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Mandatory Arbitration Provisions—not in my State—McCarran-Ferguson, the FAA, and Reverse Preemption

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There is a well-established public policy recognized in both the federal and state court systems that arbitration, rather than litigation, is a procedure that, in many cases, is the most economical, efficient, and fair method for the resolution of disputes. However, in the world of insurance coverage litigation, from complex commercial to personal lines disputes, there is a view, especially among policyholders, that mandatory arbitration is not necessarily the most effective or fair way to resolve such disputes. Indeed, there are instances, such as reinsurance disputes, in which insurers themselves have embraced that position. The ambivalence concerning the merits of arbitration as an insurance coverage dispute resolution mechanism has led some states to enact laws that preclude the enforcement of arbitration clauses that are included in insurance policies.

The focus of this article is how the courts have handled litigation concerning the enforceability of such statutes in a number of different contexts. In many instances, the enforceability of such statutes depends upon the resolution of the clash between two federal statutes—the McCarran-Ferguson Act,[1] enacted in 1945 and the Federal Arbitration Act,[2] a part of federal law since 1925.

STATES WITH LIMITED RESTRICTIONS ON ARBITRATION IN INSURANCE COVERAGE DISPUTES

Remarkably, almost half of the 50 states and the District of Columbia have either general or more limited restrictions on the use of mandatory arbitration in insurance policies. At present, 24 states and the District of Columbia have such restrictions.[3] A significant number of these states have enacted legislation restricting the use of arbitration in insurance disputes only with respect to certain types of coverage. The most common restrictions on the use of arbitration in insurance disputes relate to certain types of ''consumer'' or personal lines insurance contracts, such as health, life, homeowners, and automobile insurance policies. Maryland is a good example of a state that restricts the use of mandatory arbitration provisions in any type of ''consumer'' insurance policy. The relevant Maryland statute provides:

§ 3-206.1. Arbitration provisions in insurance contracts with consumers

(a) In this section, ''consumer'' means a party to an arbitration agreement who, in the context of the arbitration agreement, is an individual, not a business, who seeks or acquires, including by lease, any goods or services primarily for personal, family, or household purposes including financial services, health care services, or real property.

(b)(1) Except as provided in paragraph (2) of this subsection, any provision in an insurance contract with a consumer that requires arbitration is void and unenforceable.

(2) This subsection does not apply to a provision that establishes an appraisal process to determine the value of property.[4]

Subsection (b)(1) of the Maryland statute encompasses the whole spectrum of personal lines coverage, such as homeowners' policies and automobile insurance, in which case mandatory arbitration provisions are proscribed.

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Some states have added flexibility to their statutory schemes on restricting arbitration in the context of consumer, personal lines oriented coverage by permitting the inclusion of an arbitration provision in such insurance policies but giving the option to use arbitration to the policyholder alone. For example, in Louisiana, the pertinent subsection dealing with uninsured motorists' coverage in its insurance code states:

The coverage required under this Section may include provisions for the submission of claims by the assured to arbitration; however, the submission to arbitration shall be optional with the insured, shall not deprive the insured of his right to bring action against the insurer to recover any sums due under the terms of the policy and shall not purport to deprive the courts of this state jurisdiction of actions against the insurer.[5]

STATES WITH BROAD PROHIBITIONS ON THE USE OF ARBITRATION IN INSURANCE COVERAGE DISPUTES

In contrast to the states with more limited restrictions on the use of arbitration, a significant number of states have taken a more comprehensive approach and prohibited the use of mandatory binding arbitration in most if not all types of insurance coverage disputes. For example, South Carolina's Uniform Arbitration Act, states:

(a) A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. . . .

(b) This chapter however shall not apply to:

* * *

(4) Any claim arising out of personal injury, based on contract or tort, ***or to any insured or beneficiary under any insurance policy or annuity contract.***[6]

Some states with broad prohibitions on the use of arbitration in insurance disputes, such as Montana, provide, however, an exception for disputes among insurers.[7]

THE FEDERAL STATUTORY FRAMEWORK AND STATE RESTRICTIONS ON ARBITRATION IN INSURANCE COVERAGE DISPUTES

The area in which policyholders, insurers, and reinsurers litigate the applicability of mandatory arbitration provisions is bisected by the fault line created by the broad mandate of the Federal Arbitration Act on one side and state statutes enacted under the aegis of the McCarran-Ferguson Act on the other.

