# RECENT DEVELOPMENTS

# *Safety National Casualty Corp. v. Certain Underwriters at Lloyd's London*, 587 F.3d 714 (5th Cir. 2010)

## I. INTRODUCTION

The United States Court of Appeals for the Fifth Circuit ruled on November 19, 2009 that the McCarran-Ferguson Act does not allow a state law to reverse preempt a foreign treaty or its implementing legislation. The court decided that state laws regarding arbitration were superseded by the treaty, a treaty that was not considered an Act of Congress as described by the McCarran-Ferguson Act.

## II. FACTS AND PROCEDURAL HISTORY

### A. *Facts*

The Louisiana Safety Association of Timbermen-Self Insurers Fund, colloquially referred to as "LSAT," is a workers' compensation self-insurance fund.[1] The LSAT provided insurance for members' occupational injuries.[2] As some compensation claims exceeded the self-insurance that LSAT provides, the LSAT contracted with Certain Underwriters at Lloyd's for excess insurance coverage.[3] The LSAT reinsured claims included an arbitration provision.[4] LSAT additionally assigned its rights under the reinsurance agreement with Certain Underwriters at Lloyd's with Safety National through a loss portfolio transfer.[5] Certain Underwriters contested LSAT's assignment of rights to Safety National, claiming that the reinsurance obligations were "strictly personal and therefore non-assignable."[6]

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[1] Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's London, 587 F.3d 714, 717 (5th Cir. 2009) (rehearing en banc).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.* In its decision, however, the Fifth Circuit did not decide upon the issue of the assignment of rights.

## B. *Procedural History*

Safety National sued Certain Underwriters in the District Court for the Middle District of Louisiana, and Certain Underwriters moved to stay proceedings and compel arbitration as per the contract between Certain Underwriters and LSAT.[7] Once in arbitration, the parties could not agree on the methodology of selecting an arbitrator. As such, Certain Underwriters petitioned the district court to lift the stay, join LSAT as a party, and compel arbitration regarding the composition of the arbitration panel.[8] LSAT responded that arbitration should be quashed because arbitration agreements were unenforceable under Louisiana law.[9]

The district court granted LSAT's motion to quash arbitration.[10] The district court concluded that a Louisiana statute[11] prohibiting arbitration agreements controlled and reversely preempted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[12] (New York Convention) because the McCarran-Ferguson Act[13] allowed reverse preemption.[14] The district court certified that its ruling involved a question of law with substantially differing opinions and recommended immediate appeal under the statute.[15] The Fifth Circuit granted the appeal and concluded that the McCarran-Ferguson Act did not provide the Louisiana statute the power to reverse preempt the New York Convention.[16] The panel opinion was vacated upon the granting of a rehearing en banc.[17]

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[7] Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's London, 587 F.3d 714, 717–18 (5th Cir. 2009).

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] LA. REV. STAT. ANN. § 22:868 (previously LA.REV.STAT. ANN. § 22:629).

[12] Convention on the Recgonition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2157, 330 U.N.T.S. 3.

[13] 15 U.S.C. § 1012(b) (2006).

[14] Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's London, 587 F.3d 714, 717–18 (5th Cir. 2009).

[15] *Id.* at 718; *see* 28 U.S.C. § 1292(b) (2009) (stating that when a district judge decides that their order involves a "controlling question of law as to which there is substantial ground for different of opinion," the Court of Appeals of the circuit that would ordinarily decide other interlocutory appeals has discretionary jurisdiction regarding appeals from the district court's order).

[16] *Safety Nat'l Cas. Corp.*, 543 F.3d at 752.

[17] *Id.* at 718.

