

## RECENT DEVELOPMENTS

### *Allied-Bruce Terminix Cos. v. Dobson*\*

Congress enacted the Federal Arbitration Act (FAA)<sup>1</sup> in 1925 to ensure the validity and enforcement of arbitration agreements in contracts involving maritime transactions or interstate commerce.<sup>2</sup> Section 2 of the FAA states that a written arbitration provision in “a contract evidencing a transaction involving commerce” will be “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>3</sup> Although Congress had the constitutional power to require the enforcement of all commercial arbitration agreements “affecting commerce,”<sup>4</sup> Congress did not specifically exercise its power to control interstate commerce<sup>5</sup> and did not provide a standard for determining

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\* 115 S. Ct. 834 (1995).

<sup>1</sup> 9 U.S.C. §§ 1-14 (1996).

<sup>2</sup> English courts reacted hostilely toward arbitration agreements because the judges opposed anything that would deprive them of jurisdiction. See *Allied-Bruce Terminix Cos.*, 115 S. Ct. at 838. Early American courts adopted the English hostility and refused to enforce agreements to arbitrate. See *id.* As a result, Congress enacted the FAA to “place such agreements ‘upon the same footing as other contracts.’” *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)).

<sup>3</sup> 9 U.S.C. § 2 (1996). Section 2 of the FAA provides:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation in any contract.

*Id.* Section 1 of the FAA defines commerce as:

“[C]ommerce,” as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

*Id.*

<sup>4</sup> See *Allied-Bruce Terminix*, 115 S. Ct. at 839.

whether a contract evidences a transaction involving commerce.<sup>6</sup> The absence of such a standard forced courts to develop their own standards for determining whether a contract involved interstate commerce for purposes of the FAA. Two tests were created: (1) the "commerce in fact" test and (2) the "contemplation of the parties" test. After years of watching courts apply two conflicting standards, the United States Supreme Court, in *Allied-Bruce Terminix Cos. v. Dobson*,<sup>7</sup> decided to adopt the commerce in fact test.

Under the commerce in fact test, the FAA will apply to a contract if there is any correlation between the transaction in question and interstate commerce.<sup>8</sup> The United States Court of Appeals for the Seventh Circuit established the commerce in fact test in a case involving an Illinois partnership that owned property in Texas.<sup>9</sup> The partnership agreement in *Snyder v. Smith* stated that "any controversy or claim arising out of or relating to this agreement, or to the interpretation, breach or enforcement thereof" would be settled by arbitration.<sup>10</sup> In determining whether the FAA applied to the agreement, the court reasoned that the language "evidencing a transaction involving commerce" must be construed broadly because "section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements"<sup>11</sup> and "any questions as to whether an issue is arbitrable are to be resolved in favor of arbitration."<sup>12</sup> The Seventh Circuit concluded that the "involving commerce" requirement suggests that "Congress intended the FAA to apply to all contracts that it constitutionally

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<sup>5</sup> See *id.* at 838. Initially, it was assumed that the FAA represented an exercise of Congress' Article III power to "ordain and establish" federal courts. See *id.* (quoting U.S. CONST. art. III, § 1). In 1967, however, the Supreme Court held that the FAA "is based upon and confined to the incontestable federal foundations of 'control over interstate commerce and over admiralty.'" *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967) (quoting H.R. REP. NO. 68-96, at 1 (1924)).

<sup>6</sup> See 9 U.S.C. § 2 (1996).

<sup>7</sup> 115 S. Ct. 834 (1995).

<sup>8</sup> See *Snyder v. Smith*, 736 F.2d 409, 417-418 (7th Cir. 1984). Other courts have adopted the Seventh Circuit's formulation of the commerce in fact test. See *e.g.*, *Mesa Operating Ltd. v. Louisiana Intrastate Gas Corp.*, 797 F.2d 238, 243 (5th Cir. 1986); *Lost Creek Mun. Util. Dist. v. Travis Indus. Painters*, 827 S.W.2d 103, 105 (Tex. Ct. App. 1992); *Crawford v. West Jersey Health Sys.*, 847 F. Supp. 1232, 1240 (D.N.J. 1994).

