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# FAA Pre-emption: When Should Conflicting State Law Be Pre-empted by the FAA?

*Weston Securities Corp. v. Aykanian*<sup>1</sup>

## I. INTRODUCTION

The Federal Arbitration Act (“F.A.A.”) was created by Congress to alleviate the judicial system’s historical hostility toward arbitration.<sup>2</sup> To promote arbitration as a means of alternative dispute resolution, Congress included section 2 of the F.A.A.,<sup>3</sup> which “declared a policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”<sup>4</sup>

Since the creation of the F.A.A., courts, including the United States Supreme Court, have considered whether the F.A.A. pre-empts conflicting state law. Although courts generally find that the F.A.A. pre-empts state substantive and procedural law when it stands as an obstacle to Congress’ goal of enforcing arbitration,<sup>5</sup> the Massachusetts Court of Appeals, in *Weston Securities Corp. v. Aykanian*, made its own determination on this issue, since it was a case of first impression for the court. The court faced the question of whether a Massachusetts procedural rule, which did not allow an immediate appeal from an order to arbitrate, was pre-empted by the F.A.A. The court’s holding expanded the federal policy favoring enforcement of arbitration agreements in Massachusetts by upholding a state procedural rule that promoted arbitration agreements by disallowing certain judicial appeals. The court, therefore, held that the rule was not pre-empted by the F.A.A., even though it contradicted the F.A.A.’s corresponding rule.

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1. 703 N.E.2d 1185 (Mass. App. Ct. 1998).

2. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219-20 (1985).

3. Section 2 states:

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 equity for the revocation of any contract.

9 U.S.C. § 2 (1994).

4. Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

5. Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 477 (1988). The Supreme Court stated in this case that state law may “be pre-empted to the extent it actually conflicts with federal law—that is, to the extent that it ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1940) (citing *Savage v. Jones*, 225 U.S. 501, 533 (1912))).

## II. FACTS AND HOLDING

Weston Securities Corporation, Douglas A. Biggar, I. Richard Horowitz, and Joseph Robbat, Jr. are the plaintiffs in this suit. Weston Securities Corporation is a member of the National Association of Securities Dealers ("NASD").<sup>6</sup> Horowitz and Biggar were registered principals of Weston Securities Corporation, and Robbat was a registered representative.<sup>7</sup> All the plaintiffs signed a Uniform Application for Securities Registration or Transfer Form ("U-4 Form") that stated that they would agree to arbitrate any disputes that were required to be arbitrated under the "NASD Code of Arbitration Procedure" ("NASD Code").<sup>8</sup>

In 1994, the defendants, Ara Aykanian and others,<sup>9</sup> claimed that the plaintiffs had "violated various Federal and State statutes, breached its fiduciary duties to the defendants, and concealed and misrepresented certain material facts."<sup>10</sup> The defendants each filed a "Uniform Submission Agreement" for arbitration with the NASD, which bound them to arbitrate all claims they had against Weston.<sup>11</sup> Weston claimed, however, that the defendants' claims were either barred by the six-year rule in the NASD Code,<sup>12</sup> or else, not arbitrable under the NASD Code.<sup>13</sup> Accordingly, Weston refused to adhere to the Uniform Submission Agreements.<sup>14</sup>

In April of 1995, Weston called upon the NASD's Director of Arbitration ("director") to dismiss the defendants' arbitration claim.<sup>15</sup> Nevertheless, in October of 1995, the director stated that the defendants had standing to compel arbitration because they were "public customers of Weston."<sup>16</sup> The director then referred the defendants' claims that arose after June 16, 1988 to a panel of arbitrators.<sup>17</sup> Before the arbitration panel considered the claims, the plaintiffs sued in the superior court to enjoin the defendants' ability to proceed with arbitration.<sup>18</sup>

In June 1996, a superior court judge issued a preliminary injunction against the defendants. The injunction enjoined the defendants from proceeding with the arbitration.<sup>19</sup> The judge also ordered submission of cross motions for summary judgment by both parties.<sup>20</sup> Weston's motion for summary judgment was denied and

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6. *Weston Sec. Corp. v. Aykanian*, 703 N.E.2d 1185, 1187 (Mass. App. Ct. 1998). Collectively the plaintiffs are called "Weston."

