's objectives of promoting an informal and expeditious dispute resolution system would be undermined if a California state court's rule were applied.<sup>125</sup> Application of the rule would have permitted classwide arbitration, a process believed to be slower and more expensive.<sup>126</sup>

Following its decision in *Concepcion*, the Court considered another case involving a class arbitration waiver in a consumer agreement. In *American Express Company v. Italian Colors Restaurant*, a group of merchants that accepted the American Express card challenged a class arbitration waiver on the ground that it contravened the policies of federal antitrust laws.<sup>127</sup> The merchants argued that the credit card company used its monopoly power to force them to accept its cards at rates 30 percent higher than the fees charged for competing credit cards.<sup>128</sup> The U.S. Court of Appeals for the Second Circuit (Second Circuit) declined to enforce the class arbitration waiver, citing the prohibitive costs that would be incurred by the merchants if they were compelled to pursue individual actions.<sup>129</sup>

On appeal, the Supreme Court noted that the enforcement of an arbitration agreement pursuant to the FAA may be overridden by a "contrary congressional command" against arbitration.<sup>130</sup> Here, however, because the antitrust laws do not express an intention to preclude a waiver of class action procedures, the Court concluded in a 5-3 opinion authored by Justice Scalia that the class arbitration waiver was enforceable.<sup>131</sup> The Court also maintained that the cost of pursuing individual arbitration should not be viewed as preventing the effective vindication of the merchants' rights under the antitrust laws.<sup>132</sup> The Court explained: "[T]he fact that it is not worth

<sup>121</sup> *Id.* ("Indeed, in 1999, the 10 major banks that issue credit cards—including American Express, Citibank, First USA, Capital One, Chase, and Discover—formed a group called 'the Arbitration Coalition' to promote the use of arbitration clauses that bar class actions.").

<sup>122</sup> GREENBERG AND GEBELOFF, *supra* note 4.

<sup>123</sup> *See, e.g.*, Brief of the Chamber of Commerce of the United States of America as Amicus Curiae Supporting Petitioners in Nos. 16-285 and 16-300 and Respondents in No. 16-307 at 4, *Epic Sys. Corp. v. Lewis*, No. 16-285 (U.S. *petition for cert. granted* Jan. 13, 2017), *Ernst & Young LLP v. Morris*, No. 16-300 (U.S. *petition for cert. granted* Jan. 13, 2017), *Nat'l Labor Relations Bd. v. Murphy Oil USA, Inc.*, No. 16-307 (U.S. *petition for cert. granted* Jan. 13, 2017).

<sup>124</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348-50 (2011).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Am. Express Co. v. Italian Colors Rest.*, 133 S.Ct. 2304, 2306 (2013).

<sup>128</sup> *Id.* at 2308.

<sup>129</sup> *In re Am. Express Merchs.' Litig.*, 554 F.3d 300 (2nd Cir. 2009).

<sup>130</sup> *Italian Colors*, 133 S.Ct. at 2309.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 2310.

the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.”<sup>133</sup>

In January 2017, the Court agreed to review three employment-related cases that involve class or collective action waivers.<sup>134</sup> Unlike the class arbitration waivers at issue in *Concepcion* and *Italian Colors*, the waivers in these three cases prohibit a class or collective action in both arbitral and judicial forums.<sup>135</sup> The cases—*National Labor Relations Board v. Murphy Oil USA, Inc.*; *Epic Systems Corporation v. Lewis*; and *Ernst & Young LLP v. Morris*—involve employees who contend that the waivers violate their right under the NLRA to engage in “other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]”<sup>136</sup> This right, established in Section 7 of the NLRA, is enforced by Section 8 of the statute, which states that it is an unfair labor practice to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7.]”<sup>137</sup>

In *Murphy Oil*, the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) upheld a gas station operator’s use of a class or collective action waiver. The court concluded that the NLRA does not express a contrary congressional command against arbitration that should preclude the enforcement of the waiver.<sup>138</sup> In *Epic Systems* and *Ernst & Young*, however, the Seventh Circuit and the Ninth Circuit respectively held that the waivers contravene the NLRA, and may not be enforced pursuant to the FAA.

In *Epic Systems*, the Seventh Circuit determined that the waiver was unlawful under the NLRA after first recognizing that the concerted activities contemplated by section 7 include the ability to maintain a class or collective action.<sup>139</sup> Citing the NLRA’s history and purpose, the court observed: “Section 7 should be read broadly to include resort to representative, joint, collective, or class legal remedies.”<sup>140</sup> Because the waiver restricts these Section 7 rights and thus would be considered an unfair labor practice under Section 8, the court determined that it was unlawful.<sup>141</sup>

Finding the waiver to be unlawful, the Seventh Circuit further maintained that the FAA’s saving clause should render it unenforceable.<sup>142</sup> The court explained:

Illegality is a standard contract defense contemplated by the FAA’s saving clause ... If the NLRA does not render an arbitration provision sufficiently illegal to trigger the saving clause, the saving clause does not mean what it says.<sup>143</sup>

<sup>133</sup> *Id.* at 2311 (emphasis in original and citation omitted).