## III. THE FIFTH CIRCUIT'S EN BANC HOLDING AND REASONING

The full bench of the Fifth Circuit, in an opinion by Judge Priscilla Owen, identified three issues in its opinion: (1) whether the New York Convention was an "Act of Congress" because it fell within the language of the McCarran-Ferguson Act; (2) whether the McCarran-Ferguson Act applied to international commercial transactions; and (3) whether the New York Convention superseded the McCarran-Ferguson Act even when the Act applies to international transactions.[18]

### A. *Texts of the Treaties and Acts*

The Court determined that the text of the statutes and treaties would control the result, and their interaction would resolve the reverse preemption issue[19] and whether the Mccarran-Ferguson Act considered an international treaty in its reverse preemption language.[20] Moreover, Supreme Court precedent that analyzed the interaction of statutes and treaties and interpreted their meaning always started with the text.[21]

#### 1. *The Louisiana Statute*

The Louisiana statute at issue stated that:

> A. No insurance contract delivered or issued for delivery in this state. . . . shall contain any condition, stipulation, or agreement:
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> (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
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> (2) Depriving the courts of this state of the jurisdiction of action against the insurer
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> . . . .

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[18] *Id.* The court never reached the latter two issues, ruling that after the McCarran-Ferguson Act did not allow reverse preemption, the latter points were moot.

[19] *Id.*

[20] *Id.* at 718–19.

[21] Medellin v. Texas, 552 U.S. 491, 128 S. Ct. 1346, 1356–58 (2008) (holding that similar to the process of interpreting the text of a statute, the interpretation of a treaty begins with its text).

> 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.[22]

The Fifth Circuit noted it was not clear the statute prohibited and voided arbitration agreements; however, previous Louisiana court decisions found the statute acted to hold arbitration agreements unenforceable.[23] The Louisiana statute, when interpreted to make arbitration agreements void and unenforceable, conflicts with the New York Convention.[24]

### 2. *The International Convention*

The New York Convention is an agreement adopted by diplomatic conference and prepared by the United Nations on June 10, 1958.[25] The New York Convention requires that contracting nations enforce arbitration agreements in actions covered under the Convention and recognize arbitration awards from other states.[26] The New York Convention states that courts "shall" require arbitration when an international arbitration agreement exists, subject to "certain agreements not at issue" in the case before the Fifth Circuit.[27]

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[22] LA. REV. STAT. ANN. § 22:868 (section (b) contains a provision prohibiting limitations on actions against insurers).

[23] Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's London, 587 F.3d 714, 719 (5th Cir. 2009) (citing McDermott Int'l, Inc. v. Lloyds Underwriters of London, 120 F.3d 583, 586 (5th Cir. 1997); Doucet v. Dental Health Plans Mgmt. Corp., 412 So.2d 1383, 1384 (La. 1982). *See accord* W. Eng. Ship Owners Mut. Ins. Ass'n (Luxembourg) v. Am. Marine Corp., 981 F.2d 749, 750 n.5 (5th Cir. 1993) ("Louisiana has prohibited arbitration clauses in insurance policies") (citing LA.REV.STAT. ANN. § 22:868; *Doucet*, 412 So.2d at 1384).

[24] *Safety Nat'l Cas. Corp.*, 587 F.3d at 719

[25] Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II(1), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

[26] *Id.* at art. II(3). The agreement requires that:

> the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

*Id.*

[27] *Safety Nat'l Cas. Corp.*, 587 F.3d at 719.

The New York Convention is reinforced in the United States by the Convention Act, which provides that the New York Convention will be enforced in the United States, as proscribed by the Convention.[28] The Convention Act was passed by Congress and signed by the President on July 31, 1970.[29] The Convention Act also establishes relevant definitions, federal court jurisdiction, and venue.[30] Judge Owen, writing for the majority, noted that the disputing parties agreed that the New York Convention requires arbitration in direct contravention with the Louisiana statute.[31]

### 3. *The McCarren-Ferguson Act*

The McCarran-Ferguson Act, the final actor in this statutory interpretation ballet, passed March 9, 1945.[32] The Act provides, among other things, that:

> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.[33]

The McCarran-Ferguson Act provides the basis for states to reverse preempt federal laws. Understanding the basis for reverse preemption first requires a necessary sidestep and explanation of preemption doctrine.