7. *Id.*

8. *Id.* Weston, under section 12(a) of the NASD Code, is required to "arbitrate any 'dispute, claim or controversy . . . between a customer and a member and/or associated person arising in connection with the business of such member or in connection with the activities of such associated persons . . . upon the demand of the customer.'"

9. They were customers of Weston.

10. *Weston*, 703 N.E.2d at 1187 n.3.

11. *Id.* at 1187.

12. *Id.* Section 15 of the NASD Code states that arbitration shall not be available where six years have lapsed from the event causing the claim.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

the defendants' motion was allowed.<sup>21</sup> The judge then entered an order compelling Weston to commence arbitration before the NASD.<sup>22</sup> Weston filed an appeal from the superior judge's order and a motion to stay arbitration pending appeal.<sup>23</sup> The plaintiffs' motion to stay was denied and its appeal from the denial of its motion was consolidated with its appeal from the order compelling arbitration.<sup>24</sup>

In their appeal, the plaintiffs argued that the Massachusetts Uniform Arbitration Act, which does not permit an immediate appeal from an order compelling arbitration, was pre-empted by the F.A.A., which does permit such an appeal.<sup>25</sup> The Massachusetts Court of Appeals held that state procedural law is pre-empted by the F.A.A. only "to the extent that it is contrary to Congress' purpose in enacting the F.A.A., which is to enforce arbitration agreements."<sup>26</sup> The appeal was dismissed because the court found that the Massachusetts rule promotes enforcement of arbitration agreements by not permitting an immediate appeal from an order compelling arbitration, notwithstanding the F.A.A.'s provision allowing the appeal.<sup>27</sup>

### III. LEGAL BACKGROUND

The F.A.A. was enacted in 1925 to "overrule the judiciary's longstanding refusal to enforce agreements to arbitrate."<sup>28</sup> Before this time, courts refused to enforce arbitration agreements,<sup>29</sup> clinging to ancient notions of judicial province originating in England when the courts "opposed anything that would altogether deprive every one of them of jurisdiction."<sup>30</sup> In fact, the incentive for Congress to enact the F.A.A. was its desire to change the courts' "antiarbitration [sic] rule."<sup>31</sup> The F.A.A. foresaw the potential confrontation of the F.A.A. and conflicting state law and, therefore, established federal substantive law, which applied in both state and federal courts<sup>32</sup> pursuant to Congress' authority under the Commerce Clause to enact substantive rules of law.<sup>33</sup> Thus, the F.A.A. is applicable to any transaction involving interstate commerce.<sup>34</sup>

Since the enactment of the F.A.A., courts have decided whether the Act pre-empts state substantive and procedural law that is contrary to the Act. A line of

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21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 1187-88.

26. *Id.* at 1188.

27. *Id.* at 1192.

28. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985).

29. *Allied-Bruce Terminix Co., Inc. v. Dobson*, 513 U.S. 265, 270 (1995) (citing *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989)).

30. *Id.* (quoting *Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198, 211 n.5 (1956) (quoting *United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1007 (S.D.N.Y. 1915) (quoting *Scott v. Avery*, 5 H.L. Cas. 811 (1856))).

31. *Id.* at 270-71 (citing *Dean Witter*, 470 U.S. at 220).

32. *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984).

33. *Id.* at 10.

