KINDRED ERRONEOUSLY EXTENDED THE SCOPE OF THE FEDERAL ARBITRATION ACT TO GOVERN TORT CLAIMS

I. INTRODUCTION*

Arbitration is a dispute resolution technique whereby two or more parties agree to resolve their existing or possible future disputes before a private decision maker instead of a public court. This unique and efficient dispute resolution technique is quite old; arbitration was used in Ancient Egypt, Ancient Greece, and Ancient Rome.[1] Arbitration is still commonly used throughout the world. In the United States, arbitration is frequently used in resolving disputes arising from commercial transactions and

* The Author would like to dedicate this Note to his beloved parents, Semra and Yakup Tanyıldız, and his brother, Deniz Çağrı Tanyıldız, for their endless support and love.

1. GEORGIOS I. ZEKOS, INTERNATIONAL COMMERCIAL AND MARINE ARBITRATION 9–10 (2008) ("The ancient Sumerians, Persians, Egyptians, Greeks, and Romans all had a tradition of arbitration.") (footnote omitted).

maritime, insurance, consumer, and employment contracts.[2]

Arbitration became increasingly common in the United States throughout the nineteenth and early twentieth century, especially in resolving commercial disputes.[3] In 1925, Congress enacted the Federal Arbitration Act (FAA) to regulate arbitration law for the purposes of providing a quick and efficient method for resolving commercial disputes and promoting business and commerce.[4]

The text of the FAA suggests that it was intended to govern only contractual claims arising from commercial disputes.[5] Because the nature of the claims in *Kindred Nursing Centers Ltd. v. Clark*[6] were related to the law of torts, i.e., they were *delictual*,[7] the United States Supreme Court erroneously applied the FAA, disregarding its text and purpose.

Part I of this Note provides detailed information regarding the facts and the holding of the Supreme Court's *Kindred* decision. Part II sets forth the legal background and provides detailed information about the FAA and the Supreme Court rule that the FAA preempts state laws that disfavor arbitration agreements. Part III explains the *Kindred* holding, and Part IV analyzes and criticizes this flawed decision.

II. FACTS AND HOLDING

On August 31, 2006, Olive G. Clark executed a power of attorney designating her daughter, Janis Clark, as her attorney-in-fact.[8] Two years later, Olive Clark was admitted to the

2. *See* ZEKOS, *supra* note 1, at 25.

3. *See generally* IMRE SZALAI, OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA (2013).

4. *See* ZEKOS, *supra* note 1, at 21–22.

5. Professor Imre Szalai argued the same in his amicus brief that he filed as amicus curiae in support of the respondents in *Kindred*. In addition, Professor Szalai argued that the FAA's legislative history demonstrates that it only applies in commercial disputes, and that applying the FAA in *Kindred* resulted in an unconstitutional intrusion on state sovereignty. *See generally* Brief of Arbitration Scholar Imre S. Szalai as Amicus Curiae in Support of Respondents, Kindred Nursing Ctrs. Ltd. v. Clark, 137 S. Ct. 1421 (2017) (No. 16-32), 2017 WL 345126 [hereinafter Szalai Amicus Brief].

6. *See* Kindred Nursing Ctrs. Ltd. v. Clark, 137 S. Ct. 1421 (2017).

7. Delictual is a term used in civil law jurisdictions to define an obligation arising from a tort. *See Delictual*, BLACK'S LAW DICTIONARY (10th ed. 2014).

8. Extendicare Homes, Inc. v. Whisman, 478 S.W.3d 306, 317 (Ky. 2015), *as corrected* (Oct. 9, 2015), *cert. granted sub nom.* Kindred Nursing Ctrs. Ltd. v. Clark, 137 S. Ct. 368 (2016), *rev'd in part*, *vacated in part*, 137 S. Ct. 1421 (2017).

