No. 20-____

IN THE

Supreme Court of the United States

OLD REPUBLIC HOME PROTECTION COMPANY, INC.,

Petitioner,

v.

WILLIAM B. SPARKS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Oklahoma

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Epic Systems, Corporation* v. *Lewis*, 138 S. Ct. 1612 (2018), this Court "rejected efforts to conjure conflicts between the [Federal] Arbitration Act and other federal statutes[,]" as it has done with "*every* such effort to date[.]" *Id.* at 1627 (emphasis in original).

The state supreme court in this case conjures a conflict, this time purporting to preempt the FAA based on the Oklahoma Arbitration Act and (mis)application of the McCarran–Ferguson Act. Its opinion deepens a split in authority involving other state courts of last resort and federal courts of appeals analyzing these same issues, and it is at odds with this Court's precedent. The two-part question presented is:

Whether, in a case involving interstate commerce and a written contract with an arbitration provision that expressly requires application of the FAA, a state arbitration statute that by its terms "shall not apply to * * * contracts which reference insurance" (a) qualifies as a "law enacted by [a] State for the purpose of regulating the business of insurance" under the McCarran–Ferguson Act, and (b) can support reverse preemption of the FAA based on an asserted impairment of such a state law.

PARTIES TO THE PROCEEDING

Old Republic Home Protection Company, Inc., petitioner on review, was the defendant-appellant in the Supreme Court of Oklahoma.

William B. Sparks and Donna Sparks, respondents on review, were the plaintiffs-appellees in the Supreme Court of Oklahoma.

CORPORATE DISCLOSURE STATEMENT

Petitioner Old Republic Home Protection Company, Inc. is a wholly owned subsidiary of ORHP Management Company. ORHP Management Company is a wholly owned subsidiary of Old Republic General Insurance Group, Inc., which in turn is wholly owned by Old Republic International Corporation, a publicly traded corporation. No publicly traded corporation, other than Old Republic International Corporation, owns 10% or more of Old Republic Home Protection Company, Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Old Republic Home Protection Company, Inc. (ORHP) respectfully petitions for a writ of certiorari to review the decision of the Supreme Court of Oklahoma in this case.

INTRODUCTION

Congress enacted the Federal Arbitration Act (FAA) in 1925 "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 219-20 (1985). The FAA declares a "written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract." 9 U.S.C. 2.

Consistent with that well-recognized federal policy, this Court, time and again, has reiterated that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 341 (2011).[1] This Court also has repeatedly

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[1] See also *Marmet Health Care Ctr., Inc.* v. *Brown*, 565 U.S. 530, 533 (2012) (preemption of state law prohibiting arbitration of certain claims against nursing homes); *Preston* v. *Ferrer*, 552 U.S. 346, 356 (2008) (preemption of state law providing state commissioner jurisdiction to decide issues subject to arbitration); *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56 (1995) (preemption of state law requiring punitive damages claims to be resolved by judicial proceeding); *Perry* v. *Thomas*, 482 U.S. 483, 491 (1987) (preemption of state law requiring a judicial forum for wage disputes); *Southland Corp.* v. *Keating*,

rejected attempts to construe other federal statutes to render arbitration agreements unenforceable despite the FAA. See *Epic Sys.*, 138 S. Ct. at 1627 (collecting cases).

Courts, like the Supreme Court of Oklahoma here, nevertheless continue to invent "new devices and formulas" evincing "antagonism toward arbitration." *Id.* at 1623; see also *Concepcion,* 563 U.S. at 342. This Court has not hesitated to grant petitions for writs of certiorari to review state court decisions that undermine the FAA.[2]

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465 U.S. 1, 16 (1984) ("In creating a substantive rule [in favor of arbitration] applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.").

[2] See, *e.g.*, *Kindred Nursing Ctr. Ltd. P'ship* v. *Clark*, 137 S. Ct. 1421 (2017) (reviewing decision of the Kentucky Supreme Court); *DirectTV* v. *Imburgia*, 136 S. Ct. 463 (2015) (reviewing decision of the California Court of Appeal); *Nitro-Lift Techs., L.L.C.* v. *Howard*, 568 U.S. 17 (2012) (per curiam) (reviewing decision of the Supreme Court of Oklahoma); *Marmet Health Care Ctr., Inc.* v. *Brown*, 565 U.S. 530 (2012) (reviewing decision of the West Virginia Supreme Court of Appeals); *KPMG LLP* v. *Cocchi*, 565 U.S. 18 (2011) (per curiam) (reviewing decision of the Florida District Court of Appeal); *Preston* v. *Ferrer*, 552 U.S. 346 (2008) (reviewing decision of the California Court of Appeal); *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440 (2006) (reviewing decision of the Florida Supreme Court); *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52 (2003) (per curiam) (reviewing decision of the Alabama Supreme Court); *Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S. 444 (2003) (reviewing decision of the Supreme Court of South Carolina); *C&L Enter., Inc.* v. *Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411 (2001) (reviewing decision of the Court of Civil Appeals of Oklahoma); *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681 (1996) (reviewing decision of the Montana Supreme Court); *Allied-Bruce Terminix*

The Court should grant this Petition for the following reasons:

First, in order to find reverse preemption under the McCarran–Ferguson Act, the Supreme Court of Oklahoma interpreted a generally applicable state arbitration statute to be a law "enacted * * * for the purpose of regulating the business of insurance" under 15 U.S.C. 1012(b). It did so despite the fact that the Oklahoma arbitration statute expressly states that it "shall not apply to * * * contracts which reference insurance[.]" Okla. Stat. Ann. tit. 12, § 1855(D). The conclusion that the Oklahoma statute "regulat[es] the business of insurance" is directly at odds with this Court's precedents regarding the McCarran–Ferguson Act, as well as decisions by other state courts of last resort and federal courts of appeals—some interpreting virtually identical statutory provisions. Clarifying this Court's earlier rulings and resolving this split in authority involves an important question of federal law that is deserving of this Court's review.

Second, the decision below is at odds with this Court's precedent. The McCarran–Ferguson Act only permits reverse preemption when a federal law "invalidate[s], impair[s], or supersede[s]" a state law enacted to "regulat[e] the business of insurance." 15 U.S.C. 1012(b). This Court has made clear that, where a State has "*chosen not to regulate*" a particular aspect of the business of insurance, federal laws that do regulate in that domain do not "impair" state law. *Humana Inc.* v. *Forsyth*, 525 U.S. 299, 309 (1999)

Cos. v. *Dobson*, 513 U.S. 265 (1995) (reviewing decision of the Alabama Supreme Court).

