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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

CITIZENS OF HUMANITY et al., Plaintiffs and Respondents, v. APPLIED UNDERWRITERS, INC., et al., Defendants and Appellants.	B276601 (Los Angeles County Super. Ct. No. BC571913)

APPEAL from an order of the Superior Court of Los Angeles County. Allan Goodman, Judge. Affirmed.

Hinshaw & Culbertson, Spencer Y. Kook, Misty A. Murray and James C. Castle for Defendants and Appellants.

Browne George Ross, Eric M. George, Peter W. Ross and Corbin K. Barthold for Plaintiffs and Respondents.

Defendants and appellants Applied Underwriters, Inc. (Applied Underwriters), California Insurance Company

(CIC), Continental Indemnity Company (CNI), Applied Risk Services, Inc., Joan Sheppard, Westin Fredrick Penfield, and Michael Scott Wichman (collectively, defendants) appeal from an order denying their petition to compel arbitration of a dispute with plaintiffs and respondents Citizens of Humanity, LLC, and CM Laundry, LLC (collectively, plaintiffs). We affirm the trial court's order.

BACKGROUND

The RPA

In 2012, plaintiffs purchased from defendants a workers' compensation insurance package known as the EquityComp program. As part of that program, plaintiffs entered into a Reinsurance Participation Agreement (RPA) with Applied Underwriters Captive Risk Assurance Company, Inc. (AUCRA), a company affiliated with defendants. The RPA contains an arbitration provision that provides in relevant part:

> "13. Nothing in this section shall be deemed to amend or alter the due date of any obligation under this Agreement. Rather, this section is only intended to provide a mechanism for resolving accounting disputes in good faith."
>
> "(A) It is the express intention of the parties to resolve any disputes arising under this Agreement without resort to litigation in order to protect the confidentiality of their relationship and their respective businesses and affairs. Any dispute or controversy that

> is not resolved informally pursuant to subparagraph (B) of Paragraph 13 arising out of or related to this Agreement shall be fully determined in the British Virgin Islands under the provisions of the American Arbitration Association.
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> "(B) All disputes between the parties relating in any way to (1) the execution and delivery, construction or enforceability of this Agreement, (2) the management or operation of the Company, or (3) any other breach or claimed breach of this Agreement or the transactions contemplated herein shall be settled amicably by good faith discussion among all of the parties hereto, and, failing such amicable settlement, finally determined exclusively by binding arbitration in accordance with the procedures provided herein. The reference to this arbitration clause in any specific provision of this Agreement is for emphasis only, and is not intended to limit the scope, extent or intent of this arbitration clause or to mean that any other provision of this Agreement shall not be fully subject to the terms of this arbitration clause. All disputes arising with respect to any provision of this Agreement shall be fully subject to the terms of this arbitration clause."

None of the other agreements between the parties contains an arbitration provision.

The RPA also contains a choice of law provision that states:

> "16. This Agreement shall be exclusively governed by and construed in accordance with the laws of Nebraska and any matter concerning this Agreement that is not subject to the dispute resolution provisions of Paragraph 13 hereof shall be resolved exclusively by the courts of Nebraska without reference to its conflict of laws."

The instant action

In February 2015, plaintiffs filed a complaint against defendants and AUCRA alleging causes of action against AUCRA for fraudulent inducement in entering into the arbitration agreement, breach of contract, and breach of the covenant of good faith and fair dealing; and against all of the defendants for fraud, false advertising, breach of fiduciary duty, professional negligence, and declaratory relief.

The parties filed competing motions to compel and to stay arbitration of their dispute. In their motion to stay the arbitration, plaintiffs argued that Nebraska law applied pursuant to the choice of law provision in the RPA and that the arbitration provision of the RPA was void under section 25-2602.01(f)(4) of the Nebraska Uniform Arbitration Act (NUAA), which prohibits arbitration of "any agreement concerning or relating to an insurance policy." Plaintiffs further argued that the Federal Arbitration Act (9 U.S.C. §§ 1-16) (FAA) did not preempt the NUAA because another federal statute, the McCarran-Ferguson Act (15 U.S.C. §§ 1011-1015) mandates that state laws "regulating

the business of insurance" preempt any federal statute not specifically related to the business of insurance and that impairs state insurance laws. Defendants argued that the FAA governs and preempts the NUAA, and that under the RPA's broad delegation clause, any issue concerning arbitrability should be resolved by the arbitrator.

Before the hearing on defendants' motion to compel arbitration, plaintiffs dismissed AUCRA as a defendant. Plaintiffs then argued that the motion to compel arbitration should be denied because the only defendant that had signed the RPA had been dismissed. At the hearing on defendants' motion, the trial court requested supplemental briefing from the parties on a number of issues, including whether California or Nebraska law should be applied to determine whether defendants have the right to enforce the RPA's arbitration provision, whether Nebraska law bars arbitration of the parties' dispute, and whether the FAA or the McCarran-Ferguson Act applies.

In their supplemental brief, plaintiffs argued, among other things, that the McCarran-Ferguson Act displaced the FAA, that both California and Nebraska law applied to bar arbitration, and that the court, not the arbitrator, should determine the consequences of applying the McCarran-Ferguson Act. Defendants argued that the RPA's delegation clause required all questions concerning construction and enforceability of that agreement, including applicability of the NUAA, to be decided by the arbitrator, and that the

FAA governed the arbitration provision, which was not displaced by the general choice of law provision.

Following a July 8, 2016 hearing, the trial court denied the motion to compel arbitration. In its written order denying the motion, the trial court first addressed the threshold question of who should decide – the court or the arbitrator – the arbitrability of the parties' dispute. The court noted that defendants' sole basis for arguing that the arbitrator rather than the court should decide this issue was the FAA and cases decided thereunder. The trial court then noted that a potential conflict existed between the FAA and the McCarran-Ferguson Act, which allows state laws enacted for the purpose of regulating the business of insurance to reverse preempt the FAA. After analyzing applicable federal case law on the reverse preemption issue, the trial court concluded that reverse preemption applied under the McCarran-Ferguson Act and that Nebraska law applied to invalidate the arbitration clause in the RPA. The trial court denied the motion to compel arbitration and this appeal followed.

