

# **Be Careful What You Ask For -- Where The Selection of Governing Law Could Void A Contract's Arbitration Provision**

**By: Jack Vales and Kelly Lankford<sup>1</sup>**

## **Introduction**

Most reinsurance agreements and some insurance contracts include mandatory arbitration provisions. The inclusion of such provision, however, does not guarantee the arbitration of all disputes under the contract. In fact, the state law applicable to a contract could void the arbitration provision therein. Thus, parties who seek to include arbitration provisions in contracts should give careful consideration to selecting the law that will govern the contract.

This article provides a framework by which to analyze the selection of governing law and discusses two cases where the court cast aside the contract's governing law -- along with the parties' arbitration agreement. In the first case, a dispute arising under a reinsurance participation agreement calling for arbitration under Nebraska law wound up litigated in a Virginia court. In the second, a direct insurance policy containing a mandatory arbitration provision and a California governing law provision proceeded to a litigation in a Missouri court.

## **I. Overview of the Issue**

Many states restrict, or outright prohibit arbitration provisions in insurance contracts. These prohibitions fall along a spectrum from complete bans in all insurance contracts, bans in certain insurance contracts, special disclosure or opt-out requirements, or no prohibition at all. Although many such laws exclude from their scope contracts between insurers - including reinsurance contracts - some do not. Thus, the selection of governing law could impact the ultimate enforceability of a contractual arbitration provision.

As more fully discussed below, to ensure the future enforceability of an arbitration provision, parties to a contract should consider several factors when deciding what state's law should govern the contract: (1) whether a court will honor the parties' chosen governing law; (2) whether the governing law prohibits or restricts arbitration provisions in insurance and/or reinsurance contracts; and (3) whether the Federal Arbitration Act ("FAA") preempts any such state prohibition or restriction. This analysis may require a detailed look at state court precedent on choice-of-law and preemption issues, as well as consideration of state statutes and regulatory codes regarding arbitration and insurance.

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## **II. Choosing a Governing Law: Points to Consider**

### **A. Will the Selected Law Stick?**

The best-laid plans of mice and men often go awry. Although courts give deference to the governing law selected by the parties, courts will consider alternatives when (i) the forum state has a more significant relationship to the parties and the underlying dispute, and (ii) the forum state law conflicts with the governing law on the matter at issue. It can be risky, therefore, to select a governing law that lacks a strong nexus to the parties or the subject matter of the underlying contract. In such situations, the court may override the parties' contractual agreement and apply the law of the forum state.

In *Sturgeon v. Allied Professionals Insurance Co.*,<sup>2</sup> for example, the Missouri Court of Appeals compelled an insurer to litigate a direct coverage dispute in a Missouri court, even though the insurance contract provided for mandatory arbitration, and even though the contract's governing law (California) did not prohibit arbitration provisions in insurance contracts.<sup>3</sup> The court nonetheless declined to compel arbitration because the court determined that Missouri had the most significant relationship to the parties and the dispute, and because the law of Missouri forbid the inclusion of arbitration provisions in insurance contracts.

### **B. Does the Selected Law Support the Arbitration Provision?**

#### **1. Does the selected state's law speak to arbitration provisions in insurance contracts?**

At the outset, parties should consider whether the desired state law prohibits or restricts arbitration provisions in insurance contracts. The two most common sources for these prohibitions are: (i) state statutes or regulations generally governing arbitration, and (ii) state insurance or reinsurance regulations.

At least fifteen (15) states maintain an outright prohibition, rather than a restriction, on arbitration in insurance contracts.<sup>4</sup> Although many of these states carve out exceptions

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<sup>2</sup> 344 S.W.3d 205 (Mo. Ct. App. 2011).