(emphasis in original) (citation omitted). Because the Oklahoma law does not regulate in this area, but rather carves out insurance contracts from the general state arbitration act—as do the arbitration acts of many other States—the decision below is at odds with this Court's McCarran–Ferguson Act precedent. Nonetheless, there is a split in authority to be resolved as to what it means to "impair" state insurance law in the arbitration context. That split has, on the one hand, the Supreme Court of Oklahoma simply assuming reverse preemption applies and other courts similarly ignoring the high-bar for McCarran–Ferguson Act "impairment" when addressing arbitration and, on the other hand, other courts finding no impairment at all.

Finally, the Court should grant this Petition because it presents important issues of federal law that are likely to reoccur. Arbitration agreements are common throughout the insurance industry. There are 18 States other than Oklahoma that have enacted either similar provisions carving out insurance contracts from their general state arbitration acts or statutes that purport to prohibit outright arbitration of insurance disputes. Guidance from this Court on these important federal questions can help inform conduct in the industry and avoid inappropriate forum shopping.

OPINIONS BELOW

The opinion of the Supreme Court of Oklahoma, Pet. App. 1a-24a, is reported at 467 P.3d 680 (Okla. 2020). The opinion of the Court of Civil Appeals of Oklahoma, Pet. App. 25a-53a, is unreported. The District Court of Cleveland County, Oklahoma's

summary order denying ORHP's motion to compel arbitration, Pet. App. 54a, is unreported.

STATEMENT OF JURISDICTION

The Supreme Court of Oklahoma issued its opinion on May 27, 2020. Pet. App. 1a. ORHP invokes this Court's jurisdiction under 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Supremacy Clause of the United States Constitution, the FAA, the McCarran–Ferguson Act, and the Oklahoma Arbitration Act.

The Supremacy Clause, U.S. Const. Art. VI, Cl. 2, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the FAA, 9 U.S.C. 2, provides in pertinent part:

> A written provision in any maritime transaction or 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 grounds as exist at law or in equity for the revocation of any contract.

The McCarran–Ferguson Act, 15 U.S.C. 1012(b), provides in pertinent part:

> 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[.]

The Oklahoma Arbitration Act, Okla. Stat. Ann. tit. 12, § 1855(D), provides in pertinent part:

> The [Oklahoma] Arbitration Act shall not apply to collective bargaining agreements and contracts which reference insurance, except for those contracts between insurance companies.

STATEMENT OF THE CASE

A. Factual Background

ORHP sells home service contracts covering residential properties, often in connection with real estate transactions. Under the terms of its contracts, ORHP arranges and pays for the repair or replacement of certain covered appliances and fixtures (*e.g.*, refrigerators, HVAC equipment, oven/ranges, and washer dryers).

Respondent Donna Sparks originally purchased a home service contract from ORHP in 2009 and

subsequently renewed it for consecutive one-year terms, including the final term beginning September 15, 2015. The "Declaration of Coverage" issued by ORHP to Ms. Sparks is included at Pet. App. 63a-65a. This Declaration of Coverage incorporated the terms, conditions, and limitations detailed in the accompanying "Oklahoma Home Warranty"[3] provided by ORHP to Ms. Sparks, which is attached at Pet. App. 66a-102a.

The one-page Declaration of Coverage also informed Ms. Sparks that "this Contract will be subject to the Arbitration Provision outlined on Page 9" of the service contract. Pet. App. 64a. It explained that Ms. Sparks would be "giving up certain rights to have a dispute settled in court" and that if she did "not want to agree to this provision, [she could] cancel [her] Plan by contacting [ORHP] within 30 days of purchase of [her] Home Protection Plan." Pet. App. 64a-65a.

Page 9 of the contract sets out—in a black-outlined text box on the right side of the document—the following arbitration provision:

> ***Arbitration:*** By entering into this Agreement the parties agree and acknowledge that all disputes they have that involve us, or arise out of actions that we did or did not take, shall be arbitrated

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[3] While Ms. Sparks' service contract is entitled an "Oklahoma Home Warranty" in accordance with the lay terminology within the industry, the service contracts issued by ORHP in Oklahoma are regulated by two separate statutory schemes, the Oklahoma Service Warranty Act, Okla. Stat. Ann. tit. 15, §§ 15-141.1 *et seq.*, and the Oklahoma Home Service Contract Act, Okla. Stat. Ann. tit. 36, §§ 6752 *et seq*.

> as set forth herein as long as the claim is in excess of the applicable small claims court jurisdictional limit. *The parties further agree that they are giving up the right to a jury trial, and the right to participate in any class action, private attorney general action, or other representative or consolidated action, including any class arbitration or consolidated arbitration proceeding*.
>
> * * *
>
> **The parties expressly agree that this Agreement and this arbitration provision involve and concern interstate commerce and are governed by the provisions of the Federal Arbitration Act (9 U.S.C. § 1, et seq.) to the exclusion of any different or inconsistent state or local law, ordinance or judicial rule.**

Pet. App. 99a-100a (italicized emphasis in original and bolded emphasis added).

The Sparks assert that faulty repairs to their air conditioning system caused it to malfunction in March 2016, resulting in damage to their home. They allege the independent contractors dispatched by ORHP repeatedly failed to repair their air conditioning system to their satisfaction, that ORHP engaged in a pattern and practice of hiring unqualified independent contractors to perform repair work, and that ORHP is liable for breach of contract, negligence, and "bad faith," such that punitive damages are warranted.

B. The Revised Uniform Arbitration Act and Oklahoma's Enactment

Central to the proceedings below is the fact that Oklahoma, like many States, has enacted a general state arbitration act enforcing agreements to arbitrate disputes and establishing various rules for how arbitrations shall be conducted if state law applies. The Oklahoma Arbitration Act was enacted in 2006 and is virtually identical to the Uniform Law Commission's Revised Uniform Arbitration Act, which was published in 2000. Compare Okla. Stat. Ann. tit. 12, §§ 1851-1880 with Revised Uniform Arbitration Act §§ 1-33.

