THE REMAINING HOSTILITY TOWARDS ARBITRATION SHIELDED BY THE MCCARRAN-FERGUSON ACT: HOW FAR SHOULD THE PROTECTION TO POLICYHOLDERS GO?

ARTICLE

MARIANA ISABEL HERNÁNDEZ-GUTIÉRREZ*

I. INTRODUCTION

STATES HAVE THE POWER TO REGULATE THE BUSINESS OF INSURANCE. UNDER the veil of their power to regulate this business, some States and Territories have prohibited pre-dispute arbitration agreements in insurance contracts. Others have limited the statutory preclusion to arbitration agreements contained in insurance contracts between a policyholder and an insurer, thus allowing pre-dispute arbitration agreements in contracts of reinsurance or in contracts between insurance companies. At the same time, there is a strong national policy favoring arbitration and, in some cases, a State public policy fa-

* L.L.M., Columbia Law School, 2010; J.D., University of Puerto Rico School of Law, 2007; B.A., University of Puerto Rico, 2004. The author wishes to thank Professor Stephen J. Ware, Professor of Law at the University of Kansas School of Law, for his insightful comments on an earlier draft of this article.

voring arbitration in evident tension with the broad anti-insurance arbitration statutes in these jurisdictions.

In this paper, I will analyze the provisions of the McCarran-Ferguson Act, the case law pertaining to the States' powers to regulate the business of insurance and the reverse-preemption rule over federal statutes that do not specifically relate to the business of insurance. With more detail, I will examine the case law and governing rules of law that are considered, and those that should be but have not been properly considered, in determining whether an anti-insurance arbitration state law does reverse-preempt the provisions of the Federal Arbitration Act under the McCarran-Ferguson Act. Furthermore, I will argue that, formally, arbitration agreements do not have the effect of transferring or spreading a policyholder's risk, which in turn considerably weakens the theory that anti-insurance arbitration state laws regulate the business of insurance.

I will examine in detail the statutes and related case law of those U.S. jurisdictions that preclude arbitration agreements in insurance policies or, more generally, in insurance contracts, as well as the policy reasons that have inspired these statutes *vis à vis* the strong national public policy favoring arbitration. In Part IV I will discuss the recent *en banc* holding of the Court of Appeals for the Fifth Circuit in *Safety Nat'l. Casualty Corp. v. Certain Underwriters at Lloyd's London*. In that case, the Fifth Circuit concluded that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards is not within the scope of the McCarran-Ferguson Act, and, thus, the anti-insurance arbitration statute of Louisiana does not reverse-preempt the Convention.

Finally, I will propose alternatives that State legislatures may adopt in order to regulate arbitration of insurance contracts, instead of precluding arbitration agreements in insurance contracts. These alternatives are driven to be more consistent with the national policy favoring arbitration as well as the parties' liberty to contract. The reason for formulating these proposals is to allow the states to protect policyholders from insurance companies' potential abuse of arbitration procedures, while at the same time leaving the door open for the benefits of arbitration.

II. THE MCCARRAN-FERGUSON ACT AND THE REVERSE-PREEMPTION OF THE FEDERAL ARBITRATION ACT

In 1925, the Federal Arbitration Act[1] ("FAA") was enacted to declare a national policy favoring arbitration and to reverse the longstanding judicial hostility to arbitration agreements that had been inherited by American courts from the English common law.[2] As a result, arbitration agreements were placed upon

---

1 9 U.S.C. § 1

2 *See* Southland Corp. v. Keating, 465 U.S. 1, 10 (1984); *See also* Allied-Bruce Terminix Co. Inc. v. Dobson, 513 U.S. 265, 270-271 (1995) ("The origins of [court's refusals to enforce agreements to arbitrate] apparently lie in 'ancient times' when the English courts fought for extension of jurisdiction-all

the same footing as other contracts.[3] With a few exceptions, the FAA applies to written arbitration agreements in any maritime transactions or contracts evidencing a transaction involving interstate or international commerce.[4] The Supreme Court has interpreted this language to cover all transactions affecting interstate or international commerce.[5]

Some debate emerged as to the preemptive nature and scope of the FAA over conflicting arbitration law of the States.[6] Although the Supreme Court has not answered the question regarding the extent on which the FAA preempts State law, it has applied the FAA to State court cases and affirmatively held that the FAA's substantive provisions preempt conflicting State law.[7] As a result, the FAA presently preempts arbitration laws if the arbitration agreement is within the scope of the FAA and the State statute either invalidates arbitration agreements or "discriminates" against arbitration agreements. By the term "discriminates", I mean that the State law in question establishes grounds for denying the enforcement of arbitration agreements that are not grounds for the revocation of any contract.[8]

---

of them being opposed to anything that would altogether deprive every one of them of jurisdiction.").

3 9 U.S.C. § 2 ("[A]n 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."); *See also* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991); American Bankers Ins. Co. v. Inman, 436 F.3d 490, 492-493 (5th Cir. 2006); STEPHEN W. WARE, PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION 26 (2nd ed. 2007).

4 9 U.S.C. §§ 1-2.

5 *See* Allied-Bruce Terminix Co. Inc. v. Dobson, 513 U.S. at 273-274; WARE, *supra* note 3, at 26.

6 *See* WARE, *supra* note 3, at 29 ("While many believe that the FAA was originally understood to be merely a *procedural* law governing only in federal courts, some evidence suggests that those who enacted the FAA intended it to be *substantive* federal law governing both in state court and thus preempts inconsistent state law.")

7 *See* WARE, *supra* note 3, at 30; Southland Corp. v. Keating, 465 U.S. at 10 ("In enacting § 2 of the federal Act, Congress declared a national 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."); Allied-Bruce Terminix Co. Inc. v. Dobson, 513 U.S. at 272-273 ("Did Congress intend the Act also to apply in state courts? Did the Federal Arbitration Act pre-empt conflicting state anti-arbitration law, or could state courts apply their anti-arbitration rules in cases before them, thereby reaching results different from those reached in otherwise similar federal diversity cases? In Southland ... this Court decided that Congress would not have wanted state and federal courts to reach different outcomes about the validity of arbitration in similar cases. The Court concluded that the Federal Arbitration Act pre-empts state law; and it held that state courts cannot apply state statutes that invalidate arbitration agreements. ... Further, Congress, both before and after Southland, has enacted legislation extending, not retracting, the scope of arbitration. . . . For these reasons, we find it inappropriate to reconsider what is by now well-established law.")

8 9 U.S.C. § 2; Preston v. Ferrer, 552 U.S. 346, 353 (2008) ("Section 2 'declare[s] a national policy favoring arbitration' of claims that parties contract to settle in that manner. ... That national policy, we held in *Southland*, 'appli[es] in state as well as federal courts' and 'foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements.' ... The FAA's displacement of

In *Allied-Bruce Terminix Co. Inc. v. Dobson*, the Supreme Court of the United States reviewed the legislative history of the FAA. The Court concluded that "Congress, when enacting this law, had the needs of consumers, as well as others, in mind", and that the advantages of arbitration would often seem helpful to individuals who need a less expensive alternative to litigation. [9] In support of this contention, the Court cited a Senate Report indicating that the Act avoided "the delay and expense of litigation" as well as a Report of the House of Representatives stating that "the advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices."[10] In addition, the Court took into account the *amicus* brief of the American Arbitration Association, which asserted that cases involving claims between ten and fifty thousand dollars have an average processing time of less than six months.[11] In subsequent years, the Supreme Court has repeatedly acknowledged that "[a] prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results'."[12]

Some scholars have questioned the certainty of these statements favoring arbitration by highlighting the abuses that can stem from arbitration procedures, particularly in cases between consumers and individuals against insurance companies and other wealthy corporations.[13] Among other things, opponents of the arbitration of customer claims have argued that arbitration can entail higher costs (due to filing and arbitrators' fees) than litigation; arbitrators are often biased in favor of companies that are frequent users of the arbitration procedures; discovery is limited in arbitration procedures to the discretion of the arbitrator; arbitration awards must be confirmed or recognized by a court in order to be enforceable; and that arbitration awards are usually final even when the arbitrator ignored the applicable law. [14] While some of these criticisms are more me-

---

conflicting state law is 'now well-established,'... and has been repeatedly reaffirmed,") (citations omitted); Southland Corp. v. Keating, 465 U.S. at 15-16; WARE, *supra* note 3, at 37.

9 *See* Allied-Bruce Terminix Co. Inc. v. Dobson, 513 U.S. at 280.

10 *Id*.

11 *Id*.

12 Preston v. Ferrer, 552 U.S. at 357.

13 *See* Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631 (2005); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33 (1997).

14 *See* Sternlight, *supra* note 12, at 1648-1653; Schwartz, *supra* note 12, at 39-53; Susan Randall, *Mandatory Arbitration in Insurance Disputes: Inverse Preemption of the Federal Arbitration Act*, 11 CONN. INS. L. J. 253, 257-262 (2005); Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 IND. L.J. 591, 595-596 (2001).

ritorious than others, some of these arguments can also easily be raised, and have been raised, against court procedures as well.[15]

As mentioned above, like almost every other federal law, the FAA preempts conflicting State law.[16] However, the McCarran-Ferguson Act, enacted by Congress in 1945,[17] provides an important exception to this rule in cases where a State law that is directed to regulate the business of insurance conflicts with a federal statute that is not specifically related to the business of insurance, like the FAA.[18] The McCarran-Ferguson Act empowers State statutes regulating the business of insurance with a reverse-preemption effect over conflicting federal statutes that, in contrast to a State statute, do not specifically relate to the business of insurance.