34. *M & L Power Serv., Inc. v. American Networks Int'l*, 44 F. Supp.2d 134, 140 (D.R.I. 1999) (citing 9 U.S.C. § 2 (1994)).

federal and state cases have considered this very issue, and have consistently recognized the F.A.A.'s goal to promote enforcement of arbitration agreements by stating that state substantive law will be pre-empted by the F.A.A. when it is contrary to the F.A.A.'s purpose,<sup>35</sup> and that state procedural law will be pre-empted when the state procedures serve to defeat the substantive right to arbitration granted under the F.A.A.<sup>36</sup>

In *Hines v. Davidowitz*,<sup>37</sup> the United States Supreme Court addressed the issue of pre-emption, however, it did not specifically consider F.A.A. pre-emption. Later courts, though, looked to the language of the F.A.A. when dealing with the issue of F.A.A. pre-emption.<sup>38</sup> In *Hines*, the Court decided whether Pennsylvania's Alien Registration Act "encroached upon legislative powers constitutionally vested in the federal government" in view of the Federal Alien Registration Act, and if equal protection of the laws was denied by the Pennsylvania Act.<sup>39</sup> Its analysis discussed the power of both state and national governments.<sup>40</sup> In determining whether the state law was valid in light of the federal law created by Congress, the Court stated "there is not--and from the very nature of the problem there cannot be--any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress."<sup>41</sup>

It then looked to *Savage v. Jones*<sup>42</sup> for help in discovering a manner of determination.<sup>43</sup> Specifically, *Savage* stated that if the purpose of the federal act in question cannot be accomplished or is frustrated by the state law, "the state law must yield to the regulation of Congress within the sphere of its delegated power."<sup>44</sup> In light of *Savage*, the *Hines* Court stated that its job was to decide whether the law of Pennsylvania stood as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>45</sup> The Court concluded that Congress' purpose in enacting the Federal Alien Registration Act was the creation of a "uniform national registration system" and, therefore, the Pennsylvania Act could not be enforced<sup>46</sup> since it would stand as an obstacle to such a system.

In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,<sup>47</sup> the Supreme Court not only dealt with the pre-emption issue as it did in *Hines*, it specifically dealt with F.A.A. pre-emption. The case involved a dispute between Moses H. Cone Hospital ("Hospital") and the defendant Mercury Construction

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35. See *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1988) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1940)).

36. *Duggan v. Zip Mail Serv., Inc.*, 920 S.W.2d 200, 203 (Mo. Ct. App. 1996) (citing *Greenwood v. Sherfield*, 895 S.W.2d 169, 172-73 (Mo. Ct. App. 1995)).

37. 312 U.S. 52 (1941).

38. See *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1988); *Weston Sec. Corp. v. Aykanian*, 703 N.E.2d 1185 (Mass. App. Ct. 1998).

39. *Hines*, 312 U.S. at 59-60.

40. *Id.* at 62.

41. *Id.* at 67.

42. 225 U.S. 501 (1912).

43. *Hines*, 312 U.S. at 67.

44. *Savage*, 225 U.S. at 533.

45. *Hines*, 312 U.S. at 67 (citing *Savage*, 225 U.S. at 533).

46. *Id.* at 74.

47. 460 U.S. 1 (1983).

Corporation (“Mercury”), which it hired to construct additions to the hospital.<sup>48</sup> In its analysis of whether the dispute between the parties was arbitrable, the Court adhered to the proposition that the F.A.A. pre-empts state law, as it declared that any written arbitration agreement “in any maritime transaction of a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract.”<sup>49</sup> It further stated, “[s]ection 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”<sup>50</sup> Hence, the Court said that the section effectively creates “a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.”<sup>51</sup> It agreed with numerous courts of appeals, which consistently stated that “questions of arbitrability must be addressed with a healthy regard for federal policy favoring arbitration.”<sup>52</sup>