<sup>9</sup> See *id.* at 412.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 417 (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

<sup>12</sup> *Id.*

could regulate” and held that the partnership agreement clearly fell within the constitutional limitations of Congress’ interstate commerce authority.<sup>13</sup>

In contrast to the commerce in fact test, Judge Lumbard developed the contemplation of the parties test in his concurring opinion in *Metro Industrial Painting Corp. v. Terminal Construction Co.*<sup>14</sup> According to Judge Lumbard, Section 2 of the FAA should apply to a contract only if the parties contemplated substantial interstate activity at the time they agreed to the arbitration clause.<sup>15</sup> Evidence regarding the parties’ state of mind comes from examining the terms of the contract, the expectations of the parties and the performance of the contract.<sup>16</sup>

In *Allied-Bruce Terminix*, the Supreme Court rejected Judge Lumbard’s argument that the FAA does not regulate arbitration provisions in all contracts “affecting commerce” and rejected the contemplation of the parties test.<sup>17</sup> In ruling that a termite protection agreement between a homeowner and the local office of a national pest control company involved interstate commerce,<sup>18</sup> the Court concluded that Congress intended to exercise its commerce power to the fullest extent and adopted the commerce in fact test.<sup>19</sup>

In 1987, Steven Gwin bought a lifetime Termite Protection Plan (Plan) from the local office of Allied-Bruce Terminix Companies (Allied-Bruce), a

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<sup>13</sup> *Id.* at 418.

<sup>14</sup> 287 F.2d 382, 387 (2d Cir. 1961). Many courts have used Judge Lumbard’s contemplation of the parties test. *See, e.g.,* Lacheney v. Porfitkey Int’l., Inc., 818 F. Supp. 922, 924 (E.D. Va. 1993); Acton CATV, Inc. v. Wildwood Partners, Ltd., 508 So. 2d 1274, 1276 (Fla. Dist. Ct. App. 1987); University Casework Sys., Inc. v. Bahre, 362 N.E.2d 155, 162 (Ind. Ct. App. 1977); R.J. Palmer Constr. Co. v. Wichita Band Instrument Co., 642 P.2d 127, 130 (Kan. App. 1982); Loche v. Dean Witter Reynolds, Inc., 526 N.E.2d 1296 (Mass. App. Ct. 1988); Burke County Public Schools Bd. of Ed. v. Shaver Partnership, 279 S.E. 2d 816, 822-823 (N.C. 1981).

<sup>15</sup> *See Metro Industrial*, 287 F.2d at 387. Judge Lumbard explained:

The significant question . . . is not whether, in carrying out the terms of the contract, the parties did cross state lines, but whether, at the time they entered into it and accepted the arbitration clause, they contemplated substantial interstate activity. Cogent evidence regarding their state of mind at the time would be the terms of the contract, and if it, on its face, evidences interstate traffic . . . the contract should come within § 2. In addition, evidence as to how the parties expected the contract to be performed and how it was performed is relevant to whether substantial interstate activity was contemplated.

*Id.* (Lumbard, C.J., concurring).

<sup>16</sup> *See id.*

<sup>17</sup> *See Allied-Bruce Terminix*, 115 S. Ct. at 841-842.

<sup>18</sup> *See id.* at 843.

<sup>19</sup> *See id.* at 841.

franchise of Terminix International Company (Terminix).<sup>20</sup> In the contract embodying the Plan, Allied-Bruce promised to protect the Gwins' home "against the attack of subterranean termites," to reinspect periodically, to provide any future treatment free of charge and to repair any damage caused by new termite infestations.<sup>21</sup> The contract also included an arbitration clause, which provided that the "[p]urchaser and Terminix agree that any controversy or claim between them arising out of any provision of this agreement shall be settled exclusively by arbitration."<sup>22</sup>

In 1991, Steven and Jan Gwin agreed to sell their house to Michael and Wanda Dobson. The sales contract required the Gwins to provide written evidence from a licensed pest control company that the company had performed a visual inspection of the house and had observed no active infestation of termites or damage from active infestation.<sup>23</sup> Allied-Bruce reinspected the house and issued a report certifying that the property was free from termite infestation.<sup>24</sup> Relying on this report, the Dobsons closed the sale and prepared to move into the house. One week later, however, the couple discovered that the report was false because the house was "absolutely infested with live termites."<sup>25</sup>

The Dobsons' investigations revealed that just six weeks before certifying the house as termite-free, Allied-Bruce had attempted to exterminate "a massive swarm of termites," information that neither the Gwins nor Allied-Bruce had disclosed.<sup>26</sup> The Dobsons filed tort claims in Alabama state court against Allied-Bruce, Terminix and the Gwins, alleging fraudulent misrepresentation and breach of contract.<sup>27</sup> The Gwins cross-claimed against Allied-Bruce and Terminix.<sup>28</sup> Allied-Bruce and Terminix moved to stay the proceedings and to compel the Dobsons and the Gwins to submit their claims to arbitration pursuant to the contract's arbitration clause.<sup>29</sup>

The Supreme Court of Alabama unanimously upheld the trial court's denial of the stay.<sup>30</sup> After noting that predispute agreements are

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<sup>20</sup> See *id.* at 837.