Winchester Centre, a nursing home operated by the petitioner, Kindred Nursing Centers Limited Partnership.[9] Respondent Janis Clark completed the necessary paperwork for admission by the authority given to her through the power of attorney.[10] As part of the admission process, she also signed a four-page arbitration agreement entitled "Alternative Dispute Resolution Agreement Between Resident and Facility (Optional)" on behalf of her mother.[11]

Similarly, on May 15, 2008, Joe Paul Wellner executed a power of attorney designating his wife, Beverly Wellner, as his attorney-in-fact.[12] That same year, Joe Paul Wellner became a resident at the Winchester Centre.[13] Respondent Beverly Wellner completed the necessary paperwork using her authority as the attorney-in-fact.[14] She also signed the same arbitration agreement that Janis Clark had signed.[15]

According to the arbitration agreement, "[a]ny and all claims or controversies arising out of or in any way relating to . . . the Resident's stay at the Facility would be resolved through binding arbitration rather than a lawsuit."[16]

Upon Joe Wellner and Olive Clark's deaths, which occurred while they were residents in the petitioner's nursing home, respondents brought separate lawsuits against the petitioner in Kentucky circuit court and alleged that the petitioner's substandard care resulted in their relatives' deaths.[17] Both of the complaints "asserted causes of action for personal injury, violations of [Kentucky Revised Statutes] 216.510 *et seq*., and wrongful death."[18] In both cases, "[petitioner] moved to dismiss the action or, alternatively, to stay the action pending arbitration pursuant to the arbitration agreement."[19] The Kentucky circuit court

9. Extendicare Homes, Inc. v. Whisman, 478 S.W.3d 306, 317 (Ky. 2015), *as corrected* (Oct. 9, 2015), *cert. granted sub nom.* Kindred Nursing Ctrs. Ltd. v. Clark, 137 S. Ct. 368 (2016), *rev'd in part*, *vacated in part*, 137 S. Ct. 1421 (2017).

10. Kindred Nursing Ctrs. Ltd. v. Clark, 137 S. Ct. 1421, 1425 (2017); *Extendicare Homes*, 478 S.W.3d at 317.

11. *Kindred*, 137 S. Ct. at 1425; *Extendicare Homes*, 478 S.W.3d at 317.

12. *Extendicare Homes*, 478 S.W.3d at 318.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Kindred*, 137 S. Ct. at 1425 (internal quotation marks omitted).

17. *Id.*

18. *Extendicare Homes*, 478 S.W.3d at 317–18.

19. *Id.*

granted the petitioner's motions and entered final orders dismissing the pending lawsuits and compelling arbitration of the claims.[20] However, the Kentucky Supreme Court entered its *Ping v. Beverly Enterprises, Inc.*[21] decision on August 23, 2012, which caused the trial courts to change their previous decisions.[22]

Upon Janis Clark's motion, the trial court reconsidered its prior decision, vacated the order of dismissal, and "ruled that the power of attorney did not provide Janis Clark with the authority 'to waive Olive Clark's jury trial rights.'"[23] Identically, upon Beverly Wellner's motion, the trial court reconsidered the case and reversed its previous ruling for the same reasons.[24] The Kentucky Court of Appeals affirmed.[25]

After consolidating the two cases, the Kentucky Supreme Court affirmed both of the appellate courts' judgments.[26] First, the court held that the Wellner power of attorney's scope was limited and did not give Beverly Wellner the authority to enter into an arbitration agreement on behalf of her husband.[27] Second, the court concluded that both of the arbitration agreements were invalid because, according to its "clear-statement rule," "a power of attorney could not entitle a representative to enter into an arbitration agreement without *specifically* saying so."[28]

Kindred Nursing Centers filed a petition for a writ of certiorari with the United States Supreme Court and the Court agreed to hear the case. The Supreme Court concluded that the Kentucky Supreme Court's clear-statement rule violated the FAA, and therefore, was preempted by the FAA.[29] Accordingly, the Court reversed the Kentucky Supreme Court's judgment in favor of Janis Clark and ordered the Kentucky Supreme Court to enforce

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20. Extendicare Homes, Inc. v. Whisman, 478 S.W.3d 306, 317–18 (Ky. 2015), *as corrected* (Oct. 9, 2015), *cert. granted sub nom.* Kindred Nursing Ctrs. Ltd. v. Clark, 137 S. Ct. 368 (2016), *rev'd in part*, *vacated in part*, 137 S. Ct. 1421 (2017).

