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Kutak Rock Client Alert

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Arkansas Supreme Court Again Holds Class-Action Waivers are Valid Under Arkansas Law, Reaffirming Trend Toward Enforcing Parties' Pre-Litigation Agreements

In *Funding Metrics, LLC v. Letha's Pies, LLC*, the Arkansas Supreme Court recently reaffirmed that contractual class-action waivers are enforceable under Arkansas law.¹ The Court's ruling continues a trend reversing past hostility toward parties' pre-dispute agreements, placing them on the same footing as other contracts.

The Arkansas trend started with the supreme court's 2020 ruling in *Jorja Trading, Inc. v. Willis*. There, the court rejected Arkansas courts' prior practice of applying the doctrine of mutuality of obligation to require that dispute resolution agreements have perfect symmetry between the parties.² The court clarified that mutuality of obligation applies to promises exchanged in a contract as a whole and that courts could not subject agreements about dispute resolution "to a more stringent analysis than other contracts."³ The court clarified that Arkansas law does *not* require an exchange of bilateral promises between the parties, an agreement conferring identical rights to the parties, an agreement conferring identical obligations to the parties, or an agreement conferring identical benefits to the parties.⁴ So a class action waiver, one-sided right to seek judicial relief, waiver of the right to a jury trial, or similar language no longer renders unenforceable the parties' agreements under Arkansas law.

¹ 2022 Ark. 73, 2022 WL 1042970.

² *Id.* 2020 Ark. 133, 598 S.W.3d 1.

³ *Id.* 2020 Ark. 133, at 3-4, 598 S.W.3d at 4-5.

⁴ *Id.* 2020 Ark. 133, at 5-8, 598 S.W.3d at 5-7; see also *EBF Partners, LLC v. Letha's Pies, LLC*, 2021 Ark. App. 187, at 5.

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Funding Metrics renews the Supreme Court's commitment to contractual parity. *Funding Metrics* appealed the circuit court's class-certification order and refusal to enforce the parties' class-action waiver. Letha's Pies had successfully argued that *Jorja* extended only to contracts subject to the Federal Arbitration Agreement. Holding the parties' agreement was binding, the supreme court reversed, reasoning:

Here, Letha's Pies contends that the absence of an arbitration agreement and the inapplicability of the Federal Arbitration Act determines the viability of the class-action waiver. However, in *Jorja Trading*, we specifically addressed Arkansas contract law and held that the class waiver there did not turn on application of the Federal Arbitration Act. We therefore conclude that the class-action waiver is enforceable pursuant to Arkansas contract law.⁵

Will the trend continue? We expect so. While there are certainly exceptions to Arkansas courts' willingness to enforce arbitration agreements,⁶ these rulings illustrate a reluctance of the intermediary court of appeals to extend *Jorja* broadly to overturn previous industry-specific holdings on similar contracts. But *Funding Metrics* itself signals the supreme court's additional commitment to and willingness to apply *Jorja*. The *Jorja* decision was also long overdue. *Jorja* and *Funding Metrics* follow the decades-old national trend supporting arbitration against unfavorable state law,⁷ and federal courts in Arkansas have unsurprisingly extended *Jorja* appropriately.⁸

Arkansas law and courts have shifted away from prior hostility toward pre-litigation dispute-resolution agreements. Businesses in consumer-facing industries should take note and renew efforts to put in place and seek to enforce them.

If you have any questions, please contact one of the attorneys in Kutak Rock's [Class Action Litigation Practice Group](#). You may also visit us at www.KutakRock.com.

⁵ *Funding Metrics, LLC*, 2022 Ark 73, at 6-7.

⁶ See, e.g., *Reg'l Care of Jacksonville, LLC v. Henry*, 2014 Ark. 361, 6, 444 S.W.3d 356, 359 (excluding billing disputes from arbitration); *Hickory Heights Health & Rehab, LLC v. Adams*, 2018 Ark. App. 560, 566 S.W.3d 134 (imposing arbitration only on claims above \$30,000); *Robinson Nursing & Rehab. Ctr., LLC v. Phillips*, 2019 Ark. 305, 586 S.W.3d 624, *cert. denied*, 141 S. Ct. 161, 207 L. Ed. 2d 1098 (2020) (same); *Country Club Gardens, LLC v. Alexander*, 2020 Ark. App. 239, 599 S.W.3d 363, *reh'g denied* (Oct. 7, 2020) (same); *Northport Health Servs. of Ark., LLC v. Chancey*, 2022 Ark. App. 103; but see *Robinson Nursing & Rehab. Ctr., LLC v. Briley*, 2022 Ark. App. 85.

⁷ See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011); see also *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624, 200 L. Ed. 2d 889 (2018) (class action waivers are enforceable); *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 203 L. Ed. 2d 636 (2019) (agreements for class-wide arbitration must be clear and unambiguous).

⁸ *Jones v. Santander Consumer USA Inc.*, No. 4:19-CV-00811-BRW, 2020 WL 4113045 (E.D. Ark. July 20, 2020).