In 1984, the Supreme Court continued to adhere to a policy favoring arbitration when it was again presented with the F.A.A. pre-emption issue. In *Southland Corp. v. Keating*,<sup>53</sup> the Court decided whether a California statute, which did not allow the arbitration of suits brought under its law, could invalidate a contract which called for arbitration under the F.A.A.<sup>54</sup> It concluded that the F.A.A.’s authority comes from Congress’ power under the Commerce Clause, which allows it to enact substantive rules.<sup>55</sup> The Court stated that it was implicit in the F.A.A.’s power stemming from the Commerce Clause that the F.A.A. should apply in both federal and state courts.<sup>56</sup> It also noted that the *Moses* decision “reaffirmed” its stance on the scope of the substantive federal arbitration law—that it applied to both federal and state courts.<sup>57</sup> The Court reasoned that Congress would not want the validity of arbitration provisions to reach different outcomes depending on whether the case was tried in federal or state court.<sup>58</sup> The Court, therefore, held that the F.A.A.’s substantive law pre-empts conflicting state law, and that state statutes that were anti-arbitration could not be used to defeat the goals of the F.A.A.<sup>59</sup>

Two years later, the Supreme Court was again presented with the F.A.A. pre-emption issue. In *Perry v. Thomas*,<sup>60</sup> the Court decided whether the F.A.A.’s policy of mandatory enforcement of agreements to arbitrate pre-empted a California labor

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48. *Id.* at 5. Mercury entered into a contract with the Hospital which stated that “disputes involving interpretation of the contract or performance of the construction work were to be referred in the first instance to J.N. Pease Associates, an independent architectural firm hired by the Hospital to design and oversee the construction project.” However, with only a few exceptions, any dispute, regardless of whether it was decided by the architectural firm, could be submitted to binding arbitration by either party under an arbitration clause within the contract. *Id.* at 4-5.

49. *Id.* at 24 (quoting 9 U.S.C. § 2 (1994)).

50. *Id.* at 24.

51. *Id.*

52. *Id.* at 24-25.

53. 465 U.S. 1, 12 (1984).

54. *Id.* at 6.

55. *Id.* at 11.

56. *Id.* at 12.

57. *Id.*

58. *Id.* at 15-16.

59. *Id.*

60. 482 U.S. 483 (1987).

statute that provided for a judicial forum for collection of wages actions irrespective of any contract to arbitrate.<sup>61</sup> The petitioners sought arbitration under sections 2 and 4 of the F.A.A.<sup>62</sup> Their demand for arbitration stemmed from an arbitration provision in a U-4 Form that the defendants had signed.<sup>63</sup> The defendant opposed arbitration because section 299 of the California Labor Code mandated a judicial forum for his case. The Supreme Court looked to *Moses* which stated that section 2 of the F.A.A. creates substantive law that is applicable to any agreement to arbitrate that comes within the domain of the F.A.A.<sup>64</sup> It found in favor of arbitration by looking to *Keating*, which stated that "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."<sup>65</sup> It further stated that Congress' federal policy favoring arbitration took away state's power to require the judicial hearing of a case when the parties had contracted to arbitrate.<sup>66</sup> The parties clearly contracted to arbitrate, bringing their agreement within the coverage of the F.A.A.<sup>67</sup> It was also clear that the federal policy of the F.A.A. was in conflict with section 229 of the California Code that required litigants to resolve wage disputes in court and, therefore, the F.A.A. pre-empted the state statute under the Supremacy Clause.<sup>68</sup> This outcome revealed that the Supreme Court would continue to stand firmly behind its pro-arbitration policy by striking down state law that was contrary to such policy.

The F.A.A. pre-emption issue surfaced again in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*.<sup>69</sup> This time the Supreme Court decided whether state procedural law contrary to the F.A.A.'s policy applied if the parties contracted to have a certain state law apply to their contract.<sup>70</sup> The Court found that the state law would not be pre-empted since the parties agreed in their contract to strictly be governed by a specific state law.<sup>71</sup> In its analysis, the Court first looked to *Hines*, concluding that although the F.A.A. did not pre-empt state regulation of arbitration agreements, state law would have to be pre-empted in one instance.<sup>72</sup> This instance, the Court stated, occurred when state law ran contrary to the federal policy of enforcing arbitration agreements and, therefore, was in conflict with federal law.<sup>73</sup> It recognized its long-standing adherence to finding that the F.A.A. pre-empts state laws requiring "a judicial forum for the resolution of

61. *Id.* at 484.