The relevant statutory language of both the FAA and McCarran-Ferguson are straightforward in the present context. The FAA provides:

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.[8]

McCarran-Ferguson states in relevant part:

(a) State regulation. The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation. No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . .[9]

As discussed in more detail below, the tension between state statutes that restrict the use of arbitration in insurance disputes and the broad reach of the FAA arises out of the language in McCarran-Ferguson providing that, ''[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state ***for the purpose of regulating the business of insurance*** . . . unless such Act specifically relates to the business of insurance. . . .''[10]

The area in which policyholders, insurers, and reinsurers litigate the applicability of mandatory arbitration provisions is bisected by the fault line created by the broad mandate of the Federal Arbitration Act on one side and state statutes enacted under the aegis of the McCarran-Ferguson Act on the other

The question of whether a state enactment is ''for the purpose of regulating the business of insurance'' has been the subject of Supreme Court decisions that have figured in the state and federal courts' analysis of specific situations where states have attempted to circumscribe the FAA's reach into areas of insurance regulation. The earliest of these Supreme Court cases is *Securities & Exchange Commission v. National Securities, Inc.*[11] In that decision, the Supreme Court considered the relationship between the policyholder and the insurer to be the most significant factor in determining whether a state statute or regulation constitutes the business of insurance:

The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the ''business of insurance.'' . . . But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly are laws governing the ''business of insurance.''[12]

The Supreme Court in 1982 in *Union Labor Life Insurance Company v. Pireno*[13] articulated three criteria relevant to deciding whether a practice is part of the ''business of insurance:''

first, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry. None of these criteria is necessarily determinative in itself. . . .[14]

While the guidance from the Supreme Court on what constitutes the ''business of insurance'' seems relatively clear, that guidance has not diminished the number of cases in which that issue and others have figured in debates as to whether state restrictions on arbitration in insurance coverage disputes are protected because McCarran-Ferguson acts to reverse preempt the FAA.

SOME COURTS HAVE HELD THAT MCCARRAN-FERGUSON REVERSE PREEMPTS THE FAA WHEN APPLIED TO STATE ANTI-ARBITRATION PROVISIONS

Whether a state's anti-arbitration statute precludes the enforcement of a policy's mandatory arbitration provision has been widely litigated in various factual contexts involving different types of insurance coverage, different statutory language, and different underlying facts. The discussion of a few representative cases, below, reflects the analysis applied by courts that have found the McCarran-Ferguson Act to reverse preempt the FAA when an insurer seeks to enforce an arbitration clause against a policyholder.

The decision by the Court of Appeals of Georgia in *Continental Insurance Company v. Equity Residential Properties Trust*[15] is representative. The policyholder, Equity Residential Properties Trust (''Equity''), filed suit against its insurer, Continental Insurance Company (''Continental''), claiming that Continental breached its insurance contract with Equity by failing to pay amounts due under the policy. Continental moved to stay the action because of a mandatory arbitration provision in the policy.[16] Applying Georgia law,[17] the court looked to the Georgia Arbitration Code[18] to determine whether the arbitration provision was enforceable under Georgia law. The relevant section of the Georgia Arbitration Code specifically excluded contracts of insurance from mandatory arbitration.[19] The court recognized, however, that the insurance policy

involved interstate commerce and, absent an exception, would be subject to federal preemption under the FAA.

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Because the Georgia Arbitration Code was specifically directed to arbitration matters, the arbitration agreement in the Continental policy would ordinarily have been protected by the FAA.[20] The policyholder argued, however, that the McCarran-Ferguson Act applied in this situation because the language in the arbitration provision, when applied to insurance policies, affected an integral part of the business of insurance as regulated by Georgia, even though the provision in question was part of Georgia's arbitration statutory scheme, rather than its insurance code.

The court held that the dispositive issue was whether the provision in question was indeed for the purpose of regulating the business of insurance and found that it was. Relying principally on the Supreme Court decisions in *National Securities* and *Pireno*, the court held that the language in the Georgia Arbitration Act, if not directly, at least indirectly regulated the relationship between an insured and the insurer with respect to a disputed insurance claim. Further, applying the *Pireno* standards discussed above, the Georgia court found that the prohibition was integral to the policy relationship between the insured and the insurer and had the effect of transferring or spreading risk by confirming the right to a decision on coverage by a jury, rather than a decision by a single arbitrator. In sum, the Georgia court held that the McCarran-Ferguson Act reverse preempted the FAA and permitted the policyholder to litigate its coverage dispute in court, rather than through an arbitration process.[21]

The decision by the court in *National Home Insurance Company v. King*[22] provides another interesting perspective on whether an arbitration provision in a contract is preempted by the state's anti-arbitration provision relating to insurance. The background to the decision in *King* arises from the purchase by the policyholders of a homeowners' construction warranty plan from the builder of their home, a warranty that was backed by insurance coverage issued by National Home Insurance Company ("National Home"). After failing to obtain the necessary repairs to structural defects to their home from the builder, the Kings demanded that National Home pay for the correction of the defects in accordance with the warranty agreement. When the insurer advised the Kings that they were required under the warranty agreement to submit the dispute to arbitration, the Kings filed suit in state court against National Home for breach of contract and bad faith. Shortly thereafter, National Home filed the instant action in federal court to compel arbitration of the coverage dispute in question.[23]

The Kentucky anti-arbitration statute in question provides:

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law for the revocation of any contract. This chapter does not apply to:
>
> * * *
>
> (2) Insurance Contracts. Nothing in this subsection shall be deemed to include or render unenforceable contractual arbitration provisions between two (2) or more insurers, including reinsurers.[24]

In deciding the preemption issue, the court relied upon the Supreme Court's decision in *United States Department of Treasury v. Fabe*.[25] The Supreme Court stated, in determining whether the McCarran-Ferguson Act prevented the preemption of a state law dealing with arbitration in an insurance coverage dispute by the FAA, that a three-part test should apply. The three factors are:

(1) Whether the federal statute specifically relates to the business of insurance;

(2) Whether the state law at issue was enacted for the purpose of regulating the business of insurance; and

(3) Whether the application of the federal law invalidates, supersedes or impairs the state law.[26]

In applying those factors, the *King* court held that the McCarran-Ferguson Act's language, "for the purpose of regulating the business of insurance," was to be given a broad reading and that any law with an "end, intention, or aim of adjusting, managing, or controlling the business of insurance" is a law "enacted for the purpose of regulating the business of insurance" for purposes of the McCarran-Ferguson Act.[27] Thus, the court concluded that National Home could not invoke the arbitration

provision to forestall the state litigation initiated by the policyholder homeowners.

OTHER COURTS HAVE HELD THAT THE FAA PREEMPTS STATE ANTI-ARBITRATION PROVISIONS IN INSURANCE COVERAGE DISPUTES

One interesting example of the limitations of the McCarran-Ferguson reverse preemption argument is reflected in *IGF Insurance Co. v. Hatcreek Partnership.*[28] The insurance coverage dispute in *Hatcreek* involved a crop insurance policy issued to Hatcreek by IGF under which Hatcreek sought coverage damage to its wheat crop.[29] The wheat crop was a total loss, and when a claim was submitted to the insurer by Hatcreek, the IGF claims representative informed Hatcreek, for the first time, that more than 1,100 acres of the wheat crop was not insured.[30] Hatcreek subsequently filed an action against IGF, alleging that IGF had breached the insurance contract and that the claims representative was separately liable for negligent misrepresentation as to the portion of the Hatcreek property that Hatcreek thought had been insured.[31]

IGF sought to stay the action in favor of arbitration under the FAA based upon an arbitration provision in the crop insurance policy issued by IGF to Hatcreek.[32] Hatcreek responded by contending that the anti-arbitration provision as to insurance matters in the Arkansas Uniform Arbitration Act reverse preempted the FAA.[33] In analyzing the parties' contentions, the Arkansas Supreme Court recognized that the McCarran-Ferguson Act precluded the regulation of insurance by the federal government, so long as there was no federal statute in question that "specifically relate[d] to the business of insurance. . . ."[34]

The direct insurance policy at issue in the dispute between Hatcreek and IGF was issued without reference to any type of federal policy regarding insurance coverage. However, the IGF policy provided that it was "reinsured by the Federal Crop Insurance Corporation (FCIC) under the provisions of the Federal Crop Insurance Act. . . . All provisions of the policy and rights and responsibilities of the parties are specifically subject to the Act."[35] Because of this nexus to federal law relating to the business of insurance, the *Hatcreek* court held that the McCarran-Ferguson Act was inapplicable; and, the FAA supported the procedural limitation of arbitration that was contained in the IGF policy.[36] The fact that the Federal Crop Insurance Act's relationship to the coverage dispute at issue involved reinsurance, rather than direct insurance, did not affect the Arkansas Supreme Court's view that the Federal Crop Insurance Act was designed to preempt state statutes that might otherwise be permissible under McCarran-Ferguson:

> Thus, it is clear that Congress contemplated that the FCIC's reinsurance contracts should be able to provide that state law would be inapplicable to an insurance contract reinsured by the FCIC. The Arkansas statute purporting to prevent the enforceability of arbitration clauses in insurance contracts "directly or indirectly affect[s] or govern[s]" the crop insurance contract authorized by the FCIC, and it is therefore inconsistent with, and preempted by, the federal statute.[37]

McCarran-Ferguson reverse preemption was also held by the Alabama Supreme Court not to preclude the enforcement of an arbitration provision in an insurance policy that was the source of a coverage dispute in *American Bankers Insurance Company of Florida v. Crawford*.[38] The key to the Alabama Supreme Court's rejection of a McCarran-Ferguson reverse preemption argument as to the arbitration provision in question was the location of the restriction on arbitration in Alabama's statutory scheme. The trial court had held that the arbitration provision that was in a mortgage insurance policy was not enforceable because it was reverse preempted under McCarran-Ferguson by a section of Title 8 of the Alabama Code that dealt generally with contracts and precluded the specific enforcement of an agreement to submit a controversy to arbitration.[39] Significantly, though, the Alabama Supreme Court held that there was no similar provision in the Alabama Insurance Code respecting arbitration provisions and their enforceability.