<sup>3</sup> *Id.*

<sup>4</sup> These states include: Arkansas, ACA 16-108-201; Georgia, Ga. Code Ann. § 33-1-1(2); Hawai'i, Haw. Rev. Stat. Ann. § 431:10-221(a)(2); Iowa (ban applies only to contracts of adhesion), Iowa Code Ann. § 679A.1(2)(a); Louisiana, LA Rev. Stat. § 22:651; Maryland (ban applies only to consumer policies), Md. Code Ann., Cts. & Jud. Proc. § 3-206.1; Massachusetts, Mass. Gen. Laws Ann. Ch. 20a; Missouri, V.A.M.S. § 435.350 (exempts reinsurance contracts); Montana (exempts contracts between insurance companies), Mont. Code Ann. §27-5-114(2)(c); Nebraska, Neb. Rev. Stat. § 25-2602.01(f)(4) (exempts contracts between insurance companies and reinsurance); Oklahoma (exempts contracts between insurance companies) Okla. Stat. Ann. Tit. 12 § 1855; Puerto Rico r 98 § III.F; South Carolina, S.C. Code Ann. § 15-48-10(b)(4); South Dakota (exempts contracts between insurance companies), S.D. Codified Laws § 21-25A-3; Va. Code Ann. § 38.2-300; 312(2); Vermont, Vt. Stat. Ann. Tit. 12 § 5653(a); and Wash. Rev. Code Ann. § 48.18.200(1)(b).

for contracts between insurers, including reinsurance contracts,<sup>5</sup> others, such as Washington and South Carolina, do not clearly except reinsurance contracts.<sup>6</sup> Additionally, a smaller subset of states maintain a limited prohibition on arbitration in certain types of insurance contracts -- generally consumer policies. For example, the law of Mississippi prohibits arbitration provisions in automobile policies,<sup>7</sup> the law of Rhode Island prohibits arbitration provisions in life insurance policies,<sup>8</sup> the law of Illinois prohibits arbitration in health care services contracts,<sup>9</sup> and the law of Pennsylvania prohibits arbitration of statutory bad faith claims.<sup>10</sup>

As an alternative to outright prohibition, some states maintain disclosure or “opt-out” requirements. For example, the law of California requires disclosure of arbitration provisions in health care service plans in “clear and understandable language.”<sup>11</sup> The law of Tennessee requires insureds to sign or initial arbitration clauses in specific policies.<sup>12</sup> And the law of Utah requires specific disclosure, and further mandates access to small claims courts despite arbitration provisions.<sup>13</sup>

As of March 2019, it appears twenty-three (23) states have no statutory or regulatory prohibition or restriction on arbitration addressing insurance contracts.<sup>14</sup> However, it is worth noting that these regulations change. For example, the New York legislature is currently considering a bill banning mandatory arbitration clauses in insurance contracts

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<sup>5</sup> See, e.g., Georgia, Ga. Code Ann. § 9-9-2(c)(3); Kentucky, Ky. Rev. Stat. Ann. § 417.050(2); Louisiana, La Rev. Stat. § 22:651, Maryland (ban applies only to consumer policies), Md. Code Ann., Cts. & Jud. Proc. § 3-206.1; Iowa (ban applies only to contracts of adhesion), Iowa Code Ann. § 679A.1(2)(a); Massachusetts, Mass. Gen. Laws Ann. Ch. 20a; Missouri, V.A.M.S. § 435.350 (exempts reinsurers); Montana (exempts contracts between insurance companies), Mont. Code Ann. §27-5-114(2)(c); Nebraska, Neb. Rev. Stat. § 25-2602.01(f)(4); Oklahoma (exempts contracts between insurance companies) Okla. Stat. Ann. Tit. 12 § 1855; Puerto Rico r 98 § III.F; South Dakota (exempts contracts between insurance companies), S.D. Codified Laws § 21-25A-3; Va. Code Ann. § 38.2-300; 312(2).

<sup>6</sup> See Wash. Rev. Code Ann. § 48.18.200(1)(b); and S.C. Code Ann. § 15-48-10(b)(4). See also Mo. Ann. Stat. § 435.350.

<sup>7</sup> See Miss. Code Ann. § 83-11-109. See also W. Va. Code Ann. § 33-6-31(g) (voiding arbitration in uninsured and underinsured motorist policies); Wyo. Admin. Code Ins. Ch. 23, § 7 (voiding arbitration provisions in uninsured motorist coverage unless provision is contained in a separate written agreement).

<sup>8</sup> R.I. Gen. Laws Ann. § 27-4-13.