DISCUSSION

I. Standard of review

We ordinarily review an order denying a petition to compel arbitration for abuse of discretion. However, where, as is the case here, the trial court's denial of a petition to compel arbitration presents a pure question of law, we review the order de novo. (*Gorlach v. Sports Club Co.* (2012) 209 Cal.App.4th 1497, 1505.)

II. Applicable legal framework

The instant case involves the intersection of three different statutory schemes: the FAA, the McCarran-Ferguson Act, and the NUAA.

A. The NUAA

Section 25-2602.01(b) of the NUAA provides that a written agreement to arbitrate disputes between the contracting parties "is valid, enforceable, and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract, if the provision is entered into voluntarily and willingly." (Neb. Rev. Stat., § 25-2602.01(b).) Subsection (f) of that statute, however, excepts from this provision "any agreement concerning or relating to an insurance policy," thereby prohibiting agreements to arbitrate certain insurance-related disputes.[1]

B. The FAA

The FAA reflects the fundamental principle that arbitration is "a matter of contract." (*Rent-A-Center,*

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[1] Section 25-2602.01 of the NUAA provides in relevant part: "(b) A provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable, and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract, if the provision is entered into voluntarily and willingly. [¶] . . . [¶] (f) Subsection (b) of this section does not apply to: [¶] . . . [¶] . . . any agreement concerning or relating to an insurance policy other than a contract between insurance companies including a reinsurance contract." (Neb. Rev. Stat., § 25-2602.01.)

West, Inc. v. Jackson (2010) 561 U.S. 63, 67 (*Rent-A-Center*).) Section 2 of the FAA makes arbitration agreements in contracts "involving commerce . . . valid, irrevocable, and enforceable" (9 U.S.C. § 2), and section 4 of the FAA provides for federal district court enforcement of such agreements. The "body of federal substantive law" created by the FAA is applicable, however, in both state and federal courts. (*Southland Corp. v. Keating* (1984) 465 U.S. 1, 12.) State law therefore cannot bar enforcement of the FAA, even in the context of state law claims brought in state court. (*Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 445.) The FAA thus ordinarily preempts conflicting state laws that prohibit arbitration of particular types of claims. (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 341.)

C. McCarran-Ferguson Act

The federal McCarran-Ferguson Act provides a narrow exception to federal preemption of conflicting state laws that regulate the business of insurance. Section 1012(b) of the McCarran-Ferguson Act provides: "No 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. . . . " (15 U.S.C. § 1012(b).) "The McCarran-Ferguson Act thus allows state law to reverse-preempt an otherwise applicable federal statute, because the McCarran-Ferguson Act does not permit an 'Act of Congress' to be 'construed to invalidate, impair, or

supersede' state law unless the Act of Congress 'specifically relates to the business of insurance.'" (*Safety Nat'l Cas. Corp. v. Certain Underwriters* (5th Cir. 2009) 587 F.3d 714, 720.)

The principal issues presented here are (1) whether the McCarran-Ferguson Act causes the NUAA to reverse preempt the FAA, thereby rendering the arbitration provisions of the RPA unenforceable; and (2) who – a court or an arbitrator – should decide the preemption/enforceability issue. We address the latter of these issues first.

III. Who decides arbitrability

"The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the '*question of arbitrability,*' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.' [Citations.]" (*Howsam v. Dean Witter Reynolds* (2002) 537 U.S. 79, 83.) "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." (*First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 944, quoting *AT&T Techs. v. Communs. Workers of Am.* (1986) 475 U.S. 643, 649.)

Defendants argue that paragraph 13(B) of the RPA, which requires "[a]ll disputes between the parties relating in any way to . . . the execution and delivery, construction or enforceability of this Agreement" and "[a]ll disputes arising with respect to any provision of this

Agreement" to be "finally determined exclusively by binding arbitration" expresses a clear and unmistakable intent to arbitrate the question of arbitrability.[2] That provision must be considered, however, in the context of the agreement as a whole (see *Ruble v. Reich* (Neb. 2000) 611 N.W.2d 844, 850 [when interpreting an agreement, court views contract as a whole]), including the provision that requires the RPA to "be exclusively governed by and construed in accordance with the laws of Nebraska." Under Nebraska law, the entire arbitration clause, including the delegation provision, is potentially unenforceable.

Paragraph 13(B), including the delegation provision, must also be considered in the context of the applicable statutory framework. (*Bickford v. Board of Education* (Neb. 1983) 336 N.W.2d 73, 74 ["it is the general rule that contracts include applicable statutory provisions, whether specifically mentioned or not"].) Here, the conflicting preemptive effects of the FAA, the McCarran-Ferguson Act, and the NUAA impact the parties' agreement to arbitrate. Viewed in context, the language of paragraph 13(B) of the RPA is not clear and unmistakable evidence of the parties' agreement to arbitrate disputes arising under that agreement, including disputes concerning arbitrability.

Defendants contend the Supreme Court's decision in *Rent-A-Center* precludes judicial determination of arbitrability in this case. In *Rent-A-Center*, the

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[2] Defendants refer to this contract language as the "delegation provision."

Supreme Court explained that a "delegation provision is an agreement to arbitrate . . . 'gateway' 'questions of arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy" and that such "[a]n agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the . . . court to enforce." (*Rent-A-Center*, *supra*, 561 U.S. at pp. 68-70.) The court in *Rent-A-Center* further explained that under substantive federal law, an arbitration provision, including a delegation provision, "'is severable from the remainder of the contract'" (*id.* at pp. 70-71), and that a party must challenge the validity of "the precise agreement to arbitrate at issue" before a court will intervene to consider the challenge (*id.* at p. 71).