With the enactment of the McCarran-Ferguson Act, Congress declared "that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."[19] Accordingly, the McCarran-Ferguson Act provides that "[t]he 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".[20] Thus, in order to avoid the federal preemption rule from eroding the States' power to regulate the business of insurance, the Act further adds 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

---

15 *See, e.g.*, Jeffrey Stempel, *Chief William's Ghost: The Problematic Persistence of the Duty to Sit*, 57 BUFF. L. REV. 813 (2009); John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505 (2000); Virginia E. Hench, *Mandatory Disclosure and Equal Access to Justice: The 1993 Federal Discovery Rules Amendments and the Just, Speedy and Inexpensive Determination of Every Action*, 67 TEMP. L. REV. 179 (1994); Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1 (1992); John C. Reitz, *Why We Probably Cannot Adopt the German Advantage in Civil Procedure*, 75 IOWA L. REV. 987 (1990).

16 *See supra* note 6; Altria Group, Inc. v. Good, 555 U.S. ___ (2008), 129 S.Ct. 538, 543; Sprietsma v. Mercury Marine, a Div. of Brunswick Corp., 537 U.S. 51, 64-65 (2002) ("We have recognized that a federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively . . . or when state law is in actual conflict with federal law. We have found implied conflict pre-emption where it is 'impossible for a private party to comply with both state and federal requirements' . . . or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'.") (citations omitted).

17 The McCarran-Ferguson Act was enacted as a response to the Supreme Court opinion in *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944). In *South-Eastern*, the Supreme Court reversed the doctrine stating that issuing an insurance policy is not a transaction of commerce, and held that "an insurance company that conducted a substantial part of its business across state lines was engaged in interstate commerce and thereby subject to [Congressional authority under the commerce clause]." *See* United States v. Fabe, 508 U.S. 491, 499 (1993).

18 *See* Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41, 50 (1987).

19 15 U.S.C. § 1011

20 15 U.S.C. § 1012(a).

of insurance... unless such Act specifically relates to the business of insurance".[21] Therefore, through Section 1012 of the McCarran-Ferguson Act, Congress relinquished some of its powers to State legislatures by allowing State laws regulating the business of insurance to reverse-preempt an otherwise applicable federal statute.

In sum, under the McCarran-Ferguson Act, a State law reverse-preempts a federal law when (1) the federal statute does not specifically relate to the "business of insurance"; (2) the State law was enacted specifically for the purpose of regulating the "business of insurance"; and (3) the federal statute operates to invalidate, impair or supersede the State law.[22] In this regard, the Supreme Court has clarified that the McCarran-Ferguson Act *does not* make State legislation supreme in regulating *all* the activities of insurance companies. Rather, the language of the McCarran-Ferguson Act refers *only* to laws "regulating the business of insurance."[23] Therefore, "insurance companies may do many things which are subject to paramount federal regulation".[24]

In defining the scope of the McCarran-Ferguson Act's reverse-preemption rule, the Supreme Court has stated three factors that must be considered in the task of determining whether a State law "regulates the business of insurance". Even though none of these criteria are conclusive by themselves, they are meant to provide a guideline to assist courts in answering the question whether a particular State law does or does not regulate the "business of insurance".[25] These three factors are (1) whether the practice regulated in the law has the effect of transferring or spreading the policyholder's risk; (2) whether the practice is an integral part of the policy relationship between the insurer and the insured; and (3) whether the practice is limited to entities within the insurance industry.[26]

In cases where the question of whether an arbitration state law reverse-preempts the FAA pursuant to the McCarran-Ferguson Act is posed, the analysis of whether the statute in question regulates the business of insurance requires detailed thinking about some theoretical issues. Specifically, the effect that arbitration clauses may have in transferring or spreading policyholders' risks constitutes a rather big hurdle in this analysis. The Supreme Court explained in *Group Life & Health Ins. Co. v. Royal Drug Co*. that—

> the primary elements of an insurance contract are the spreading and underwriting of a policyholder's risk. 'It is characteristic of insurance that a number of risks

---

21 15 U.S.C. § 1012(b).

22 *See* American Bankers Ins. Co. v. Inman, 436 F.3d at 493; *Standard Sec. Life Ins. Co. of New York v. West*, 267 F. 3d 821, 824 (8th Cir. 2001).

23 SEC v. National Securities, Inc., 393 U.S. 453, 459-460 (1969).

24 *Id*.

25 *See* Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982); American Bankers Ins. Co. v. Inman, 436 F.3d at 493.

26 *Id*.

> are accepted, some of which involve losses, and that such losses are spread over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it.'"[27]

In this quest, it is important to keep in mind the distinction between the obligations of insurance companies under their insurance policies (*i.e.* insuring against the risk that policyholders will be unable to pay for particular losses or damages) and those arrangements made by insurance companies with the only purpose of minimizing the costs incurred in fulfilling their underwriting obligations.[28] The latter play no part in the "spreading and underwriting of a policyholder's risk".[29]

Some courts have concluded that State laws precluding arbitration clauses in insurance contracts have the effect of transferring or spreading the policyholder's risk by subjecting insurance disputes to the possibility of a jury trial.[30] While this is a reasonable argument from the prudential perspective that refers to the fact that juries tend to dislike insurance companies and powerful corporations in general,[31] there are some legal principles that considerably undermine the merits of such conclusion and that must be explored.

In *Standard Sec. Life Ins. Co. of New York v. West* the Eighth Circuit held that a Missouri statute declaring arbitration provisions in insurance contracts unenforceable[32] transfers or spreads the policyholder's risk.[33] The Eighth Circuit based

---

27 Group Life & Health Ins. Co. v. Royal Drug Co. , 440 U.S. 205, 211 (1979).

28 *See Id*. at 213; Union Labor Life Ins. Co. v. Pireno, 458 U.S. at 130.

29 Union Labor Life Ins. Co. v. Pireno, 458 U.S. at 130.

30 *See* Standard Sec. Life Ins. Co. of New York v. West, 267 F. 3d at 824; Mutual Reinsurance Bureau v. Great Plains Mut. Ins. Co., 969 F.2d 931 (10th Cir. 1992); McKnight v. Chicago Title Ins. Co., 358 F.3d 854, 858 (11th Cir. 2004); Cox v. Woodmen of World Ins. Co., 556 S.E.2d 397, 401-401 (2001) (The arbitration exception "sets forth the method for resolving disputes between the insured and the insurer. Through the exception, the legislature placed limits on the enforceability of an agreement to spread risk.")

31 *See* Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 431 (1994) ("If anything, the rise of large, interstate and multinational corporations has aggravated the problem of arbitrary awards and potentially biased juries."); Stephen Pate, *Representing Carriers in a Negative Environment*, Aspatore, (February 2010), 2010 WL 561456, *1 ("[Y]et many judges, juries, and mediators seem to dislike insurance companies so much that they are willing to overlook any misdeeds on the part of policyholders."); Hon. Kimberly A. Moore, *Populism and Patents*, 82 N.Y.U. L. REV. 69, 70 (2007) ("The perception that American juries are biased in favor of individuals and prejudiced against corporations is widespread. As one commentator noted, 'A common belief is that jurors are so prone to favor individual plaintiffs over corporate defendants that they pick the 'deep pockets' of rich business corporations and deliver extremely high awards that are not merited by the company's actions or the plaintiff's injuries.' Anecdotal accounts often bear great weight in the formation of these impressions. Whether jury populism is perceived as anticorporate prejudice, a preference for the underdog, or a desire to redistribute wealth, there is no doubt that the prevailing wisdom among commentators is that juries are prejudiced against the large corporate entity and biased in favor of the small, often injured, individual.")

32 MO. REV. STAT. § 435.350.

33 Standard Sec. Life Ins. Co. of New York v. West, 267 F.3d 821 (8th Cir. 2001).

this holding in its reading of *United States v. Fabe*,[34] in which the Supreme Court observed "that without the performance or enforcement of contract terms, no risk transfer occurs".[35] However, the Eighth Circuit did not consider that the Supreme Court made those statements in the context of explaining the holdings in *Union Labor Life Ins. Co. v. Pireno* and *Royale Drug*.[36] In *Fabe*, the Supreme Court explained that—

> the statement in *Pireno* that the "transfer of risk from insured to insurer is effected by means of the contract between the parties ... and ... is complete at the time that the contract is entered", presumes that the insurance contract in fact will be enforced. Without *performance of the terms of the insurance policy*, there is no risk transfer at all. Moreover, *performance of an insurance contract* also satisfies the remaining prongs of the Pireno test: It is central to the policy relationship between insurer and insured and is confined entirely to entities within the insurance industry.[37] [(Emphasis provided.)]

Before proceeding, I must make clear the fact that I am not questioning the fact that regulations governing the *performance of insurance contracts* fall within the category of "regulating the business of insurance", nor that the performance of an insurance contract is central to the relationship between the insurer and the insured. Neither am I questioning whether an arbitration agreement in an insurance contract may be considered an integral part of the relationship between the insurer and the insured,[38] nor that under some statutes the preclusion of arbitration clauses is limited to entities within the insurance industry. What I am questioning is the reasoning in *West*, *Mutual Reinsurance Bureau* and other state and federal cases that have held that arbitration clauses are catalytic agents in the transferring and spreading of risk. My questioning is based on statements and case law of the Supreme Court regarding the nature and effect of arbitration clauses, the analysis of what is risk transferring for the purpose of determining

---

34 United States v. Fabe, 508 U.S. 491 (1992). The Court of Appeals also considered the opinion of the Tenth Circuit in *Mutual Reinsurance Bureau v. Great Plains Mut. Ins. Co.*, 969 F.2d 931 at 933 (concluding that a Kansas statute providing that arbitration agreements in a contract of insurance are unenforceable regulates the business of insurance because it is a statute "aimed at protecting [and regulating] the relationship between the insurance company and the policyholder 'directly or indirectly'").