21. Ping v. Beverly Enters., Inc., 376 S.W.3d 581 (Ky. 2012).

22. *Extendicare Homes*, 478 S.W.3d at 317–18 ("After *Ping* was released, counsel for Clark and Wellner moved to vacate the orders, and in November 2012 the trial court ruled that the cases would proceed in court instead of in arbitration proceedings.").

23. *Id.* at 317.

24. *Id.* at 318.

25. *Id.*

26. Kindred Nursing Ctrs. Ltd. v. Clark, 137 S. Ct. 1421, 1425 (2017).

27. *Id.*

28. *Id.* at 1426.

29. *Id.* at 1429.

the arbitration agreement.[30] In addition, the Court vacated the judgment in favor of Beverly Wellner and remanded the case for further consideration, ordering the Kentucky Supreme Court to "determine whether it adheres, in the absence of its clear-statement rule, to its prior reading of the Wellner power of attorney."[31]

III. LEGAL BACKGROUND

A. ARBITRATION AND THE FEDERAL ARBITRATION ACT

As previously mentioned, arbitration is an efficient and frequently-used dispute resolution technique whereby two or more parties agree to resolve their existing or possible future disputes before a private decision maker instead of a public court. In the United States, arbitration is frequently used in resolving disputes arising from commercial transactions, and maritime, insurance, consumer, and especially employment contracts. For example, recent research shows that "80 [percent] of the companies in the *Fortune* 100, including subsidiaries or related affiliates, have used arbitration agreements in connection with workplace-related disputes since 2010."[32]

The FAA regulates arbitration law in the United States.[33] The drafters developed the FAA to provide for quick and effective dispute resolution in "everyday trade disputes and business differences arising from the interstate shipment of goods in the growing national economy of the early 1900s."[34] As stated by the drafters of the FAA, "arbitration reduces business litigation and encourages business men to settle their business differences."[35]

Congress enacted the FAA "in response to widespread judicial hostility to arbitration agreements."[36] The FAA was intended to

30. Kindred Nursing Ctrs. Ltd. v. Clark, 137 S. Ct. 1421, 1429 (2017).

31. *Id.* On remand, the Kentucky Supreme Court held, "our conclusion that the Wellner [power of attorney] was insufficient to vest Beverly Wellner with the power to execute a pre-dispute arbitration agreement as part of Joe Wellner's admission to a nursing home was wholly independent of the clear statement rule decried by the United States Supreme Court." Kindred Nursing Ctrs. Ltd. v. Wellner, 533 S.W.3d 189, 194 (Ky. 2017).

32. IMRE S. SZALAI, THE WIDESPREAD USE OF WORKPLACE ARBITRATION AMONG AMERICA'S TOP 100 COMPANIES 2 (2017).

33. *See* 9 U.S.C. §§ 1–16 (2012).

34. Szalai Amicus Brief, *supra* note 5, at 10. *See generally* SZALAI, *supra* note 3.

35. Szalai Amicus Brief, *supra* note 5, at 10. *See generally* SZALAI, *supra* note 3.

36. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011).

maintain and promote the use of arbitration in resolving commercial disputes.[37] "The principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms."[38]

Since 1925, the FAA has been applied in thousands of cases before federal and state courts. As of today, the "[United States Supreme Court] has issued nearly sixty opinions discussing or applying the FAA."[39]

B. THE FAA'S PREEMPTION OF STATE LAWS

Although the FAA regulates arbitration law at the federal level, states can establish rules or enact statutes regulating arbitration law in their respective jurisdictions. However, in its landmark decision, *AT&T Mobility LLC v. Concepcion*, the United States Supreme Court held that the FAA preempts any state law that disfavors arbitration agreements.[40] This decision shows how protective of arbitration the Supreme Court has become.