## B. *Preemption and Reverse Preemption*

### 1. *Preemption Doctrine Generally*

Preemption is not a new doctrine, and is the concept that a federal law can unseat state laws, regulations, or administrative rules.[34] Preemption arises from the Constitution: the Supremacy Clause states that "the Laws of

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[28] *See* 9 U.S.C. § 201 (2006).

[29] *Id.*

[30] Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's London, 587 F.3d 714, 719 (5th Cir. 2009).

[31] *Id.*

[32] 15 U.S.C. § 1011–15 (2006).

[33] 15 U.S.C. § 1011 (2006).

[34] BLACK'S LAW DICTIONARY 1297 (9th ed. 2009).

the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[35] Preemption occurs in two manners: express or implied. Express preemption occurs when a federal statute directly states Congress' intent to preempt state laws.[36] Implied preemption arises when a court infers federal intent to preempt state laws.[37] Implied preemption has two forms, but essentially happens when a pervasive, federal regulation, dominant federal interest;[38] or when state law stands as an impossible "obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[39]

The Federal Arbitration Act (FAA),[40] although lacking an express preemption clause,[41] nevertheless expresses congressional intent to "overcome courts' refusals to enforce agreements to arbitrate."[42] The Supreme Court has regularly held the FAA applies to state courts, preempting state statutes that invalidate arbitration agreements.[43] In *Southland Corp. v. Keating*, the Supreme Court held that the FAA preempted

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[35] U.S. CONST. art. VI, cl. 2.

[36] English v. Gen. Elec. Co., 496 U.S. 72, 78–79 (1990); *see also* ERISA § 514(a), 29 U.S.C. § 1144(a) (1994) (an example of express preemption). The ERISA statute proscribes that "[ERISA] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. " *Id.* Note that Congress could override the Federal Arbitration Act and decide that pre-dispute arbitration agreements are unenforceable. *See* Drahozal, *infra* note 39, at 393 n.5.

[37] *See* Gibbons v. Ogden, 22 U.S. 1 (1824) (holding that any state law that conflicts with a federal law is preempted); *see also* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (holding that conflict arises when state law creates an obstacle to achieving Congress' objectives). For a review of the preemption doctrine, see generally California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987).

[38] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[39] Hines v. Davidowitz, 312 U.S. 52, 67 (1941); *see also* Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 397 (2004) (noting that *Hines* is traditionally considered as one of the standard cases for obstacle preemption, the case itself involved field preemption).

[40] 9 U.S.C. § 1–16 (2006) (Chapter 1 of the FAA); 9 U.S.C. § 201–08, 301–07 (2006) (applying the FAA to international arbitration).

[41] *See* Drahozal, *supra* note 39, at 397 n.29 (citing Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 299 (2000)) (arguing that there is little difference between § 2 of the FAA and an express preemption provision).

[42] Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 270 (1995).

[43] *See, e.g.*, First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 947 (1995); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985); Southland Corp. v. Keating, 465 U.S. 1, 16 (1984).

a California anti-waiver provision when that provision was applied in an attempt to void arbitration clauses.[44] The California Supreme Court previously ruled that a claim arising under the California Franchise Investment Law—created to protect franchisees from unfair practices by franchisors—was not subject to arbitration because the arbitration clause was an invalid provision.[45] The Supreme Court reversed the ruling, identifying a broad national policy favoring arbitration and that the FAA preempted the state statute.[46] The Supreme Court concluded that "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."[47]

### 2. *Reverse Preemption Doctrine*

Reverse preemption is more difficult to define and far more rare. One commentator, attempting to define reverse preemption, wrote that implied reverse preemption occurs when courts can infer congressional retreat from earlier instances of implied preemption.[48] In a previous reverse preemption case, the Fifth Circuit held that FAA ordinarily permits a party to compel arbitration through the courts when the other parties ignore or neglect arbitration agreements.[49] Judge Stewart, writing for the majority, stated that some federal laws create exceptions where state laws can control, and in the specific instance before the Fifth Circuit, the federal law provided that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance. . . . unless such Act specifically relates to the business of insurance."[50] Therefore, a state statute could reverse preempt federal laws if the state statute was in the business of insurance, which included examining whether "(1) the federal statute does not specifically relate to the 'business of insurance;' (2) the state law was enacted for the 'purpose of regulating the business of insurance;' and (3) the federal statute operates to 'invalidate,

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[44] *Southland*, 465 U.S. at 16.