35 Standard v. West, 267 F.3d at 824.

36 Previously, in the *Fabe* opinion, the Supreme Court indicated in relation to *Pireno* that the peer review practice that advised the insurance company in evaluating policyholder's claims "had nothing to do with whether the insurance contract was performed; it dealt only with calculating what fell within the scope of the contract's coverage" and that the peer review process "is a matter of indifference to the policyholder, whose only concern is *whether* his claim is paid, not *why* it is paid." Fabe, 508 U.S. at 503.

37 *Id*. at 503-504.

38 *See* SEC v. National Securities, Inc., 393 U.S. at 460.

whether a state law regulates the business of insurance, and the relationship between an arbitration agreement and the container contract.

Looking at arbitration agreements contained in insurance policies as vehicles to transfer or spread risk operates, by analogy, in tension with the well-known doctrine of separability. Under the separability doctrine, arbitration clauses are considered as a separate contract from the contract in which they are contained, or in this case, the insurance policy.[39] Therefore, because the separability doctrine treats an arbitration agreement as a different and separate contract from the container contract, then the performance of the arbitration clause is or should be a separate obligation and its enforceability is or should be a separate matter from the performance and enforceability of the insurance contract. Theoretically, the enforcement or performance of an arbitration agreement cannot have any effect on the transferring or spreading of the risk under the insurance contract, since the enforceability and performance of the terms of the insurance policy suppose certain rights and obligations distinct from the enforceability and performance of an arbitration agreement.

The Fifth Circuit has raised similar concerns and has questioned whether a State statute that prohibits arbitration agreements in insurance contracts regulates the business of insurance. Specifically, in *Safety Nat'l.* the Fifth Circuit said that "[a]n argument could be made that, at least in theory, resolving claims in an arbitration rather than in a court or potentially before a jury does not substantially affect the risk pooling arrangement between the insurer and the insured."[40] In support of this interpretation, the Fifth Circuit cited Supreme Court case law holding that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral . . . forum."[41] Moreover, considering the procedural nature of arbitration and the procedural differences between arbitration and court proceedings, arbitration agreements could be easily characterized as one of those arrangements made by insurance companies with the purpose of minimizing the costs incurred in fulfilling their underwriting obligations. As the Supreme Court clarified in *Pireno*, these arrangements play no part in the "spreading and underwriting of the policyholder's risk"; the dispute resolution procedure takes place after the risk has been transferred by means of the policy.[42]

---

39 *See* Prima Paint v. Flood & Conklin, 388 U.S. 395 (1967); Buckley v. Cardegna, 546 U.S. 440 (2006); West, *supra* note 3, at 49; TIBOR VÁRADY ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE 144-159 (4th ed. 2009).

40 Safety Nat'l. Casualty Corp. v. Certain Underwriters at Lloyd's, London, 587 F.3d at 720-721, n. 21.

41 *Id.*; *See also* Preston v. Ferrer, 552 U.S. at 359; Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985); cf. Int'l Ins. Co. v. Duryee, 93 F.3d 837, 839-840 (6th Cir. 1996).

42 *See* Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. at 213; Union Labor Life Ins. Co. v. Pireno, 458 U.S. at 130.

Even though the "risk transferring" factor does not by itself exclude a statute precluding arbitration clauses in insurance contracts from the category of "regulating the business of insurance", it is debatable whether the enforcement of an arbitration clause in an insurance contract has the effect of spreading or transferring a policyholder's risk. Furthermore, it is questionable whether the rationale of the Supreme Court in *Pireno* as to "risk transferring" and the performance of the insurance policy was meant to include the performance of an arbitration agreement contained in an insurance policy.[43] In view of the Supreme Court's statements stressing the procedural nature of arbitration procedures, the effects of the separability doctrine, and with regards to risk transferring, I assert that it does not.

In addition, the possibility of a civil jury trial cannot be used to justify the preclusion against arbitration as a regulation of the "business of insurance" in a jurisdiction such as Puerto Rico, where there is no right to a civil jury trial.[44] The argument also has a limited application in Louisiana, where the right to a civil jury trial is limited to those cases where the amount in controversy exceeds fifty thousand dollars.[45] As I will further discuss, Puerto Rico and Louisiana are both jurisdictions where arbitration clauses are prohibited without exception in insurance contracts.

Generally, the other two elements of the "regulating business of insurance" test have not constituted hurdles to courts finding for the reverse-preemption effect of State laws precluding arbitration clauses in insurance contracts. Presently, the consensus among courts is that such preclusions are regulations of the business of insurance because these are regulations of the dispute resolution procedure between the parties to an insurance contract that have a substantial

---

43 *See* Triton Lines, Inc. v. Steamship Mut. Underwriting Ass'n (Bermuda) Ltd., 707 F. Supp. 277, 279 (S.D. Tex. 1989) ("A disputed claim is not the business of insurance. The business of regulating the insurance industry focuses on the underwriting and spreading of the policyholder's risk . . . . [S]tate regulation of a practice of an insurance company does not mean that the practice is the 'business of insurance'." [citing Royal Drug.] "The McCarran Act has never been held to have abrogated federal procedural practices in federal court cases. The anti-arbitration provision of the Texas Insurance Code, therefore, is countermanded by the Federal Arbitration Act." [citing Life of America Ins. Co. v. Aetna Life Ins. Co., 744 F.2d 409 (5th Cir.1984)]); Smith v. PacifiCare Behavioral Health of California, Inc., 93 Cal.App.4th 139, 156-157 (2001).

44 García Mercado v. Tribunal Superior, 99 D.P.R. 293, 304 (1970) ("por no existir en Puerto Rico juicios por jurado en los casos civiles, por ser eso extraño a nuestra tradición jurídica civil, por no proveer nuestras leyes ni nuestras Reglas de Procedimiento para eso, y por disponer nuestra legislación para la celebración de los juicios civiles ante tribunal de derecho, sin jurado...") (Translation provided by the author: "because in Puerto Rico there are no jury trials in civil cases, because that institution is foreign to our Civil Law legal tradition, because our laws and Civil Procedure Rules do not provide for civil jury trials, and because our legislation provides for civil trials before a bench trial.")

45 *See* LSA-C.C.P. Art. 1732.

effect on the insurer-insured relationship.[46] This issue should be thoroughly reexamined, particularly considering the principles of the separability doctrine and the expressions of the Supreme Court to the effect that an arbitration clause is a kind of forum-selection clause which does not affect substantive rights afforded by a statute or other substantive law.[47]

III. STATES AND TERRITORIES PRECLUDING OR LIMITING THE ENFORCEMENT OF ARBITRATION CLAUSES IN INSURANCE DISPUTES

In the United States there are several jurisdictions that preclude arbitration clauses in insurance contracts. A minority of these States and Territories forbid arbitration clauses in insurance contracts "across the board", while the majority either preclude arbitration clauses in some insurance contracts or limit the enforceability of arbitration agreements by imposing conditions of validity.[48] Because of the multiplicity of statutes and jurisdictions involved, in this paper I will concentrate my analysis on those jurisdictions that have statutes broadly prohibiting the enforceability of arbitration agreements in insurance contracts.

It is important to highlight that in the anti-insurance arbitration statutes of Louisiana and Puerto Rico, as well as in the majority of other statutes precluding arbitration agreements in certain insurance contracts, the scope of the preclusion is limited to pre-dispute agreements to arbitrate contained in insurance policies.[49] Although it is rather unusual for parties to enter into an arbitration agreement after a dispute has emerged,[50] *generally*, the language used in these statutes does not seem to forbid post-dispute arbitration agreements between the insurer and the insured.

---

46 *See, e.g.,* McKnight v. Chicago Title Ins. Co., 358 F.3d at 858-859; Mut. Reinsurance Bureau v. Great Plains Mut. Ins. Co., 969 F.2d at 933; Standard Sec. Life Ins. Co. of New York v. West, 267 F. 3d at 823; Love v. Money Tree, Inc., 279 Ga. 476, 479-480 (2005).

47 *See* Safety Nat'l. Casualty Corp. v. Certain Underwriters at Lloyd's, London, 587 F. 3d at 721 n.21; Preston v. Ferrer, 552 U.S. at 359; Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. at 628; Little v. Allstate Ins. Co., 167 Vt. 171, 174 (1997).

48 *See* Randall, *supra* note 11, at 270-276; WARE, *supra* note 3, at 36; Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration as a Dispute Resolution Process*, 77 NEB. L. REV. 397, 439, n. 280 (1998); Joseph T. Mclaughlin, *Arbitrability: Current Trends in the United States*, 59 ALB. L. REV. 905, 924-925, n. 170 and 171 (1996). Because for the purpose of this paper I am concentrating on those state statutes that prohibit arbitration clauses in insurance contracts, I will not discuss the Alabama statute providing that agreements to submit a controversy to arbitration are unenforceable in that state. *See* ALA. CODE 1975 § 8-1-41. The FAA preempts this Alabama statute even in insurance disputes because its anti-arbitration rule is not limited to insurance contracts (*i.e.* it was not enacted for the purpose of regulating the business of insurance), but to all arbitration agreements. *See* ALA .CODE 1975 § 27-14-22, Note 4; Mclaughlin, *supra*, at 924.