To analyze *Concepcion*, a brief explanation of the relevant parts of the FAA is necessary. According to § 2 of the FAA, "the primary substantive provision of the Act,"[41] an arbitration agreement is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[42] This provision reflects "both a 'liberal federal policy favoring arbitration,'[43] . . . and the 'fundamental principle that arbitration is a matter of contract.'"[44] According to these principles, courts must treat arbitration agreements as equal to other contracts and enforce them in accordance with their terms.[45] But, this does not mean that a court cannot declare an arbitration agreement unenforceable.

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37. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011).

38. *Id.* at 344 (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989)).

39. Szalai Amicus Brief, *supra* note 5, at 4.

40. *See Concepcion*, 563 U.S. at 352.

41. *Id.* at 339 (internal quotation marks omitted) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

42. 9 U.S.C. § 2 (2012).

43. *Concepcion*, 563 U.S. at 339 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

44. *Id.* at 339 (quoting Rent–A–Center, West, Inc. v. Jackson, 561 U.S. 63, 67 (2010)).

45. *See id.* at 339; Kindred Nursing Ctrs. Ltd. v. Clark, 137 S. Ct. 1421, 1426 (2017).

According to the Act's 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.'"[46] Thus, *Concepcion* established the rule that the FAA preempts any state law that discriminates against or disfavors arbitration agreements.[47]

In *Concepcion*, the United States Supreme Court considered whether California's *Discover Bank* rule violated the FAA and was therefore preempted by it.[48] In its *Discover Bank v. Superior Court of Los Angeles* decision, the California Supreme Court developed a rule rendering class action waivers in consumer contracts of adhesion unconscionable.[49] California courts frequently applied this rule in finding arbitration agreements containing class-action waivers to be unenforceable.[50]

In *Concepcion*, the Court stated that the FAA was designed to promote arbitration agreements, and the *Discover Bank* rule "st[oo]d as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[51] As a result, the Court concluded that the FAA preempted the *Discover Bank* rule.[52]

The *Concepcion* decision can be considered an explicit warning that state legislators and courts are expected to avoid enacting or establishing any rule that implicitly or explicitly discriminates or undermines arbitration agreements, as the FAA preempts such rules.

C. THE KENTUCKY SUPREME COURT'S "CLEAR-STATEMENT RULE"

In *Extendicare Homes*, the Kentucky Supreme Court assessed the enforceability of the arbitration agreements that were signed by Janis Clark and Beverly M. Wellner on behalf of their

46. Kindred Nursing Ctrs. Ltd. v. Clark, 137 S. Ct. 1421, 1426 (2017) (citing AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011)).

47. *Id.*; *Concepcion*, 563 U.S. at 341.

48. *Concepcion*, 563 U.S. at 340.

49. *Id.*; *see also* Discover Bank v. Superior Court, 113 P.3d 1100, 1117 (Cal. 2005), *abrogated by* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

50. *Concepcion*, 563 U.S. at 340.

51. *Id.* at 352.

52. *Id.*

relatives.[53]

The Kentucky Supreme Court focused on the scope of the authority embedded in the power of attorney documents and considered whether those powers were sufficient to confer on an agent the authority to enter into an arbitration agreement on behalf of the principal.[54] The court explained that the Kentucky Constitution protected the rights of access to the courts and trial by jury, as the drafters of the Kentucky Constitution "deemed the right to a jury trial to be *inviolate*, a right that cannot be taken away; and, indeed, a right that is *sacred*, thus denoting that right and that right alone as a divine God-given right."[55] Accordingly, the court held that "an agent's authority to waive his principal's constitutional right to access the courts and to trial by jury must be clearly expressed by the principal."[56]

Therefore, after applying the "clear-statement rule" to the pertinent dispute, the Kentucky Supreme Court held that the respondents were not authorized to enter into arbitration agreements on behalf of their relatives because the power of attorneys did not contain an explicit statement conferring such authority.[57]