Section 1855(D) contains one of the few provisions of the Oklahoma Arbitration Act that deviates from the Revised Uniform Arbitration Act. Compare Okla. Stat. Ann. tit. 12, § 1855(D) with Revised Uniform Arbitration Act § 4. Oklahoma's statute provides that it "shall not apply to collective bargaining agreements and contracts which reference insurance, except for those contracts between insurance companies." Okla. Stat. Ann. tit. 12, § 1855(D). At least 18 other States have enacted statutory provisions that either exempt insurance contracts from the scope of their general state arbitration acts or purport to prohibit outright insurance disputes from being arbitrated. See p. 30 n.10, *infra* (compiling state statutes).

C. Proceedings Below

In 2016, the Sparks filed this lawsuit in the District Court of Cleveland County, Oklahoma. Based on the parties' agreement and the FAA, ORHP responded by moving to compel arbitration and stay litigation. Pet. App. 61a ("[A]s provided by the FAA, a

stay of these proceedings is appropriate until the arbitration has been conducted as the parties agreed."). The trial court entered a summary order denying ORHP's motion, without explaining its reasons. Pet. App. 54a.

A divided three-judge panel of the Court of Civil Appeals of Oklahoma affirmed, ruling that the Oklahoma Arbitration Act rendered the arbitration provision in the parties' contract unenforceable. Pet. App. 41a. The majority, "based on an interpretation of the McCarran–Ferguson Act," rejected ORHP's argument that the Oklahoma Arbitration Act is preempted by the FAA. Pet. App. 28a-29a. Notably, the dissenting judge explained that reverse preemption was inappropriate because the FAA does not impair any Oklahoma law "regulating the business of insurance" within the meaning of the McCarran–Ferguson Act. Pet. App. 45a-53a.

The Supreme Court of Oklahoma granted a petition for certiorari to review the decision. Pet. App. 3a ¶1. On May 27, 2020, the court issued its decision without any further briefing or oral argument. Pet. App. 1a-2a. It began by claiming that the McCarran–Ferguson Act "bestows upon states *absolute authority* over matters relating to the regulation of insurance." Pet. App. 11a-12a ¶15 (emphasis in original); but see *Humana*, 525 U.S. at 308 ("We reject any suggestion that Congress intended to cede the field of insurance regulation to the States, saving only instances in which Congress expressly orders otherwise."). Despite acknowledging the controlling legal questions before it, the Supreme Court of Oklahoma failed to conduct a substantive analysis of the interaction between the FAA, the Oklahoma Arbitration Act, and the

McCarran–Ferguson Act. Instead, the court denigrated the parties' agreement, characterizing it as a forced arbitration clause because the provision was part of a pre-printed contract that the court assumed was drafted by ORHP and not separately negotiated. Pet. App. 3a ¶¶1-2, 18a ¶29.[4]

In reaching its conclusion, the Supreme Court of Oklahoma did not engage in the type of analysis this Court has required to determine if McCarran–Ferguson Act reverse preemption applies. The court did not analyze whether the Oklahoma legislature enacted the Oklahoma Arbitration Act for the purpose of regulating the business of insurance nor whether the FAA operates "to invalidate, impair, or supersede" any part of Oklahoma law. Instead, it simply concluded "that state laws involving the business of insurance take precedence over the competing federal law, FAA[,] favoring arbitration." Pet. App. 14a ¶21.[5]

Even though it acknowledged that the Oklahoma Arbitration Act "*exempts* 'contracts which reference insurance,'" the court apparently assumed this meant

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[4] As this Court has recognized, under the FAA, the mere fact that an arbitration clause is contained in a form contract does not render it unenforceable. See *Concepcion*, 563 U.S. at 346-47 (noting that "the times in which consumer contracts were anything other than adhesive are long past").

[5] In determining that Ms. Sparks purchased a contract "which reference[s] insurance" for purposes of the Oklahoma Arbitration Act, Pet. App. 19a-22a, the Supreme Court of Oklahoma also cast aside the Oklahoma legislature's declaration that home service contracts and warranty contracts "are not insurance in [Oklahoma] or otherwise regulated under the [Oklahoma] Insurance Code." Okla. Stat. Ann. tit. 15 § 15-141.2(17)(f); Okla. Stat. Ann. tit. 36, § 6752(9).

it invalidated arbitration agreements in such contracts and that "the state law must prevail over the" FAA. Pet. App. 15a ¶23 (emphasis added). For this latter proposition, the court cited cases where "courts have concluded that state laws *invalidating* arbitration provisions in insurance contracts reverse preempt the FAA." Pet. App. 15a ¶22 (emphasis added).

After recognizing that the Oklahoma Arbitration Act does not apply to arbitration provisions in contracts referencing insurance, and using that as a basis for reverse preemption of the FAA, the court went on to support its conclusion with its common law precedent singling out arbitration agreements for unfavorable treatment:

> [F]or more than half a century, this Court has held that an insurance company's insertion of forced arbitration in an insurance contract deprived the insured of a judicial examination and determination of the issues and such policy provision was contrary to public policy and unenforceable.

Pet. App. 16a ¶24 (citing *Boughton* v. *Farmers Ins. Exch.*, 354 P.2d 1085, 1089 (Okla. 1960)).

Nowhere did the Supreme Court of Oklahoma acknowledge that common law rulings by courts do not justify reverse preemption under the McCarran–Ferguson Act. See 15 U.S.C. 1012(b) (applying only to laws "*enacted* by any State") (emphasis added).

REASONS FOR GRANTING THE WRIT

As this Court has explained, the McCarran–Ferguson Act "precludes application of a federal statute in the face of state law 'enacted * * * for the purpose of regulating the business of insurance,' if the federal measure does not 'specifically relat[e] to the business of insurance,' and would 'invalidate, impair, or supersede' the State's law." *Humana*, 525 U.S. at 307 (citing *Department of Treasury* v. *Fabe*, 508 U.S. 491, 501 (1993)). While the FAA does not relate specifically to the business of insurance, review by this Court is justified to address the other two requirements of McCarran–Ferguson Act reverse preemption in the context of arbitration agreements.

I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW REFLECTS A SPLIT IN AUTHORITY ON ANALYZING WHETHER, UNDER FEDERAL LAW, STATE ARBITRATION STATUTES REGULATE THE BUSINESS OF INSURANCE.