49 *See, e.g.,* Federated Rural Elec. Ins. Co. v. Nationwide Mut. Ins. Co., 874 F. Supp. 1204, 1208 (D. Kan. 1995).

50 WARE, *supra* note 3, at 20.

If post-dispute arbitration agreements are valid and enforceable in these jurisdictions—like the language used in most anti-insurance arbitration statutes suggests—the argument in support of preclusion cannot stand for the proposition that insurance disputes are nonarbitrable as a matter of public policy.[51] In other words, because the language used in most of these statutes seems to preclude only those arbitration agreements contained in insurance policies and not post-dispute arbitration agreements between insurer and insured, the concern that moves these anti-insurance arbitration statutes is not insurance law as a subject matter. The common concern is rather about adhesion contracts with arbitration clauses entered into because of necessity; or more specifically, about policyholders without bargaining power being "ousted" from courts and "forced" to arbitrate.[52] The nature of the concern can be perceived more clearly in those jurisdictions that have chosen to preclude arbitration agreements in insurance contracts with the exception of those arbitration agreements contained in reinsurance contracts or contracts between insurance companies.

Other courts have said that the preclusion is motivated by an effort to protect the rights of the insured to redress their claims in court.[53] Until now, the only reason why these jurisdictions have been able to guarantee the rights of the insured—as opposed to other citizens—to redress their claims in court, in spite of waivers in pre-dispute arbitration agreements and in spite of the FAA, is the rationale that these anti-insurance arbitration statutes regulate the business of insurance and supersede the FAA through the reverse-preemption rule provided in the McCarran-Ferguson Act. In addition to the deficiencies of this reasoning discussed above, from the standpoint of the strong national public policy favor-

---

51 VÁRADY, *supra* note 34, at 99 ("Arbitrability also has a narrower meaning, referring to whether mandatory law in a given jurisdiction disallows arbitration disputes dealing with particular subject matter because that subject matter is infused with high-order public policy concerns".); Lozano v. AT & T Wireless Services, Inc., 504 F.3d 718, 726-727 (2007) ("Accordingly, we conclude that, even considering the important public policy concerns associated with [Federal Communications Act] claims, these claims are arbitrable absent evidence of congressional intent to the contrary.")

52 *See, e.g.,* Buck Run Baptist Church, Inc. v. Cumberland Sur. Ins. Co., Inc., 983 S.W.2d 501, 504 (Ky. 1998) ("There is a significant difference between types of insurance contracts contemplated by KRS 417.050 as exempt from arbitration and the typical construction contract. In the case of the ordinary insurance contract between a policyholder and an insurance company, *it can readily be understood why the legislature exempted future disputes from being subjected to compulsory arbitration because such contracts are contracts of adhesion to which the insured parties have limited bargaining power*. However, a contractual relationship which involves a commercial construction project, such as we have here, involves a negotiated voluntary agreement between relatively sophisticated commercial entities and a surety company, each of which undertakes a significant financial obligation.") (emphasis added).

53 *See, e.g.,* Friday v. Trinity Universal of Kansas, 262 Kan. 347, 350 (1997); Hobbs v. IGF Ins. Co., 834 S.O.2d 1069, 1071 (La. App. 3 Cir. 2002); 26 L.P.R.A. § 1119.

ing arbitration, these anti-insurance arbitration statutes shielded by the McCarran-Ferguson Act respond to hostility and parochial views against arbitration.[54]

A. Louisiana

Section 868 of the Louisiana Insurance Code, renumbered from LA R.S. 22:629, states in its pertinent part that:

> A. No insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state . . . shall contain any condition, stipulation or agreement:
>
> (1) Requiring it to be construed according to the laws of any other state or country except as necessary to meet the requirements of the motor vehicle financial responsibility laws of such other state or country; or
>
> (2) Depriving the courts of this state of the jurisdiction of action against the insurer.
>
> ...
>
> C. Any such condition, stipulation, or agreement in violation of this Section shall be void, but such voiding shall not affect the validity of the other provisions of the contract.

Even though it is not clear from the text of this provision that its purpose is to preclude arbitration clauses,[55] in *Doucet v. Dental Health Plans Management Corporation* the Louisiana Supreme Court interpreted it as a total prohibition of arbitration clauses in contracts of insurance under the premise that these clauses operate to deprive Louisiana courts of "the jurisdiction of action against the insurer".[56] The rationale is that arbitration clauses in contracts of insurance are prohibited as a matter of public policy because their enforcement would deny Louisiana citizens free access to its courts, a right guaranteed by the State's constitution.[57]

---

54 *See, e.g.,* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 537-538 (1995); Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991) (Several Washington residents argued that a forum selection clause contained in a cruise ticket providing for litigation in Florida should not be enforced because the expense and inconvenience of litigation in Florida would "caus[e] plaintiffs unreasonable hardship in asserting their rights," and would "lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for ... loss or injury, or the measure of damages therefore". Despite the disparate bargaining power between the parties, the Supreme Court enforced the challenged agreement.)

55 Safety Nat'l. Casualty Corp. v. Certain Underwriters at Lloyd's, London, 587 F.3d at 719.

56 412 So.2d 1383, 1384 (La. 1982); Hobbs v. IGF Ins. Co., 834 So.2d at 1071; Macaluso v. Watson, 171 So.2d 755 (La. App. 4 Cir. 1965); LA R.S. 22:868.

57 *See* Hobbs v. IGF Ins. Co., 834 So.2d at 1071; Lawrence v. Continental Ins. Co., 199 So.2d 398, 399 (La. App. 3 Cir. 1967).

The Louisiana approach against arbitration clauses in insurance contracts suffers from two notable weaknesses. The first is as to the not so plausible interpretation that the Supreme Court of Louisiana has given to Section 868 of the Insurance Code. As the Fifth Circuit suggested in *Safety Nat'l*, and as Louisiana case law demonstrates, it is not correct to say that arbitration procedures deprive courts of their jurisdiction. The fact that other jurisdictions like Hawaii,[58] Maine,[59] Virginia,[60] Massachusetts,[61] Virgin Islands,[62] and Washington[63] have identical provisions, but nonetheless allow the enforcement of arbitration clauses in insurance contracts,[64] is strong evidence against the interpretation adopted by Louisiana courts.

After an arbitrator or arbitral panel renders a final decision, judicial enforcement of the award may be needed if the losing party in the arbitration procedure does not comply voluntarily with the orders in the award.[65] In those cases, the winning party can request a court order confirming the award, which in turn converts the award into a judgment of the court.[66] If the court confirms the award, the court can enforce the award in the same manner as any other court judgment.[67]

---

58 HRS § 431:10-221.

59 24-A M.R.S.A. § 2433 ("No conditions, stipulations or agreements in a contract of insurance shall deprive the courts of this State of jurisdiction of actions against *foreign* insurers..." (emphasis added) During the course of the investigation realized for this paper, I could not find any state or federal court case interpreting this provision.)

60 VA. CODE ANN. § 38.2-312.

61 M.G.L.A. 175 § 22.

62 22 V.I.C. § 820.

63 RCWA 48.18.200, Note 11.

64 *See* Christiansen v. First Ins. Co. of Hawai`i, Ltd., 88 Haw. 136, 138 (1998) ("In the meantime, in a separate proceeding... First Insurance filed a motion to compel arbitration and for court appointment for a neutral umpire, which was subsequently granted... [A]n umpire was selected [and] the Christiansens were awarded an amount, undisclosed in the record, for the "loss" caused to their property by Hurricane Iniki."); Primoff v. Slocum, 31 Va. Cir. 179, *2 (1993), Not Reported in S.E.2d ("Primoff opposes Stewart Title's Motion to Stay and Compel Arbitration based on two arguments. Primoff contends that Stewart Title waived its right to enforce the arbitration clause since this issue was not raised earlier in this suit. Secondly, Stewart Title argues that even if the Court chooses to enforce the arbitration clause in reference to the Breach of Contract claim, the remaining five counts in Primoff's Amended Motion for Judgment are not directly based on the title insurance contract and do not present issues which are subject to arbitration."); Wilson v. Merrimack Mut. Fire Ins. Co., 66 Mass. App. Ct. 1102 (2006), 844 N.E.2d 1124 (Table), Unpublished Disposition; Ortiz v. One Beacon Ins. Co., No. 0501047L2, *4 (2006), Not Reported in N.E.2d; Brisco v. Schreiber, ____ F.Supp.2d ____ (2010), Civ. No. 06-cv-132 (decided on March 16, 2010); Keesling v. Western Fire Ins. Co. of Fort Scott, Kansas, 10 Wash. App. 841, 845 (1974).

65 WARE, *supra* note 3, at 22 and 109.

66 *Id*.

67 *Id*.