What happens when a policyholder seeks to compel arbitration, and an insurer resists on the basis of a state provision precluding the arbitration of future controversies arising between parties to the insurance policy?

Relying on Supreme Court precedent discussed above, the Alabama Supreme Court stated that the McCarran-Ferguson Act's reverse preemption provision applied in three instances: (1) the federal statute that is the subject of preemption does not relate to the business of insurance; (2) the state statute in question was enacted for the purpose of regulating the business of insurance; and (3) the application of the federal statute would invalidate or otherwise impair the state's statute.[40] For the *Crawford* court, the nub of the dispute related to the second factor, above, and specifically whether the restriction on arbitration that appeared in a portion of the Alabama Code dealing with contracts dealt with the regulation of the business of insurance.[41] The court found that the

Alabama anti-arbitration provision at issue had no bearing on the more essential aspects of the insurer-insured relationship, including, *inter alia*, the scope of the insurance coverage, the term of the policy, or the price of the coverage. In short, the general anti-arbitration provision in the contract section of the Alabama Code, as opposed to the insurance portion of the Alabama Code, was not integral to the insurer-insured relationship, and the arbitration provision was not subject to reverse preemption.[42]

OTHER TYPES OF DISPUTES ON THE APPLICATION OF STATE ANTI-ARBITRATION PROVISIONS

Insurers' Reliance on Anti-Arbitration Provisions

What happens when a policyholder seeks to compel arbitration, and an insurer resists on the basis of a state provision precluding the arbitration of future controversies arising between parties to the insurance policy? This issue was addressed by the Iowa Supreme Court in *Mutual Service Casualty Insurance Company v. Iowa District Court for Woodbury County*.[43] In that case, there was an odd role reversal between policyholder and insurer with respect to the application of an arbitration provision in an insurance policy in Iowa, a state with an anti-arbitration provision as to ''contracts of adhesion'' which the court in this case construed to include automobile insurance policies.

The plaintiff policyholders filed suit based on a dispute with their automobile insurer with respect to uninsured motorist coverage.[44] The insurance policy contained a mandatory arbitration requirement.[45] The Iowa Code had two provisions relating to contract provisions requiring the arbitration of contract disputes. One provision precluded the mandatory arbitration of ''contracts of adhesion'' as to a future controversy arising between the contracting parties.[46] However, parties to a contract, including insurance policies, could agree to arbitrate an existing controversy, regardless of the nature of the contract at issue.[47] Interestingly, the insurer argued that its policy contained an unenforceable arbitration provision because the provision was contained in what it admitted to be a contract of adhesion, an automobile insurance policy, and related to a future controversy arising between that insurer and the plaintiffs.[48]

The key question was whether the dispute between the parties, or in the words of the Iowa Code the ''controversy,'' was an existing or future one and how it was determined whether a controversy was an existing or future one. The plaintiffs argued that the answer to this question depended on when arbitration was demanded. Because the plaintiffs sought to enforce the terms of the mandatory arbitration provision in their insurance policy when the dispute with their insurer had ripened to the point of litigation, they argued that their claim to arbitration was not proscribed because they were agreeing to arbitrate an existing controversy.

The court found the insurer's argument to be more compelling. It ruled that the time for determining when the controversy would be considered a future or existing one was at the time the policyholder purchased the policy.[49] In the court's view, looking at the date that arbitration was demanded, rather than the date of the inception of the contract, would vitiate that part of the Iowa Code that barred mandatory arbitration as to future contracts arising between parties concerning contracts of adhesion, like insurance policies.[50]

The Iowa Supreme Court also rejected the secondary basis for the lower court's decision to enforce arbitration at the policyholder's request. The lower court ruled that regardless of the proper interpretation of when a future or existing controversy arises, the statute precluding mandatory arbitration with respect to insurance policies was intended to protect the policyholder (or other party to a contract of adhesion) from unwanted arbitration, but should not be read to preclude the policyholder from electing to choose arbitration, notwithstanding the fact that to do so would be in direct derogation of the Iowa statute precluding such enforcement of arbitration provisions.[51] The Iowa Supreme Court held that the statute should be read literally and that if the General Assembly had intended to give policyholders the option to choose arbitration or not, it would have done so explicitly.[52] Thus, the Iowa Supreme Court held that the coverage dispute could not be arbitrated even though that is what the policyholder preferred.