IV. THE COURT'S DECISION

A. THE FAA PREEMPTS THE KENTUCKY SUPREME COURT'S "CLEAR-STATEMENT RULE"

In *Kindred*, the United States Supreme Court, in a 7-to-1 majority opinion authored by Justice Kagan, held that the FAA preempted the Kentucky Supreme Court's clear-statement rule, and therefore, the Kentucky Supreme Court erred in finding that the arbitration agreements signed by the respondents were unenforceable.[58] According to the Court, the Kentucky Supreme Court "did exactly what *Concepcion* barred: adopt a legal rule hinging on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive

53. *See generally* Extendicare Homes, Inc. v. Whisman, 478 S.W.3d 306 (Ky. 2015), *as corrected* (Oct. 9, 2015), *cert. granted sub nom.* Kindred Nursing Ctrs. Ltd. v. Clark, 137 S. Ct. 368 (2016), *rev'd in part*, *vacated in part*, 137 S. Ct. 1421 (2017).

54. *Id.* at 327–28.

55. *Id.* at 329.

56. *Id.* at 331.

57. *Id.* at 332.

58. *See* Kindred Nursing Ctrs. Ltd. v. Clark, 137 S. Ct. 1421, 1429 (2017).

a jury trial."[59] Although the Kentucky Supreme Court suggested that its clear-statement rule could also apply in other circumstances, it could not convince the Supreme Court Justices.[60] The Court decided that the "[clear-statement] rule is too tailor-made to arbitration agreements—subjecting them, by virtue of their defining trait, to uncommon barriers—to survive the FAA's edict against singling out those contracts for disfavored treatment."[61] Accordingly, the Court held that the Kentucky Supreme Court purposefully impeded the ability of attorneys-in-fact to enter into arbitration agreements, and therefore, failed to put arbitration agreements on an equal plane with other contracts.[62]

Though the Kentucky Supreme Court developed arguments that its clear-statement rule was not specifically targeting arbitration agreements, the *Kindred* Court did not consider these legitimization efforts sincere. The Court determined that the Kentucky Supreme Court developed its clear-statement rule as a tool to find the arbitration agreement unenforceable in this dispute.[63] This attitude demonstrates the aggressive protectiveness of the United States Supreme Court when arbitration agreements are in question. *Kindred* supports a finding that states are not allowed to develop rules governing arbitration unless they abide by the Court's strict interpretation of the FAA, which limits the ability and creativity of the states in enacting or establishing arbitration laws.

Justice Thomas authored the only dissenting opinion in *Kindred*.[64] According to the dissent, the FAA is applicable only in federal courts, and "therefore, the FAA does not displace a rule that requires express authorization from a principal before an agent may waive the principal's right to jury trial."[65] Unfortunately, Justice Thomas did not provide reasons for his decision in *Kindred*; rather, he supported his dissent by citing six other cases in which

59. Kindred Nursing Ctrs. Ltd. v. Clark, 137 S. Ct. 1421, 1427 (2017).

60. *See id.* at 1426–27; *see also* Imre Szalai, *US Supreme Court Issues Arbitration Decision in Nursing Home Dispute,* OUTSOURCING JUSTICE (May 15, 2017), http://www.outsourcingjustice.com/kindred-nursing-clark-arbitration (explaining that the FAA preempts the Kentucky clear-statement rule because the state rule singles out arbitration agreements for special treatment).

61. *Kindred*, 137 S. Ct. at 1429.

62. *Id.* at 1426–27, 1429.

63. Szalai, *supra* note 60.

64. *Kindred*, 137 S. Ct. at 1429 (Thomas, J., dissenting).

65. *Id.* at 1430.

he dissented and opined that the FAA does not apply in state courts.[66] Apparently, the facts in *Kindred* were not different enough to change Justice Thomas's longstanding view that the FAA applies only in federal courts.

V. ANALYSIS

A. THE FAA DOES NOT GOVERN TORT CLAIMS

The United States Supreme Court erred in applying the FAA in *Kindred* because the text of the FAA demonstrates that it does not govern tort claims, as its scope is limited to contractual disputes. In any case concerning arbitration law, it is crucial for the court to determine the threshold question of whether the FAA is applicable in resolving the dispute. Therefore, in order to analyze the Court's *Kindred* decision, an assessment regarding the scope of the FAA is necessary.