The provision at issue in *Rent-A-Center* was a delegation provision "that gave the arbitrator 'exclusive authority to resolve any dispute relating to the . . . enforceability . . . of this Agreement.'" (*Rent-A-Center*, *supra*, 561 U.S. at p. 74.) The party resisting enforcement in *Rent-A-Center* challenged the validity of the arbitration agreement as a whole on the ground that it was unconscionable but did not make any arguments specific to the delegation provision. (*Ibid.*) Given the absence of any challenge to the delegation provision, the court in *Rent-A-Center* concluded that it must treat that provision as valid and enforceable under the FAA, leaving any challenge to the validity of the arbitration agreement as a whole to the arbitrator. (*Id.* at pp. 73-75.)

Rent-A-Center did not involve application of the McCarran-Ferguson Act or the NUAA and is therefore distinguishable from the instant case. *Rent-A-Center* is also distinguishable because plaintiffs' challenge, based on the preemptive effect of the McCarran-Ferguson Act and the NUAA, is directed to the delegation provision as well as the arbitration provision as a whole. (See *Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assur. Co.* (4th Cir. 2017) 867 F.3d 449, 455-456 [insured's argument that Virginia statute rendered void "any" arbitration provision in RPA necessarily included challenge to enforceability of delegation provision].) Resolution of those issues are accordingly for the court, and not the arbitrator, to decide. (*Rent-A-Center*, *supra*, 561 U.S. at p. 71.)

There is also an issue as to whether plaintiffs' challenge to the arbitration provision, premised on preemption of the FAA by the McCarran-Ferguson Act and the NUAA, raises a "question of arbitrability" that can legally be delegated to an arbitrator. We find the Ninth Circuit's analysis in *Van Dusen v. United States Dist. Court for the Dist. of Ariz.* (9th Cir. 2011) 654 F.3d 838 (*Van Dusen*) to be instructive on this issue.

At issue in *Van Dusen* was whether arbitration agreements entered into by the defendant employers and the plaintiff interstate truck drivers came within an exemption under section 1 of the FAA for "'contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.'" (*Van Dusen*, *supra*, 654 F.3d at p. 840.) The federal district court declined to rule on the

applicability of the exemption, concluding that the question of whether the drivers were employees of the defendants was a question for the arbitrator to decide. (*Ibid.*) The drivers sought mandamus relief from the Ninth Circuit, arguing that the district court's failure to address the exemption issue constituted clear error. (*Id.* at p. 842.)

On appeal, the drivers argued that the issue of whether the FAA section 1 exemption applied was not a "question of arbitrability" the parties could legally delegate to an arbitral forum. (*Van Dusen*, *supra*, 654 F.3d at p. 842.) The Ninth Circuit found that argument to be persuasive, noting that "a district court has no authority to compel arbitration under Section 4 [of the FAA] where Section 1 exempts the underlying contract from the FAA's provisions. [Citation.]" (*Id.* at p. 843.) The court in *Van Dusen* further noted that the defendants' "position that contracting parties may invoke the authority of the FAA to decide the question of *whether the parties can invoke the authority of the FAA* . . . puts the cart before the horse: Section 4 has simply no applicability where Section 1 exempts a contract from the FAA, and private contracting parties cannot, through the insertion of a delegation clause, confer authority upon a district court that Congress chose to withhold." (*Id.* at p. 844.) The Ninth Circuit observed that the United States Supreme Court defines " 'questions of arbitrability' as questions of 'whether parties have submitted a particular dispute to arbitration' [citation]" *and* that the question of whether the FAA confers

authority on the court to compel arbitration "does not fit within that definition." (*Ibid.*)[3]

The First Circuit, in *Oliveira v. New Prime, Inc.* (1st Cir. 2017) 857 F.3d 7 (*Oliveira*) addressed the same issue presented in *Van Dusen* in a similar dispute involving a motion to compel arbitration where the parties had delegated questions of arbitrability to the arbitrator. (*Oliveira*, at p. 9.) Applying the court's reasoning in *Van Dusen*, the First Circuit held that whether the FAA confers authority on a district court to compel arbitration is not a question of arbitrability: "[T]he question of the court's authority to act under the FAA is an 'antecedent determination' for the district court to make before it can compel arbitration under the [FAA]." (*Oliveira*, at p. 14.)

Here, as in *Van Dusen* and *Oliveira*, the threshold issue is whether the FAA applies, thereby authorizing the court to compel arbitration of the dispute, or whether such authority is lacking because the FAA is preempted by the McCarran-Ferguson Act and the NUAA. We agree with the *Van Dusen* court's reasoning that defendants' reliance on the FAA as the basis for compelling arbitration of this threshold issue "puts the

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[3] Although the Ninth Circuit determined that "the best reading of the law requires the district court to assess whether a Section 1 exemption applies before ordering arbitration" the absence of controlling precedent, along with the FAA's policy favoring arbitration, made the question a "relatively close" one and that it could not find the district court's ruling to be " 'clearly erroneous' " under the applicable standard for mandamus relief. (*Van Dusen*, *supra*, 654 F.3d at p. 846.)

cart before the horse." (*Van Dusen*, *supra*, 654 F.3d at p. 844.) We therefore conclude that the trial court did not err by denying defendants' motion to compel arbitration of the preemption issue and the validity of the arbitration agreement, including the delegation provision.

IV. Validity of the agreement to arbitrate

The validity of the parties' arbitration agreement turns on whether the McCarran-Ferguson Act applies, whether section 25-2602.01(f) of the NUAA applies, and whether those two statutes together preempt the FAA.