<sup>21</sup> *Id.*

<sup>22</sup> Respondents' Brief at 3, *Allied-Bruce Terminix* (No. 93-1001).

<sup>23</sup> See *Allied-Bruce Terminix Cos. v. Dobson*, 628 So.2d 354, 354 (Ala. 1993) [hereinafter *Dobson*].

<sup>24</sup> See Respondents' Brief at 4, *Allied-Bruce Terminix* (No. 93-1001).

<sup>25</sup> *Id.*

<sup>26</sup> See *id.* at 5.

<sup>27</sup> See *Dobson*, 628 So.2d at 355.

<sup>28</sup> See *id.*

<sup>29</sup> See *id.*

<sup>30</sup> See *id.* at 357.

unenforceable under Alabama law,<sup>31</sup> the court reasoned that the FAA preempts state law and makes the arbitration agreement enforceable only if the parties “contemplated substantial interstate activity” when they entered into the contract.<sup>32</sup> Applying the contemplation of the parties test, the court found that the parties “contemplated” a transaction that was primarily local in nature and not substantially interstate.<sup>33</sup>

The United States Supreme Court granted certiorari to determine whether the interstate commerce language in Section 2 of the FAA should be read broadly in order to extend the FAA’s reach to the limits of Congress’ Commerce Clause power.<sup>34</sup> In a 7-2 decision reversing the Alabama Supreme Court’s ruling, the Supreme Court concluded that the FAA governs all contracts within Congress’ interstate commerce power and that the commerce in fact test is the proper standard for determining whether a contract involves interstate commerce for purposes of the FAA.<sup>35</sup>

In the majority opinion, Justice Breyer first set forth the background of the FAA because Dobson asked the Court to overrule *Southland Corp. v. Keating*.<sup>36</sup> After explaining that the basic purpose of the FAA is to

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<sup>31</sup> See ALA. CODE § 8-1-41 (1994). Many other states have statutes designed to protect consumers from waiving their right to a trial without knowing and voluntary consent. See e.g., ARK. CODE ANN. § 23-79-203 (Michie 1995); CAL. BUS. & PROF. CODE § 7191 (West 1996); GA. CODE ANN. § 9-9-2 (1996); IND. CODE ANN. § 4-4-2-1 (West 1996); KAN STAT. ANN. § 5-401 (1995); KY. REV. STAT. ANN. § 417.050 (Michie/Bobbs-Merrill 1994); MO. ANN. STAT. § 435.460 (West 1996); MONT. CODE ANN. § 27-5-114 (1995); NEB. REV. STAT. § 25-2602 (1995); N.Y. GEN. BUS. LAW § 399-C (McKinney 1996); R.I. GEN. LAWS § 10-3-2 (1995); S.C. CODE ANN. § 15-48-10 (Law. Co-op. 1995); TENN. CODE ANN. § 29-5-302 (1996); TEX. CIV. PRAC. & REM. CODE ANN. § 171.001 (West 1996).

<sup>32</sup> See *Dobson*, 628 So.2d at 355 (citing *Metro Indus. Painting Corp. v. Terminal Constr. Co.*, 287 F.2d 382, 387 (2d Cir. 1961) (Lombard, C.J., concurring)).

<sup>33</sup> See *id.* at 356.

<sup>34</sup> See *Allied-Bruce Terminix*, 115 S. Ct. at 836.

<sup>35</sup> See *id.* at 841, 843.

<sup>36</sup> 465 U.S. 1 (1984). The Supreme Court in *Southland* concluded that the FAA preempts state law and held that state courts cannot apply state statutes that invalidate arbitration agreements. See *id.* at 15-16. In *Southland*, several franchisees brought suit against the franchisor for allegedly violating the California Franchise Investment Law. See *id.* at 4. Since the franchise agreements contained an arbitration clause, the franchisor moved to stay the proceedings and compel the franchisees to submit their claims to arbitration pursuant to the contract’s arbitration clause. See *id.* The Supreme Court of California denied the stay and refused to compel arbitration because it concluded that the California Franchise Investment Law provided for judicial interpretation of claims. See *id.* at 5. In reversing the California Supreme Court’s ruling, the United States Supreme Court held that § 2 of the FAA applies to state courts as well as federal courts because it decided that Congress would not have wanted

overcome courts' refusals to enforce agreements to arbitrate and making clear that Congress passed the FAA pursuant to its interstate commerce power, the Court affirmed its holding in *Southland* that the FAA preempts state laws and that state courts cannot apply state statutes that invalidate arbitration agreements.<sup>37</sup>