[45] Keating v. Superior Court, 645 P.2d 1192, 1198, 1203–04 (Cal. 1982).

[46] *Southland*, 465 U.S. at 10.

[47] *Id.* at 16.

[48] *See* Anita Bernstein, *Implied Reverse Preemption*, 74 BROOK. L. REV. 669, 673–74 (2009).

[49] Am. Bankers Ins. Co. of Florida v. Inman, 436 F.3d 490, 493 (5th Cir. 2006) (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991)).

[50] Am. Bankers Ins. Co. of Florida v. Inman, 436 F.3d 490, 493 (5th Cir. 2006) (quoting 15 U.S.C. § 1012(b)).

impair, or supercede [sic]' the state law."[51] The Court analyzed the state statute, determined it regulated the business of insurance, related to the business of insurance, and therefore the state statute reverse preempted the FAA.[52]

### 3. *Reverse Preemption in* Safety National

In *Safety National*, the Fifth Circuit's analysis would proceed similarly to its previous reverse preemption cases, except that the New York Convention confused the interpretation. The McCarran-Ferguson Act allows a state statute to reverse preempt, if such statute "relates to the business of insurance."[53] The McCarran-Ferguson Act only allowed Congress to eliminate the possibility of reverse preemption through an explicit Act of Congress.[54] The Fifth Circuit noted that neither the New York Convention, nor the implementing Convention Act is specifically related to the business of insurance;[55] however, the Louisiana statute, regulating reinsurance agreements between insurers, operated within the meaning of the McCarran-Ferguson Act.[56] Therefore, as Judge Owen noted, if the New York Convention is a self-executing treaty, it was not an Act of Congress.[57] However, if the New York Convention required congressional action to validate, then the Convention would not be self-executing (a "non-self-executing" treaty) and would be an Act of Congress as within the McCarran-Ferguson Act.[58]

Determining whether the New York Convention was self-executing, the Fifth Circuit looked to the Supreme Court's decision in *Medellin v. Texas*, where the Court examined the "Vienna Convention on Consular Relations and the Optional Protocol Concerning the Compulsory Settlement of

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[51] *Am. Bankers*, 436 F.3d at 493 (citing Munich Am. Reinsurance Co. v. Crawford, 141 F.3d 585, 590 (5th Cir. 1998)).

[52] *Id.* at 493–94 (citing Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982).

[53] 15 U.S.C. § 1012(b).

[54] Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's London, 587 F.3d 714, 721 (5th Cir. 2009).

[55] *Safety Nat'l Cas. Corp.*, 587 F.3d at 720.

[56] *Id.*

[57] *Id.*

[58] *Id.*

Disputes to the Vienna Convention."[59] In *Medellin*, the Court noted that disputes arising out of the Vienna Convention and the Optional Protocol "shall" be under the jurisdiction of the International Court of Justice and "may" accordingly be brought to the International Court of Justice.[60] The Supreme Court decided that treaties have different binding effect than domestic law and do not alone function as binding federal law.[61] The Court held that a treaty was self-executing when it is equivalent to an act of the legislature and operates without the aid of the legislature.[62] Conversely, a treaty was not self-executing when the treaty stipulations required legislative action before it could be enforced in the United States.[63] In summary, the Supreme Court decided that treaties are international commitments, but the provisions of the treaty do not become domestic law unless Congress either enacts statutes enforcing the treaty or the international commitment itself is self-executing and ratified as self-executing.[64]

Considering the Supreme Court's guidance in *Medellin*, the Fifth Circuit noted that the New York Convention expressly required domestic courts to enforce arbitration awards as per an international arbitration agreement, using mandatory "shall" language.[65] However, Judge Owen also noted that *Medellin* dicta explicitly stated New York Convention provisions regarding enforcing international arbitration tribunal judgments were not self-executing.[66] However, Judge Owen reasoned that a "treaty remains an international agreement or contract negotiated by the Executive Branch and ratified by the Senate, not by Congress."[67] The Fifth Circuit stated that