A. Applicability of the McCarran-Ferguson Act

Courts apply a three-part test for determining whether the McCarran-Ferguson Act causes a state law to reverse preempt a federal statute: (1) whether the federal statute to be preempted specifically relates to the business of insurance, (2) whether the state law was enacted for regulating the business of insurance, and (3) whether application of the federal statute operates to invalidate, impair, or supersede the state law. (*American Bankers Ins. Co. v. Inman* (5th Cir. 2006) 436 F.3d 490, 493 (*American Bankers*); *Std. Sec. Life Ins. Co. v. West* (8th Cir. 2001) 267 F.3d 821 (*Std. Sec.*); *Kremer v. Rural Comt'y Ins. Co.* (Neb. 2010) 788 N.W.2d 538, 551 (*Kremer*).)

It is undisputed that the FAA does not regulate the business of insurance, and that application of the FAA in this case would invalidate section 25-2602.01(f) of the NUAA. The determinative inquiry is whether section 25-2602.01(f) of the NUAA was enacted for the purpose of regulating the business of insurance within the meaning of the McCarran-Ferguson Act. That inquiry is guided by principles articulated by the United States Supreme Court in *Department of Treasury v. Fabe* (1993) 508 U.S. 491, 500-503 (*Fabe*).

In *Fabe*, the Supreme Court held that an Ohio statute governing the priority of claims against an insolvent insurer is a "'law enacted . . . for the purpose of regulating the business of insurance'" within the meaning of the McCarran-Ferguson Act and rejected the argument that the Ohio statute was a bankruptcy law rather than a law "regulating the business of insurance." (*Fabe*, *supra*, 508 U.S. at pp. 498-499, 505-506.) The court reasoned that although "the Ohio statute does not directly regulate the 'business of insurance' by prescribing the terms of the insurance contract or by setting the rate charged by the insurance company," the business of insurance is not "confined entirely to the writing of insurance contracts, as opposed to their performance." (*Id.* at pp. 502-503.)

The court in *Fabe* emphasized that the focus of the McCarran-Ferguson Act is the relationship between insurer and insured and that "'[s]tatutes aimed at protecting or regulating this relationship [between insurer and insured], directly or indirectly, are laws

regulating the "business of insurance."'" (*Fabe*, *supra*, 508 U.S. at p. 501, quoting *SEC v. National Sec. Inc.* (1969) 393 U.S. 453, 460.) The Supreme Court concluded that "[t]he broad category of laws enacted 'for the purpose of regulating the business of insurance' consists of laws that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance. [Citation.]" (*Fabe*, at p. 505.)

Applying the principles articulated in *Fabe*, the Nebraska Supreme Court in *Kremer*, *supra*, 788 N.W.2d 538, addressed the precise issue presented here – whether section 25-2602.01(f) of the NUAA is a state law enacted for the purpose of regulating the business of insurance within the meaning of the McCarran-Ferguson Act. The court in *Kremer* held that it was, and that section 25-2602.01(f) accordingly reverse preempts the FAA through application of the McCarran-Ferguson Act. (*Kremer*, at p. 553.) The Nebraska Supreme Court reaffirmed this principle in *Speece v. Allied Professionals Ins. Co.* (2014) 289 Neb. 175.

Federal courts applying *Fabe* have likewise concluded that the FAA is reverse preempted under state laws similar to the Nebraska statute at issue here. (See, e.g., *American Bankers*, *supra*, 436 F.3d 490 [FAA reverse preempted under McCarran-Ferguson Act by Mississippi statute prohibiting arbitration of disputes regarding uninsured and underinsured motorist coverage of personal automobile insurance policies]; *McKnight v. Chicago Title Ins. Co.* (11th Cir. 2004) 358 F.3d 854, 858-859 [FAA reverse preempted by Georgia

law prohibiting arbitration clauses in insurance contracts]; *Standard Security*, *supra*, 267 F.3d 821 [FAA reverse preempted by Missouri Arbitration Act's prohibition on arbitration clauses in insurance contracts]; *Mutual Reinsurance Bureau v. Great Plains Mutual Ins. Co.* (10th Cir. 1992) 969 F.2d 931, 934-935 [FAA reverse preempted by Kansas statute barring arbitration provision in insurance contracts].)

Consistent with the principles articulated in *Fabe*, *supra*, 508 U.S. 491, as applied by federal appellate courts and the Nebraska Supreme Court, we agree with the trial court's conclusion in the instant case that section 25-2602.01(f) of the NUAA is a state law enacted for the purpose of regulating the business of insurance. If the NUAA applies in the instant case, by operation of the McCarran-Ferguson Act, it reverse preempts the FAA.

B. Applicability of the NUAA

Defendants argue that even if section 25-2602.01(f) is a state law that regulates the business of insurance, the statute does not apply. They argue that the general choice of law provision in the RPA requiring the RPA to "be exclusively governed by and construed in accordance with the laws of Nebraska" constitutes an agreement to apply Nebraska law to resolve the parties' substantive claims only, and not to incorporate state law rules limiting arbitration. Defendants cite *Mastrobuono v. Shearson Lehman Hutton* (1995) 514 U.S. 52 (*Mastrobuono*) as support for their

position. In that case, the Supreme Court considered two seemingly conflicting contractual provisions regarding punitive damages – an arbitration provision that required "'any controversy'" arising out of the transactions between the parties to be arbitrated in accordance with the rules of the National Association of Securities Dealers (NASD), which authorized punitive damages awards; and a choice of law provision incorporating "the laws of the state of New York." Under New York case law, the power to award punitive damages was limited to judicial tribunals. (*Id.* at pp. 55, 61.) The court in *Mastrobuono* concluded that the "best way to harmonize" the two provisions was to read the choice of law provision "to encompass substantive principles that New York courts would apply, but not to include [New York's] special rules limiting the authority of arbitrators." (*Id.* at pp. 63-64.)