Surety and Performance Bonds

Another interesting twist on the application of anti-arbitration provisions in certain states relates to whether a statute precluding arbitration with respect to insurance coverage disputes extends to surety or performance bonds. This issue was addressed by the Kentucky Supreme Court in *Buck Run Baptist Church, Inc. v. Cumberland Surety Insurance Co., Inc*.[53] The plaintiff church purchased a performance bond from the defendant insurer, which guaranteed the performance of the general contractor on the church's construction work. The church and the contractor entered into an agreement that included a mandatory binding arbitration provision, and the defendant insurer, in its performance bond sold to the church, incorporated the terms of the contract between the church and the contractor into its bond.[54]

The church sought damages from the contractor and requested coverage under the performance bond. The surety, Cumberland, disputed the church's right to coverage and filed a declaratory judgment action seeking to compel the church to arbitrate the claim. The church argued that it was not required to arbitrate the dispute because of a Kentucky anti-arbitration statute applicable to insurance contracts.[55]

The Kentucky Supreme Court determined that Kentucky's anti-arbitration statute did not apply. It reasoned that because the contract between the church and the contractor was the contract that incorporated the arbitration provision, which in turn was incorporated by reference into the performance bond, the ''dispute involve[d] a construction contract, and not the applicability of an insurance exemption to the [anti-arbitration] statute.''[56] The court further held that the performance bond was not a typical contract of adhesion as with most insurance policies. It determined that because the facts of the case involved a commercial construction project and a negotiated voluntary agreement between sophisticated commercial entities, such factors placed the performance bond outside of the realm of insurance policies.[57]

Another area in which the courts have addressed the interaction of statutes with anti-arbitration provisions regarding insurance matters, the FAA, and McCarran-Ferguson reverse preemption relates to state insurance receivership proceedings

The Kentucky court's reasoning was made in the face of a compelling argument by the plaintiff church. It pointed out that the word ''insurance'' was defined by the Kentucky Code as including ''a contract to act as a surety.''[58] The court was forced to recognize that Kentucky surety companies were regulated by the Kentucky Insurance Department. However, it distinguished a performance bond from an insurance contract by explaining that an insurance policy was based on an underwriting process that took into account risks over a large market. In contrast, the court held that a surety bond was underwritten based on an evaluation of only a specific contractor and that contractor's capability to perform a construction contract, a debatable conclusion.[59]

Insurance Company Receivership Provisions

Another area in which the courts have addressed the interaction of statutes with anti-arbitration provisions regarding insurance matters, the FAA, and McCarran-Ferguson reverse preemption relates to state insurance receivership proceedings. *Munich American Reinsurance Company v. Crawford*[60] addressed the anti-arbitration provisions and receivership proceedings under Oklahoma law in this context. The *Crawford* case involved a claim by a reinsurer, Munich American Reinsurance Company (''Munich''), and its claim against an insurer, Employers National Insurance Corporation (ENIC), that was placed in receivership by an Oklahoma state court subject to the decisions of the receiver, the Insurance Commissioner of Oklahoma, John Crawford. Munich sought the return of monies to which it would otherwise have been entitled pursuant to its reinsurance of ENIC that Crawford now considered part of the receivership estate.[61]

Munich filed a petition in federal court to compel arbitration under the FAA.[62] Crawford sought the dismissal of the federal action to compel arbitration because of the prior injunction entered in Oklahoma state court precluding all actions involving the receivership estate. The principal issue before the court was, notwithstanding the injunction by the Oklahoma state court, whether Munich could still require arbitration because of the FAA's preemption of state law as it relates to arbitration. Further, the court was required to address the argument of Crawford that the FAA was reverse preempted by the McCarran-Ferguson Act.[63]

The court's analysis focused first on whether the Oklahoma legislation dealing with receivership actions qualified under McCarran-Ferguson's requirement that the laws promulgated by the state were for the purpose of regulating the business of insurance. In that regard, the *Crawford* court decided that the Oklahoma receivership legislation was crucial to the relationship between insurers and policyholders because it provided assurance to insurers and policyholders that an insurance company's liquidation would be done in an organized fashion. Secondly, the law was limited to the insurance industry—not companies in general.[64] Lastly, Munich and another reinsurer argued that under the Oklahoma Arbitration Act, arbitration clauses in contracts between insurance companies were permitted. Thus, in their view, when the dispute did not involve a policyholder but rather the insolvent insurer and its reinsurers, the FAA, rather than McCarran-Ferguson, should dictate the outcome. The court rejected that argument as well, finding that the Oklahoma receivership statutory scheme was broad enough to encompass the receiver's control of the property of the insolvent insurer and therefore was for the purpose of regulating the business of insurance.[65]

Anti-Arbitration Statutes and Mandatory "Appraisal" or "Adjustment" of Claims

Finally, another area in which there has been litigation regarding the application of states' anti-arbitration provisions relating to insurance coverage disputes concerns whether those statutes apply to "appraisal" or "adjustment" provisions in first-party policies. Many types of first-party policies require that disputes as to the amount of coverage available for a first-party loss should be determined through a process of mandatory arbitration concerning the extent of the policyholder's loss. The courts in those states which have statutory anti-arbitration provisions have decided the issue differently.