62. *Id.* at 485. See 9 U.S.C. § 2 (1994) and 9 U.S.C. § 4 (1994) (allowing a party to petition a United States district court for an order to arbitrate when the other party to its arbitration agreement refuses to arbitrate).

63. *Perry*, 482 U.S. at 485. The provision stated, "I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions or by-laws of the organizations with which I register. . . ." *Id.*

64. *Id.* at 489 (citing *Moses*, 460 U.S. at 24).

65. *Id.* (quoting *Keating*, 465 U.S. at 16).

66. *Id.* (citing *Keating*, 465 U.S. at 10).

67. *Id.* at 483.

68. *Id.* at 491.

69. 489 U.S. 468 (1989).

70. *Id.* at 470.

71. *Id.* at 477.

72. *Id.* (citing *Hines*, 312 U.S. at 67).

73. *Id.* (citing *Hines*, 312 U.S. at 67).

claims which the contracting parties agreed to resolve by arbitration.”<sup>74</sup> It noted that the F.A.A. does not prevent the enforcement of arbitration agreements made under rules that are not within the F.A.A., as such a rule would run contrary to the F.A.A.’s “primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms.”<sup>75</sup> The Court followed that the parties to arbitration agreements have free reign in structuring the agreements, such as by limiting the disputes that can be arbitrated.<sup>76</sup> It stated that as in the case before them where the parties had agreed that state rules of arbitration would govern, enforcing the rules in accordance with the agreement would be consistent with the F.A.A.’s goals, even though by doing so the arbitration would be stayed rather than going forward as it would under the F.A.A.<sup>77</sup> The Court summed up its ruling by stating that by permitting courts to enforce arbitration agreements rigorously in accordance with their terms,<sup>78</sup> it “give[s] effect to the contractual rights and expectations of the parties, without doing violence to the policies behind by the F.A.A.”<sup>79</sup>

Other courts have also followed the Supreme Court’s ruling that state substantive law contrary to the F.A.A. will pre-empt the F.A.A. However, these courts have also helped further establish when a state’s procedural rule will pre-empt the F.A.A. The Missouri Court of Appeals stated in *Duggan v. Zip Mail Services, Inc.*,<sup>80</sup> that the F.A.A. is applicable when a contract involves commerce.<sup>81</sup> It asserted that Missouri courts “are not bound by the procedural provisions of the F.A.A. and state procedural rules may be applied when arbitration is pursuant to the F.A.A.”<sup>82</sup> The court further stated that “state procedures may not be applied to defeat the substantive rights granted by the F.A.A.”<sup>83</sup> However, in determining whether the Missouri act which dealt with arbitration would be pre-empted by the F.A.A. it stated that applying the Missouri act would “defeat arbitration in instances where the F.A.A. permits it” and thus “would place the state act above the federal act, violating the Supremacy Clause of the U.S. Constitution.”<sup>84</sup> It then concluded by looking to the Missouri Supreme Court’s precedent, that the Missouri act could not be used to render ineffective an arbitration provision that is covered by the F.A.A.<sup>85</sup>

This interpretation of state’s rights under the F.A.A. was further delineated in *Reis v. Peabody Coal Co.*<sup>86</sup> In this case, the Missouri Court of Appeals found that though the F.A.A. created substantive rights for the state courts to enforce, the Missouri courts were not bound by F.A.A. procedural provisions, provided that the

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74. *Id.* at 478 (quoting *Keating*, 465 U.S. at 10).

75. *Id.* at 479.

76. *Id.* (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

77. *Id.*

78. *Id.* (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

79. *Id.*

80. 920 S.W.2d 200 (Mo. Ct. App. 1996).

81. *Id.* at 202 (citing 9 U.S.C. § 2 (1970)).

82. *Id.* at 203 (citing *Greenwood v. Sherfield*, 895 S.W.2d 169, 172 (Mo. Ct. App. 1995)).

83. *Id.* (citing *Greenwood*, 895 S.W.2d at 172-73).