The Supreme Court of Oklahoma necessarily concluded that the Oklahoma Arbitration Act was enacted for the purpose of "regulating the business of insurance," 15 U.S.C. 1012(b), even though the statute clearly states by its own terms that it "shall not apply to * * * contracts which reference insurance[.]" Okla. Stat. Ann. tit. 12, § 1855(D). Nothing in the text of the Oklahoma Arbitration Act purports to render arbitration provisions in insurance contracts void, revocable, or unenforceable, or otherwise expresses any legislative attempt to regulate the insurance industry or reverse preempt the FAA. Indeed, the Oklahoma Arbitration Act does just the opposite, declining to regulate arbitration in "contracts which

reference insurance" by excluding such contracts from its scope. Okla. Stat. Ann. tit. 12, § 1855(D); see also *Regulate*, Black's Law Dictionary (11th ed. 2019) ("To control (an activity or process) esp. through the implementation of rules.").

When determining whether a law was enacted for the purpose of regulating the business of insurance, this Court has explained that the law must "possess the 'end, intention, or aim' of adjusting, managing or controlling the business of insurance." *Department of the Treasury* v. *Fabe,* 508 U.S. 491, 505 (1993) (quoting Black's Law Dictionary 1236, 1286 (6th ed. 1990)). As several courts have recognized, specific application of this test post-*Fabe* has proven difficult.[6] The confusion over the applicable standard has predictably led to divergent outcomes.

a. Analyzing identical McCarran–Ferguson reverse preemption arguments considered by the Supreme Court of Oklahoma here, the Vermont Supreme Court rejected reverse preemption in *Little* v. *Allstate Insurance Company*, 705 A.2d 538 (Vt. 1997). *Little* involved a state arbitration statute nearly identical to Oklahoma's. Specifically, Vermont's arbitration law provides that it "does not apply to labor interest arbitration, nor to arbitration

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[6] See, *e.g.*, *Munich Am. Reinsurance Co.* v. *Crawford*, 141 F.3d 585, 592 (5th Cir. 1998) ("*Fabe*'s holding in this respect is simply unclear."); *International Ins. Co.* v. *Duryee*, 96 F.3d 837, 839 (6th Cir. 1996) ("It is not clear from the majority opinion in *Fabe* how far its holding extends."); *Milliman, Inc.* v. *Roof*, 353 F. Supp. 3d 588, 601 (E.D. Ky. 2018) ("[D]etermining whether a law 'regulates the business of insurance' has proved difficult.").

agreements contained in a contract of insurance." Vt. Stat. Ann. tit. 12, § 5653.

The Vermont Supreme Court held that the Vermont Arbitration Act's exclusion of insurance contracts from its scope meant that it was *not* a law enacted for the purpose of regulating the business of insurance within the meaning of the McCarran–Ferguson Act. *Little*, 705 A.2d at 541. In reaching that conclusion, the Vermont Supreme Court distinguished between state arbitration acts that exempt arbitration agreements in insurance contracts from those that affirmatively invalidate arbitration provisions:

> All the insurance contract exclusion from the [Vermont Arbitration Act] has done is to allow insurance arbitration agreements to continue to be governed by the common law. Thus, the [Vermont Arbitration Act] regulates those arbitration agreements subject to its terms. Those that are excluded are *not* regulated by the [Vermont Arbitration Act].
>
> We emphasize that the Vermont Legislature has not specifically acted to make insurance arbitration agreements revocable. * * * Instead, the Legislature has chosen not to regulate arbitration agreements at all.

Id. (emphasis in original, internal citation omitted).

Based on this conclusion, the Vermont Supreme Court held that the FAA preempted the state statute and "the agreement to arbitrate is irrevocable." *Id.* at

539, 541; see also *American Guar. & Liab. Ins. Co.* v. *Abram Law Grp., LLC*, No. 1:11-cv-3483-SCJ, 2013 WL 12099359 (N.D. Ga. Feb. 20, 2013) (following the Vermont Supreme Court's decision in *Little*); *Bixler* v. *Next Fin. Grp., Inc.*, 858 F. Supp. 2d 1136, 1146 & n.5 (D. Mont. 2012) (rejecting McCarran–Ferguson Act reverse preemption because it was "highly unlikely" that an arbitration statute—which by its terms "does not apply to * * * any agreement concerning or relating to insurance policies or annuity contracts"—"was enacted for the purpose of regulating the business of insurance") (citing *Northwestern Corp.* v. *Nat'l Union Fire Ins. Co.*, 321 B.R. 120 (D. Del. Bankr. 2005)).

b. Here however, the Supreme Court of Oklahoma reached the exact opposite conclusion when presented with a virtually indistinguishable state statute. Like the Vermont Arbitration Act, the Oklahoma Arbitration Act does not apply to "contracts which reference insurance." Okla. Stat. Ann. tit. 12, § 1855(D). Despite acknowledging this exemption, the Supreme Court of Oklahoma concluded that the statute "is a state law regulating the business of insurance." Pet. App. 15a ¶23. It failed to provide any explanation for its conclusion.

Although the Supreme Court of Oklahoma purported to consider whether the *contract* before it is one "which reference[s] insurance" notwithstanding that the Oklahoma legislature had determined the contracts were not insurance (see p. 11 n.5, *supra*), that is not the dispositive question under the McCarran–Ferguson Act, which asks whether the state *law* was "enacted * * * for the purpose of regulating the business of insurance." 15 U.S.C.

1012(b). Without proper analysis, the court simply assumed that the Oklahoma Arbitration Act was somehow enacted to regulate insurance and therefore qualified for reverse preemption under the McCarran–Ferguson Act.