<sup>9</sup> 710 Ill. Comp. Stat. Ann. 15/3.

<sup>10</sup> *Nealy v. State Farm*, 695 A.2d 790 (Pa. Super. 1997) (requiring bad faith insurance claims under 42 Pa. C.S.A. § 8371 to be determined by court) *Shaddock v. Christopher J. Kaclik, Inc.*, 713 A.2d 635, 639 (Pa. Super. Ct. 1998) (distinguishing *Nealy*); *Central Res. Life v. Marelllo*, 200 WL 1474106 (E.D. Pa., Oct. 4, 2000) (holding arbitrator could decide issues of bad faith).

<sup>11</sup> Cal. Health & Safety Code § 1363.1; see also Cal. Ins. Code § 10123.19.

<sup>12</sup> Tenn. Code Ann. § 29-5-302.

<sup>13</sup> Utah Admin. Code r. R590-122.

<sup>14</sup> These states include: Alabama, Alaska, Colorado, Connecticut, Delaware, Florida, Idaho, Indiana, Kansas, Maine, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Texas, Wisconsin. See *State Laws Regulating Arbitration in Insurance Contracts*, [www.naic.org](http://www.naic.org). See also *Hoelt v. Rain & Hail, LLC*, No. CIV. 01-581-AS, 2001 WL 34039497, at \*3 (D. Or. Oct. 31, 2001) (finding mandatory arbitration in insurance contract violates state constitution).

with consumers.<sup>15</sup> Meanwhile, other states, like Kansas and Texas, repealed prior prohibitions on arbitration.<sup>16</sup>

## 2. Does the prohibition/restriction apply to reinsurance contracts?

Even in those states that prohibit the inclusion of arbitration provisions in insurance contracts, the prohibition may not apply to reinsurance agreements. Georgia, for example, broadly defines insurance,<sup>17</sup> but retains an explicit carve-out for contracts between insurance companies.<sup>18</sup> Similarly, states including Massachusetts, Maryland, Nebraska and Virginia carve out reinsurance agreements from the ambit of insurance contract arbitration bars.<sup>19</sup>

Other states are silent regarding reinsurance contracts. For example, South Carolina simply excludes “any insured or beneficiary under any insurance policy or annuity contract” from its general enforcement of arbitration provisions.<sup>20</sup> Similarly, Washington’s regulatory code prohibits any insurance policy from “depriving the courts of this state of the jurisdiction of actions against the insurer.”<sup>21</sup>

## 3. *Minnieland*: The Fourth Circuit declines to enforce an arbitration provision in a Reinsurance Participation Agreement

In a January 2019 decision, *Minnieland Private Day School School Inc. v. Applied Underwriters Captive Risk Assur. Co.*,<sup>22</sup> the United States Court of Appeals for the Fourth Circuit declined to enforce an arbitration provision contained in a Reinsurance Participation Agreement (“RPA”) executed in connection with Minnieland’s purchase of workers’ compensation insurance. In reaching this decision, the court concluded that the

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<sup>15</sup> Senate Bill S7924. The proposed Senate language states: “[a] mandatory arbitration agreement within or part of any written contract for insurance with a consumer or other written agreement involving the offering of insurance to a consumer is invalid, unenforceable and void. Any such arbitration agreement shall be considered severable, and all other provisions of the contract for insurance shall remain in effect and given full force.”

<sup>16</sup> Kansas, for example, initially prohibited arbitration provisions in direct insurance contracts, but carved out reinsurance contracts. However in 2018 it repealed the prohibition entirely. Kan. Stat. Ann. § 5-401 (2018 West). Similarly, in 1995, Texas amended its version of the Uniform Arbitration Act, including its prior exclusion of insurance contracts and coverage disputes from arbitration. TX CIV PRAC & REM s 171.001 et seq.

<sup>17</sup> Ga. Code Ann. § 33-1-1(2).

<sup>18</sup> *Id.* § 9-9-2(c)(3).