84. *Id.*

85. *Id.*

86. 935 S.W.2d 625 (Mo. Ct. App. 1996).



Missouri procedural rules did not “defeat the [substantive] rights granted by Congress.”<sup>87</sup>

Missouri’s view of the F.A.A.’s procedural pre-emption was echoed by the Supreme Court of North Dakota in *Superpumper, Inc. v. Nerland Oil, Inc.*<sup>88</sup> This court asserted that the F.A.A.’s objectives and purposes<sup>89</sup> are effected through its substantive provisions,<sup>90</sup> and thus “a state is not obligated to altogether ignore its own procedural requirements in light of the procedural aspects of the F.A.A., provided the state-enacted procedure does not defeat the rights granted by Congress.”<sup>91</sup> To the extent that a state enacted uniform arbitration act “impedes the accomplishment and execution of the full purposes and objectives of the F.A.A., the U.A.A. is pre-empted by federal law.”<sup>92</sup>

The Oregon Court of Appeals in *Marr v. Smith Barney, Harris Upham and Co., Inc.*<sup>93</sup> was presented with the pre-emption question in the case of an appeal from an order of arbitration. The court’s analysis revealed the interweaving of the F.A.A.’s pre-emption of state procedural and substantive law. The court stated that federal law pre-empts conflicting state law that affects the party’s substantive rights for arbitration.<sup>94</sup> Thus, pre-emption occurs when it conflicts with the Congress’ goal of enforcing arbitration agreements. The court further stated that when the question is purely procedural, “the forum state is free to apply its own law.”<sup>95</sup> However, the court noted that a state’s procedural law could not be applied if it limits the rights of the party’s federal claim, although the claim is asserted in state court.<sup>96</sup> Therefore, the court determined whether applying Oregon law, which did not allow appeal from an order to arbitrate, would deny the party a federal substantive right.<sup>97</sup> It held that the timing of the right to appeal is purely procedural and that the party’s substantive right would not be denied because it could appeal after the arbitration award was made.<sup>98</sup> Hence, the Oregon court was permitted to apply its own procedural law since it did not deny a substantive right of the party in that it allowed the party to have the right to appeal when the arbitration award judgment was entered in the state proceeding.<sup>99</sup>

It is clear that the F.A.A. has presented many courts with the pre-emption question. In the instant case, however, the pre-emption question was one of first impression for the Massachusetts Court of Appeals.

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87. *Id.* at 630 (citing *McClellan v. Barrath Constr. Co.*, 725 S.W.2d 656, 658 (Mo. Ct. App. 1987)).

88. 582 N.W.2d 647 (N.D. 1998).

89. The F.A.A.’s “purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.” *Id.* at 650 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)).

90. *Id.* at 651 (citing *Reis*, 935 S.W.2d at 630).

91. *Id.* (citing *Reis*, 935 S.W.2d at 630).

92. *Id.* (citing *Smith Barney, Harris Upham & Co., Inc. v. Luckie*, 647 N.E.2d 1308, 1314 (N.Y. 1995)).

93. 842 P.2d 801 (Or. Ct. App. 1991).

94. *Id.* at 803.

95. *Id.* (citing *Nutbrown v. Munn*, 811 P.2d 131 (Or. 1991)).

96. *Id.* (citing *Rogers v. Saylor*, 760 P.2d 232 (Or. 1988)).

97. *Id.*

98. *Id.* at 804.

