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## **No Jury for Grandma**

In *Kindred Nursing Centers Ltd. Partnership v. Clark* (2017) \_ U.S. \_ (2017 WL 2039160), decided May 15, 2017, the U.S. Supreme Court stated again that the Federal Arbitration Act (FAA) preempts any state rule that disfavors arbitration agreements, even when claims for wrongful death are at stake. The court ruled that Kindred Healthcare could enforce a binding arbitration agreement with the families of two residents of its nursing homes who died while under Kindred’s care.

The arbitration agreements were signed by the residents’ family members pursuant to powers of attorney. The Kentucky Supreme Court held both arbitration agreements were invalid because neither power of attorney specifically entitled the representative to enter into an arbitration agreement on behalf of the residents. Because the Kentucky Constitution declares the rights of access to the courts and trial by jury to be “sacred” and “inviolable,” the court determined, an agent could deprive her principal of such rights only if expressly provided in the power of attorney (the “clear statement rule”).

The U.S. Supreme Court reversed. The FAA preempts any state rule that discriminates against arbitration or disfavors arbitration agreements. The Kentucky Supreme Court’s clear-statement rule fails to put arbitration agreements on an equal plane with other contracts. By requiring an explicit statement before an agent can relinquish her principal’s right to go to court and receive a jury trial, the court adopted a legal rule that singled out arbitration agreements for disfavored treatment in violation of the FAA.

### **The takeaway:**

The FAA makes arbitration agreements “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” (9 U.S.C. § 2). That statutory provision establishes an equal-treatment principle: A court may invalidate an arbitration agreement based on “generally applicable contract defenses” like fraud or unconscionability, but not on legal rules that “apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.”