Justice Breyer next examined whether the FAA governs all contracts within Congress' interstate commerce power and whether the commerce in fact test is the proper standard for determining whether a contract involves interstate commerce for purposes of the FAA. In determining the scope of the FAA, the Court stated that the words "affecting commerce" normally signal a congressional intent to exercise its Commerce power and noted that section 2 of the FAA uses the words "involving commerce."<sup>38</sup> After examining the statute's language, background and structure, the Court concluded that the word "involving," like "affecting," signals Congress' intent to govern all contracts within its interstate commerce power.<sup>39</sup>

In determining which standard to apply, the Court examined whether the words "evidencing a transaction" mean only that the transaction must involve interstate commerce in fact (the commerce in fact test) or whether

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state and federal courts to reach different outcomes about the validity of arbitration in similar cases. *See id.* at 12-16.

Dobson and the attorneys general of twenty states argued that the FAA should not be interpreted as governing proceedings in state court. *See* Respondent's Brief at 9-10, *Allied-Bruce Terminix* (No. 93-1001). They asked the Court to overrule *Southland* and adopt the construction of the FAA outlined in the dissenting opinion of Justice O'Connor in *Southland* because they felt that the *Southland* court was denied the benefit of a full adversarial briefing and argument on the issue of whether the FAA governs proceedings in state courts. *See id.* at 10. Since the *Southland* appellees had stipulated in the lower courts that the FAA applied, the states were not put on notice that the issue of preemption was before the Court and did not participate. *See id.* at 10, 13.

The amici curiae brief of the attorneys general argued that the approach to statutory interpretation used in *Southland* has been outmoded by key precedents during the past decade. *See id.* at 13. The *Southland* court held that the FAA preempted state law despite the plain text of the FAA addressing only "courts of the United States" and "United States district court[s]," and the admission that "the legislative history is not without its ambiguities." *Id.* at 14 (quoting *Southland*, 465 U.S. at 12). Moreover, the *Southland* court's core supposition that "Congress had in mind something more than making arbitration agreements enforceable only in the federal courts," *id.* (quoting *Southland*, 465 U.S. at 12), cannot survive the present Court's "clear statement" jurisprudence emphasized subsequent to *Southland*. *See id.* (quoting States' Brief at 8-9, *Allied-Bruce Terminix* (No. 93-1001)).

<sup>37</sup> *See Allied-Bruce Terminix*, 115 S. Ct. at 839.

<sup>38</sup> *See id.*

<sup>39</sup> *See id.* at 841.

they mean that the parties must have contemplated interstate activity at the time of the contract (the contemplation of the parties test).<sup>40</sup> The Court rejected the contemplation of the parties test for three reasons. First, the contemplation of the parties test would defeat the purpose of the FAA by inviting litigation about what was, or was not, “contemplated.”<sup>41</sup> Second, the statute’s language permits the commerce in fact test and nothing in the FAA’s history suggests any other standard.<sup>42</sup> Third, previous interpretations<sup>43</sup> of the FAA held that state laws contrary to the FAA are preempted by the FAA.<sup>44</sup>

The Court also noted that an amicus curiae argued for an “objective” version of the contemplation of the parties test because such a standard would better protect consumers asked to sign form contracts by businesses.<sup>45</sup> The Court rejected this version because it was uncertain how the “objective” version of the contemplation of the parties test would help consumers.<sup>46</sup> The Court also noted that section 2 gives States a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision.<sup>47</sup>

Justice O’Connor wrote a concurring opinion in which she reluctantly agreed with the Court’s judgment.<sup>48</sup> She continued to adhere to the view

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<sup>40</sup> Respondents urged the Supreme Court to uphold the Alabama Supreme Court by adopting the contemplation of the parties interpretation. See Respondent’s Brief at 15, *Allied-Bruce Terminix* (No. 93-1001).

<sup>41</sup> *Allied-Bruce Terminix*, 115 S. Ct. at 841. Justice Breyer asked, “Why would Congress intend a test that risks the very kind of costs and delay through litigation (about the circumstances of contract formation) that Congress wrote the Act to help the parties avoid?” *Id.* Moreover, “that interpretation too often would turn the validity of an arbitration clause on what, from the perspective of the statute’s basic purpose, seems happenstance, namely whether the parties happened to think to insert a reference to interstate commerce in the document or happened to mention it in an initial conversation.” *Id.*

<sup>42</sup> See *id.* at 842.