<sup>19</sup> See, e.g., Kentucky, Ky. Rev. Stat. Ann. § 417.050(2); Louisiana, LA Rev. Stat. § 22:651, Maryland (ban applies only to consumer policies), Md. Code Ann., Cts. & Jud. Proc. § 3-206.1; Iowa (ban applies only to contracts of adhesion), Iowa Code Ann. § 679A.1(2)(a); Massachusetts, Mass. Gen. Laws Ann. Ch. 20A; Missouri, V.A.M.S. § 435.350; Montana, Mont. Code Ann. §27-5-114(2)(c); Oklahoma Okla. Stat. Ann. Tit. 12 § 1855; Puerto Rico r 98 § III.F; South Dakota, S.D. Codified Laws § 21-25A-3; Virginia, Va. Code Ann. § 38.2-300; 312(2).

<sup>20</sup> S.C. Code Ann. S 15-48-10(b)(4).

<sup>21</sup> Wash. Rev. Code Ann. S 48.18.200(1)(b).

<sup>22</sup> 913 F.3d 409 (4th Cir. 2019).

RPA constituted an “insurance” contract for purposes of Virginia’s regulatory prohibition on arbitration clauses in insurance contracts--notwithstanding an exclusion in the regulation for reinsurance contracts.<sup>23</sup>

The RPA existed as part of a sophisticated workers’ compensation program. Under the program, Minnieland purchased guaranteed cost workers’ compensation insurance through Applied Underwriters, Inc. In connection with this transaction, Minnieland agreed to enter into a Reinsurance Participation Agreement with Applied Underwriters Captive Risk Assurance Company, Inc. (“AUCRA”), which reinsured the workers’ compensation insurance. Through the RPA, Minnieland paid into a segregated cell or account used to fund AUCRA’s liabilities, thereby enabling Minnieland to participate in the reinsurance of its own workers’ compensation insurance policies. This arrangement aligned Minnieland’s interests with Applied Underwriters, insofar as it permitted Minnieland to benefit if its workers’ compensation claims experience remained low during the term of the RPA. The RPA contained an arbitration provision and a governing law provision calling for the application of Nebraska law.

After a dispute arose regarding premium amounts, Minnieland filed suit in Virginia.<sup>24</sup> AUCRA, in turn, filed an arbitration demand and moved to compel arbitration. Minnieland countered that the RPA was an insurance contract, rendering the arbitration provision void under Virginia Code § 38.2-312. The court’s determination of whether the RPA was an insurance contract was pivotal because although Virginia voids arbitration contracts in insurance contracts, it permits them in reinsurance contracts.<sup>25</sup> The district court held that the RPA constituted an insurance contract, thus rendering the arbitration provision void. AUCRA appealed.

On appeal, the Fourth Circuit engaged in a detailed analysis of the program as a whole, and concluded that the RPA and the associated Request to Bind Coverages and Services were integrated contracts comprising one transaction. The court then looked to the Virginia regulatory code’s definition of insurance to conclude the transaction constituted an insurance contract. Upon reaching that conclusion, the court found the arbitration clause unenforceable, and thus declined to compel arbitration.

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<sup>23</sup> *Id.*

<sup>24</sup> Although the RPA called for exclusive jurisdiction in Nebraska, as well as the application of Nebraska law, the issue of whether it was an insurance contract was resolved under Virginia law. 913 F.3d at 414 n.4. Neither party argued the point, perhaps because Nebraska law is similar. See Neb. Rev. Stat. § 25-2602.01(f)(4) (prohibiting arbitration provisions in “any agreement concerning or relating to an insurance policy other than a contract between insurance companies **including a reinsurance contract.**”) (emphasis added).

<sup>25</sup> See Virginia Code § 38.2-300 (stating the chapter containing the prohibition does not apply to contracts of reinsurance).

Other courts faced with an RPA and related documents have also similarly concluded that the transactions involve insurance contracts.<sup>26</sup> Although each court evaluated the RPA under different laws and for different purposes, “the general consensus has consistently been that the RPA is subject to insurance regulations.”<sup>27</sup>

Accordingly, parties to a RPA should not assume that courts will enforce arbitration provisions contained therein. To the extent the dispute arises in a state -- or under the governing law of a state -- that prohibits the inclusion of arbitration provisions in insurance contracts, a court could very well decline to compel arbitration, even if the state also exempts reinsurance contracts from such prohibitions.

