
United States Supreme Court Once Again Affirms the Strong Federal Public Policy Favoring Arbitration

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By: [Stephen J. Anthony](#)

On November 26, 2012, the United States Supreme Court affirmed its prior decisions regarding the authority of the Federal Arbitration Act ("FAA") when it vacated a decision of the Oklahoma Supreme Court in *Nitro-Lift Technologies, L.L.C. v. Eddie Lee Howard, et. al.*, 568 U.S. ____ (2012) ("*Nitro-Lift*"). The U.S. Supreme Court made it clear that the correct application of the FAA was "a matter of great importance" and that state supreme courts must "adhere to a correct interpretation" of the FAA.

The FAA applies to all cases where the arbitration claim affects interstate commerce or foreign commerce. Arbitration clauses in construction contracts affect interstate commerce where materials, supplies, services and personnel flow across state lines, so most construction contracts of any significant size are governed by the FAA. Therefore, in most instances, the enforceability of arbitration clauses in construction contracts will be governed by the FAA, and state law will be preempted. The U.S. Supreme Court has previously issued numerous decisions highlighting the importance of applying the FAA to enforce arbitration clauses. One of the key recent decisions was in *Rent-A-Center West, Inc. v. Jackson*, 130 S.Ct. 2772 (2010), where the Court appeared to unequivocally proclaim that an arbitration clause cannot be challenged on the basis that the underlying contract is somehow invalid because the FAA states that an arbitration clause is "valid, irrevocable and enforceable without mention of the validity of the contract in which it is contained." Despite the prior clear direction from the U.S. Supreme Court, courts around the country including, the Oklahoma Supreme Court still had problems enforcing an arbitration clause under the FAA.

In *Nitro-Lift*, the dispute arose out of a confidentiality and non-compete agreement entered into by two employees with the company. The agreement contained an arbitration clause which stated that "any dispute, difference or unresolved question between Nitro-Lift and the Employee shall be settled by arbitration ..." The employees began working for a competitor and Nitro-Lift served them with a demand for arbitration claiming that the employees breached the non-compete agreement. In response, the employees filed suit in state court in Oklahoma seeking a declaration that the non-compete agreements were null and void.

After the trial court dismissed the employees' lawsuit, because it found that there was a valid arbitration clause under which an arbitrator should decide the dispute, the Oklahoma Supreme Court granted the employees' appeal. Despite Nitro-Lift's reliance on several U.S. Supreme Court cases which interpreted the FAA to apply to both state and federal courts, the Oklahoma Supreme Court held that the arbitration clause did not prohibit its independent review of the underlying non-compete agreements, and the court found that the non-compete agreements were void and unenforceable as against Oklahoma's public policy.

In its opinion in *Nitro-Lift*, the U.S. Supreme Court explained that the Oklahoma Supreme Court's decision had to be vacated because it depended on a rejection of the federal claim under the FAA which was both properly presented and addressed by the state court. The U.S. Supreme Court went on to explain that the FAA provides that a "written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... shall be **valid, irrevocable, and enforceable**, save upon such grounds as exist at law or equity for the revocation of any contract." (emphasis added). 9 U.S.C. § 2.

The U.S. Supreme Court held that a key aspect of the FAA is that, when parties commit to arbitrate contractual disputes, attacks on the validity of the contract (as distinct from attacks on the validity of the arbitration clause itself) are to be resolved by the arbitrator in the first instance, not by a court. The Court further held that an arbitration provision is severable from the remainder of the contract and while the validity of the arbitration clause is subject to an initial court determination, the validity of the remainder of the contract is only for the arbitrator to decide.

When looking at the Oklahoma Supreme Court's action, the U.S. Supreme Court issued a warning that courts must abide by the FAA, which is the supreme law of the land, and by the opinions of the U.S. Supreme Court interpreting the FAA. Once the U.S. Supreme Court has spoken as to the meaning of the FAA, it is the duty of other courts in the country to respect that understanding as the governing rule of law. The Court explained that its prior decisions on the FAA foreclose precisely the type of judicial hostility towards arbitration shown by the Oklahoma Supreme Court in this case.

Finally, to clear up any doubts about the preemption of state law, the U.S. Supreme Court held in *Nitro-Lift*, that where a specific state statute conflicts with a general federal statute as the Oklahoma law did with the FAA, the FAA governs. There is no exception to the Supremacy Clause of the United States Constitution.

The United States Supreme Court's decision in *Nitro-Lift* makes it fundamentally clear that in any case involving interstate commerce, if there is a valid arbitration clause, then it is for the arbitrator to decide in the first instance whether the overall contract is valid under applicable state law. In other words, a state court is required to compel arbitration, even where the parties dispute the terms of the contract at issue, as long as the parties agree, or the court determines, that the arbitration clause, which is separate and severable from the rest of the contract, is valid.

If you have any questions about the decision in *Nitro-Lift* or the applicability of the FAA, you may contact Stephen J. Anthony at (480) 684-1120 or at santhony@clarkhill.com or another member of Clark Hill's Construction Practice Group.