An examination of the FAA's text proves that the FAA's scope is limited to contractual disputes; therefore, the FAA does not govern claims related to the law of torts. First, this section analyzes and sets forth the scope of the FAA by conducting a textual analysis. Next, this section provides the framework that should be used in determining the nature of a claim. Finally, using this framework, this section assesses the nature of the claims in *Kindred* to show that the Supreme Court erred in applying the FAA because the dispute in *Kindred* was not contractual, but delictual.

1. THE FAA'S TEXT DEMONSTRATES THAT IT GOVERNS ONLY CONTRACTUAL DISPUTES AND DOES NOT GOVERN DELICTUAL DISPUTES

The FAA governs only contractual disputes. The FAA's scope is set forth in § 2. The relevant part provides as follows:

> 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

66. *See* Kindred Nursing Ctrs. Ltd. v. Clark, 137 S. Ct. 1421, 1429–30 (2017).

equity for the revocation of any contract.[67]

As indicated in amicus curiae Imre Szalai's brief in *Kindred*, it is apparent from its text that the FAA applies only in two types of controversies: "(1) controversies arising out of a contract involving interstate commerce; and (2) controversies arising out of a maritime transaction."[68] Thus, for the FAA to apply in a case there must be a valid contract between parties, and the dispute must relate to one of the parties' obligations arising from the contract. In other words, the dispute between the parties must be contractual.

Therefore, the FAA's text explicitly supports a finding that the FAA governs only contractual claims, not tort claims—such as personal injury or wrongful death actions. But, in *Marmet Health Care Center, Inc. v. Brown*, the Supreme Court erroneously extended the application of the FAA to tort claims by holding that "[t]he [FAA's] text includes no exception for personal-injury or wrongful-death claims."[69]

This analysis is flawed and does not accord with the fundamental principles of statute drafting. There is no need for the FAA to provide exceptions regarding the areas of law to which it does not apply[70]; its core provision already sets forth the specific

67. 9 U.S.C. § 2 (2012).

68. Szalai Amicus Brief, *supra* note 5, at 6.

69. Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 532 (2012). Although *Marmet* seems analogous to *Kindred*, it is distinguishable in an important way. Before the case came before the Supreme Court, the Supreme Court of Appeals of West Virginia concluded that "an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforced to compel arbitration of a dispute concerning the negligence." Brown *ex rel*. Brown v. Genesis Healthcare Corp., 724 S.E.2d 250, 292 (W. Va. 2011), *cert. granted*, *vacated sub nom*. Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 532 (2012). Therefore, the Supreme Court of Appeals of West Virginia aimed to forbid parties from entering into arbitration agreements in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death. But in *Kindred*, the Kentucky Supreme Court did not forbid parties from entering into arbitration agreements in nursing home admissions. It only required that "an agent's authority to waive his principal's constitutional right to access the courts and to trial by jury must be clearly expressed by the principal." Extendicare Homes, Inc. v. Whisman, 478 S.W.3d 306, 331 (Ky. 2015), *as corrected* (Oct. 9, 2015), *cert. granted sub nom.* Kindred Nursing Ctrs. Ltd. v. Clark, 137 S. Ct. 368 (2016), *rev'd in part*, *vacated in part*, 137 S. Ct. 1421 (2017). Therefore, if the Supreme Court was influenced by *Marmet* when deciding *Kindred*, it erred.

70. For example, the FAA's text does not contain an exception to civil rights claims, although such claims are not governed by the FAA.

type of claim that the FAA governs. If Congress did not intend for the FAA to apply exclusively to contractual disputes, it would have drafted § 2 of the FAA accordingly.[71] Thus, courts must apply the FAA only in cases where the controversy between the parties arises from a contractual dispute.

2. DETERMINATION OF A CONTRACTUAL DISPUTE

Although the FAA's text clearly states that the FAA governs only contractual disputes, it is unclear how a court should determine whether a claim arises from a contractual dispute or from another type of controversy.