Neither the Revised Uniform Arbitration Act nor the Oklahoma Arbitration Act regulate the business of insurance. Instead, these laws provide default arbitration rules in the event that the parties' arbitration agreement does not specifically spell out particular procedures, but § 1855(D) simply declined to provide those procedures for "contracts which reference insurance." Moreover, the drafters of the Revised Uniform Arbitration Act expressly recognized that the "emphatically pro-arbitration provision perspective [of Congress in the FAA] will be applicable in both federal and state courts," such that "state law of any ilk, including adaptations of the [Revised Uniform Arbitration Act], mooting or limiting contractual agreements to arbitrate must yield to the pro-arbitration policy voiced in Sections 2, 3, and 4 of the FAA." Revised Uniform Arbitration Act Preface at 2 (Unif. Law Comm'n 2000); see also *Oklahoma Oncology & Hematology P.C.* v. *U.S. Oncology, Inc.*, 160 P.3d 936, 947 (Okla. 2007) ("Both the FAA and the [Oklahoma Arbitration Act] require the courts to honor private parties' agreements to settle their 'controversies' in the arbitral forum.").

c. Contrary to the approach taken by the Supreme Court of Oklahoma, federal courts of appeals have explained that state arbitration laws, which apply generally to all contracts, do not regulate the business of insurance. See, *e.g.*, *Kong* v. *Allied Prof'l Ins. Co.*, 750 F.3d 1295, 1304 (11th Cir. 2014) (state arbitration

statute that applied to "all arbitration agreements, not just those found in insurance contracts" did not regulate the business of insurance under the McCarran–Ferguson Act); *Hart* v. *Orion Ins. Co.*, 453 F.2d 1358, 1360 (10th Cir. 1971) (holding that state laws of "general application pertaining to the method of handling contract disputes" do not "regulate the business of insurance" for McCarran–Ferguson Act purposes); *Hamilton Life Ins. Co.* v. *Republic Nat'l Life Ins. Co.*, 408 F.2d 606, 611 (2d Cir. 1969) ("It is quite plain that arbitration statutes * * * are not statutes regulating the business of insurance, but statutes regulating the method of handling disputes generally."). And other state courts of last resort have explained that where a general arbitration act is incorporated by reference into the state insurance code, this act of incorporation does not transform the state arbitration act into a law regulating "insurance so as to reverse-preempt the FAA under the provisions of the McCarran–Ferguson Act." *Southern United Fire Ins. Co.* v. *Howard*, 775 So. 2d 156, 164 (Ala. 2000).

d. There are other federal and state courts that have concluded that arbitration statutes or insurance statutes that *specifically* address the arbitrability of insurance related disputes are state laws enacted for the purpose of regulating insurance. The Supreme Court of Oklahoma relied on several of these decisions, although they are distinguishable and apply at best a cursory analysis of the requisite McCarran–Ferguson Act elements. Pet. App. 14a-15a ¶¶21-22.

The court heavily relied on *Minnieland Private Day School, Incorporated* v. *Applied Underwriters Captive Risk Assurance Company*, 867 F. 3d 449 (4th

Cir. 2017), but that reliance (misplaced as it was)[7] only highlights why clarification from this Court is necessary.

While the Supreme Court of Oklahoma described the Virginia law at issue in *Minnieland* as similar to § 1855(D) of the Oklahoma Arbitration Act, Pet. App. 14a-15a ¶21, the texts of the two laws differ in significant ways. The Virginia statute provides that "[n]o insurance contract delivered or issued for delivery" in Virginia "shall contain any condition, stipulation or agreement * * * [d]epriving the courts of [Virginia] of jurisdiction in actions against the insurer," and rendered any such provision "void." *Minnieland*, 867 F.3d at 455 (quoting Va. Code Ann. § 38.2-312).

By contrast, the Oklahoma Arbitration Act does not include any language rendering arbitration provisions in insurance contracts "void," nor does it mention contractual provisions that "deprive" state courts of their "jurisdiction." Oklahoma's law merely excludes "contracts which reference insurance" from its scope. Okla. Stat. Ann. tit. 12, § 1855(D). Nowhere does it purport to render such provisions void, unenforceable, or revocable, or otherwise prohibit

[7] Notably, despite the Supreme Court of Oklahoma's suggestion that *Minnieland* supported reverse preemption of the FAA, the Fourth Circuit did not reach the issue, stressing in its opinion that the appellant did not raise it. *Id.* at 454. As a result, the court's decision and holding focused exclusively on the appellant's argument that the delegation language of the parties' contract required the arbitrator, rather than the district court, to determine the arbitrability question. *Id.*

agreements that would "deprive" Oklahoma state courts of their "jurisdiction."

Similarly, the Supreme Court of Oklahoma relied on *American Bankers Insurance Company* v. *Inman*, 436 F.3d 490 (5th Cir. 2006). Pet. App. 14a n.14, 15a ¶22. But that case, like *Minnieland*, involved a state statute that expressly proscribed any "provision requiring arbitration arising under" any uninsured motorist endorsement and provided that "[t]he insured shall not be restricted or prevented in any manner from employing legal counsel or instituting or prosecuting to judgment legal proceedings." *Inman*, 436 F.3d at 493 (quoting Miss. Code Ann. § 83-11-109). The text of the Oklahoma Arbitration Act lacks any language similar or even close to that, and nothing in it can plausibly be read to prohibit, invalidate, or void arbitration agreements in insurance contracts.

* * *

Review by this Court can resolve the split in authority and lack of clarity regarding whether (or when) an arbitration statute that excludes from its coverage arbitration of insurance related contracts is a law "enacted * * * for the purpose of regulating the business of insurance," such that reverse preemption under the McCarran–Ferguson Act is possible.

II. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW IS AT ODDS WITH THIS COURT'S PRECEDENT AND IT IS INDICATIVE OF INCONSISTENT DECISIONS FROM APPELLATE COURTS ADDRESSING WHEN, IF EVER, ENFORCEMENT OF THE FAA IMPAIRS A STATE STATUTE ENACTED FOR THE PURPOSE OF REGULATING INSURANCE.

a. A "key question" under the McCarran–Ferguson Act is whether application of federal law would "invalidate, impair, or supersede" a state law regulating the business of insurance. *Humana*, 525 U.S. at 307-08.[8] Indeed, this Court in *Humana* made clear that reverse preemption under the McCarran–Ferguson Act is inapplicable when federal law does not impair a state law regulating the business of insurance. *Id.* at 309.

This Court has not hesitated to grant review of a state supreme court decision that is directly at odds with this Court's precedent interpreting federal law. See, *e.g.*, *Kindred Nursing Ctr. Ltd. P'ship* v. *Clark*, 137 S. Ct. 1421, 1427 (2017) (reviewing state supreme court's application of the FAA and explaining that "the court did exactly what [*AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)] barred" by "singling out [arbitration] contracts for disfavored treatment"). And that is the case here.

