Client Alert

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District Court Holds "Reverse Preemption" by Missouri Anti-Arbitration Statute Precludes Enforcement of Policy's Arbitration Provision

A Missouri district court recently declined to enforce a policy's international arbitration provision and refused to retain jurisdiction over a coverage dispute, holding that Missouri's anti-arbitration statute "reverse preempts" the multinational treaty cited by the insurer as the basis for federal subject matter jurisdiction and remanding the lawsuit to state court. The decision highlights the need to carefully evaluate the impact of any alternative dispute resolution provisions when selecting or renewing insurance policies, as well as the importance of state law in determining the appropriate venue in insurance coverage actions.

The *Foresight* Decision

In *Foresight Energy, LLC v. Certain London Market Insurance Cos., et al.*, No. 4:17-CV-2266 CAS, 2018 WL 1942222 (E.D. Mo. Apr. 25, 2018), a mine owner (Foresight) sued in Missouri state court to enforce its insurance coverage for loss incurred under a property policy following a combustion event in one of Foresight's mines. One of the insurers, Chubb, removed the lawsuit to federal court, asserting that federal question jurisdiction existed pursuant to the Federal Arbitration Act (FAA) because Foresight's policies contained an arbitration provision stating that disputes must be arbitrated in London, England, under the English Arbitration Act 1996. Chubb argued that the policies' arbitration provision constituted an "international arbitration agreement subject to a multinational treaty, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (the Convention), which authorizes removal to federal courts under the FAA to enforce arbitration agreements.

Foresight moved to remand to state court, arguing that the insurer's removal was improper because the federal court lacked subject matter jurisdiction where: (1) the federal question depended on the applicability of the FAA provision permitting removal under the Convention; and (2) Missouri law prohibits mandatory arbitration in insurance policies, such as the provisions at issue in Foresight's policies, which "reverse preempts" the Convention under the McCarran-Ferguson Act, 15 U.S.C. § 1011-1015.

The court found that the Convention was a "multinational treaty" subject to enforcement under the FAA, but agreed with Foresight that Missouri's anti-arbitration statute—which explicitly excepts "contracts of insurance" from the Missouri Uniform Arbitration Act—was a state law enacted "for the purpose of regulating the business of insurance." Recognizing a split of authority among federal courts interpreting the Convention and its enforcement in US courts for the purposes of state-federal preemption, the court adopted the reasoning of the Second Circuit and other courts in holding that the Convention itself, as a non-self-executing treaty, is inapplicable as a rule of law in federal courts and is only implemented through the federal legislation under the FAA.

Under this framework, the court determined that the Missouri anti-arbitration statute satisfied the three-factor test for federal preemption under the McCarran-Ferguson Act where: (1) the FAA does not specifically relate to the business of insurance; (2) application of the FAA would invalidate the Missouri statute if applied; and (3) the Missouri statute was enacted for the purpose of regulating insurance. As a result, the court held that the anti-arbitration statute "reverse preempts" the Convention by operation of the McCarran-Ferguson Act, eliminating any basis for federal jurisdiction under the insurance policies' arbitration provisions. Because the

Convention does not apply, the insurer did not have a basis for removal of the state court coverage lawsuit to federal court. The court, therefore, lacked subject matter jurisdiction and remanded to state court.

Key Takeaways

The court's refusal to enforce the policy's arbitration provision is significant and underscores the importance of considering state law in drafting, interpreting, and enforcing insurance contracts. As the *Foresight* decision recognizes, federal courts vary widely in their interpretation of state and federal statutes with respect to jurisdictional questions such as preemption. Many states, like Missouri, have enacted similar anti-arbitration statutes, however, so policyholders should consider the impact of state law when selecting venue.

The decision also highlights the importance of arbitration provisions, which insurers often include in policies for their own benefit. Policyholders should carefully consider whether, if given a choice, they want to limit dispute resolution to arbitration or other forms of alternative dispute resolution, which can have significant disadvantages. For example, despite the well-publicized cost of litigation in US courts, arbitration is not always more economical and in some cases is more expensive than traditional litigation.

Furthermore, insurers are often repeat players in arbitration, which can place policyholders at an informational disadvantage when selecting arbitrators and evaluating likelihood of success based on prior arbitration decisions. Collectively, arbitration provisions also limit the development of common law on insurance issues by removing decisions on significant or emerging coverage issues from the US court system to private proceedings.

Arbitration may have advantages, however, particularly where the policyholder values confidentiality (arbitrations are usually confidential proceedings, while publicly filed lawsuits are not) or finality (arbitration decisions are usually final and non-appealable, unlike lawsuits). Given the prominence of substantive policy provisions on key definitions, insuring agreements, and exclusions during policy placement and renewals, policyholders often overlook procedural limitations like arbitration provisions, despite such provisions potentially having outsized impact on future coverage disputes. As the *Foresight* decision makes clear, favorable state law may prevent enforcement of insurer-friendly dispute resolution clauses, but negotiating them out of a policy in the first instance may save time and money in the event of a claim.

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