On the other hand, while as a general rule arbitration awards cannot be appealed[68] and a court cannot substitute its conclusions for those of the arbitrators,[69] under Louisiana law—just like in most jurisdictions—courts have jurisdiction to conduct a limited review of arbitration awards and can vacate a challenged award in any of the circumstances provided in LA R.S. 9:4210, or modify the award under the grounds stated in LA R.S. 9:4211.[70]

---

68 Some arbitral institutions provide for an arbitration structure with an appellate level. *See* VÁRADY, *supra* note 34, at 742. Since arbitration is a creature of contract, the parties are free to draft their agreement almost any way they like and provide for particular discovery standards and procedural rules. WARE, *supra* note 3, at 22. The parties' freedom of contract does not extend to create additional grounds for vacating the award or regimes of judicial review *under the FAA*. *See* Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008); Ernesto R. Blanes, *Normativismo y Decisionismo: El Estándar Federal para la Revisión Judicial del Arbitraje,* 76 REV. JUR. U.P.R. 357, 365-366 (2007) ("En otras palabras, en *Mattel* el Tribunal Supremo establece una norma para la revisión judicial del arbitraje, pero limita esta norma a laudos que surjan exclusivamente bajo el F.A.A. y que no presenten otro posible vehículo para su puesta en vigor.") (Translation provided by the author: "In other words, in *Mattel* the Supreme Court establishes a rule for the judicial review of arbitration awards, but limits such rule to those awards rendered under the scope of the FAA and which can only be enforced through the provisions of the FAA.")

69 Firmin v. Garber, 353 So.2d 975, 977 (La. 1977); In re Arbitration Between U.S. Turnkey Exploration, Inc. and PSI, Inc., 577 So.2d 1131, 1133-1134 (La. App. 1 Cir. 1991).

70 Many states have adopted either the Uniform Arbitration model law or the Revised Uniform Arbitration model law, both of which are similar to the FAA. WARE, *supra* note 3, at 27 and 113-124; Young v. Peaslee Capital Group, LLC, 7 So.3d 1258 (La. App. 3 Cir. 2009); 9 U.S.C. § 10. LA R.S. 9:4210 provides:

> In any of the following cases the court in and for the parish wherein the award was made shall issue an order vacating the award upon the application of any party to the arbitration.
>
> A. Where the award was procured by corruption, fraud, or undue means.
>
> B. Where there was evident partiality or corruption on the part of the arbitrators or any of them.
>
> C. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced.
>
> D. Where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> Where an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

Furthermore, LA R.S. 9:4211 provides:

> In any of the following cases the court in and for the parish wherein the award was made shall issue an order modifying or correcting the award upon the application of any party to the arbitration.
>
> A. Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

In addition, Louisiana courts can vacate an arbitration award whenever the award in question has errors regarded as a manifest disregard of the law or when "the award is so misconceived that it compels the violation of law or conduct contrary to accepted public policy."[71] That is, after the arbitration award is issued, Louisiana courts can vacate the award if the decision of the arbitrator(s) is contrary to the public policy of Louisiana or if the arbitrator(s) incurred in an error of law that is obvious and capable of being readily and instantly perceived by an average person qualified to serve as an arbitrator.[72] The "manifest disregard of the law" jurisprudential rule implies that the arbitral tribunal knew of the existence of a clearly governing legal principle but decided to ignore or pay no attention to it.[73]

Because the assistance of the courts is often needed to enforce an arbitration award, the opposing party can challenge the validity of the award before the courts. In Louisiana, courts have the power to vacate an arbitration award under several grounds stated in Louisiana law, including whenever the award is contrary to public policy or issued in manifest disregard of the law. Therefore, in spite of an arbitration clause, Louisiana courts are clearly not deprived of jurisdiction.[74] In any insurance dispute where the parties have agreed to arbitrate,

---

B. Where the arbitrators have awarded upon a matter not submitted to them unless it is a matter not affecting the merits of the decision upon the matters submitted.

C. Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order shall modify and correct the award so as to effect the intent thereof and promote justice between the parties.

71 In re Arbitration Between U.S. Turnkey Exploration, Inc. and PSI, Inc., 577 So.2d at 1134; Matter of Standard Coffee Service Co., 499 So.2d 1314, 1316 (La. App. 4 Cir. 1986).

72 *See* Robert S. Robertson, Ltd. v. State Farm Ins. Companies/State Farm Fire and Cas. Companies, 921 So.2d 1088, 1091 (La. App. 5 Cir. 2006); Welch v. A.G. Edwards & Sons, Inc., 677 So.2d 520, 524 (La. App. 4 Cir. 1996); In the Matter of Standard Coffee Service Co., 499 So.2d 1314, 1316 (La. App. 4 Cir. 1986); WARE, *supra*, note 3 at 119-120 citing Merrill Lynch v. Bobker, 808 F. 2d 930, 933 (2nd Cir. 1986).

73 *Id*. As traditionally understood, in order to meet the "manifest disregard of the law" test, the challenging party has to demonstrate that the arbitrator made an egregious error while consciously disregarding the correct law. This test is very difficult to meet. WARE, *supra* note 3, at 119-120. However, in recent years some courts have expanded the test for vacating an award due to a manifest disregard of the law, and are beginning to review arbitrator's legal rulings more closely. WARE, *supra* note 3, at 120-121 (citing Cole v. Burns International Security Services, 105 F.3d 1465 (D.C. Cir. 1997) and Halligan v. Piper Jaffray, Inc., 148 F. 3d 197 (2nd Cir. 1998)). ("The *Halligan* opinion seems to challenge the longstanding practice of arbitrators not to write reasoned opinions justifying their decisions... If arbitrators must write reasoned opinions, it seems that courts will be more likely to vacate awards on the ground that the arbitrator did not adequately apply the law"). Under this case law, the "manifest disregard of the law" doctrine appears to be limited to disregard of the law excluding disregard of facts or evidence. WARE, *supra* note 3, at 121.

74 *See* Rollings v. Thermodyne Industries, Inc., 910 P.2d 1030, 1033 (Okl. 1996) ("Although the legislature is permitted to enact legislation to facilitate speedy resolution of differences, that legislation cannot be used to deny access to court. . . . Oklahoma has adopted the Uniform Arbitration Act.

Louisiana courts will still be able to exercise their jurisdiction and review the award in the stage of the confirmation and the enforcement of the award if one of the parties to the arbitration proceeding challenges the validity of the award and requests that the award be vacated or modified by the court.

The other weakness of the Louisiana approach against arbitration agreements in insurance contracts is the public policy argument that the Louisiana Court of Appeals has offered to explain why arbitration agreements in insurance contracts are held to be void and unenforceable. As I mentioned above, the Louisiana Court of Appeals has reasoned that arbitration clauses in contracts of insurance are prohibited because if enforced, these clauses would deny Louisiana citizens of their constitutional right to have access to the State courts. Considering that there is a strong public policy favoring arbitration in Louisiana, and that contracting parties can freely waive their right of access to courts by entering into an arbitration agreement,[75] the "access to courts" argument is without merits. Under the rationale of the Louisiana Court of Appeals, all arbitration agreements that are not within the scope of the FAA would be unconstitutional, unenforceable and contrary to public policy under Louisiana law. This result has no support in Louisiana law (since Louisiana indeed has a public policy favoring arbitration and has enacted an arbitration act similar to the FAA) and is unconvincing.[76] Up to this point, the Supreme Court of Louisiana has not released an opinion explaining the holding in *Doucet* and the far-reaching interpretation given to the provisions in LA R.S. 22:868 (A)(2).

B. Puerto Rico

Similar to Louisiana's statute LA R.S. 22:868, Section 11.90 of the Insurance Code of Puerto Rico[77] provides the following in its relevant part:

> (1) No policy delivered or issued for delivery in Puerto Rico and covering a subject of insurance resident, located, or to be performed in Puerto Rico, shall contain any condition, stipulation, or agreement:
>
> (a) Depriving the insured of right of access to the courts for determination of his rights under the policy in event of dispute.

. . . The Act, in Section 802, states that the making of a written arbitration agreement confers upon the courts the jurisdiction to enforce the agreement to arbitrate any existing or future controversies. It further states the grounds which may serve as a basis to vacate the award by a reviewing court: (1) fraud, (2) bias of an arbitrator, (3) arbitrator exceeded his or her power, (4) hearing was not conducted fairly, (5) there was no arbitration agreement. *Clearly, the Uniform Arbitration Act provides for judicial review, albeit limited***.**") (emphasis added).

75 *See* National Tea Co. v. Richmond, 548 So.2d 930, 932 (La. 1989); Tubbs Rice Dryers, Inc. v. Martin, ___ So.3d ___ (La. App. 2 Cir. 2010), No. 44,800-CA, *2.

76 *See* Standard Co. of New Orleans, Inc. v. Elliott Const. Co., Inc., 363 So.2d 671, 674 (1978).

77 26 L.P.R.A. § 1119.

> (b) Depriving the courts of Puerto Rico of jurisdiction of action against the insurer.
>
> ...
>
> (2) Any condition, stipulation, or agreement in violation of this section shall be void, but such voidance shall not affect the validity of the other provisions of the policy.

In 1974, the Supreme Court of Puerto Rico had the opportunity to interpret this statute in *Berrocales v. Superior Court*.[78] In *Berrocales*, the plaintiff bought a new truck for $34,809.20. The price of the truck included an insurance policy with the American Motorists Insurance Company of Chicago. The insurance policy contained an arbitration clause.

A few months later, differences arose between Berrocales and the insurance company, which led the plaintiff to file a complaint before the court of first instance in Puerto Rico. American did not answer the complaint until ten months after it was summoned. The trial court compelled the parties to arbitrate in accordance with the arbitration clause in the policy.