Mastrobuono is distinguishable because it involved two provisions that on their face pointed to different bodies of law with conflicting rules regarding the availability of punitive damages. The Supreme Court drew the distinction between "substantive principles" of law and "special rules limiting the authority of arbitrators" solely as a means of "giv[ing] effect" to both provisions. (*Mastrobuono*, *supra*, 514 U.S. at p. 64.) Here, however, the RPA has a single provision that unambiguously provides that the RPA "shall be exclusively governed by and construed in accordance with the laws of Nebraska." Although the RPA does refer to the AAA rules, those rules – unlike the competing arbitration rules in *Mastrobuono* – do not

conflict with Nebraska law. Because there is no need to give effect to any competing provision, there is no basis not to give effect to its plain language incorporating *all* of the laws of Nebraska, including its substantive law prohibiting the arbitration of insurance-related disputes. (See *Bickford*, *supra*, 336 N.W.2d at p. 74.)[4]

Defendants next contend the RPA falls outside the scope of section 25-2602.01(f) and cite *South Jersey Sanitation Co. v. Applied Underwriters Captive Risk Assur. Co.* (3d Cir. 2016) 840 F.3d 138 (*South Jersey*) as support for that argument. In *South Jersey*, the Third Circuit concluded that section 25-2602.01(f) did not invalidate an arbitration provision in a similar RPA because the statute applied only to insurance policies. Disregarding the broad language of the statute prohibiting enforcement of an arbitration provision in "any agreement concerning or relating to an insurance policy," the court in *South Jersey* instead relied on *dicta* by the Nebraska Supreme Court in *Kremer*, *supra*, 788 N.W.2d at page 552 stating that "'a statute precluding the parties to an insurance contract from including an arbitration agreement for future controversies regulates the insurer-insured contractual relationship.'" (*South Jersey*, at p. 146.) The court in *South Jersey* stated: "This language, while

[4] During oral argument, both parties discussed *Mastick v. TD Ameritrade, Inc.* (2012) 209 Cal.App.4th 1258, in which the court concluded that a general choice of law provision applying California law operates to invoke the specific provisions of the California Arbitration Act. (*Mastick*, at pp. 1264-1265.) We do not address the parties' arguments concerning *Mastick*, as California law does not govern the instant dispute.

dicta, strongly suggests that Subsection (f)(4) of the Nebraska Statute applies only to insurance policies themselves, and that 'any agreement' must be read as an arbitration agreement or provision within such a policy, rather than a derivative investment contract." (*Ibid.*, fn. omitted.)

We decline to apply the *South Jersey* court's advisory interpretation of section 25-2602.01(f)(4) because it is inconsistent with the plain language of the statute, which broadly covers "any agreement concerning or relating to an insurance policy." The *South Jersey* court's interpretation nullifies that statutory language, and violates fundamental principles of statutory interpretation that "courts should give meaning to every word of a statute and should avoid constructions that would render any word or provision surplusage," and that "'[a]n interpretation that renders statutory language a nullity is obviously to be avoided.' [Citation.]" (*Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1038-1039.) The *South Jersey* court's interpretation is also inconsistent with the principles set forth in *Fabe* that laws regulating the "business of insurance" are not "confined entirely to the writing of insurance contracts" (*Fabe*, *supra*, 508 U.S. at p. 503), but include "laws that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance." (*Id.* at p. 505.)

South Jersey is also distinguishable. The district court in that case "never found that the RPA falls within the ambit of the Nebraska Statute," (*South*

Jersey, *supra*, 840 F.3d at p. 146), whereas the trial court in the instant case did. There is substantial evidence in the record to support the trial court's finding. The RPA itself allows plaintiffs to participate in an underlying reinsurance treaty between AUCRA and CIC, and section 25-2602.01 applies to "any agreement concerning or relating to an insurance policy . . . including a reinsurance contract." (Neb. Rev. Stats., § 25-2602.01.) There was also substantial evidence that the RPA was an integral part of a workers' compensation insurance program defendants sold to plaintiffs and others. A consent order entered into by Applied Underwriters and the California Department of Insurance on September 6, 2016,[5] is further support that the RPA concerns or relates to the workers' compensation insurance policies issued as part of defendants' EquityComp program. For example, the consent order defines the term "RPA" as "ancillary or collateral to a guaranteed cost workers' compensation insurance policy that covers claims by California workers" and the terms "policy" or "policies" as "a Guaranteed Cost Policy or Policies for which an RPA is in force as of July 1, 2016." The consent order states that it "applies to policies and RPAs covering loss exposures in California" and that it "is not intended to impact policies or RPAs relating to

[5] The consent order prohibits CIC and AUCRA from issuing new RPAs or renewing existing RPAs with respect to any California policy until the RPA is submitted to the Workers' Compensation Insurance Ratings Bureau and the California Department of Insurance for approval in compliance with Insurance Code sections 11658 and 11735. We granted plaintiffs' request that we take judicial notice of the consent order.

risks covered outside of California." There is substantial evidence in the record that the RPA is an "agreement concerning or relating to an insurance policy" within the meaning of section 25-2602.01(f) of the NUAA.

Defendants argue that Nebraska law should not be applied to the instant dispute, because to do so would result in impermissible "extraterritorial" regulation by a state, prohibited by the Supreme Court in *Federal Trade Commm'n v. Travelers Health Assn.* (1960) 362 U.S. 293 (*Travelers Health*). That case, however, is inapposite.

At issue in *Travelers Health* was a Nebraska statute that prohibited Nebraska insurance companies from engaging in unfair trade practices "'in any other state.'" (*Travelers Health*, *supra*, 362 U.S. at p. 296.) A Nebraska insurance company argued that the Nebraska statute, by operation of the McCarran-Ferguson Act, precluded the Federal Trade Commission from regulating the insurance company's conduct outside Nebraska. The Supreme Court rejected that argument, concluding that the McCarran-Ferguson Act was not intended to allow a state to "regulate activities carried on beyond its own borders." (*Id.*, at p. 300.)

The Nebraska statute at issue in *Travelers Health* sought, by its express terms, to regulate the conduct of an insurer in another jurisdiction. The NUAA by its terms does not seek to regulate activities carried on outside Nebraska. The NUAA applies in the instant

case because the parties contractually agreed to its application.