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[8] See also *Miller* v. *Nat'l Fidelity Life Ins. Co.*, 588 F.2d 185, 187 (5th Cir. 1979) (explaining that the "test under McCarran–Ferguson is not whether a state has enacted statutes regulating the business of insurance, but whether such state statutes will be invalidated, impaired, or superseded by application of federal law").

The FAA does not "impair" any Oklahoma statute, certainly not any that regulate insurance, and the Supreme Court of Oklahoma's contrary conclusion is at odds with decisions of this Court and various appellate courts.

Because the Oklahoma Arbitration Act does not apply to "contracts which reference insurance[,]" Okla. Stat. Ann. tit. 12, § 1855(D), application of the FAA to such contracts does not impair the Oklahoma Arbitration Act. As this Court has explained, where a State has "*chosen not to regulate*" a particular aspect of the business of insurance, federal laws that do regulate in that domain do not "impair" state law. *Humana*, 525 U.S. at 309 (emphasis in original). Interpreting the meaning of "impair" as used in the McCarran–Ferguson Act, this Court has explained:

> When federal law does not directly conflict with state regulation, and when application of the federal law would not frustrate any declared state policy or interfere with a State's administrative regime, the McCarran–Ferguson Act does not preclude its application.

Id. at 310.[9]

Though not expressly stating it, the Oklahoma Supreme Court necessarily concluded that application

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[9] To qualify for McCarran–Ferguson Act reverse preemption, the state law must be one "enacted" by the state legislature, 15 U.S.C. 1012, not merely a policy announced by a government officials, see *American Heritage Life Insurance Company* v. *Orr*, 294 F.3d 702, 709 (5th Cir. 2002), or common law doctrine, see *American International Group, Incorporated* v. *Siemens Building*

of the FAA would "impair" the Oklahoma Arbitration Act in order to find McCarran–Ferguson Act reverse preemption. But that conclusion is directly at odds with the holding in *Humana*. A state arbitration statute that simply provides that it does not apply to an insurance contract cannot, by definition, be impaired by a federal statute that permits arbitration to be enforced in accordance with the parties' express written agreement, even if it is believed to resemble insurance.

b. The decision below is also at odds with several other appellate court decisions rejecting impairment by the FAA under similar circumstances. Earlier this year, the Iowa Supreme Court held that "[i]f there is no conflict, McCarran–Ferguson's reverse preemption is inapplicable." *Ommen* v. *Milliman, Inc.*, 941 N.W.2d 310, 319 (Iowa 2020). In *Ommen*, the court ruled that McCarran–Ferguson Act reverse preemption did not apply because the FAA did not impair the Iowa Liquidation Act. The Iowa statute permitted a liquidator to "continue to prosecute and to institute * * * any and all suits and other legal proceedings." Iowa Code § 507C.21(1)(l). It did not preclude arbitration of such claims and did not conflict with the FAA: "Requiring arbitration only alters the forum in which the liquidator may pursue his common law tort claims." *Ommen*, 941 N.W.2d at 320.

New York's highest court reached a similar conclusion in *Monarch Consulting, Incorporated* v. *National Union Fire Insurance Company,* 47 N.E.3d 463 (N.Y. 2016). The case addressed whether a

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Technologies, Incorporated, 881 So. 2d 7, 11-12 (Fla. Ct. App. 2004).

California law requiring filing of certain insurance related agreements with a state regulator would be impaired by compelling arbitration under an agreement that was not filed as required. *Id.* at 470. The court held that the state law was not "impaired" by application of the FAA because it did not purport to "prohibit, limit, or regulate the use or form of arbitration clauses in insurance contracts." *Id.* at 471. The same is undeniably true of the Oklahoma Arbitration Act.

Clearly the rationale of the Vermont Supreme Court in *Little* also supports a finding of non-impairment, because it concluded that the state statute simply did not apply to insurance contracts. See *Little*, 705 A.2d at 541. It is axiomatic that a state law that does not apply to insurance contracts cannot be impaired by the application of the FAA to insurance contracts.

Outside of the context of arbitration, lower courts apply the *Humana* impairment test rigorously. Their decisions stress the importance of carefully analyzing the question based on the particular facts and legal theories at issue. See, *e.g.*, *Brown* v. *Cassens Transp. Co.*, 546 F.3d 347, 362 (6th Cir. 2008) ("*Humana* treats the impairment consideration as an 'as-applied' challenge that looks to whether the federal statute would impair the state statute in a particular application."); *Saunders* v. *Farmers Ins. Exch.*, 537 F.3d 961, 967 (8th Cir. 2008) ("In applying *Humana*'s fact-intensive interpretation of the word 'impair,' our focus must be on the precise federal claims asserted. Federal civil rights statutes are drafted broadly, so a statute might 'impair' state insurance laws when applied in some ways, but not in others."); *Greene* v.

United States, 440 F.3d 1304, 1316 (Fed. Cir. 2006) ("Given that the state statute is silent as to the relative priority order of the federal government over policyholders within the same class of claimants * * * we can discern no 'impairment' here.").

The Supreme Court of Oklahoma is not alone, however, in ignoring the requirements of the *Humana* test when it comes to arbitration agreements in the insurance context. For example, in *Standard Security Life Insurance Company* v. *West*, 267 F.3d 821 (8th Cir. 2001) (per curiam), the Eighth Circuit did not explain how Missouri's state arbitration statute, which exempts insurance contracts from its scope, is invalidated, impaired, or superseded by application of the FAA. *Id.* at 824. The Eighth Circuit reasoned that the Missouri Arbitration Act's exclusion of insurance contracts regulated the business of insurance by "spreading risk" in introducing the possibility of jury verdicts. *Id*. at 823. This Court has subsequently held that the prospect of punitive damages does not spread a policyholder's risk such as to "regulate" the "business of insurance[.]" *Kentucky Ass'n of Health Plans* v. *Miller*, 538 U.S. 329 (2003).

Likewise, in *Mutual Reinsurance Bureau* v. *Great Plains Mutual Insurance Company*, 969 F.2d 931, 933 (10th Cir. 1992), the Tenth Circuit simply concluded, without analysis, that the FAA impaired a Kansas arbitration statute, which exempted insurance contracts in similar fashion to the Oklahoma Arbitration Act. The court just noted the exemption, without explaining its impairment analysis further. *Id.* at 933-34.