The Supreme Court of Puerto Rico granted the certiorari requested by Berrocales and reversed. The Court concluded that the arbitration clause in question was in contravention to the *lex specialis* (*i.e.* Section 11.90 of the Insurance Code) and thus, void and unenforceable. The Court rejected American's argument that this case was governed by the Arbitration Law of Puerto Rico, and stressed that the parties cannot voluntarily agree to an arbitration procedure when it is contrary to the provisions of the Insurance Code.[79]

After *Berrocales*, neither the Supreme Court nor the Court of Appeals of Puerto Rico have addressed any controversy related to the enforceability of an arbitration clause contained in an insurance policy. It is important to note, however, that the holding in *Berrocales* has a stronger foundation than the Supreme Court of Louisiana's holding in *Doucet*. Although Section 11.90 seems to be very similar to Louisiana's Section 868, there is an important difference between the two that possibly makes the holding in *Berrocales* the only plausible interpretation of Section 11.90. Unlike Louisiana's Section 868, in addition to the provision stating that no policy or insurance contract shall contain a stipulation "[d]epriving the courts... of jurisdiction of action against the insurer", the Puerto Rican statute also states that no insurance policy shall contain a stipulation "[d]epriving the insured of right of access to the courts for determination of his rights under the policy in event of dispute."[80]

The same analysis above with regards to the Louisiana statute in *Doucet* can certainly be made to any interpretation concluding that arbitration agreements

---

78 Agustín Berrocales Gómez v. Tribunal Superior de P.R., 102 D.P.R. 224 (1974), 2 P.R. Offic. Trans. 281.

79 *See* Berrocales v. Superior Court, 102 D.P.R. at 227.

80 26 L.P.R.A. § 1119.

are prohibited under subparagraph (1)(b) of Section 11.90 of the Puerto Rico Insurance Code.[81] Nevertheless, the legislative intent to preclude arbitration clauses is clearly manifested in subparagraph (1)(a).[82] If an insurance policy contains an arbitration clause, as a matter of fact and of law, the insured will not have the right to present his or her case on its merits before a court in the event of a dispute.

C. Vermont

The Vermont Arbitration Act provides that written agreements to submit any existing controversy to arbitration or to submit to arbitration any controversy thereafter arising between the parties are valid, enforceable and irrevocable, except upon such grounds as exist for the revocation of a contract.[83] Further on, the Arbitration Act adds that *its provisions do not apply* to arbitration agreements contained in a contract of insurance.[84] This provision has been construed by the Supreme Court of Vermont as allowing "insurance arbitration agreements to continue to be governed by the common law" instead of by the Vermont Arbitration Act, as opposed to a prohibition against the enforcement of arbitration agreements in insurance contracts.[85]

The Supreme Court of Vermont has also held that the Vermont Arbitration Act, as well as the "common-law rule making arbitration agreements revocable up to the time of award is not a state law regulating the business of insurance."[86] The highest court of Vermont has reasoned that Section 5653 of the Vermont Arbitration Act pertains to methods of handling contractual disputes, and does not constitute a *regulation* of the business of insurance.[87] Thus, the McCarran-Ferguson reverse-preemption rule does not apply, and the FAA preempts Section 5653 of the Vermont Arbitration Act.

D. Arkansas

The Uniform Arbitration Act of Arkansas provides the following:

---

81 *See* 32 L.P.R.A. § 3201 et seq.; Municipio de Mayagüez v. Lebrón, 167 D.P.R. 713 (2006); Febus, et al. v. MARPE Const. Corp., 135 D.P.R. 206 (1994), 1994 P.R.-Eng. 909; Omega Engineering, S.E. v. Corporación Rodum, Inc., KLCE200901566.

82 26 L.P.R.A. § 1119.

83 VT. STAT. ANN. TIT. 12 § 5652.

84 VT. STAT. ANN. TIT. 12 § 5653.

85 *See* Little v. Allstate Ins. Co., 167 Vt. at 174.

86 *Id*.

87 *Id*. ("All the insurance contract exclusion from the [Vermont Arbitration Act] has done is to allow insurance arbitration agreements to continue to be governed by the common law. Thus, the VAA regulates those arbitration agreements subject to its terms. Those that are excluded are not regulated by the VAA.")

> (a) A written agreement to submit any existing controversy to arbitration arising between the parties bound by the terms of the writing is valid, enforceable, and irrevocable, save upon such grounds as exist for the revocation of any contract.
>
> (b)(1) A written provision to submit to arbitration any controversy thereafter arising between the parties bound by the terms of the writing is valid, enforceable, and irrevocable, save upon such grounds as exist for the revocation of any contract.
>
> (2) *This subsection shall have no application* to personal injury or tort matters, employer-employee disputes, *nor to any insured or beneficiary under any insurance policy* or annuity contract.[88]

Contrary to the Supreme Court of Vermont, the Supreme Court of Arkansas has interpreted the provision above as a nonarbitrability rule.[89] Moreover, according to the language in subsection (2), the scope of this nonarbitrability rule is limited to making arbitration agreements contained in insurance policies unenforceable *only* against the insured.[90] Therefore, considering that an insured party may enforce a pre-dispute mandatory arbitration agreement against the insurer, it is evident that the purpose of this statute is to benefit policyholders.

E. South Carolina

Like the Arkansas statute, the Uniform Arbitration Act of South Carolina states that its provisions are *not applicable* to "[a]ny claim arising out of personal injury, based on contract or tort, *or to any insured* or beneficiary under any insurance contract or annuity contract."[91] In *Cox v. Woodmen of World Ins. Co.*, the Court of Appeals of South Carolina indicated that this provision regarding arbitration agreements in insurance contracts is an exception to the public policy in South Carolina favoring the arbitration of disputes.[92] Following the Tenth Circuit's rationale in *Mutual Reinsurance Bureau* regarding a Kansas statute, the Court of Appeals of South Carolina determined that by enacting this exception – limited to entities within the insurance industry- in the Uniform Arbitration Act, the legislature placed limits on the enforceability of an agreement to spread risk.[93]

---

88 A.C.A. § 16-108-201.

89 *See* Cash in a Flash Check Advance of Arkansas, L.L.C. v. Spencer, 348 Ark. 459, 466-467 (2002); IGF Ins. Co. v. Hat Creek Partnership, 349 Ark. 133, 143 (2002); Matson, Inc. v. Lamb & Associates Packaging, Inc., 328 Ark. 705, 713 (1997); Terminix Intern. Co. v. Stabbs, 326 Ark. 239, 242 (1996).

90 *See* IGF Ins. Co. v. Hat Creek Partnership, 349 Ark. at 137.

91 S.C. ST. § 15-48-10 (emphasis added).

92 Cox v. Woodmen of World Ins. Co., 347 S.C. 460, 464 (2001).

93 *Id*. at 468.

Furthermore, through a construction of the decision of the Court of Appeals of South Carolina *vis à vis* the "exception" contained in S.C. ST sec. 15-48-10(b)(4), the federal District Court of South Carolina gave the statute a somewhat broader interpretation than what the statute necessarily calls for. Even though it recognized that the *Cox* court did not address the possibility of giving the statute a more constricted interpretation, in *American Health and Life Ins. Co. v. Heyward* the District Court held that Section 15-48-10(b)(4) prohibits the enforcement of arbitration clauses "across the board" in insurance policies under South Carolina law.[94]

F. Missouri

According to the Uniform Arbitration Act of Missouri, arbitration agreements are valid, enforceable and irrevocable, except for those arbitration agreements contained in contracts of insurance and contracts of adhesion.[95] The statute, however, clarifies that "reinsurance contracts are not 'contracts of insurance or contracts of adhesion' for purposes of [this provision]".[96] Therefore, under Missouri law, arbitration agreements contained in insurance contracts are not enforceable unless the container contract is a reinsurance contract.

G. Montana, Oklahoma, Kansas, Nebraska, South Dakota, Georgia, and Kentucky

The common ground between these states is that they have enacted statutes providing that *statutory rules* governing the validity and enforcement of arbitration agreements, or arbitration agreements in general, *do not apply* to insurance policies or contracts of insurance, except for contracts between insurance companies.[97] The South Dakota statute goes further and expressly declares that any

---

94 272 F. Supp. 2d 578, 582-583 (2001) (Rejecting that the exception contained in S.C. ST. § 15-48-10 only "makes inapplicable the various rights and duties imposed by the South Carolina Uniform Arbitration Act (*e.g.*, the requirement that the arbitration clause be in typed, underlined capital letters on the front page of the policy)" and holding instead that the statute in question "prohibits the enforcement of arbitration clauses in insurance policies under South Carolina law".). Apparently, neither in *Cox* nor in *American* the insurance companies proposed a construction of the South Carolina statute similar to those given to similar statutes given in Vermont or Arkansas.

95 V.A.M.S. 435.350.

96 *Id*.

97 MCA 27-5-114 ("A written agreement to submit to arbitration any controversy arising between the parties after the agreement is made is valid and enforceable except upon grounds that exist at law or in equity for the revocation of a contract. ... [T]his subsection does not apply to... any agreement concerning or relating to insurance policies or annuity contracts except for those contracts between insurance companies..."); NEB. REV. ST. § 25-2602.01; K.S.A. § 5-401; 12 OKL. STAT. ANN. § 1855; GA. CODE ANN. § 9-9-2; KRS § 417.050.

provision requiring arbitration or restricting a party or beneficiary from pursuing legal proceedings in ordinary tribunals is void and unenforceable.[98]

In Montana, the normative effect of the statute exempting arbitration agreements concerning or relating to insurance policies from the validity and enforceability provisions is uncertain. In *Garretson v. Mountain West Farm Bureau Mutual Ins. Co.*, the Supreme Court of Montana found that the insurance policies exception in MCA Section 27-5-114 made the Uniform Arbitration Act inapplicable to an auto insurance policy.[99] The court explained that prior to 1985, the general rule in Montana was that contract provisions requiring arbitration to resolve all future disputes were invalid. However, under a common law exception to this rule, the parties could validly agree to arbitrate future disputes relating solely to questions of fact, such as value or quantity.[100] Based on this common law principle, the *Garretson* court enforced an insurance policy clause under which the amount of the loss had to be set by an appraisal if either party so requested.