In *J. C. Rawlings v. AMCO Insurance Co.*,[66] the Nebraska Supreme Court held that a mandatory arbitration process as to the appraisal of the value of the loss was unenforceable under the state's anti-arbitration provision. Nebraska, like some of the other states with anti-arbitration provisions, precluded the inclusion of a mandatory arbitration provision regarding an insurance dispute that related to a future coverage dispute. The insurer in *Rawlings* recognized that such an aspect of Nebraska's anti-arbitration statute as construed by the Nebraska courts would normally apply to the insurance policy at issue.[67] However, the insurer argued that an "appraisal clause" was qualitatively different from an arbitration provision because the appraisal clause was limited simply to the amount of coverage as opposed to whether the insurer had a duty to provide coverage, which, on the facts of this case, the insurer admitted it did.[68] In finding the appraisal provision to be unenforceable, the *Rawlings* court held that the extent of a policyholder's level of recovery is no less a function of the insurance contract than the existence of the right to coverage in the first instance. Accordingly, the plaintiff homeowner was not precluded from litigating in a court the extent of the coverage that it was owed under the insurance contract at issue.[69]

The Supreme Court of Montana reached a different result in *Garretson v. Mountain West Farm Bureau Mutual Insurance Co.*[70] The *Garretson* court's decision concerned a dispute between the owners of an automobile and the insurer with respect to a first-party loss and the value of the damage to the vehicle. The insurance policy contained a provision applicable to first-party coverage that required an appraisal process when a dispute arose as to the amount of the loss. The automobile owners filed a complaint, and the insurer filed a motion for summary judgment, contending that even though Montana has an anti-arbitration provision relating to insurance disputes, it did not apply to the mandatory appraisal process contained in its insurance policy.[71] The court recognized that the Montana anti-arbitration statute[72] precludes mandatory arbitration provisions in contracts relating to insurance policies, except for contracts between insurance companies.[73] The court even noted the fact that the statute was the product of a long history in common law that reflected a public policy against depriving courts of jurisdiction by contract over disputes.[74] However, with virtually no analysis, the court found that a mandatory appraisal process as to value did not fall within the intent of the statute, stating: "Therefore a provision in a contract like the one under consideration in the case at bar, requiring that the value of the assured property, under certain conditions, shall be ascertained by appraisal, is not disregarded as against public policy, but is upheld as valid."[75]

The court seemed to ignore the fact that with first-party coverage, when there are disputes between a policyholder and the insurer, in a substantial number of those cases, the primary dispute is as to the amount of the loss, the very reason that policyholders prefer to have such a claim resolved in the courts.

CONCLUSION

The above discussion shows that anti-arbitration statutes come in many shapes and sizes, and the courts' treatment of them is equally varied even within the same state. Thus, neither a policyholder nor an insurer should assume, automatically, that a mandatory arbitration provision is enforceable.

Finally, a key threshold issue for the insurance coverage litigator, that is beyond the scope of this article, will be what law applies to a dispute that involves the enforcement of an anti-arbitration provision. The resolution of choice of law will be straightforward in those cases in which the insurance coverage dispute arises among parties all of whom are domiciled in a state with a statutory anti-arbitration scheme. However, that situation will more likely be the exception than the rule, particularly in more complex commercial coverage cases. The forum court will need to address two critical issues. One is whether the decision on the application of an anti-arbitration statute is substantive or procedural. The second, and related issue, is whether the law of the insurer's domicile, the forum state, or some other state's law should govern the decision as to whether the anti-arbitration statute should apply. As experienced coverage practitioners know, choice of law issues can often be case dispositive and should figure in a choice of forum decision.[76]

[1] 15 U.S.C. § 1012 (b).

[2] 9 U.S.C. §§ 1–14.

[3] The states and the relevant statutes restricting the use of arbitration in insurance coverage matters to one degree or another are as follows:

- Arkansas—Ark. Code Ann. § 16-108-201.
- California—Cal. Ins. Code § 10123.19 and Cal. Health & Safety Code § 1363.1.
- District of Columbia—D.C. Code § 16-4403.
- Georgia—Ga. Code Ann. § 9-9-2.
- Hawaii—Haw. Rev. Stat. § 431:10-221.
- Iowa—Iowa Code Ann. § 679A.1.
- Kansas—Kan. Stat. Ann. § 5-401.
- Kentucky—Ky. Rev. Stat. Ann. § 417.050 and Ky. Rev. Stat. Ann. § 304.20-050.
- Louisiana—La. Rev. Stat. Ann. § 22:1295 (5) and La. Rev. Stat. Ann. § 22:868.
- Maine—Me. Rev. Stat. Ann. Tit. 14 § 5948 and 24-A § 2747.
- Maryland—Md. Code Ann., Cts. & Jud. Proc. § 3-206.1 and Md. Code Ann. Ins. § 19-509 and Md. Ins. Admin. 31.11.10.07.
- Mississippi—Miss. Code Ann. § 83-11-109.
- Missouri—Mo. Ann. Stat. § 435.350.
- Montana—Mont. Code Ann. § 27-5-114.
- Nebraska—Neb. Rev. Stat. § 25-2602.01.
- Nevada—Nev. Rev. Stat. § 690 B.017 and Nev. Rev. Stat. § 689 B.067.
- Oklahoma—Okla. Stat. Tit. 12 § 1855.
- Rhode Island—R.I. Gen. Laws § 10-3-2 and R.I. Gen. Laws § 27-10.3-1.
- South Carolina—S.C. Code Ann. § 15-48-10 and S.C. Code Ann. § 38-77-200.
- South Dakota—S.D. Codified Laws § 21-25 A-3.
- Utah—Utah Code Ann. § 31A-21-313 and Utah Admin. Code R. 590-122.
- Virginia—Va. Code Ann. § 38.2-312 and Administrative Letter 1998-12.
- West Virginia—W.Va. Code § 33-6-31.
- Wyoming—Wyo. ADC Ins. Gen. Ch. 23 § 9.