<sup>134</sup> *Murphy Oil USA v. Nat’l Labor Relations Bd.*, 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, 85 U.S.L.W. 3341 (U.S. Jan. 13, 2017) (No. 16-307); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 85 U.S.L.W. 3343 (U.S. Jan. 13, 2017) (No. 16-285); *Morris v. Ernst & Young LLP*, 834 F.3d 975 (9th Cir. 2016), *cert. granted*, 85 U.S.L.W. 3344 (U.S. Jan. 13, 2017) (No. 16-300).

<sup>135</sup> *See, e.g., Murphy Oil*, 808 F.3d at 1015 (“The Arbitration Agreement further requires employees to waive the right to pursue class or collective claims in an arbitral or judicial forum.”).

<sup>136</sup> 29 U.S.C. § 157.

<sup>137</sup> 29 U.S.C. § 158(a)(1).

<sup>138</sup> *Murphy Oil*, 808 F.3d at 1016-18.

<sup>139</sup> *Epic Sys.*, 823 F.3d at 1153.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 1156.

<sup>142</sup> *Id.* at 1157.

<sup>143</sup> *Id.* at 1159 (citation omitted).



Unlike the Fifth Circuit, the Seventh Circuit declined to find the waiver enforceable because the NLRA does not include a contrary congressional command against arbitration. Rather, the Seventh Circuit contended that the NLRA and the FAA should be construed to give effect to both statutes.<sup>144</sup> Here, the court maintained that the statutes “work hand in glove” given the waiver’s illegality and the operation of the FAA’s saving clause.<sup>145</sup>

Like the Seventh Circuit, the Ninth Circuit also concluded that a concerted action waiver included in an accounting firm’s arbitration agreement violated the NLRA and was unenforceable. In *Ernst & Young*, however, the Ninth Circuit emphasized that Section 7 provides a non-waivable substantive right to collectively pursue legal claims.<sup>146</sup> The court noted that “when an arbitration contract professes the waiver of a substantive federal right, the FAA’s saving clause prevents a conflict between the statutes by causing the FAA’s enforcement mandate to yield.”<sup>147</sup> While the Ninth Circuit did recognize the waiver as a violation of Sections 7 and 8, it seems that the court might have found the waiver to be unenforceable simply because “substantive rights cannot be waived in arbitration agreements.”<sup>148</sup>

The consolidated cases provide the Court with an opportunity to not only resolve the split among the appellate courts, but also address how the FAA should be construed when an arbitration agreement attempts to eliminate a right provided by another federal statute. In past cases, the Court has concluded that an arbitration agreement can restrict how a right will be enforced. In *Gilmer v. Interstate/Johnson Lane Corporation*, for example, the Court maintained that a claim alleging a violation of the Age Discrimination in Employment Act could be subject to arbitration in lieu of litigation.<sup>149</sup> Unlike the agreement at issue in *Gilmer*, however, the agreements in the consolidated cases would eliminate both a judicial and arbitral forum for concerted activity, a right provided by the NLRA.

Moreover, how the Court interprets the application of the saving clause could be particularly notable. Epic Systems and Murphy Oil argue that the saving clause does not apply for various reasons, including the contention that it “has no application to other federal statutes like the NLRA.”<sup>150</sup> As discussed, however, this position is at odds with the decisions of the Seventh and Ninth Circuits.

## Recent Federal Regulatory and Legislative Action

### Federal Agency Action to Restrict Mandatory Arbitration

Given the Court’s FAA jurisprudence and the seemingly limited ability of states to curb the use of mandatory arbitration agreements, some federal agencies have taken recent action to regulate the use of arbitration agreements under certain circumstances. For example, on July 19, 2017, the

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<sup>144</sup> *Id.* at 1158.

<sup>145</sup> *Id.* at 1157.

<sup>146</sup> *Morris v. Ernst & Young LLP*, 834 F.3d 975, 985-86 (9th Cir. 2016), *cert. granted*, 85 U.S.L.W. 3344 (U.S. Jan. 13, 2017) (No. 16-300).

<sup>147</sup> *Id.* at 986.

<sup>148</sup> *Id.* at 985.

<sup>149</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1990).

