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In a Big Boost for the Federal Arbitration Act, the Supreme Court Decides in *Preston v. Ferrer* that the Arbitrator Remains Supreme

BY MICHAEL E. JOHNSON & PIRET LOONE

As we discussed in the January issue (see “Court’s Second ’07-08 ADR Case Challenges Arbitrator Supremacy,” 1 *Alternatives* 1 (January 2008)), on Jan. 14, the U.S. Supreme Court heard an appeal from the decision in *Ferrer v. Preston*, 145 Cal. App. 4th 440 (Nov. 30, 2006). The California Court of Appeal had held that the California Talent Agencies Act, Labor Code § 1700.44, required that parties to a management contract containing an arbitration clause submit a dispute concerning the contract’s validity to the state Labor Commissioner, rather than an arbitrator.

But in its Feb. 20, 2008, opinion, the U.S. Supreme Court reversed the California Court of Appeal. Delivering the Court’s 8-1 decision, Associate Justice Ruth Bader Ginsburg characterized the issue presented as “simply who decides” whether the contract was unenforceable, because petitioner Arnold M. Preston was acting as an unlicensed talent agent at the time the contract was entered into. *Preston v. Ferrer*, No. 06-1463, 552 U.S. ___ (2008) (available at www.supremecourt.us/opinions/07pdf/06-1463.pdf).

As it did in *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440 (2006), the Court held that the arbitrator would decide the validity of Preston’s management contract. In arriving at its holding, the Court reasoned that when the parties agree to arbitrate, the Federal Arbitration Act, 9 U.S.C. §§ 1-16, supersedes all state laws, such as the Talent Agencies Act, that lodge “primary jurisdiction in another forum, whether judicial or administrative.”

The case involves a 2002 contract between Preston, an entertainment lawyer, and Alex E. Ferrer, a Fox television personality known as “Judge Alex.” Under their contract, Ferrer agreed to pay Preston a

percentage of his television show earnings for Preston’s managerial services.

In 2005, Preston, seeking fees under the contract, filed an arbitration demand with the American Arbitration Association, which Ferrer countered by filing a petition with the California Labor Commissioner to stay arbitration.

COURT DECISIONS

When the Labor Commissioner denied Ferrer’s motion to stay, Ferrer filed a complaint in the Los Angeles County Superior Court seeking to restrain Preston from proceeding with the arbitration. On Dec. 7, 2005, the court granted Ferrer’s motion for

clause, the Talent Agencies Act vested exclusive original jurisdiction in the Labor Commissioner to decide whether the contract was valid, and whether it involved the services of a talent agency. The appeals court deemed *Buckeye*—where the Supreme Court held that any challenge to a contract’s validity as a whole must be determined by the arbitrator—inapposite because “it did not involve an administrative agency with exclusive jurisdiction over a disputed case.” *Ferrer*, 145 Cal. App. 4th at 447.

The Supreme Court granted certiorari on Sept. 25, 2007, to determine whether the Federal Arbitration Act, which requires that courts enforce contractual agreements to arbitrate, “overrides state law vesting initial adjudicatory authority in an administrative agency.” 552 U.S. ___. Ferrer, in his brief, argued that the California Labor Commissioner had exclusive original jurisdiction to determine the validity of Preston’s contract.

In its February opinion, the Supreme Court rejected this argument, emphasizing the national policy favoring arbitration and the FAA’s “well-established” displacement of conflicting state law. 552 U.S. ___ (2008), citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995). The Court held that under *Buckeye*, the arbitrator would have to decide whether the contract was invalid under California law, and rejected Ferrer’s argument that the Talent Agencies Act merely required exhaustion of administrative remedies before proceeding to arbitration and, as such, did not conflict with the FAA.

The Court held that the TAA did, in fact, conflict with the FAA’s dispute resolution regime in two respects: (1) By granting the Labor Commissioner exclusive jurisdiction to decide an issue that the parties agreed to arbitrate, and (2) by imposing prerequisites to enforcement of an arbitration agreement.

The Supreme Court also rejected Ferrer’s argument that the TAA could be reconciled with the FAA because it merely postponed arbitration until after the Labor Commissioner had exercised jurisdiction. The Court held that the inevitable delay associated with pursuing nonbinding admin-

Who’s First?

The issue: The U.S. Supreme Court revisits arbitration and the Federal Arbitration Act.

The claim: TV’s Judge Alex wanted the California Labor Commissioner to review his case before an arbitrator does.

The decision: The FAA trumps state law. Judge Alex loses.

a preliminary injunction, denied Preston’s motion to compel arbitration, and stayed the action pending resolution of the petition by the Labor Commissioner.

The California Court of Appeal, in an unpublished opinion, upheld the trial court’s order by a 2-1 vote. The majority held that notwithstanding the agreement’s arbitration

Johnson is a partner and Loone is an associate in the Litigation and Trial Practice Group of the New York office of Alston & Bird LLP. They previewed *Preston v. Ferrer* case in January, “Court’s Second ’07-08 ADR Case Challenges Arbitrator Supremacy,” 1 *Alternatives* 1 (January 2008).