It is not clear that the FAA could ever "impair" a state law regulating the business of insurance, given that the FAA merely provides an alternative forum for resolution of parties' disputes and does not alter any underlying substantive rights. In *DiMercurio* v. *Sphere Drake Insurance, PLC*, 202 F.3d 71 (1st Cir. 2000), the First Circuit held that a Massachusetts statute—nearly identical to the Virginia statute in *Minnieland* discussed above, pp. 18-19—which rendered "void" any "condition, stipulation, or agreement [in an insurance policy] depriving the courts of [Massachusetts] of jurisdiction of actions against [the insurer,]" did not conflict with the FAA because arbitration agreements do not actually deprive courts of "jurisdiction." *Id*. at 73-74, 77 (quoting Mass. Gen. Laws ch. 175, § 22); see also *Ommen*, 941 N.W.2d at 320 ("Requiring arbitration only alters the forum[.]"); *Milliman, Inc.* v. *Roof*, 353 F. Supp. 3d 588, 603 (E.D. Ky. 2018) ("Arbitration does not deprive the [party] of any substantive rights, only altering the forum in which the [party] may pursue those rights."); cf. *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (harmonizing choice-of-law provisions with arbitration provisions by holding that the former control the "substantive principles" while the latter control the authority of the arbitrator). Enforcement of an arbitration provision does not implicate any of the elements that this Court has identified as the "business of insurance," such as spreading a policyholder's risk or altering "an integral part of the policy relationship[.]" *Fabe*, 508 U.S. at 497-98.

Courts recognize this lack of impairment when confronting state statutes purporting to prohibit

insurers from removing lawsuits to federal court. See, *e.g.*, *Hammer* v. *Dep't of Health and Human Servs.*, 905 F.3d 517, 534 (7th Cir. 2018) ("[I]t cannot fairly be said that choice of forum between state and federal court, within a state is 'integral' to the policy relationship or the substantive concerns of the McCarran–Ferguson Act."); *International Ins. Co.* v. *Duryee*, 96 F.3d 837, 840 (6th Cir. 1996) (holding that a state statute prohibiting insurers from removing lawsuits did not qualify for McCarran–Ferguson Act reverse preemption because it was "not enacted so much for the purpose of regulating the business of insurance as for the parochial purpose of regulating a foreign insurer's choice of forum"). If state anti-insurance removal statutes are not "impaired" by application of federal law for purposes of the McCarran–Ferguson Act, there is no reason why state anti-insurance arbitration statutes should be treated differently.

Regardless, in this case it is clear that the FAA does not impair any Oklahoma state law. The Oklahoma Arbitration Act unambiguously states that it does not apply to "contracts which reference insurance." Okla. Stat. Ann. tit. 12, § 1855(D). Under this Court's analysis in *Humana*, application of the FAA to a contract which references insurance cannot "impair" the Oklahoma Arbitration Act because the Oklahoma legislature has "*chosen not to regulate*" arbitration agreements in insurance contracts. 525 U.S. at 308 (emphasis in original).

The FAA and the McCarran–Ferguson Act collectively require courts to honor contractual arbitration arrangements unless application of the FAA would impair a state law enacted for the purpose

of regulating the business of insurance. Here, given the Oklahoma Arbitration Act is inapplicable by its terms, the FAA does not impair it, and reverse preemption is not proper under this Court's decision in *Humana*.

III. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT.

The insurance market in the United States is one of the largest financial markets in the world. In 2017, insurers in the United States underwrote approximately $1.2 trillion in direct premiums, accounting for just over 28 percent of the global insurance industry. See Insurance Information Institute, *2019 International Insurance Fact Book*, at 4, 21 (2019), available at https://www.iii.org/sites/default/files/docs/pdf/insurance_factbook_2019.pdf (last accessed August 24, 2020). To put that number in perspective, the insurance industry contributed $602.7 billion (or 3.1 percent) to the United States' gross domestic product in 2017. *Id.* at 24.

Arbitration is common throughout the insurance industry, see Steven Plitt, et al., 15 *Couch on Insurance* § 209:1 (3d ed. June 2020 supp.), as it (1) allows parties to design their own "efficient, streamlined, procedures tailored to the type of dispute" at issue, *Concepcion*, 563 U.S. at 344; (2) provides "expeditious results" compared to traditional litigation, *Preston*, 552 U.S. at 357-59; and (3) "reduc[es] the cost of resolving disputes[,]" *Concepcion*, 563 U.S. at 345. Property insurance policies frequently contain arbitration clauses. David M. Adlerstein, et al., 2 *Successful Partnering Between*

Inside and Outside Counsel § 25A:70 (Apr. 2020 supp.); see also Benedict M. Lenhart, et al., Arbitration of Coverage Disputes, 1 *New Appleman on Insurance Law Library Edition* § 7.03 (2020) ("In the insurance context, it is more common for the insurer and the insured to agree to arbitration in advance of a dispute.").

The frequency with which this Court grants certiorari in similar cases involving the FAA underscores the critical role commercial arbitration occupies in the modern business world. Arbitration agreements facilitate resolution of a multiplicity of disputes amongst private litigants while avoiding the costs associated with traditional litigation. A "time-consuming sideshow" of litigation to determine arbitrability is antithetical to the judicious resolution of disputes expected by parties. *Henry Schein, Inc.* v. *Archer and White Sales, Inc.*, 139 S. Ct. 524, 531 (2019). Conflict among state and federal courts concerning the implications of state arbitration statutes will "encourage and reward forum shopping." *Southland Corp.* v. *Keating*, 465 U.S. 1, 15 (1984). Plaintiffs may seek to capitalize on "judicial hostility to arbitration agreements," even where such agreements unmistakably select the FAA as the governing law. *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

Thus, how the McCarran–Ferguson Act and FAA "interact is an important legal question" implicating arbitration agreements in interstate commerce throughout the country. Robert H. Jerry II, *Explaining the Obvious: How Appraisals, Health Care, and More Implement ADR in the Insurance*

Field, 35 Alternatives to High Cost Litig. 115, 116 (Sept. 2017).

As shown above, there is widespread confusion about how the basic elements of reverse preemption under the McCarran–Ferguson Act should be determined. There are inconsistent or cursory analyses, directly conflicting decisions, and unnecessary and improper hostility toward using arbitration to resolve insurance related disputes.