<sup>43</sup> See *Southland*, 465 U.S. at 10-16 (1984); *Perry v. Thomas*, 482 U.S. 483, 489-492 (1987).

<sup>44</sup> See *Allied-Bruce Terminix*, 115 S. Ct. at 842.

<sup>45</sup> See *id.* at 842-843.

<sup>46</sup> See *id.* at 843.

<sup>47</sup> See *id.* Justice Breyer wrote, “States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause ‘upon such grounds as exist at law or in equity for the revocation of any contract.’” *Id.*

<sup>48</sup> See *id.* at 843-44 (O’Connor, J., concurring). Justice O’Connor commented that “[t]he reading of § 2 adopted today will displace many state statutes carefully calibrated to protect consumers, . . . and state procedural requirements aimed at ensuring knowing and voluntary consent . . . .” *Id.*

that Congress intended the FAA to apply only in federal courts,<sup>49</sup> but she joined the majority based upon a concern for individuals who had made contracts in reliance on the Court's previous interpretations<sup>50</sup> of the FAA and the principle of stare decisis.<sup>51</sup> Justice O'Connor concluded that it remains Congress' task to correct the Court's expansive interpretation of the FAA's interstate commerce language.<sup>52</sup>

Justice Scalia dissented from the Court's holding and stated that *Southland* clearly misconstrued the FAA.<sup>53</sup> Although he acknowledged that he previously joined two judgments that upheld *Southland*,<sup>54</sup> Justice Scalia distinguished *Allied-Bruce* because the respondent in this case specifically asked the Court to overrule *Southland*.<sup>55</sup> Justice Scalia did not believe that a "proper application of stare decisis" prevented an overruling of *Southland* because "[a]dhering to *Southland* entails a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes."<sup>56</sup>

Justice Thomas filed a dissenting opinion in which he questioned whether overruling *Southland* would "frustrate the legitimate expectations of people who have drafted and executed contracts in the belief that even state courts will strictly enforce arbitration clauses."<sup>57</sup> Justice Thomas

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<sup>49</sup> See *id.* at 844. (O'Connor, J., concurring). Justice O'Connor stated that she "continue[s] to believe that Congress never intended the Federal Arbitration Act to apply in state courts, and that this Court has strayed far afield in giving the Act so broad a compass." *Id.*

<sup>50</sup> See *infra*, note 58.

<sup>51</sup> See *Allied-Bruce Terminix*, 115 S. Ct. at 843-844 (O'Connor, J., concurring). Justice O'Connor wrote:

Were we writing on a clean slate, I would adhere to that view and affirm the Alabama court's decision. But, as the Court points out, more than 10 years have passed since *Southland*, several subsequent cases have built upon its reasoning, and parties have undoubtedly made contracts in reliance on the Court's interpretation of the Act in the interim. After reflection, I am persuaded by considerations of stare decisis, which we have said "have special force in the area of statutory interpretation," . . . to acquiesce in today's judgment.

*Id.* at 844 (O'Connor, J., concurring) (citation omitted).

<sup>52</sup> See *id.* (O'Connor, J., concurring).

<sup>53</sup> See *Allied-Bruce Terminix*, 115 S. Ct. at 844 (Scalia, J., dissenting).

<sup>54</sup> See *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989); *Perry v. Thomas*, 482 U.S. 483 (1987).

<sup>55</sup> See *Allied-Bruce Terminix*, 115 S. Ct. at 844 (Scalia, J., dissenting).

<sup>56</sup> *Id.* at 845 (Scalia, J., dissenting).

<sup>57</sup> *Id.* at 849 (Thomas, J., dissenting).

argued that the FAA does not apply in state courts<sup>58</sup> and stated that even if the interstate commerce issue raises uncertainty, the Court should defer to the “core principles of federalism.”<sup>59</sup>