99. *Id.*

#### IV. INSTANT DECISION

The Massachusetts Court of Appeals looked to the purpose of the F.A.A. to decide the question of whether section 18 of the Massachusetts procedural rule denying Weston the ability to immediately appeal an order compelling it to arbitrate was contrary to the Federal goal of encouraging enforcement of arbitration.<sup>100</sup> It first noted that the F.A.A. was enacted “to overrule the judiciary’s longstanding refusal to enforce agreements to arbitrate.”<sup>101</sup> The F.A.A. created a staunch federal policy that favored arbitration by building a large body of federal substantive law “applicable in [s]tate and [f]ederal [c]ourts.”<sup>102</sup>

The court then looked to the fact that the F.A.A. does not expressly contain a pre-emptive provision and that the state and federal courts have concurrent jurisdiction to enforce the Arbitration Act.<sup>103</sup> It looked to *Hines* and concluded that the F.A.A. pre-empts state law only when it is an obstacle to Congress accomplishing its objectives.<sup>104</sup> The court, by further looking to *Hines* and *Volt*, found that the case law established that states may usually establish procedural rules for dealing with the arbitration process because federal policy does not require arbitration to be done under a “certain set of procedural rules.”<sup>105</sup> The only way that the state’s procedural rules would be pre-empted by the F.A.A. is if the effect of the rule was contrary to the “goals and policies of the F.A.A.,” which is to encourage the enforcement of arbitration agreements.<sup>106</sup>

In the spirit of *Volt*, the appellate court determined that the right to appeal from a court’s order that compels arbitration is not a substantive right, but rather a procedural right.<sup>107</sup> It then stated that Weston’s substantive rights would not be affected by its inability to immediately appeal the order compelling it to arbitrate, as it would eventually be able to appeal the defendant’s application to confirm their award.<sup>108</sup> The court’s holding was in line with the rule stated in *Marr*, *Superpumper*, *Duggan*, and *Reis*, which is that a state’s procedural rule will not be pre-empted by the F.A.A., unless the procedure is contrary to the substantive rights granted by the F.A.A.<sup>109</sup> Hence, the court stated that since Weston’s substantive rights were preserved by the Massachusetts’ procedural rule, the rule did not undermine the Federal goal encouraging enforcement of agreements to arbitrate, and the rule was not pre-empted by the F.A.A.<sup>110</sup>

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100. *Weston Sec. Corp. v. Aykanian*, 703 N.E.2d 1185, 1188 (Mass. App. Ct. 1998).

101. *Id.* (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985)).

102. *Id.*

103. *Id.*

104. *Id.* (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). See also *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1988).

105. *Weston*, 703 N.E.2d at 1188 (quoting *Volt*, 489 U.S. at 476).

106. *Id.* (quoting *Volt*, 489 U.S. at 477-78).

107. *Id.* at 1189.

108. *Id.* Massachusetts law allows a party to appeal an unfavorable arbitration award confirmed by a superior court. MASS. GEN. LAWS ch. 251, § 18(a)(3) (1988).

109. *Weston*, 703 N.E.2d at 1189.

110. *Id.*

## V. COMMENT

Although *Weston* was a case of first impression for the Appeals Court of Massachusetts, the question before it had been presented to many other courts. The court correctly held that state procedural rules are only pre-empted by the F.A.A. when they defeat the substantive rights granted by Congress in the F.A.A.<sup>111</sup> Its decision is consistent with those of other state courts and the United States Supreme Court.

The precedent this decision establishes in Massachusetts will serve to further expand the federal policy of encouraging arbitration where the parties have agreed to arbitrate. Not only is the court's opinion consistent with the underlying policy considerations of the F.A.A., as stated before, it is also in line with the precedent established by other courts which have dealt with the pre-emption issue.

Congress' enactment of the F.A.A. created a strong federal policy in favor of arbitration. Since the creation of the F.A.A., almost all states have "passed modern arbitration statutes that adopt the F.A.A.'s underlying policy of promoting and enforcing arbitration agreements . . ."<sup>112</sup> However, even though only Mississippi, Alabama, and Nebraska<sup>113</sup> cling to the "common law hostility toward arbitration,"<sup>114</sup> by only enforcing arbitration agreements when the F.A.A. applies,<sup>115</sup> there still exists conflict between state and federal arbitration laws in the states that have embraced the F.A.A.'s policy of encouraging arbitration. The instant case is an example of a state which is not anti-arbitration, but which has a procedural rule in conflict with the F.A.A. The procedural rule, though in direct conflict with the F.A.A. procedural rule, did not defeat the substantive rights found in the F.A.A. The court, therefore, refused to hold that the F.A.A. pre-empted the state rule. Though the Massachusetts rule did not allow "an immediate appeal from the judge's order compelling it to arbitrate" the court found that this rule was a purely procedural rule and the timing of the right to appeal neither affected the substantive right of the defendants to enforce the arbitration agreement, nor *Weston's* right not to be bound by an illegal award.<sup>116</sup> Thus, in effect, the court's decision denying F.A.A. pre-emption of the state law rule showed its adherence to the federal policy of enforcing arbitration agreements.