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[59] *Id.* at 721 (citing Medellin v. Texas, 552 U.S. 491 (2008); *see also* Vienna Convention on Consular Relations and Optional Protocol on Disputes, Dec. 24, 1969, 21 U.S.T. 77 (Vienna Conventions); 21 U.S.T. 325 (Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77; Optional Protocol Concerning the Compulsory Settlement of Disputes, April 24, 1963, 21 U.S.T. 325)

[60] *Medellin*, 552 U.S. at 499.

[61] *Id.* at 503–04.

[62] *Id.* at 504–05 (citing United States v. Percheman, 32 U.S. 51 (1833)) (holding that a treaty is "equivalent to an act of the legislature" when such treaty "operates of itself without the aid of any legislative provision.").

[63] *Id.* (citing Whitney v. Robertson, 124 U.S. 190 (1888)) ("stipulations are not self-executing [when] they can only be enforced pursuant to legislation to carry them into effect.").

[64] *Id.* at 505 (citing Igartua-De La Rosa v. United States, 417 F.3d 145, 150 (1st Cir. 2005) (en banc).

[65] Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's London, 587 F.3d 714, 722 (5th Cir. 2009).

[66] *Id.* (citing *Medellin*, 552 U.S. at 504).

[67] *Safety Nat'l Cas. Corp.*, 587 F.3d at 723.

because a treaty is implemented by Congress, implementation does not change the treaty into an Act of Congress.[68]

The Fifth Circuit held that Congress would not differentiate between self-executing treaty provisions and treaty provisions implemented through legislative action when it passed the McCarran-Ferguson Act and allowed reverse preemption through an "Act of Congress" in the McCarran-Ferguson Act.[69] Judge Owen found support for this conclusion in the terms of the New York Convention Act and the 1970 Amendments to the FAA, which provided that "action[s] or proceeding[s] falling under the Convention "shall be deemed to arise under the laws and treaties of the United States."[70] The Fifth Circuit concluded that Congress recognized that privileges from the Convention were not provided merely through Acts of Congress in the action of implementing the New York Convention.[71]

Further, the Convention Act stated that the New York Convention "shall be enforced in United States courts in accordance with this chapter."[72] The Convention Act passed by Congress, in implementing the New York Convention, explicitly states that the New York Convention is the operative legal agreement.[73] Examination of the New York Convention confirms that the Convention encompasses the operative legal language.[74] The Convention provides courts with jurisdiction; the Convention defines whether agreements fall under its contents; and therefore, when the Convention conflicts with the FAA, the Convention applies, not the Convention Act.[75] According to the Fifth Circuit, the New York Convention controls and supersedes the Louisiana statute because the Convention is an implemented treaty.[76] McCarran-Ferguson's "no Act of Congress" language allowing reverse preemption does not appear to arise when the operative agreement is a treaty.[77] The Fifth Circuit also noted that the Supreme Court used similar

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[68] *Id.* at 723.

[69] *Id.* at 724.

[70] *Id.* (citing 9 U.S.C. § 203).

[71] Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's London, 587 F.3d 714, 724 (5th Cir. 2009).

[72] *Id.* at 724.

[73] *Id.*

[74] 9 U.S.C. § 201-203

[75] *Safety Nat'l Cas Corp.*, 587 F.3d at 724–25.