### **C. Does the FAA Preempt the State Prohibition?**

The FAA strongly favors arbitration and the enforcement of arbitration clauses in contracts involved in interstate commerce. The FAA pre-empts conflicting state laws that prohibit outright the arbitration of a particular type of claim.<sup>28</sup> Thus, at first blush, one would expect the FAA to invalidate many of the state statutes and regulations discussed above. However, that is not the end of the inquiry.

The determination of whether the FAA preempts the state prohibition turns on whether the prohibition is part of the state’s regulation of the business of insurance. Congress enacted the McCarron Ferguson Act (“MFA”)<sup>29</sup> to limit federal preemption of states’ ability to regulate insurance. The MFA states in relevant part:

[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.<sup>30</sup>

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<sup>26</sup> 913 F.3d at 422-23 (citing *Nat'l Convention Servs., LLC v. Applied Underwriters Captive Risk Assur. Co., Inc.*, 239 F.Supp.3d 761, 768 (S.D.N.Y. 2017) (observing that the RPA and guaranteed cost policies “plausibly serve the common purpose of providing workers' compensation insurance at rates that are affected by loss experience”); *Nielsen Contracting, Inc. v. Applied Underwriters, Inc.*, 22 Cal. App. 5th 1096, 1116-17, 232 Cal. Rptr. 3d 282 (Cal. Ct. App. 2018) (determining that the RPA's provisions were meant to replace those of the insurance policies and that the Applied Underwriters affiliated entities were “so enmeshed” and “intertwined” that the RPA and insurance policies should be considered together); *Citizens of Humanity, LLC v. Applied Underwriters Captive Risk Assurance Co., Inc.*, 299 Neb. 545, 909 N.W.2d 614, 632 (Neb.) (stating that “the RPA has the hallmarks of a retrospective rating plan” and concluding that the RPA is an “agreement concerning or relating to an insurance policy” under Nebraska law), *cert. denied*, 139 S. Ct. 274, 202 L. Ed. 2d 135 (2018).

<sup>27</sup> *Id.*

<sup>28</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 341 (2011) (quoting *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 480 U.S. 1, 24 (1983)).

<sup>29</sup> 15 U.S.C. § 1012.

<sup>30</sup> 15 U.S.C. § 1012(b).

A 2011 case from Missouri, *Sturgeon v. Allied Professionals Insurance Co.*, breaks the MFA analysis down into three clear steps: (1) whether the federal statute (in this case the FAA) 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 FAA would invalidate, supersede or impair the state law.<sup>31</sup>

The category of laws enacted “for the purpose of regulating the business of insurance” is broad and encompasses laws “that possess the ‘end, intention, or aim’ of adjusting, managing, or controlling the business of insurance.”<sup>32</sup> Statutes focusing on the relationship between the insurer and insured regulate the business of insurance.<sup>33</sup> “The three criteria relevant in determining whether a regulated practice properly involves the relationship between the insurer and insured include whether: (1) the practice has the effect of transferring or spreading a policyholder's risk; (2) the practice is an integral part of the policy relationship between the insurer and the insured; and (3) the practice is limited to entities within the insurance industry.”<sup>34</sup> None of these criteria is dispositive.

The majority of cases directly addressing the implication of the MFA in a conflict between a state anti-arbitration provision *expressly relating to insurance* and the FAA found the MFA applies.<sup>35</sup> Examples include:

- ***Stephens v. American International Insurance Co.***: finding the Kentucky Liquidation Act is not preempted by the FAA because it is a state statute enacted “for the purpose of regulating the business of insurance” and is “designed to protect policyholders” under the McCarran-Ferguson Act.<sup>36</sup>
- ***McKnight v. Chicago Title Insurance Co.***: holding that “[b]ased on these definitions of laws regulating the business of insurance, we conclude, like the only other two federal courts of appeals to address this question have concluded, that a provision in a state's arbitration code excepting insurance contracts is a law regulating the business of insurance.”<sup>37</sup>

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<sup>31</sup> 344 S.W.3d 205, 213 (Mo. Ct. App. 2011) (citing *U.S. Dep't of Treas. v. Fabe*, 508 U.S. 491 (1993); *Std. Sec. Life Ins. Co. v. West*, 127 F. Supp. 2d 1064, 1067 (W.D. Mo. 2000), *aff'd sub nom.*

<sup>32</sup> *United States Treasury Dept. v. Fabe*, 508 U.S. 491, 505, 113 S.Ct. 2202, 2210, 124 L.Ed.2d 449 (1993) (quoting Black's Law Dictionary 1236, 1286 (6th ed.1990)).