In order to make this determination, the court must focus on the claimant's allegations and the legal theories on which the claimant's case relies. In most cases, this determination is easy to make because the plaintiff's complaint will set forth the basic elements of the asserted cause of action. But, for the purposes of this Note, it is crucial to make a distinction between the different sources of controversies that give rise to civil actions to show that the Supreme Court erred when it applied the FAA in *Kindred*.

In a civil action, the source of a dispute is dependent upon the source of the obligation for which the plaintiff alleges that the defendant is responsible. To explain the sources of obligations, this Note uses a comparative approach and assesses this topic under both civil and common law legal systems—for this specific area of law, these two legal systems support and complete each other.

Although persons are originally free from obligation, there are situations that will impose an obligation.[72] The source of an obligation is crucial because it reflects the source of the controversy between the parties to a lawsuit. Therefore, the Ancient Romans, founders of the civil law legal system, thought that the enumeration of the situations that result in one's obligation was important and necessary.[73] It is possible to see such an enumeration and categorization of obligations in the legal works of

71. For example, Turkish International Arbitration Code article 4 was drafted broadly to cover any dispute arising from a contract or any other source of obligation.

72. *See* SAÚL LITVINOFF, THE LAW OF OBLIGATIONS § 1.6, *in* 5 LOUISIANA CIVIL LAW TREATISE 10–12 (2d ed. 2001).

73. *See id.*

Byzantine Emperor Justinian[74] and Ancient Roman jurist Gaius.[75]

"[T]he *Corpus Juris* asserts the existence of four sources of obligations, which, as universally accepted by doctrine with almost no exception, are contracts, quasi-contracts, delicts, and quasi-delicts."[76] Although it varies slightly in different legal systems, many of the continental European countries follow the Ancient Roman approach and categorize the law of obligations similarly. For example, Turkey and Switzerland followed the Ancient Roman law approach and categorized the sources of obligations into three groups: (1) contracts; (2) unjust enrichment; and (3) torts.[77] Several other civil law jurisdictions established additional sources of obligations. For example, in Louisiana, the sources of obligations are: contracts, other declarations of will, law, wrongful acts (torts), unjust enrichment, and other acts or facts.[78]

On the other hand, common law jurists focus on the causes of action rather than the sources of obligations. Although this might appear as a substantial difference between civil and common law, it actually shows the harmony and similarity between these two legal systems. Because one of the enumerated sources of obligations gives rise to a specific cause of action, they are contingent upon each other. For example, if the source of an obligation is a tort, the plaintiff, depending on the facts of the case, may have a cause of action for personal injury, wrongful death, or trespass, among other things. Similarly, if the source of an obligation is a contract, the plaintiff may have a cause of action for breach of contract. Therefore, in both civil and common law, the source of an obligation is key in determining the source of a dispute and the nature of the claims.

Determining the source of an obligation is crucial because it will ultimately determine the appropriate cause of action, and, depending on that cause of action, different rules and standards will govern the statute of limitations, available remedies, and

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74. Justinian was also a jurist and he lived in then-Constantinople (modern-day Istanbul), which is this Author's hometown. *See* Will Wyeth, *Justinian I*, ANCIENT HISTORY ENCYCLOPEDIA (Sept. 28, 2012), https://www.ancient.eu/Justinian_I/.

75. *See* LITVINOFF, *supra* note 72, at 10 ("In Roman law, according to a text by Gaius, all obligations derive from contract, delict, *and several other causes*.").

76. *See id.*

77. *See generally* TÜRK BORÇLAR KANUNU [TBK] [TURKISH CODE OF OBLIGATIONS] Jan. 12, 2011, 6101; SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB], CODE CIVIL [CC], CODICE CIVILE [CC] [CIVIL CODE] Dec. 10, 1907, SR 210, RS 210 (Switz.).

78. LA. CIV. CODE ANN. art. 1757 (2018).

assessment of damages. For example, the statute of limitations for torts liability may differ from the statute of limitations for contractual liability.[79] In determining the nature of claims in a civil case, a court must assess the claimant's allegations by considering the sources of obligations discussed above.