Ten years later, the Supreme Court of Montana revisited MCA Section 27-5-114. This time the court concluded without hesitation that under this statute arbitration agreements in "insurance policies" are invalid and unenforceable.[101] In its analysis the court did not mention exceptions to the holding. Nevertheless, this does not mean that the court overruled *Garretson* and its progeny. In this regard, it is important to note that the issue in *Young* was not the arbitration of questions of fact, such as value or quantity, but the enforceability of an arbitration provision in a title insurance policy. In addition, the court observed that "[n]either the Insurer nor the Title Company contend that Montana's statutory provision exempting insurance policies from arbitration requirements is invalid or otherwise unenforceable as a matter of law."[102]

In *Friday v. Trinity Universal of Kansas*, the Supreme Court of Kansas held that the Uniform Arbitration Act of Kansas precludes arbitration clauses in insurance contracts when it states that the rule declaring arbitration agreements as "valid, enforceable, and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract" does not apply to contracts of insur-

---

98 *See* SDCL § 21-25A-3 ("This chapter [*i.e.* Enforcement of Arbitration Agreements] does not apply to insurance policies and every provision in any such policy requiring arbitration or restricting a party thereto or beneficiary thereof from enforcing any right under it by usual legal proceedings in ordinary tribunals or limiting the time to do so is void and unenforceable. However, nothing in this chapter may be deemed to impair the enforcement of or invalidate a contractual provision for arbitration entered into between insurance companies.").

99 Garretson v. Mountain West Farm Bureau Mut. Ins. Co., 234 Mont. 103, 106 (1988). Although the statute interpreted by the court is a previous version of the actual MCA § 27-5-114, the language of the insurance policies exception was the same.

100 *Id.*; Randall v. American Fire Ins. Co., 10 Mont. 340 (1891); School District No. 1 v. Globe & Republic Ins. Co., 146 Mont. 208 (1965).

101 *See* Young v. Security Union Title Ins. Co., 292 Mont. 310, 316 (1998).

102 *Id.*

ance (except for contracts between insurance companies and reinsurance contracts).[103] Further, this court held that this statutory preclusion extends to appraisals as well as any other agreement to arbitrate a part of a controversy.[104] According to the court, the legislative intent behind the antiarbitration statute is to protect the right of insured to redress their claims in court.[105]

Arbitration agreements in insurance contracts are unenforceable and against public policy under Oklahoma common law.[106] Since the Oklahoma Uniform Arbitration Act states that its provisions do not apply to contracts that reference insurance, arbitration agreements contained in insurance contracts—except for those contracts between insurance companies—are invalid and unenforceable under Oklahoma law.[107] Thus, by express legislative approval, the Uniform Arbitration Act applies and validates arbitration agreements in contracts between insurance companies, as well as in other contracts that are within the scope of the statute.[108]

Georgia courts have also interpreted the provisions in the Georgia Arbitration Code as prohibiting arbitration agreements in contracts of insurance, except for contracts between insurance companies.[109] Different from some of the statutes previously examined, the provisions of the Georgia Arbitration Code do not leave much space for another interpretation. The statute in question provides, in its relevant part, the following:

(a) ...

---

103 262 Kan. at 349-350; K.S.A. § 5-401; Hopseker v. Coleman, No. Civ. A. 04-2409-DJW, *2 (D. Kan. 2005), Not Reported in F. Supp. 2d ("Even before the 1973 enactment of Kansas' Uniform Arbitration Act, the Kansas Supreme Court considered arbitration agreements in insurance contracts to be unenforceable. The K.S.A. 5-401(c)(1) exemption of insurance contracts merely codified the existing common law.")

104 *Id*. at 350 ("Arbitration can be for all or any part of a controversy. The parties can limit the issues to be arbitrated and can, for example, limit arbitration to the value of a loss. Actually, arbitration is a more adversarial proceeding than a normal appraisal. However, the end result is the same. A controversy is settled. . . . The legislature is presumed to know the law, and it would have been aware that an entire controversy or only one part of a controversy may be arbitrated. We see no indication that the legislature understood there to be some distinction between arbitration and appraisal, terms that appellate courts frequently use interchangeably.")

105 *Id*.

106 *See* Cannon v. Lane, 867 P.2d 1235, 1238-1239 (Okl. 1993). ("Generally, agreements to submit future controversies to arbitration are contrary to public policy."); Boughton v. Farmers Ins. Exch., 354 P.2d 1085, 1089 (Okla. 1960); Mid-Continent Cas. Co. v. General Reinsurance Corp., 331 Fed. App'x. 580 (10th Cir. 2009).

107 *See* 12 OKL. STAT. ANN. § 1855; *id*.

108 *See* Mid-Continent Cas. Co. v. General Reinsurance Corp., 331 Fed. App'x. 580 (10th Cir. 2009); Rollings v. Thermodyne Industries, Inc., 910 P.2d at 1033.

109 *See* Love v. Money Tree, Inc., 279 Ga. at 479; Continental Ins. Co. v. Equity Residential Properties Trust, 255 Ga. App. 445, 446 (2002).

> (c) This part [*i.e.* the Arbitration Code] shall apply to all disputes in which the parties thereto have agreed in writing to arbitrate and *shall provide the exclusive means by which agreements to arbitrate disputes can be enforced*, except the following, to which this part shall not apply:
>
> (1) ...
>
> (3) Any contract of insurance, as defined in paragraph (1) of Code Section 33-1-2; provided, however, that nothing in this paragraph shall impair or prohibit the enforcement of or in any way invalidate an arbitration clause or provision in a contract between insurance companies;[110]

The scope of this anti-insurance arbitration statute, however, does not extend to appraisal clauses contained in insurance policies.[111] Considering the language used in the statute, it is hard to say if post-dispute agreements to arbitrate insurance disputes are enforceable under the Georgia Arbitration Code.

Except for arbitration agreements between two or more insurers, the Kentucky statute KRS section 417.050 not only precludes arbitration agreements providing for arbitration contained in insurance contracts but *any* arbitration agreement providing for arbitration of a dispute *arising* from an insurance contract.[112] That is, through KRS section 417.050 the Kentucky legislature has expressly prohibited pre-dispute agreements providing for mandatory arbitration of disputes, as well as post-dispute agreements to arbitrate disputes arising from a contract of insurance. According to the Supreme Court of Kentucky, "the legislature exempted future disputes from being subjected to compulsory arbitration because such contracts are contracts of adhesion to which the insured parties have limited bargaining power."[113] This reasoning, however, only explains the legislative prohibition of pre-dispute mandatory arbitration agreements; but it certainly does not explain why the Kentucky legislature would want to prohibit arbitration agreements between a policyholder and an insurer to submit existing controversies to arbitration. No legitimate reason comes to mind.

---

110 GA. CODE ANN. § 9-9-2.

111 *See* McGowan v. Progressive Preferred Ins. Co., 281 Ga. 169, 172-173 (2006).

112 *See* KRS § 417.050; Buck Run Baptist Church, Inc. v. Cumberland Sur. Ins. Co., Inc., 983 S.W.2d at 502-504. KRS § 417.050 provides, in its pertinent part, the following:

> A written agreement *to submit any* existing *controversy to arbitration* or a provision in 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:
>
> (1) ...
>
> (2) Insurance contracts. Nothing in this subsection shall be deemed to invalidate or render unenforceable contractual arbitration provisions between two (2) or more insurers, including reinsurers (emphasis added).

113 Buck Run Baptist Church, Inc. v. Cumberland Sur. Ins. Co., Inc., 983 S.W.2d at 504.

IV. THE NEW YORK CONVENTION ESCAPES THE MCCARRAN-FERGUSON REVERSE-PREEMPTION RULE

Recently, in *Safety Nat'l. Casualty Corp. v. Certain Underwriters at Lloyd's, London,* the Fifth Circuit addressed *en banc* the question of whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[114] ("New York Convention") and its implementing legislation ("Convention Act")[115] is an "act of Congress" as used in section 1012 of the McCarran-Ferguson Act.[116] Section 1012, as discussed in Part II, is the provision related to the reverse-preemption effect of State statutes regulating the business of insurance over federal statutes that do not specifically relate to the business of insurance.

The Fifth Circuit held that the New York Convention is not an "Act of Congress" as used in McCarran-Ferguson, but a contract negotiated by the Executive Branch and ratified by the Senate.[117] Moreover, the Court reasoned that even if the New York Convention were a non-self executing treaty, "[t]he fact that a treaty is implemented by Congress does not mean that it ceases to be a treaty and becomes an 'Act of Congress'."[118]

Safety Nat'l. is a diversity case between two insurance companies to which Louisiana law applies. According to the facts, the Louisiana Safety Association of Timbermen-Self Insurers Fund ("LSAT") is a self-insurance fund operating in that State. Certain Underwriters at Lloyd's, London ("Underwriters") provided LSAT with excess insurance by reinsuring certain insurance claims for occupational-injury insurances. All the reinsurance contracts between the parties contained arbitration agreements. However, as I have discussed in detail, arbitration agreements contained in insurance contracts are not enforceable under Louisiana law.