[4] Md. Code Ann., Cts. & Jud. Proc. § 3-206.1.

[5] La. Rev. Stat. Ann. § 22:1295(5).

[6] S.C. Code Ann. § 15-48-10(b)(4) (emphasis added). *See also* Mo. Ann. Stat. § 435.350; Mont. Code Ann. § 27-5-114.

[7] Mont. Code Ann. § 27-5-114.

[8] 9 U.S.C. § 2.

[9] 15 U.S.C. § 1012 (a)-(b).

[10] 15 U.S.C. § 1012(b) (emphasis added).

[11] 393 U.S. 453 (1969).

[12] *Securities & Exchange Comm'n*, 393 U.S. 453, 460. This position was reiterated a decade later in Group Life and Health Insurance Co. v. Royal Drug, 440 U.S. 205 (1979).

[13] 458 U.S. 119 (1982). *See also* United States Department of Treasury v. Fabe, 508 U.S. 491 (1993).

[14] *Pireno*, 458 U.S. 119, 129.

[15] 565 S.E. 2d 603 (Ga. Ct. App. 2002).

[16] *Equity Residential*, 565 S.E. 2d 603.

[17] The insurance policy contained an Illinois choice of law provision. However, the court held that the choice of law provision did not control the procedural law applicable to the forum state. "Lex Fori" required the application of Georgia law in the context of procedural matters. *See Equity Residential*, 565 S.E. 2d 603, 604.

[18] Ga. Code Ann. § 9-9-2 (c)(3).

[19] *Equity Residential*, 565 S.E. 2d 603, 604, *citing* Ga. Code Ann. § 9-9-2 (c)(3).

[20] *Equity Residential*, 565 S.E. 2d 603, 605.

[21] *Equity Residential*, 565 S.E. 2d 603, 605. The court did not attempt to explain how risk would be spread by reliance upon the collective wisdom of a jury as opposed to an individual or multiple arbitrators. Presumably, an argument could be made that there is greater risk to both the policyholder and the insurer in relying upon a judge and jury to decide a coverage dispute, as opposed to a single or multiple arbitrators.

[22] National Home Insurance Co. v. King, 291 F. Supp. 2d 518 (E.D. Ky. 2003).

[23] *National Home*, 291 F. Supp. 2d 518, 521–24.

[24] Ky. Rev. Stat. Ann. § 417.050.

[25] *Fabe*, 508 U.S. 491 (1993).

[26] *National Home*, 291 F. Supp. 2d 518, 528 (*citing Fabe*, 508 U.S. at 501).

[27] *National Home*, 291 F. Supp. 2d 518, 529. Other courts have ruled that broad state statutes barring mandatory arbitration in insurance coverage disputes are enforceable based on reverse preemption. *See, e.g.*, Standard Security Life Insurance Co. of New York v. West, 267 F. 3d 821 (8th Cir. 2001) (applying Missouri law); Stephens v. American International Insurance Co., 66 F. 3d 41 (2d Cir. 1995); Mutual Reinsurance Bureau v. Great Plains Mutual Insurance Co., Inc., 969 F.2d 931 (10th Cir. 1992) (applying Kansas law); Riceland Foods, Inc. v. Liberty Mutual Insurance Co., No. 10CV00091, SWW, 2010 U.S. Dist. LEXIS 800100 (E.D. Ark. Aug. 6, 2010) (applying Arkansas law); American Health and Life Insurance Co. v. Heyward, 272 F.Supp. 2d 578 (D.S.C. 2003) (applying South Carolina law); Ernst & Young LLP v. David S. Meyer, 323 S.W. 3d 682 (Ky. 2010); Cox v. Woodmen of the World Insurance Co., 556 S.E. 2d 397 (S.C. Ct. App. 2001).

[28] 76 S.W. 3d 859 (Ark. 2002).

[29] *Hatcreek*, S.W. 3d 859, 861.

[30] *Hatcreek*, 76 S.W. 3d 859, 861.

[31] *Hatcreek*, 76 S.W. 3d 859, 861.

[32] *Hatcreek*, 76 S.W. 3d 859, 862.