<sup>33</sup> *Id.* at 501, 113 S.Ct. at 2208.

<sup>34</sup> *Munich Am. Reinsurance Co. v. Crawford*, 141 F.3d 585, 590–91 (5th Cir. 1998) (citing *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129, 102 S.Ct. 3002, 3009, 73 L.Ed.2d 647 (1982)).

<sup>35</sup> See e.g. *Cont'l Ins. Co. v. Equity Residential Props. Tr.*, 255 Ga.App.445, 448 (2002); *but see Triton Lines, Inc. v. Steamship Mut. Underwriting Ass'n (Bermuda) Ltd.*, 707 F.Supp. 277, 279 (S.D. Tex. 1989) (holding “[a] disputed claim is not the business of insurance”); see also *Nat'l Home Ins. Co. v. King*, 291 F.Supp.2d 518, 529 (E.D. Ky. 2003); *Scott v. Louisville Bedding Co.*, 404 S.W.3d 870, 878-80 (Ky. Ct. App. 2013) (adopting the holding).

<sup>36</sup> 66 F.3d 41 (2d Cir. 1995).

<sup>37</sup> 358 F.3d 854, 858 (11th Cir. 2004).

- ***American Bankers Insurance Co. of Fla. v. Inman***: holding that Mississippi statute prohibiting mandatory arbitration of disputes stemming from uninsured and underinsured motorist coverage provisions of personal automobile insurance policies reverse preempts Federal Arbitration Act.<sup>38</sup>
- ***Cox v. Woodmen of the World Insurance Co.***: finding a South Carolina statute barring arbitration in an insurance contract is “an integral part of the policy relationship between the insurer and the insured” because it places limits on the enforceability of an agreement to spread risk.<sup>39</sup>
- ***State, Department of Transportation v. James River Ins. Co.***: finding reverse-preemption under the MFA because “RCW 48.18.200(1)(b) is not merely a forum selection provision as James River maintains, but rather a provision prohibiting binding arbitration agreements in insurance contracts.”<sup>40</sup>
- ***Sturgeon v. Allied Professionals Insurance Co.***: finding Missouri’s anti-arbitration statute to be regulating the business of insurance under McCarran-Ferguson because it involves the operation of insurance contracts and may have a substantive outcome on the dispute.<sup>41</sup>

A minority of state courts reject the application of MFA in this circumstances. The reasoning varies, including an interpretation of the statute as a reversion to common law,<sup>42</sup> findings that certain claims or activities do not involve the business of insurance,<sup>43</sup> and an interpretation that a statute invalidating an arbitration provision did not strictly regulate the business of insurance.<sup>44</sup> Although many of these cases are outliers and do

<sup>38</sup> 436 F.3d 490, 494 (5th Cir. 2006).

<sup>39</sup> 347 S.C. 460, 556 S.E.2d 397, 399–402 (2001).

<sup>40</sup> 176 Wash. 2d 390, 402, 292 P.3d 118, 124 (2013); *accord Tech. Sec. Integration, Inc. v. Phil. Indem. Ins. Co.*, No. 3:14-CV-01895-SB, 2015 WL 4603893, at \*12 (D. Or. July 30, 2015) (adopting the holding), *aff’d*, 710 F. App’x 753 (9th Cir. 2018).

<sup>41</sup> 344 S.W.3d at 213–14.

<sup>42</sup> *See, e.g., Little v. Allstate Ins. Co.*, 167 Vt. 171, 174 (1997) (finding the state arbitration act’s exclusion of insurance coverage disputes meant the validity of agreements to arbitrate coverages disputes were determined by common law).