<sup>150</sup> Brief for Petitioner Epic Sys. Corp. and Respondent Murphy Oil USA, Inc. at 8-9, *Epic Sys. Corp. v. Lewis*, No. 16-285 (U.S. *petition for cert. granted* Jan. 13, 2017), *Nat’l Labor Relations Bd. v. Murphy Oil USA, Inc.*, No. 16-307 (U.S. *petition for cert. granted* Jan. 13, 2017).

Consumer Financial Protection Bureau (CFPB) issued a final rule that will restrict the use of mandatory pre-dispute arbitration clauses in agreements for certain consumer financial products and services.<sup>151</sup> This rule was issued pursuant to Section 1028 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which authorized the CFPB to conduct a study of the use of arbitration agreements between consumers and financial institutions and subsequently issue regulations restricting or prohibiting the use of arbitration agreements upon a finding that such a prohibition or restriction “is in the public interest and for the protection of consumers.”<sup>152</sup> The CFPB final rule circumscribes the use of mandatory arbitration agreements in two main ways. First, the final rule restricts covered financial service providers from using a pre-dispute arbitration agreement to block consumers from initiating or joining class action lawsuits.<sup>153</sup> Second, the rule requires providers that use these arbitration agreements to include language reflecting the limitation on class action waivers and to submit specified information on their use of arbitration to the CFPB.<sup>154</sup> The CFPB final rule takes effect on September 18, 2017, and applies only to mandatory arbitration agreements entered into on or after March 19, 2018.<sup>155</sup> Some Members of Congress have expressed opposition to the rule, claiming that it could detrimentally impact consumers and hamper their ability to seek expedited resolution of their legal disputes.<sup>156</sup> Legislation has been introduced that would overturn the final rule under the Congressional Review Act, including H.J.Res 111, a joint resolution passed by the House on July 25, 2017.<sup>157</sup>

Additionally, in 2016, the Centers for Medicare and Medicaid Services (CMS), a part of the Department of Health and Human Services, issued a comprehensive final rule governing the participation of nursing homes and other long-term care facilities in Medicare and Medicaid.<sup>158</sup> One requirement of the new rule that received considerable attention was a prohibition on a covered facility entering into a binding arbitration agreement with a resident (or the resident’s representative) prior to a dispute arising between the parties.<sup>159</sup> While some praised this ban as a way to better protect the health and safety of long-term care residents, others criticized this restriction and asserted that CMS lacks the authority to hinder the use of arbitration in this manner.<sup>160</sup> Shortly after the final rule was issued, a number of plaintiffs filed a lawsuit against CMS, claiming that the agency lacked the authority to limit arbitration in light of the FAA.<sup>161</sup> The

<sup>151</sup> 82 Fed. Reg. 33,210 (July 19, 2017).

<sup>152</sup> Pub. L. No. 111–203, § 1028, 24 Stat. 1376 (2010) (codified at 12 U.S.C. § 5518). *See also* 82 Fed. Reg. at 33,210 (“[The CFPB] final rule is based on the Bureau’s findings—which are consistent with the Study—that pre-dispute arbitration agreements are being widely used to prevent consumers from seeking relief from legal violations on a class basis, and that consumers rarely file individual lawsuits or arbitration cases to obtain such relief.”) *See also* CRS Legal Sidebar WSLG1574, *CFPB Issues Proposed Rule that Would Restrict Mandatory Pre-Dispute Arbitration Clauses*, by (name redacted) .

<sup>153</sup> *See* 82 Fed. Reg. at 33,358–33,387 (to be codified at 12 C.F.R pt. 1040).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 33,210.

<sup>156</sup> *See, e.g.*, Press Release, U.S. Senate Committee on Banking, Housing, and Urban Affairs, *Senators File Resolution Disapproving of CFPB Arbitration Rule* (July 20, 2017).

<sup>157</sup> H.J.Res 111, 115th Cong. (2017). For more information on the Congressional Review Act, see CRS Report R43992, *The Congressional Review Act (CRA): Frequently Asked Questions*, by (name redacted) and (name redacted) .

<sup>158</sup> 81 Fed. Reg. 68,688 (Oct. 4, 2016).

<sup>159</sup> *Id.* at 68,790.

<sup>160</sup> *See, e.g.*, Press Release, American Ass’n for Justice, *CMS Restores Nursing Home Residents’ Rights, Prohibiting Pre-Dispute Forced Arbitration Contracts* (Sept. 28, 2016); Press Release, American Health Care Ass’n, *AHCA Statement on CMS Final Rule Requirements of Participation* (Sept. 29, 2016).

<sup>161</sup> *Am. Health Care Ass’n v. Burwell*, 217 F.Supp.3d 921, 925 (N.D. Miss. 2016).