The United States Supreme Court has stated that allowing a party who contracted to arbitrate to avoid it by being allowed to bring his claim in a judicial forum "could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate."<sup>117</sup> The decision in the instant case helps alleviate these risks of the contracting parties. A party who has bargained for

111. *Id.*

112. Henry C. Strickland, *The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law?*, 21 HOFSTRA L. REV. 385, 400 (1992) (citing GABRIEL M. WILNER, DOMKE ON COMMERCIAL ARBITRATION 28 & app. I (1991)).

113. *Id.* at 460 n.93.

114. *Id.* at 400. The "old common law rule" is that "all pre-dispute arbitration agreements are void as against public policy." *Id.* at 460 n.93.

115. *Id.* at 400.

116. *Weston Sec. Corp. v. Aykanian*, 703 N.E.2d 1185, 1189 (Mass. App. Ct. 1998).

117. *Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984).

the right to arbitrate will not be usurped by the other party to the arbitration agreement simply seeking relief in the judicial system before the arbitration award is given. The holding will increase the use of arbitration by parties who want their disputes remedied by a more expedient mechanism than the judicial system. Parties can have faith that arbitration will occur without the added delay of a judicial appeal. In effect, each party will either get the benefit of its bargain (being able to arbitrate) or be held to its bargain (being forced to arbitrate rather than use the judicial system). The likely result is that contracting parties will more readily place arbitration clauses in their contracts because they will be secure in knowing that the court will not allow use of judicial proceedings when there is such a clause.

The courts, by creating pro-arbitration common law, have helped to further Congress' policy favoring arbitration and the instant decision continues the trend. Beginning with the opinion of the Supreme Court of the United States in *Moses*,<sup>118</sup> the courts have curtailed a state's ability to erect anti-arbitration statutes to defeat the enforcement of arbitration agreements. These rulings have helped ensure that parties to an arbitration agreement cannot escape arbitration by selecting the forum to dispute arbitrability. That is, if the courts would not have continually upheld the F.A.A.'s pre-emption power, parties would be able to obtain different results depending on whether the suit was brought in federal or state court. This would reward and encourage parties to forum-shop, and, therefore, the better rule is to provide contracting parties the same remedy in any forum.<sup>119</sup> The courts have removed any motivation to forum-shop as state anti-arbitration laws are pre-empted by the F.A.A. and other courts have enacted pro-arbitration laws. The strong case law behind the F.A.A. has served to further the federal policy of the F.A.A. by encouraging states to be pro-arbitration and in the same respect has alleviated any potential forum-shopping. The instant decision correctly falls within this great line of legal history, and its decision encourages the enforcement of arbitration when parties have agreed to do so. The Massachusetts decision will not only serve to further arbitration in Massachusetts, but when another state court faces this issue, the Massachusetts' decision will point the court in the right direction.

## VI. CONCLUSION

The Massachusetts Court of Appeals made the correct decision in *Weston*, as it found that the Massachusetts' state law, though in conflict with the F.A.A., would not be pre-empted by it. It made its decision by looking at the policy behind the F.A.A. and to other cases that had dealt with the pre-emption issue. By finding that its law, which does not allow an appeal before an arbitration award has been given, was not pre-empted, the court added this case to a long line of cases which encourage the federal policy of enforcing arbitration agreements.

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118. 460 U.S. 1 (1983).

119. *Id.* at 15.