<sup>43</sup> Some states narrowly construe the term “business of insurance” to exclude certain activities. *See, e.g., Triton Lines, Inc.*, 707 F.Supp. at 279 (holding “[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. State regulation of a practice of an insurance company does not mean that the practice is the ‘business of insurance’.”) For example, courts in Oklahoma and Montana found the “business of insurance” for purposes of McCarran-Ferguson usually involves the regulation of insurer-insured relationships and did not encompass suits against insurance agencies or brokers. *See Bixler v. Next Fin. Grp., Inc.*, 858 F.Supp.2d 1138, 1146-47 (D. Mont. 2012); *Towe Hester & Erwin, Inc. v. Kansas City Fire & Marine Insur. Col.*, 947 P.2d 594, 598-99 (Ok. Ct. App. 1997).

<sup>44</sup> *See, e.g., Fosler v. Midwest Care Ctr. II, Inc.*, 398 Ill. App.3d 563, 580 (2009), *as modified on denial of reh’g* (Mar. 1, 2010) (finding “Section 9(c) of the Health Care Arbitration Act does not purport to regulate the arbitration of plaintiff’s admission agreement; section 9(c) would invalidate it.”).



not carry weight beyond their jurisdictions,<sup>45</sup> it is important to be aware of state precedent when selecting a governing law.

### **III: Putting It All Together: *Sturgeon v. Allied Professionals Insurance Co.***

The 2011 *Sturgeon*<sup>46</sup> case referenced above provides an excellent step-by-step illustration of the analysis outlined above. In *Sturgeon*, Allied Professionals Insurance Co. (“Allied”) issued a professional liability policy to Mary Sturgeon, a massage therapist located in Missouri. The policy contained a choice of law provision calling for the application of California law as well as a mandatory arbitration provision.

Sturgeon was sued after her massage table collapsed, causing injury to her client. Allied denied Sturgeon’s coverage claim, and she sued Allied for coverage in Missouri state court. Allied moved to compel arbitration. The trial court denied that motion on the grounds that Missouri law prohibits mandatory arbitration clauses in insurance contracts. Allied appealed. On appeal, the Missouri Court of Appeals affirmed.

The appellate court began its analysis by comparing Missouri law and public policy with California law and public policy. In applying this analysis, the court concluded that California law would permit enforcement of the arbitration clause, whereas Missouri public policy and the Missouri Arbitration Act would not support enforcement.<sup>47</sup> After identifying a substantive conflict, the court next considered what law to apply, even though the contract provided for California law. Adopting the “most significant relationship” test, the court concluded that Missouri law governed.

The court then considered whether the FAA preempted Missouri law’s prohibition on arbitration provisions in insurance contracts. Utilizing the three-step analysis outlined above, the court found that the Missouri prohibition regulated the business of insurance, therefore preventing federal preemption pursuant to the MFA. Thus, an insurance policy calling for arbitration under California law ended up litigated in a Missouri court.

### **Conclusion**

As the above cases illustrate, merely deciding to include an arbitration provision in an insurance or reinsurance contract does not guarantee that a dispute arising under the contract will end up in arbitration. Many states contain outright bans on the arbitration of disputes under insurance contracts. Depending upon the particular state’s law or regulation, this bar could also potentially extend to a reinsurance contract or reinsurance

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<sup>45</sup> See, e.g., *Speece, D.C. v. Allied Profs. Insur. Co.*, 289 Neb. 75 (Neb. 2014) (disagreeing in part with the holding in *Sturgeon* regarding Liability Risk Retention Act preemption); *Wadsworth v. Allied Profs. Ins. Co.*, 748 F.3d 100, 109 (2d Cir. 2014) (same); see also *Scott v. Louisville Bedding Co.*, 404 S.W.3d 870, 879 (Ky. Ct. App. 2013) (rejecting *Triton Lines*, finding the analysis “so superficial as to unpersuasive.”).

<sup>46</sup> 344 S.W.3d 205 (Mo. Ct. App. 2011).

<sup>47</sup> *Id.* at 210.

participation agreement. Thus, parties would be well advised to thoughtfully consider the selection of governing law provisions. Indeed, if the wrong state's law is selected, the governing law chosen could void the arbitration provision contained in the very same contract.

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