U.S. District Court for the Northern District of Mississippi issued a preliminary injunction in *American Health Care Association v. Burwell* to temporarily prevent the agency from implementing the arbitration requirements while the case was pending.<sup>162</sup>

However, in June 2017, CMS withdrew its appeal of the district court decision, and the agency subsequently issued a proposed rule that would revise these arbitration restrictions.<sup>163</sup> The proposed rule would remove the prohibition on pre-dispute binding arbitration agreements, but also includes certain measures to promote transparency in the arbitration process.<sup>164</sup> Among the new provisions, the proposed rule would require a facility to ensure that the binding arbitration agreement is in “plain language” and in “plain writing” if it is part of the facility admission contract.<sup>165</sup> As noted in the preamble to the final rule, CMS believes that the revised approach “is consistent with the elimination of unnecessary and excessive costs to providers while enabling residents to make informed choices about important aspects of his or her healthcare.”<sup>166</sup>

## Legislation in the 115<sup>th</sup> Congress

In light of the Supreme Court’s FAA decisions, the use of mandatory arbitration agreements by private-sector companies is believed to have grown enormously.<sup>167</sup> While the efforts of federal agencies like the CFPB will likely deter the use of such agreements, the CFPB’s rule, in particular, would apply only to a specific category of agreements—that is, those involving certain consumer financial products and services. Some maintain that the only way to reverse the growing use of mandatory arbitration agreements generally is to amend the FAA.<sup>168</sup>

During the 115<sup>th</sup> Congress, several bills have been introduced that would amend the FAA and generally limit the use of mandatory arbitration agreements under specified circumstances. Examples include the following:

- **Arbitration Fairness Act of 2017 (H.R. 1374/S. 537).** This legislation would add a new chapter to the FAA and generally forbid mandatory arbitration agreements for the resolution of antitrust, civil rights, employment, or consumer disputes if an agreement was entered into before such a dispute arises.<sup>169</sup> Under the bills, courts would be responsible for determining whether a particular arbitration agreement is subject to the ban.<sup>170</sup>
- **Restoring Statutory Rights and Interests of the States Act of 2017 (H.R. 1396/S. 550).** In an effort to curb the use of pre-dispute arbitration agreements, these bills would amend Section 2 of the FAA to provide that the Act’s requirements on the enforceability of arbitration agreements would not apply to specific claims brought by individuals or certain small businesses that arise from a violation of federal or state statutes, the U.S. Constitution, or a state constitution, unless a written arbitration agreement is entered into by both parties

<sup>162</sup> *Id.*

<sup>163</sup> 82 Fed. Reg. 26,649 (June 8, 2017).

<sup>164</sup> *Id.* at 26,650.

<sup>165</sup> *Id.* at 26,651.

<sup>166</sup> *Id.*

<sup>167</sup> STONE AND COLVIN, *supra* note 2 at 14.

<sup>168</sup> *Id.* at 27.

<sup>169</sup> H.R. 1374, 115th Cong. § 3 (2017); S. 537, 115th Cong. § 3 (2017).

<sup>170</sup> *Id.*

after the claim has arisen and applies only to the existing claim.<sup>171</sup> The legislation would also amend the saving clause of the FAA to specify that it pertains to federal and state statutes and findings of a court that an agreement is unconscionable, invalid based on a lack of “meeting of the minds,” or otherwise unenforceable based on contract law or public policy.<sup>172</sup> Such changes would appear to limit the preemptive scope of the FAA under the Court’s current construction of the Act, and potentially make it easier for state courts to invalidate mandatory arbitration agreements. A determination as to whether these provisions apply to a particular arbitration agreement would be required to be made by a court instead of an arbitrator.<sup>173</sup>

- **Safety Over Arbitration Act of 2017 (S. 542).** This bill would allow arbitration to resolve a dispute “alleging facts relevant to a hazard to public health or safety” only if all parties consent to arbitration in writing after the dispute arises.<sup>174</sup> In instances when arbitration is elected, the arbitrator must provide a written explanation of the basis for any award or other outcome.<sup>175</sup>
- **Court Legal Access and Student Support (CLASS) Act of 2017 (H.R. 2301/S. 553).** Legislation has also been introduced that would address the availability of arbitration in college enrollment disputes. Pursuant to the proposed CLASS Act, provisions of the FAA promoting the enforcement of arbitration agreements would not apply to enrollment agreements between students and institutions of higher education.<sup>176</sup>

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<sup>171</sup> H.R. 1396, 115th Cong. § 3 (2017); S. 550, 115th Cong. § 3 (2017).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> S. 542, 115th Cong. § 2 (2017).

<sup>175</sup> *Id.*

<sup>176</sup> H.R. 2301, 115th Cong. § 2 (2017); S. 553, 115th Cong. § 2 (2017).

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