[76] *Id.*

[77] Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's London, 587 F.3d 714, 725 (5th Cir. 2009). Judge Owen, writing for the majority, also countered the dissent's claim that consensus existed regarding implemented non-self-executing treaties, in that legal scholars and other courts disagree with the majority's holding. *Id.* at 726. The

language to conclude that non-self-executing treaties can be considered federal law.[78]

### 4. *Determining Whether the McCarran-Ferguson Act Included Treaties*

The majority noted that in previous cases, the Supreme Court analyzed treaties as treaties and not as Acts of Congress, even when implementing legislation existed.[79] In *Holland*, the Supreme Court deliberated about a non-self-executing treaty protecting migratory birds, where Congress passed implementing legislation, giving the treaty effect in the United States.[80] When the State of Missouri tried to stop enforcing the act and regulations created in support of the treaty, the Supreme Court held that there was a difference between Congress acting through the Commerce Clause and a treaty followed by an implementing act.[81] But for the treaty, the State of Missouri would otherwise be free to regulate migratory birds within state boundaries; however, Congress implemented the treaty under the Necessary and Proper clause, declaring the treaty supreme law of the land under the authority of the Constitution.[82] When Congress possessed the proper power to implement the treaty under the Constitution, the Supreme Court thereafter upheld the treaty and implementing act, superseding any Missouri laws.[83]

Reasoning from Supreme Court precedent, the Fifth Circuit held that the McCarran-Ferguson Act was not intended to abrogate treaties implemented by an Act of Congress when the treaties conflicted with state laws regarding

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majority, however, noted that the consensus of legal scholars existed in a comment to the Restatement (Third) of the Foreign Relations Law of the United States, written by an individual who advocated for enforcing implemented treaty provisions. *Id.* at 726 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 11 cmt. h (1987)). The court cited by the dissent as disagreeing with the Fifth Circuit was the Ninth Circuit, stating that an implementing treaty should be given its plain meaning even if the interpretation conflicted with the treaty it implements. *Safety Nat'l Cas Corp.*, 587 F. 3d at 726 (citing Hopson v. Kreps, 622 F.2d 1375 (9th Cir. 1980).

[78] *See Medellin*, 552 U.S. 491, 504–05 (2008).

[79] *Safety Nat'l Cas Corp.*, 587 F.3d at 727–28 (citing Missouri v. Holland, 252 U.S. 416 (1920)).

[80] *Id.* (citing *Holland*, 252 U.S. at 431).

[81] *Id.* (citing *Holland*, 252 U.S. at 433).

[82] *Id.* (citing *Holland*, 252 U.S. at 433–35).

[83] Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's London, 587 F.3d 714, 727–28 (5th Cir. 2009) (citing *Holland*, 252 U.S. at 435).

the business of insurance.[84] Additionally, the McCarran-Ferguson Act was passed after the Supreme Court's decision in *Holland* and therefore, the Fifth Circuit opined that Congress would be reasonably aware that a treaty and its implementing acts could serve as a source of authority to override state powers.[85] Therefore, if Congress had wanted to include treaties as congressional actions that could be reverse preempted, the Fifth Circuit reasoned that the McCarran-Ferguson Act would have included such treaties in its language.[86]

## IV. IMPACT OF THE COURT'S RULING

### A. *Arbitration Policy Considerations*

The Fifth Circuit noted that its decision supporting arbitration of the dispute between Certain Underwriters at Lloyd's, the LSAT, and Safety National Casualty Corporation was in line with the general federal policy supporting arbitration.[87] Citing Supreme Court precedent, Judge Owen held that compelling arbitration among the three disputing parties encouraged the rising tide of arbitration in international commercial transactions, when supported by an agreement to arbitrate.[88] Previous decisions clearly indicated that the FAA was a plain declaration of congressional intent that courts should liberally construe the scope of arbitration agreements.[89] Therefore, Congress must clearly indicate its intent to not include a type of agreement in order for courts to ignore the standard preference for arbitration.[90] For example, in *Mitsubishi*, the Supreme Court looked at antitrust laws—text and legislative history—to determine whether there was any congressional intent to exclude agreements that waived the right to a judicial forum.[91] Following the lead of the Supreme Court, Judge Owen did not see any discernable intent to retreat from favoring arbitration in the McCarran-Ferguson Act,

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[84] *Id.* at 729.

[85] *Id.*

[86] *Id.*

[87] *Id.* at 730.

[88] *Id.* (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 616, 626–27, 638–39 (1985)).

[89] Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's London, 587 F.3d 714, 730 (5th Cir. 2009) (citing *Mitsubishi*, 473 U.S. at 627).