In arguing that Judge Lumbard pulled the contemplation of the parties test “out of thin air,”<sup>60</sup> the petitioners noted that “it would be almost inexplicable for Congress to have wanted the jurisdiction of the Act to depend in every case upon what the parties subjectively understood about the extent of interstate commerce involved”<sup>61</sup> and stated that the language “contract evidencing a transaction involving commerce” “says nothing more than the contract must be evidence of the *transaction*, not of the ‘commerce’ to which it applies.”<sup>62</sup> The petitioners further argued that the words “transaction involving commerce” (like the words “maritime transaction”) are “plainly intended to mark out the jurisdictional bounds of the statute.”<sup>63</sup> In determining whether the FAA applied to a contract, “Congress imposed two related, but distinct requirements: to establish jurisdictional nexus, there must a ‘transaction involving interstate commerce’ and, to assure that the agreement to arbitrate relates to that transaction, there must be a contract (containing a written agreement to arbitrate) ‘evidencing’ the transaction.”<sup>64</sup>

By effectively separating the words “contract evidencing a transaction” from the words “involving commerce,” both the petitioners and the Supreme Court refuse to acknowledge that the language “a contract evidencing a transaction involving commerce” is a single unit that needs to

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<sup>58</sup> See *id.* at 845 (Thomas, J., dissenting).

<sup>59</sup> *Id.* at 848 (Thomas, J., dissenting).

<sup>60</sup> Petitioners’ Brief at 24, *Allied-Bruce Terminix* (No. 93-1001).

<sup>61</sup> *Id.* at 24.

<sup>62</sup> *Id.* at 15 (emphasis in original). Furthermore, the petitioners stated that a review of the history of the phrase “contract evidencing” confirms that Congress did not intend to limit the exercise of its commerce power. See *id.* The phrase was absent from an earlier version of the FAA, which applied broadly to “a written provision in any contract or maritime transaction or transaction involving commerce.” *Id.* at 15-16 (quoting S. 4214, 67th Cong. § 2 (1922); S. 1005, 68th Cong. (1923); H.R. 646, 68th Cong. (1924)). “That language (‘any contract’), if read literally, would have made *all* arbitration provisions enforceable, and, as a consequence, raised the most serious questions about the source of congressional authority. The changed language effectively avoided those questions, confining the statute to those fields within Congress’ acknowledged control.” *Id.* (emphasis in original).

The Supreme Court conceded that this argument “leaves little work for the word ‘evidencing’ . . . to perform, for every contract evidences some transaction.” *Allied-Bruce Terminix*, 115 S. Ct. at 842. However, the Court speculated that “perhaps Congress did not want that word to perform much work[.]” *Id.*

<sup>63</sup> Petitioners’ Reply Brief at 6-7, *Allied-Bruce Terminix* (No. 93-1001).

<sup>64</sup> *Id.*

be considered as a whole.<sup>65</sup> The Court's interpretation gives no meaning to the phrase "contract evidencing" because, by definition, every contract evidences a transaction.<sup>66</sup> Although the Court speculated that Congress did not intend to give the phrase "contract evidencing" any meaning, it seems more logical to conclude that the contract *must evidence* a particular type of transaction—a transaction involving commerce.<sup>67</sup> Considering that the law of contracts attempts to effectuate the parties' understandings as to a contract's scope and content, the contemplation of the parties test is more faithful to the statutory text of the FAA because it provides a workable standard that effectuates the intentions of contracting parties.<sup>68</sup> By examining the terms of the contract, the expectations of the parties and the performance of the contract, the contemplation of the parties test enforces arbitration agreements in contracts clearly involving interstate commerce and protects unsuspecting consumers and other unsophisticated parties from being bound by the FAA.<sup>69</sup>

The petitioners' argument that the contemplation of the parties test "invites a cumbersome inquiry into the subjective understandings of the parties about the nature of the transaction and any interstate activity likely associated with it"<sup>70</sup> ultimately persuaded the Supreme Court to adopt the commerce in fact test in the *Allied-Bruce Terminix* case.<sup>71</sup> The Court did not want to adopt a standard that would create endless litigation about what was contemplated.<sup>72</sup> This judicial economy has ensured that businesses will enjoy a faster, less expensive method for disposing of consumer complaints and that unsuspecting consumers will no longer enjoy the protection of state statutes precluding the enforcement of predispute arbitration agreements.

Jay A. Yurkiw

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<sup>65</sup> Respondent's Brief at 18, *Allied-Bruce Terminix* (No. 93-1001).

<sup>66</sup> *See id.* at 19.

<sup>67</sup> *See id.*

<sup>68</sup> *See id.* at 11.

<sup>69</sup> *See id.*

<sup>70</sup> Petitioners' Brief at 9-10, *Allied-Bruce Terminix* (No. 93-1001).

<sup>71</sup> *See Allied-Bruce Terminix*, 115 S. Ct. at 843.

<sup>72</sup> *See id.*