3. DETERMINING THE NATURE OF THE CLAIMS IN *KINDRED*

The United States Supreme Court erred in applying the FAA in *Kindred* because the claims were related to the law of torts, not the law of contracts. In light of the fundamental principles explained above, it is quite simple to ascertain the source of the controversy between the parties and the nature of the respondents' claims in *Kindred*. To make this determination, one must start with the complaints filed in the original lawsuit. Upon their relatives' death, the respondents in *Kindred* filed separate actions in Kentucky circuit court "asserting claims against the [petitioner] for personal injuries suffered by the nursing home resident . . . and for wrongful death of the resident."[80] It is apparent that, in their complaints, respondents relied on two different causes of actions: (1) personal injury; and (2) wrongful death. Under the common law of the Unites States, these causes of actions are related and belong to the law of torts.[81] As explained above, the cause of action reflects the source of an obligation, and the source of an obligation reflects the nature of the claims asserted by the claimant. Here, the personal injury and wrongful death actions prove that the respondents claimed that the petitioner's obligation arose from a tort. Therefore, it is obvious that the nature of the respondents' claims in *Kindred* are not contractual, but delictual.

On the other hand, it is possible that the controversy in *Kindred* could have arisen from a contract. If the respondents, instead of bringing claims for personal injury and wrongful death, brought a claim for breach of contract, then the controversy would have been contractual. But, instead of relying on the theory of breach of contract, the respondents decided to file claims related to

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79. *See, e.g.,* D.C. CODE ANN. § 12-301 (West 2018) (limitation of time for bringing actions); *see generally Developments in the Law Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1179 (1950).

80. Extendicare Homes, Inc. v. Whisman, 478 S.W.3d 306, 312 (Ky. 2015), *as corrected* (Oct. 9, 2015), *cert. granted sub nom.* Kindred Nursing Ctrs. Ltd. v. Clark, 137 S. Ct. 368 (2016), *rev'd in part*, *vacated in part*, 137 S. Ct. 1421 (2017).

81. *Cf.* 6 C.J.S. *Torts* § 1 (2018) ("A tort is a civil wrong, other than a breach of contract, for which the law provides a remedy in the form of an action for damages.").

the law of torts, which determined the source of the controversy in the case as a tort. Moreover, if the contract between the parties were void, the respondents would have still been able to bring claims for personal injury and wrongful death because these claims are not contingent upon the existence of a contract. This proves that the claims sounding in tort law arise independently from a contract; therefore, the dispute in *Kindred* was not contractual.

Although the FAA's core provision, § 2, explicitly limits the application of the FAA to contractual disputes, the *Kindred* Court erroneously applied the FAA in a personal injury case, disregarding the text of the FAA and allowing the tort claims to be arbitrated. For some jurists, this might prove the uniqueness and liberalism of the American legal system. But, for others, this might be seen as a flawed application that does not fit with the principles and fundamentals of arbitration law.

VI. CONCLUSION

As the human population increases, the number of disputes among people, corporations, and countries increases as well. Therefore, the common way to resolve disputes, litigation, is not enough to satisfy the needs of the public in the twenty-first century. Especially in disputes arising from international commerce, the role of public courts is disappearing and arbitration is becoming the primary dispute resolution technique.

The United States has a long-standing history of using arbitration to resolve private disputes. However, as a result of the flawed decisions of the United States Supreme Court, this novel dispute resolution technique is being used in a manner that does not comport with the principles of arbitration law.

In *Kindred*, the Court, following this trend, applied the FAA in a delictual dispute. *Kindred* is a flawed decision because the claims in *Kindred* were not contractual, but delictual, which is an area of law not intended to be covered by the FAA. The text of the FAA demonstrates that it does not govern tort claims because the core provision of the statute, § 2, explicitly stipulates that the FAA governs only contractual disputes. By allowing the arbitration of personal injury claims, the Supreme Court overly extended the scope of the FAA.

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