CONCLUSIONS

The threshold issue of whether the FAA applies or is preempted by the McCarran-Ferguson Act and section 25-2602.01(f) of the NUAA was for the court, and not the arbitrator, to decide. The trial court did not err by adjudicating this gateway issue.

The trial court did not err by concluding that section 25-2602.01(f) of the NUAA is a statute that regulates the business of insurance within the meaning of the McCarran-Ferguson Act.

Application of the FAA would operate to invalidate or impair section 25-2602.01(f) of the NUAA. The trial court did not err by concluding that the McCarran-Ferguson Act applies and reverse preempts the FAA.

Section 25-2602.01(f) of the NUAA applies to the RPA and renders the arbitration provision contained in the RPA unenforceable. The trial court accordingly did not err by denying the petition to compel arbitration.

DISPOSITION

The order denying the petition to compel arbitration is affirmed. Plaintiffs are awarded their costs on appeal.

CERTIFIED FOR PUBLICATION

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE: 07/08/16	**DEPT.** 51
HONORABLE ALLAN GOODMAN JUDGE	R. DUARTE DEPUTY CLERK
HONORABLE JUDGE PRO TEM	ELECTRONIC RECORDING MONITOR
A. ALBA, CA Deputy Sheriff	NONE Reporter

3:30 pm	BC571913	Plaintiff Counsel
	CITIZENS OF HUMANITY LLC VS MARSH & MCLENNAN AGENCY LLC ET	NO APPERANCES Defendant Counsel
	170.6 – PLNTF – JUDGE ALARCON	

NATURE OF PROCEEDINGS:

MINUTE ORDER RE SUBMITTED MATTER: DEFENDANTS' PETITION TO COMPEL ARBITRATION;

The court appreciates the parties' memoranda of points and authorities submitted in response to the court's minute order of April 26, 2016 and the additional request, made on May 19, 2016, that the parties also address the application, if any, of In Re Van Dusen (9th Circ. 2011) 654 Fed.3d 838. The matter of the petition to compel arbitration having been argued, briefed and submitted, the court now rules as follows.

Defendants' request that the case be dismissed, made in the body of its most recent memorandum of points and authorities is procedurally improper. If defendants believe that the action should be dismissed, the appropriate means to bring that issue to attention of the court is by the filing of a noticed motion together with an appropriate memorandum of points and authorities. The joinder by Marsh & McLennan is limited and expressly states that it takes no position with respect to whether the matter is arbitrated so long as the stay as to it remains in place. The issue of whether the stay remains as to this party is not before the court at this time.

The key issue in this case at this time is whether this court has a "gatekeeper" role notwithstanding what is described in the defendants' memorandum as an extremely broad delegation clause in the subject Reinsurance Participation Agreement (RPA). In support of their argument that the arbitration clause of the RPA gives "exclusive authority" to the arbitrator to determine issues of construction and enforceability of the Arbitration Agreement, defendants rely exclusively on the provisions of the Federal Arbitration Act (9 U.S.C. sections 2 et seq.) and cases decided thereunder. While that mode of analysis suffices in many if not most circumstances, this case presents the atypical situation, one in which another federal statute must be analyzed to determine if it bars application of the Federal Arbitration Act.

This inquiry involves its own unique analysis. The potentially conflicting and controlling federal statute is the McCarran-Ferguson Act (15 U.S.C. sections 1011 et seq.) which was enacted with the express purpose of exempting from federal regulation contracts within the scope of that statute. Indeed, 15 U.S.C. section 1011 provides: "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."

Section § 1012 of that Act provides:

"(a) State regulation

"The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) Federal regulation

"No 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, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September

26, 1914, known as the Federal Trade Commission Act, as amended [15 U.S.C.A. 41 et seq.], shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

The first clause of section 1012(b) mandates that state laws "regulating the business of insurance" do not yield to conflicting federal statutes unless the other federal statute specifically requires otherwise. (U.S. Dept. of Treasury v. Fabe (1993) 508 U.S. 491, 507 [Fabe].)

Nothing in the Federal Arbitration Act "requires otherwise."

"The McCarran-Ferguson Act thus allows state law to reverse-preempt an otherwise applicable federal statute because the McCarran-Ferguson Act does not permit an "Act of Congress" to be "construed to invalidate, impair, or supersede" state law unless the Act of Congress 'specifically relates to the business of insurance'." (Safety Nat. Cas. Corp. v. Certain Underwriters At Lloyd's, London (5th Cir. 2009) 587 F.3d 714, 720.)

"Congress removed all Commerce Clause limitations on the authority of the States to regulate and tax the business of insurance when it passed the McCarran-Ferguson Act." (Western and Southern Life Ins. Co. v. State Bd. of Equalization of California, (1981) 451 U.S. 648, 653.)

Whether the McCarran-Ferguson Act applies in this case involves resolving three inquiries:

(1) whether the federal statute sought to be applied, here the Federal Arbitration Act, 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 federal law invalidates, supersedes or impairs the state law.

It is not disputed that the Federal Arbitration Act does not regulate the business of insurance; nor can it be disputed that application of that law in this case would invalidate the state law if that federal law had been enacted for the purpose of regulating the business of insurance.

The determinative inquiry then is whether the statute at issue here is within the scope of the qualification "regulating the business of insurance" set out in the McCarran-Ferguson Act.

While the analysis of whether there is reverse preemption involves an understanding of the purpose of the state law under consideration, construction of the state statute only is relevant once this reverse preemption analysis makes it so, and the reverse preemption analysis is not conducted under state law as it is a federal statute that we are construing. (See, e.g., Securities and Exchange Commission v. National Securities, Inc. (1969) 393 U.S. 453; Stephens v. American International Ins. Co. (5th Circ. 2009) 66 Fed.3d 41.)