[90] *Id.*

[91] *Id.* (citing *Mitsubishi*, 473 U.S. at 628).

even though the act provides for strong state control in the business of insurance.[92] Quoting the Supreme Court in Mitsubishi, the Fifth Circuit said:

> '[h]aving permitted the arbitration to go forward, the national courts . . . will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed.' The same is true of substantive Louisiana law that applies to the reinsurance agreements presently at issue.[93]

## B. *Conflict with the Second Circuit*

The Fifth Circuit noted that its decision conflicted with the Second Circuit, which found that the New York Convention was not self-executing.[94] The Second Circuit held that the language implementing the Convention did not preempt a Kentucky statute subordinating arbitration provisions.[95] The Second Circuit stated that treaties address political functions, not legislative actions, and Congress could only make the contract a rule by executing it in a law.[96] The Second Circuit reasoned that the terms of the New York Convention were not binding and the language of the Convention Act that implemented the Convention did not explicitly make the provisions law.[97] Therefore, implementing legislation did not preempt a Kentucky statute.[98]

The Fifth Circuit agreed that when the provisions of a treaty are not self-executing, they are not enforceable in court unless implemented in Congress.[99] However, the Fifth Circuit noted that this argument did not answer the language of the McCarran-Ferguson Act—in that using the language regarding "[n]o Act of Congress" would then only address treaties that only require implementation by Congress.[100] The Fifth Circuit then noted that in giving the commonly understood meanings to congressional

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[92] *Id.*

[93] *Id.* at 730-731 (citing *Mitsubishi*, 473 U.S. at 638).

[94] *Id.* (citing Stephens v. Am. Int'l. Ins. Co., 66 F.3d 41 (2nd Cir. 1995).

[95] *Stephens*, 66 F.3d at 45.

[96] Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's London, 587 F.3d 714, 731 (5th Cir. 2009) (citing *Stephens*, 66 F.3d at 43, 45).

[97] *Id.*

[98] *Id.*

[99] *Id.* (citing *Stephens*, 66 F.3d at 43, 45).

[100] *Id.*

language, there was no clear indication that Congress wanted to "distinguish between self-executing and non-self-executing-but-implemented treaties."[101]

The Fifth Circuit also noted that the Second Circuit's reasoning was at odds with subsequent decisions.[102] In the *National Distillers & Chemical Corp.* decision, the Second Circuit held that the McCarran-Ferguson Act did not allow reverse preemption "whenever federal law clearly intends to displace all state laws to the contrary."[103] The Second Circuit reasoned that federal laws applied to the insurance industry despite the McCarran-Ferguson Act, when a federal law like the FAA clearly intends to displace contradictory state laws.[104] In fact, ruling against the McCarran-Ferguson Act, the Second Circuit stated that the Act does not force reverse preemption when the FAA clearly intends to preempt all other state laws—the McCarran-Ferguson Act does not "win" merely because a state statute relates to the business of insurance.[105]

## V. CONCLUSION

The decision of the Fifth Circuit allowing arbitration between these international parties in an international contract affirms not only the federal presumption and affinity for arbitration, but also serves to enforce international agreements to arbitrate. Given that the Fifth Circuit would allow reverse FAA preemption when explicitly provided for, but only when explicitly provided for, the Fifth Circuit relatively narrowed the ability of state statutes to reverse preempt the FAA. Therefore, the range of agreements that can be put into arbitration are expanded as per the usual practice of courts in dealing with FAA preemption. Finally, as the circuits are split and disagree, this issue of treaties and their effect on the preemption process will likely be heard by the Supreme Court in the near future.

KEVIN D. OLES

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[101] *Id.*

[102] Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's London, 587 F.3d 714, 731 (5th Cir. 2009) (citing Stephens v. Nat'l Distillers & Chem Corp., 69 F.3d 1226 (2nd Cir. 1995)).

[103] *Id.* at 731–32 (citing *Stephens*, 69 F.3d 1226 (2nd Cir. 1995)).

[104] *Stephens*, 69 F.3d at 1233.

[105] *Id.*