Safety National Casualty Corporation ("Safety") claimed that in a loss portfolio transfer agreement, LSAT assigned Safety its rights under the reinsurance contracts with the Underwriters. After the Underwriters refused to recognize the assignment, Safety sued the Underwriters in the District Court of Louisiana. The Underwriters filed a motion to stay the proceedings and to compel arbitration, which the district court granted.

The Underwriters, Safety and LSAT commenced the arbitration proceedings, but could not agree on how to select the arbitrators. When the Underwriters sought the assistance of the court on the composition of the arbitration panel,

---

114 21 U.S.T. 2517, June 10, 1958.

115 9 U.S.C. §§ 201 *et seq*.

116 *See* 15 U.S.C. § 1012(b) ("[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").

117 *See* Safety Nat'l. Casualty Corp. v. Certain Underwriters at Lloyd's, London, 587 F.3d at 722-723.

118 *Id*.

LSAT intervened and moved to quash arbitration arguing that the arbitration agreements in the reinsurance contracts are unenforceable under Louisiana law. The district court reconsidered its initial order compelling arbitration and granted LSAT's motion to quash arbitration. It concluded that the New York Convention is an "Act of Congress" under the McCarran-Ferguson Act, and that the Louisiana statute interpreted as prohibiting arbitration agreements in insurance contracts reverse-preempted the New York Convention.

The Fifth Circuit reversed *en banc*. Since none of the parties challenged the district court's conclusion that Section 22:868 of the Louisiana Revised Statutes regulates the business of insurance within the meaning of the McCarran-Ferguson Act, the Circuit limited its inquiry to determine whether the New York Convention is an "act of Congress" under the McCarran-Ferguson Act (in which case, it would be open to reverse-preemption by the Louisiana anti-insurance arbitration statute). While LSAT conceded that the New York Convention would not be reverse-preempted by the McCarran-Ferguson Act and the Louisiana anti-insurance arbitration statute *if* the New York Convention was deemed to be a self-executing treaty, the Court concluded that the commonly understood meaning of an "Act of Congress" (as used in the McCarran Ferguson Act) does not include a treaty, even if—like the New York Convention—the treaty required implementing legislation.[119] A treaty, the Court reasoned, is not an "act of Congress" because a treaty is ratified only by the Senate and not by both legislative houses. The Court found no reason why Congress would choose to make a distinction between self-executing and non self-executing treaties in the McCarran-Ferguson Act.[120]

In its analysis, the Court examined the provisions of the FAA that deal with the NY Convention (the "Convention Act"),[121] and noticed that, among other things, the Convention Act regulates the jurisdiction of the courts. Nevertheless, the Court highlighted that "the Convention Act does not . . . operate without

---

119 587 F.3d at 723.

120 Regarding this particular issue, the Court in *Safety Nat'l.* said:

> Even if the Convention required legislation to implement some or all of its provisions in United States courts, that does not mean that Congress intended an "Act of Congress," as that phrase is used in the McCarran-Ferguson Act, to encompass a non-self-executing treaty that has been implemented by congressional legislation. Implementing legislation that does not conflict with or override a treaty does not replace or displace that treaty. A treaty remains an international agreement or contract negotiated by the Executive Branch and ratified by the Senate, not by Congress. The fact that a treaty is implemented by Congress does not mean that it ceases to be a treaty and becomes an "Act of Congress."

587 F.3d at 722-723; *See also* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 303 (2005) (arguing that federal statutes should prevail over conflicting federal treaties because "[a]fter all, treaties cut the House of Representatives out of the loop.")

121 9 U.S.C. §§ 201 *et seq*.

reference to the contents of the Convention"; it directs courts to the text of the treaty it implemented.[122] Furthermore, the Court asserted that—

> [i]t is *the Convention* under which legal agreements "fall"; it is an action or proceeding under *the Convention* that provides the court with jurisdiction; such an action or proceeding is "deemed to arise under the laws *and treaties*" of the United States, the treaty in this case being the Convention; and when chapter 1 of title 9 (the FAA) conflicts with the Convention, *the Convention* applies.[123]

I agree with the Fifth Circuit's holding and rationale in this case. From a practical standpoint, the strong national policy favoring arbitration should prevail over a broader-than-necessary Louisiana statute conflicting with such policy; the nature of the parties involved and the nature of the dispute in which arbitrability is in question make the Louisiana anti-insurance arbitration statute seem without purpose. The controlling question of law presented in *Safety Nat'l.* is a rather complicated constitutional matter, as is evidenced by the discussion engaged between the dissenting opinion and the opinion of the majority of the Circuit Court, as well as the work of legal experts in the field.[124] The issue is now pending before the consideration of the Supreme Court,[125] and is beyond the scope of this paper. Irrespective of the final result of this case, I believe it should serve as a wake-up call to the Louisiana legislature to revise and modify the scope of Section 22:868.

V. CONCLUSION

It is understandable that States would want to protect policyholders from actual and potential abuses from insurance companies. While legitimate concerns have been formulated against arbitration procedures, particularly when arbitration agreements are contained in contracts of adhesion where one of the contracting parties has little or no bargaining power against the other,[126] the preclusion of arbitration agreements in contracts of insurance is a rather extreme measure in evident tension with the strong national public policy favoring arbitration.

Instead of precluding arbitration agreements, there are less drastic alternatives that can be adopted by State legislatures that will allow the contracting parties the benefit and liberty of choosing between arbitration and litigation. At

---

122 587 F.3d at 724-725.

123 *Id.* (emphasis in the original).

124 *See* RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 712-714, (6th ed. 2009); AMAR, *supra* note 120, at 304-306.

125 *See* Safety Nat'l Casualty Corp. v. Certain Underwriters at Lloyd's, London 587 F.3d 714 (5th Cir. 2009) *petition for cert. filed sub nom.* Louisiana Safety Association of Timbermen - Self Insurers Fund v. Certain Underwriters at Lloyd's, London, et al. No. 09-945.

126 *See* Part II above.

the same time, if the parties choose arbitration, these alternatives will provide for safety measures against abuses of the arbitration procedure and against arbitrary decisions from the arbitrator or arbitral panel. State legislatures can either adopt all of the following proposals or only those deemed necessary, depending on the desired balance between governmental control and party autonomy: (1) preclude arbitration agreements in insurance contracts only when the policyholder is a natural person; (2) preclude arbitration of insurance disputes when the underlying claim does not exceed the amount of $50,000.00 (or any other reasonable amount); (3) provide that the arbitrator or arbitral panel must decide the controversy in accordance with applicable substantive law; (4) provide for the review of arbitration awards, if so requested to the court by one of the parties in the confirmation stage, consisting of a review for errors of law and clearly erroneous findings of fact, provided that courts may set aside an award if the findings of fact have no basis in the record;[127] and (5) if the policyholder results victorious, the policyholder will have the right to recover costs and arbitration fees from the insurer.

Through the adoption of some or all of these proposals, those jurisdictions that have enacted legislation and developed case law precluding arbitration agreements in insurance policies or the arbitration of disputes arising out of contracts of insurance –like Kentucky-, may explore a different avenue to effectively address their concerns. For example, requiring the arbitrators to decide the insurance controversies before them in accordance to the applicable substantive law and providing for the review of the award will allow courts to more closely supervise arbitration awards on their merits. By the same token, the parties will be able to benefit from the speedier, informal and relaxed procedures of arbitration.[128] If the parties choose to have the dispute decided by an arbitration

---

127 *Cf.* Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576, 579 ("One paragraph of the agreement provided that '[t]he United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous.'"); Krygoski Const. Co., Inc. v. U.S., 94 F.3d 1537, 1540 (Fed. Cir. 1996) ("This court reviews Court of Federal Claims decisions for errors of law and clearly erroneous findings of fact"); 3 L.P.R.A. § 2175 ("The findings of fact of the decisions of the agencies shall be upheld by the court if they are based upon substantial evidence contained in the administrative files. All aspects of conclusions of law shall be reviewable by the court."); Otero v. Toyota, 163 D.P.R. 716, 727-29 (2005).

128 *But see* Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. at 588 ("Instead of fighting the text, it makes more sense to see the three provisions, [Sections 9-11 of the FAA], as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can "rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process . . . and bring arbitration theory to grief in post-arbitration process.") While the incidental procedural effects of a broader review standard are still to be seen, the dissenting opinion by Justice Stevens, joined by Justice Kennedy, makes a fairly good point in asserting that—

panel instead of a sole arbitrator, then each party will have the benefit of appointing an arbitrator, an alternative that is not available in the court system. In addition, the parties will be able to tailor the qualifications that the appointed arbitrator(s) should have, which is another important advantage of arbitration.

Even though, for the reasons discussed in Part II the reverse-preemption effect of these anti-insurance arbitration statutes over the FAA is debatable, under the reasoning of the Tenth and Eight Circuit in *Mutual Reinsurance Bureau* and in *West*, a State statute adopting any or all of these proposals to regulate the arbitration of insurance disputes will supersede the provisions of the FAA under the McCarran-Ferguson reverse-preemption rule.

> [w]hile § 9 of the FAA imposes a 1-year limit on the time in which any party to an arbitration may apply for confirmation of an award, the statute does not require that the application be given expedited treatment. Of course, the premise of the entire statute is an assumption that the arbitration process may be more expeditious and less costly than ordinary litigation, but that is a reason for interpreting the statute liberally to favor the parties' use of arbitration. An unnecessary refusal to enforce a perfectly reasonable category of arbitration agreements defeats the primary purpose of the statute.

Id.