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Ferrer v. Preston

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istrative remedies would contravene arbitration's objectives of streamlining proceedings and achieving speedy resolutions.

The Court disapproved the distinction between judicial and administrative proceedings drawn by the California Court of Appeal and advocated by Ferrer.

Finally, the Court rejected Ferrer's argument that the contract's choice-of-law clause selecting California law necessarily reflected the parties' understanding that, consistent with that state's law, their disputes would be heard by the Labor Com-

missioner. The Supreme Court held that the arbitration and the choice-of-law provisions could best be harmonized by reading the latter to encompass the parties' substantive rights and obligations, but not California's special rules that could circumscribe the arbitrator's authority.

FOSTERING ADR

The *Preston* decision was hardly surprising, given the Court's recent *Buckeye* holding, and other recent decisions reflecting the Court's push to foster alternative dispute resolution mechanisms and ensure broad FAA

application in state and federal proceedings.

Notwithstanding the federalist bent of certain justices—*Preston* was decided 8-1, with Associate Justice Clarence Thomas providing his customary arbitration dissent, stating that he believes that the FAA doesn't apply to cases originating in state courts—the *Preston* opinion reflects an emerging consensus among the members of the Court that state statutory and regulatory regimes will not be permitted to impinge upon FAA provisions that facilitate contractually agreed-to arbitration. ■

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The *Preston* Opposition Amicus, Reviewed

In a sidebar to the January *Preston* preview article by Michael Johnson and Piret Loone, *Alternatives* discussed the four friend-of-the-court briefs that had been filed on behalf of petitioner Arnold M. Preston's call for reversing the California appeals court that sent his case against his former client, Alex Ferrer, to the California Labor Commissioner, rather than an arbitrator.

Those four petitioners—CTIA, the Wireless Association; Macy's Group; Pacific Legal Foundation, and the U.S. Chamber of Commerce—all found themselves on the winning side. When the January issue closed, they were the only amicus filings.

But two later briefs, highlighted below, supported Ferrer. For completeness purposes, their losing, but interesting, policy-heavy arguments are highlighted below. The briefs emanated from the entertainment industry, focusing on the talent-agency relationship, and preservation of the state authority.

The two briefs are:

- **The William Morris Agency**, the 110-year-old Hollywood talent agency, argued that principles of party autonomy under the Federal Arbitration Act required applying the Talent Agencies Act's administrative procedures. The agency stated that requiring the state administrative determination before arbitration doesn't undermine the FAA, noting that the TAA "shows a high degree of gracious solicitude to arbitral proceedings."

The talent agency also made a policy

argument: the Talent Agencies Act "regulates a unique labor market for entertainment and media talent, and its arbitral provisions should not be preempted by the FAA."

The brief argued, "This Court should appreciate the unique nature of the labor market for entertainment and media talent, especially in the context of weighing the application of a federal statutory scheme and its preemptive effect. . . . Markets in creative talent present unique regulatory challenges, and many states (not just California) have legislated in this field. California courts, in construing the TAA, have elucidated the significant public policy rationale behind the dispute settlement provisions of the Act and have roundly condemned the tactics of certain agents or representatives who would seek to deny the Act's protections to their artist-clients."

- **Screen Actors Guild Inc., and the American Federation of Television & Radio Artists, AFL-CIO**, joined to provide a history of the Talent Agencies Act's artist protection measures to justify sending the case to the California Labor Commissioner before arbitration.

The unions, with more than 200,000 members combined, noted that the "consistent enforcement of the TAA against those who encroach on its jurisdiction is essential to protecting those who are the most vulnerable to abuse by those who seek to profit from them. As the effective enforcement of the TAA is critical to the

Unions' agency franchise systems and to the protection of their members, the [unions] and their members have a fundamental interest in ensuring these protections are not eroded."

Still focusing on the statute's protective nature, the unions told the Court, "The TAA is a remedial statute crafted by the California Legislature in an exercise of the state's police power. It is critical to protecting vulnerable individuals in an environment where aspirants will do almost anything to 'make it big.' The TAA is carefully balanced to protect the interest of both the artists it protects and the agents it regulates. The consistent enforcement of the TAA is critical to maintain this careful balance. . . ."

The unions also argued that the TAA and the Federal Arbitration Act were compatible without conflict, because the state law only delayed arbitration.

They argued that the Labor Commissioner's initial oversight was needed to scrutinize the legitimacy of agents' claims. The fear was that unlicensed agents would circumvent state scrutiny by inserting an arbitration clause into contracts. "Artists often find themselves in a position where they have little to no leverage to negotiate the terms of their representation agreements. They may not have the understanding or the negotiating clout to negotiate around an arbitration provision in the representation agreements they are presented."

—Russ Bleemer