Fabe, supra, is among the seminal federal cases in which the phrase "regulating the business of insurance" has been analyzed and applied. It illustrates that the particular state law at issue is examined through a federal lens to determine whether the "reverse preemption" mandated by The McCarran-Ferguson Act is present.

The Fabe court also noted that the "Ohio priority statute was enacted as part of a complex and specialized administrative structure for the regulation of insurance companies. The statute proclaims as its purpose, "the protection of the interests of insureds, claimants, creditors, and the public generally [citation omitted]."

In Fabe, the court held that a state statute governing the priority of claims against an insolvent insurer is a "law enacted for the purpose of regulating the business of insurance," within the meaning of section 2(b) of the McCarran-Ferguson Act." (Id. at 498-499.) In so holding, the court explained that the federal priority statute (31 U.S.C. sec. 3717 [giving claims of the United States priority with respect to debtor's obligations]) must yield to the conflicting Ohio statute to the extent the Ohio statute protects policyholders. (Id. at 494.)

In the Supreme Court the petitioner had argued that liquidation of an insolvent insurance company is not part of the "business of insurance" exempt from pre-emption under the Mc-Carran Ferguson Act." (Id. at 502.)

The court expressly rejected this narrow construction of the Act. (U.S. Dept. of Treasury v. Fabe (1993) 508 U.S. 491, 505-06.)

In 1997, the United States Court of Appeals for the Second Circuit analyzed a Kentucky statute, to determine whether the McCarran-Ferguson Act preserved that state statute in the face of a contention that the FAA mandated arbitration of a reinsurance contract. After expressly holding that "reinsurance is a practice which falls within the 'business of insurance,'" the court noted that, "Fabe states that "[s]tatutes aimed at protecting or regulating [the relationship between policyholder and insurer], directly or indirectly, are laws regulating the 'business of insurance,'" and that any law with the "end, intention, or aim of adjusting, managing, or controlling the business of insurance" is a law "enacted for the purpose of regulating the business of insurance." Fabe, 508 U.S. at ___, ___, 113 S.Ct. at 2208, 2210 (citations and quotations omitted) (emphasis added)." (Stephens v. American Intern. Ins. Co. (2nd Circ. 1005) 66 Fed. 3d 41, 45.)

In the present case, the defendants argue that the Nebraska statute at issue (Neb. Stats. Section 25-2602.01) does not apply. Thus, defendants write: "Although the Court questioned how the above exemption (in section 25-2602.01(f)(4)) applies when neither Plaintiff is an insurance company, and thus there is no agreement between two insurers [April 26, 2016 Order, p.5], the statute is not

so limited. The RPA is the functional equivalent of reinsurance because it allows the Plaintiffs to participate in the underlying Reinsurance Treaty between AUCRA and CIC. As explained below, the RPA qualifies as an agreement concerning or relating to a contract between insurance companies including a reinsurance contract." (Defendants' Supplemental Memorandum, filed June 1, 2016, p.9, 11. 15-20.)

While as indicated above, both reinsurance and other insurance-related contracts are within the scope of the McCarran-Ferguson Act, by defendants' argument, they admit that plaintiffs are not insurance companies. Thus, there is reverse preemption under the McCarran-Ferguson Act. Also, the cited Nebraska statute provides that arbitration between a party to a contract which is not an insurance company, and another, which entity is an insurance company, is expressly prohibited. This construction of this statute is also most consistent with the legislative history of this Nebraska statute, as plaintiffs explain in their Supplemental Brief (filed June 15, 2016, at page 13, line 21 through page 14, line 14).

Because there is reverse preemption, the Nebraska statute applies, and that statute bars arbitration in this circumstance as the arbitration clause in the RPA at issue is invalid under Nebraska law.

For these reasons, the "renewed" motion to compel arbitration is denied.

With this disposition, the court does not address other arguments advanced.

The matter is set for a status conference on August 3, 2016 at 8:30 a.m.

Clerk to give notice.

[Clerk's Certificate Of Mailing Omitted]

Court of Appeal, Second Appellate District,
Division Two – No. B276601

S246240

IN THE SUPREME COURT OF CALIFORNIA

En Banc

CITIZENS OF HUMANITY, LLC et al.,
Plaintiffs and Respondents,

v.

APPLIED UNDERWRITERS, INC. et al.,
Defendants and Appellants.

(Filed Mar. 14, 2018)

The petition for review is denied.

The request for an order directing depublication of the opinion is denied.

CANTIL-SAKAUYE
Chief Justice

APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC. PARTICIPANT NO. 857899 REINSURANCE PARTICIPATION AGREEMENT

This reinsurance participation agreement (this "Agreement") is made and entered into by and between Applied Underwriters Captive Risk Assurance Company, Inc., a company organized and existing under the laws of the British Virgin Islands ("Company") as of August 8, 2012 and

Citizens of Humanity, LLC, and

CM Laundry, LLC (collectively, "Participant").

Whereas, Participant is desirous of participating in the Company's segregated protected cell reinsurance program designated Segregated Account No. 857899 ("Participation"); and

Whereas, the Company has entered into a Reinsurance Treaty (hereinafter referred to as the "Treaty") with California Insurance Company (NAIC No. 0031-38865) and, through its pooling arrangement, with other affiliates of Applied Underwriters, Inc., including, but not limited to Continental Indemnity Company (NAIC No. 0031-28258) (collectively the "Issuing Insurers"); and

Whereas, the Participant desires the Company to establish a segregated protected cell whereby the Participant may share in the underwriting results of the Workers' Compensation policies of insurance issued for

the benefit of the Participant by the Issuing Insurers (the "Policies"); and

Whereas the Company will allocate a portion of the premium and losses under this Agreement to the Participant's segregated protected cell,

Now, therefore, in consideration of the mutual promises and undertakings set forth herein the parties do hereby agree as follows:

* * *

13. Nothing in this section shall be deemed to amend or alter the due date of any obligation under this Agreement. Rather, this section is only intended to provide a mechanism for resolving accounting disputes in good faith.