[33] *Hatcreek*, 76 S.W. 3d 859, 862.

[34] *Hatcreek*, 76 S.W. 3d 859, 863.

[35] *Hatcreek*, 76 S.W. 3d 859, 864.

[36] *Hatcreek*, 76 S.W. 3d 859, 864.

[37] *Hatcreek*, 76 S.W. 3d 859, 865.

[38] 757 So.2d 1125 (Ala. 1999).

[39] *American Bankers*, 757 So.2d 1125, 1131.

[40] *American Bankers*, 757 So.2d 1125, 1131 (*citing Fabe*, 508 U.S. 491, 500–01).

[41] *American Bankers*, 757 So.2d 1125, 1132.

[42] *American Bankers*, 757 So.2d 1125, 1133. Other courts have ruled that broad state statutes barring mandatory arbitration in insurance coverage disputes are not enforceable because of FAA preemption. *See, e.g.*, Mid-Continent Casualty Co. v. General Reinsurance Corp., 2009 U.S. App. LEXIS 11057 (10th Cir. May 22, 2009) (applying Oklahoma law); Northwestern Corp. v. National Union Fire Insurance Co. of Pittsburgh, Pa., 321 B.R. 120 (Bankr. D. Del. 2005) (applying Montana law); Heaberlin Farms, Inc. v. IGF Insurance Co., 641 N.W.2d 816 (Iowa 2002); Little v. Allstate Insurance Co., 705 A.2d 538 (Vt. 1997); Doucet v. Dental Health Plans Management Corp., 412 So.2d 1383 (La. 1982).

[43] 372 N.W. 2d 261 (Iowa 1985).

[44] *Iowa District Court*, 372 N.W. 2d 261, 262.

[45] *Iowa District Court*, 372 N.W. 2d 261, 262.

[46] *Iowa District Court*, 372 N.W. 2d 261, 263.

[47] *Iowa District Court*, 372 N.W. 2d 261, 263.

[48] *Iowa District Court*, 372 N.W. 261, 263.

[49] *Iowa District Court*, 372 N.W. 261, 263.

[50] *Iowa District Court*, 372 N.W. 261, 263.

[51] *Iowa District Court*, 372 N.W. 261, 264.

[52] *Iowa District Court*, 372 N.W. 261, 264.

[53] 983 S.W. 2d 501 (Ky. 1998).

[54] *Buck Run*, 983 S.W. 2d at 503.

[55] *Buck Run*, 983 S.W. 2d at 502–03.

[56] *Buck Run*, 983 S.W. 2d at 503.

[57] *Buck Run*, 983 S.W. 2d at 504.

[58] *Buck Run*, 983 S.W. 2d at 504.

[59] *Buck Run*, 983 S.W. 2d at 504–05. *But see* National Home Insurance Co. v. King, 291 F. Supp. 2d 518 (E.D. Ky. 2003) (applying Kentucky law).

[60] 141 F.3d 585 (5th Cir. 1998).

[61] *Crawford*, 141 F.3d 585, 587.

[62] *Crawford* 141 F.3d 585, 587.

[63] *Crawford* 141 F.3d 585, 590.

[64] *Crawford* 141 F.3d 585, 591–92.

[65] *Crawford* 141 F.3d 585, 594. *See also* Transit Casualty Company in Receivership v. Certain Underwriters at Lloyd's of London, C.A. No. 96-4173-CV-C-2, 1996 U.S. Dist LEXIS 22710 (W.D. Mo. June 10, 1996) (in an action involving reinsurance contracts between Lloyd's and Transit Casualty, which was in a Missouri receivership, and Missouri statutory law precluded arbitration in insurance matters, the court held that both the FAA and the Convention on Recognition and Enforcement of Foreign Arbitral Awards were reverse preempted by the McCarran-Ferguson Act).

[66] 438 N.W.2d 769 (Neb. 1989).

[67] *Rawlings*, 438 N.W.2d 769, 770.

[68] *Rawlings*, 438 N.W.2d 769, 770.

[69] *Rawlings*, 438 N.W.2d 769, 771. *See also* Friday v. Trinity Universal of Kansas, 939 P.2d 869, 871 (Kan. 1997) ("the issue is what the legislature intended when it prohibited a contract of insurance from providing for mandatory arbitration of future controversies. We do not see a meaningful distinction between appraisal and arbitration").

[70] 761 P.2d 1288 (Mont. 1988).

[71] *Garretson*, 761 P.2d 1288, 1289.

[72] Mont. Code Ann. § 28-2-708.

[73] *Garretson*, 761 P.2d 1288, 1290.

[74] *Garretson*, 761 P.2d 1288, 1290.

[75] *Garretson*, 761 P.2d 1288, 1290.

[76] *See, e.g.*, Safety Nat'l Casualty Co. v. Cinergy Corp., 829 N.E.2d 986 (Ind. Ct. App. 2005).