



Ensuring Enforcement of Arbitration Agreements Under the Federal Arbitration Act

BY ROBERT G. WILLIAMSON, JR.

We can now say with certainty that the scales have tipped in favor of enforcing arbitration agreements. The U. S. Supreme Court has soundly rejected state policies under either case law or statute, which would seek to prevent arbitration. How do mobile home/manufactured housing community owners across the nation ensure their pre-dispute arbitration agreements will be enforced? Use the Federal Arbitration Act (FAA). This article discusses the key points to consider in fashioning an effective arbitration agreement based on recent Supreme Court rulings applying the FAA.

Last year produced a justified hope that state courts would more rigorously enforce arbitration agreements according to their terms based upon the U. S. Supreme Court's mandate: *the FAA trumps conflicting state public policies that would purport to preclude arbitration*. The widely recognized AT&T¹ case in 2011, upholding a consumer class action waiver provision in an arbitration agreement, signaled revitalization of the national mandate favoring arbitration of disputed claims in place of court litigation. Unfortunately, the state courts still resisted.

At the beginning of last year, the High Court in a *per curiam* opinion² told the West Virginia Supreme Court that disallowing arbitration of nursing home personal injury and wrongful death claims as a matter of state public policy was *pre-empted* by the FAA; that the arbitration agreement at-issue was enforceable, unless found to be unconscionable under traditional contract principles not particular to arbitration.³ At the end of last year the High Court reemphasized its mandate to the Oklahoma courts. Again in a *per curiam* opinion, it vacated that state's Supreme Court decision refusing to allow arbitration of an employee's non-competition agreement based on public policy considerations.⁴

This year the trend continued. In a federal antitrust price fixing case, the High Court reversed a decision by the U. S. Second Circuit Court of Appeals disallowing a class action waiver in an ar-

bitration agreement because the cost to pursue arbitration far outweighed potential individual recovery.⁵ Indeed, it has been recently reported that at least one justice of a three justice panel of the Ninth Circuit hearing oral argument on whether to uphold a class action waiver in students' arbitration agreements with their college based on state "public benefit" policy stated that, "The U. S. Supreme Court has said it really doesn't give a hoot about state policies when it comes to arbitration clauses."⁶ So it seems; time to dust off your old arbitration agreements for a second look and perhaps consider some revisions.

How do you ensure that your arbitration agreement is enforceable under FAA? A couple of key elements are necessary. First, the agreement must be in writing and second, the subject of dispute must affect interstate commerce.

"Affect interstate commerce," in the context of FAA, however, encompasses a much wider range of transactions than those actually within the flow of interstate commerce. The concept extends to consideration of the aggregate economic activity subject to federal control.⁷ The manufactured housing industry and any given community clearly exhibits aggregate economic activity subject to federal control. For example, federal regulations dictate construction standards; finished products cross state lines everyday on federal highways utilized by transporters licensed by the federal Interstate Commerce Commission; mobile home/manufactured home communities install and deliver federally regulated utility services and daily enter into transactions with residents moving from one state to another for lease of real property home sites. Sales financing using the mobile home/manufactured home as security are subject to federal consumer fair lending laws. The appropriate recitals in an arbitration agreement recognizing these types of factors provide an even better assurance that invoking FAA enforcement of the agreement when a dispute arises will be successful.

A second key element is to include a provision

expressly stating that the FAA governs enforcement of the arbitration agreement. Such a provision should make clear that the agreement excludes incorporation of state procedural case or statutory law concerning enforcement of arbitration agreements. This type of provision coupled with interstate commerce recitals will provide an even better case that your arbitration agreement will be enforced under the FAA.

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¹ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), reversing the California Supreme Court's decision disallowing such waivers in the context of a consumer contract.

² A *per curiam* decision is a decision delivered via an opinion issued in the name of the entire Court rather than authored by an individual Justice. It is the court speaking with one voice.

³ "There is no general-specific exception to the Supremacy Clause, U.S. Const. Art. VI, cl. 2. '[W]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.'" *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, (2012) (*per curiam*) Same result under federal statute where there was no express congressional mandate in the Credit Repair Organizations Act (15 U.S.C. § 1679 et seq.) preventing arbitration of consumer contracts. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 672 (Scalia, J.)

⁴ *Nitro-lift Technologies, L.L.C. v. Howard*, 133 S. Ct. 500, 503 - 504 (2012) (*per curiam*).

⁵ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013)

⁶ J. Roemer, "9th Circuit panel possibly poised to further enforce arbitration clauses" Daily Journal, August 16, 2013, reporting on oral argument in *Ferguson v. Corinthian Colleges, Inc.*, U. S. Court of Appeals for the Ninth Circuit, Docket No. 11 - 56965.

⁷ *Citizens Bank v. Alafabco*, 123 S. Ct. 2037 (2003); *Allied - Bruce Terminix Cos. v. Dobson*, 115 S. Ct. 834 (1995).