(A) It is the express intention of the parties to resolve any disputes arising under this Agreement without resort to litigation in order to protect the confidentiality of their relationship and their respective businesses and affairs. Any dispute or controversy that is not resolved informally pursuant to sub-paragraph (B) of Paragraph 13 arising out of or related to this Agreement shall be fully determined in the British Virgin Islands under the provisions of the American Arbitration Association.

(B) All disputes between the parties relating in any way to (1) the execution and delivery, construction or enforceability of this Agreement, (2) the management or operations of the Company, or (3) any other breach or claimed breach of this Agreement or the

transactions contemplated herein shall be settled amicably by good faith discussion among all of the parties hereto, and, failing such amicable settlement, finally determined exclusively by binding arbitration in accordance with the procedures provided herein. The reference to this arbitration clause in any specific provision of this Agreement is for emphasis only, and is not intended to limit the scope, extent or intent of this arbitration clause, or to mean that any other provision of this Agreement shall not be fully subject to the terms of this arbitration clause. All disputes arising with respect to any provision of this Agreement shall be fully subject to the terms of this arbitration clause.

(C) Either party may initiate arbitration by serving written demand upon the other party or parties. The demand shall state in summary form the issues in dispute in a manner that reasonably may be expected to apprise the other party of the nature of the controversy and the particular damage or injury claimed. The party receiving the demand shall answer in writing within 30 days and include in such answer a summary of any additional issues known or believed to be in dispute by such party described in a manner that reasonably may be expected to apprise the other party of the nature of the controversy and. the particular damage or injury claimed. Failure to answer will be construed as a denial of the issues in demand.

(D) The parties shall select a mutually acceptable arbitrator within 30 days of the demand for arbitration. If the parties are unable to agree on an

arbitrator within the 30 days, then each party shall appoint an arbitrator within 30 days thereof. If a party fails to appoint its arbitrator within such 30 day period, the party shall thereby waive its right to do so, and the other party's selected arbitrator shall act as the sole arbitrator. All arbitrators shall be active or retired, disinterested officials of insurance or reinsurance companies not under the control or management of either party to this Agreement and will not have personal or financial interests in the result of the arbitration.

(E) If two party-appointed arbitrators have been selected, the selected arbitrators shall then choose an umpire within 30 days from the date thereof. If the two arbitrators are unable to agree upon an umpire within 30 days after the appointment of the party-appointed arbitrators, the two party-appointed arbitrators shall each exchange a list of three (3) umpire candidates. Within ten (10) days thereafter, each party appointed arbitrator shall strike two names from the other's list. The umpire shall be selected from the remaining two names by the drawing of lots no later than ten (10) days thereafter.

(F) If more than one arbitrator shall be appointed, the arbitrators shall cooperate to avoid unnecessary expense and to accomplish the speedy, effective and fair disposition of the disputes at issue. The arbitrator or arbitrators shall have the authority to conduct conferences and hearings, hear arguments of the parties and take the testimony of witnesses. All witnesses will be made available for cross-examination by

the parties. The arbitrators may order the parties to exchange information or make witnesses available to the opposing party prior to any arbitration hearing.

(G) The arbitrator or arbitrators shall render a written decision (by majority determination if more than one arbitrator) and award within 30 days of the close of the arbitration proceeding. Judgment upon the award rendered by the arbitrator or arbitrators may be entered by any court of competent jurisdiction in Nebraska or application may be made in such court for judicial acceptance of the award and an order of enforcement as the law of Nebraska may require or allow.

(H) The award of the arbitrator or arbitrators shall be binding and conclusive on the parties, and shall be kept confidential by the parties to the greatest extent possible. No disclosure of the award shall be made except as required by the law or as necessary or appropriate to effect the enforcement thereof.

(I) All arbitration proceedings shall be conducted in the English language in accordance with the rules of the American Arbitration Association and shall take place in Tortola, British Virgin Islands or at some other location agreed to by the parties.

(J) The arbitrator or arbitrators shall be advised of all the provisions of this arbitration clause.

(K) This arbitration clause shall survive the termination of this Agreement and be deemed to be an obligation of the parties which is independent of, and without regard to, the validity of this Agreement.

(L) Punitive damages will not be awarded. The arbitrator(s) may, however, in their discretion award such other costs and expenses as they deem appropriate, including, but not limited to, attorneys' fees, the costs of arbitration and arbitrators' fees.

(M) Participant acknowledges and agrees that it will benefit from this Agreement and that a breach of the covenants herein would cause Company irreparable damage that could not adequately be compensated by monetary compensation. Accordingly, it is understood and agreed that in the event of any such breach or threatened breach, Company may apply to a court of competent jurisdiction for, and shall be entitled to, injunctive relief from such court, without the requirement of posting a bond or proof of damages, designed to cure existing breaches and to prevent a future occurrence or threatened future occurrence of like breaches on the part of Participant. It is further understood and agreed that the remedies and recourses herein provided shall be in addition to, and not in lieu of any other remedy or recourse which is available to Company either at law or in equity in the absence of this Paragraph including without limitation the right to damages.

* * *

16. This Agreement shall be exclusively governed by and construed in accordance with the laws of Nebraska and any matter concerning this Agreement that is not subject to the dispute resolution provisions of Paragraph 13 hereof shall be resolved exclusively by

the courts of Nebraska without reference to its conflict of laws.

* * *

IN WITNESS WHEREOF, the parties have set their hand.

PARTICIPANT APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC., SOLELY FOR AND ON BEHALF OF PROTECTED CELL NO. 867889

By /s/ Anthony W. Millar

Name Anthony W. Millar

From: Chief Financial Officer
[Citizens of Humanity LLC]

Date 08/10/2012

Robert Stafford
Vice President

[SEAL] /s/ Robert Stafford

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