Besides Oklahoma, at least 18 other States have enacted their own statutes that either exempt insurance contracts from the scope of their state arbitration laws or purport to prohibit outright the enforcement of arbitration agreements in insurance related matters.[10] Review by this Court is necessary

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[10] See Ariz. Rev. Stat. § 12-3003(B)(2) (providing that Arizona's arbitration act "shall not apply to an agreement to arbitrate any existing or subsequent controversy * * * [c]ontained in a contract of insurance"); Ark. Code Ann. § 16-108-233(b)(3) (providing that Arkansas's arbitration act "does not apply to * * * [a]n insured or beneficiary under any insurance policy"); Ga. Code Ann. § 9-9-2(b)(3) (providing that Georgia's arbitration act "shall not apply" to "[a]ny contract of insurance"); Haw. Rev. Stat. § 431:10-221(a)(2) ("No insurance contract * * * shall contain any condition, stipulation or agreement * * * [d]epriving the courts of [Hawaii] of the jurisdiction of action against the insurer[.]"); Ky. Rev. Stat. Ann. § 417.050 (providing that Kentucky's arbitration act "does not apply to * * * [i]nsurance contracts"); La. Rev. Stat. Ann. § 22-868 ("No insurance contract * * * shall contain any condition, stipulation, or agreement * * * [d]epriving the courts of this state of the jurisdiction of action against the insurer."); Me. Rev. Stat. Ann. tit. 24-A, § 2433 ("No conditions, stipulations or agreements in a contract of insurance shall deprive the courts of this State of jurisdiction of actions against foreign insurers[.]"); Md. Code Ann., Cts. & Jud. Proc. § 3-206.1 ("[A]ny provision in an insurance contract with a consumer that requires arbitration is void and unenforceable.");

to clarify the interaction between the FAA, the McCarran–Ferguson Act, and state arbitration laws, and once again to correct state courts' continued hostility toward arbitration.

CONCLUSION

This Petition for a Writ of Certiorari should be granted. Alternatively, the Court should grant,

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Mass. Gen. Laws ch. 175, § 22 (prohibiting provisions in "any policy of insurance" that "depriv[es] the courts of the commonwealth of jurisdiction of actions"); Mo. Rev. Stat. § 435.350 (exempting "contracts of insurance and contracts of adhesion" from Missouri's arbitration act); Mont. Code Ann. § 27-5-114(2)(c) (providing that Montana's arbitration act "does not apply to * * * any agreement concerning or relating to insurance policies or annuity contracts"); Neb. Rev. Stat. § 25-2602(f)(4) (providing that Nebraska's arbitration act "does not apply to * * * any agreement concerning or relating to an insurance policy"); R.I. Gen. Laws § 10-3-2 (permitting insureds to opt out of arbitration agreements "in all contracts of primary insurance" if the arbitration provision "is not placed immediately before the testimonium clause or the signature of the parties"); S.C. Code Ann. § 15-48-10(b)(4) (providing that South Carolina's arbitration act "shall not apply to * * * any insured or beneficiary under any insurance policy or annuity contract"); S.D. Codified Laws § 21-25A-3 (providing that South Dakota's arbitration act "does not apply to insurance policies" and that arbitration agreements in insurance policies are "void and unenforceable"); Vt. Stat. Ann. tit 12, § 5653 (providing that Vermont's arbitration act "does not apply to * * * arbitration agreements contained in a contract of insurance"); Va. Code Ann. § 38.2-312 ("No insurance contract * * * shall contain any condition, stipulation or agreement * * * [d]epriving the courts of [Virginia] of jurisdiction in actions against the insurer."); Wash. Rev. Code § 48.18.200 (rendering "void" any provision in an insurance contract "depriving the courts of [Washington] of the jurisdiction of action against the insurer").

vacate, and remand in light of its decision in *Humana Inc.* v. *Forsyth*, 525 U.S. 299, 309 (1999).

Respectfully Submitted,

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August 25, 2020

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

[Filed May 27, 2020]

No. 115,789

2020 OK 42

WILLIAM B. SPARKS and DONNA SPARKS,

Plaintiffs/Appellees,

vs.

OLD REPUBLIC HOME PROTECTION COMPANY, INC.,

Defendant/Appellant,

OLD REPUBLIC INTERNATIONAL and
ALL SEASON'S HEATING AND AIR, LLC,

Defendants.

ON WRIT OF CERTIORARI TO THE COURT
OF CIVIL APPEALS, DIVISION NO. II

¶0 Plaintiffs are homeowners who brought suit against Old Republic Home Protection Company, Inc., for breach of contract and bad faith breach of contract of their home warranty policy. Defendant filed a motion to compel arbitration of the underlying dispute pursuant to a contractual provision requiring resolution of disputes through binding arbitration. Plaintiffs argued that mandatory arbitration provisions are prohibited by 12 O.S. 2011 § 1855 (D) in any contract that references insurance and this matter should proceed

in district court. The court denied defendant's motion for arbitration. Defendant appealed from this interlocutory order and the Court of Civil Appeals affirmed the District Court. We granted certiorari to address the first impression question of whether this home warranty contract constitutes an insurance contract. We hold that the home warranty contract at issue meets the definition of an insurance contract.

CERTIORARI PREVIOUSLY GRANTED;
OPINION OF THE COURT OF CIVIL APPEALS
VACATED; ORDER OF THE DISTRICT
COURT AFFIRMED; CAUSE REMANDED
FOR FURTHER PROCEEDINGS

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OPINION

EDMONDSON, J.:

¶1 We granted certiorari to address the first impression questions of: (1) whether a home warranty plan meets the definition of an insurance contract, (2) and if it is insurance, whether a forced arbitration clause in such a contract is unenforceable under the Oklahoma Uniform Arbitration Act, (3) whether 12 O.S. 2011 § 1855 of the Oklahoma Uniform Arbitration Act is a state law enacted for the purpose of regulating insurance under the McCarran-Ferguson Act, 15 U.S.C. § 1012 (b), and (4) whether pursuant to the McCarran-Ferguson Act, does § 1855 preempt the application of the Federal Arbitration Act, 9 U.S.C. §§ 1 - 307? We answer all questions in the affirmative.

FACTS AND PROCEDURAL HISTORY

¶2 Donna Sparks purchased a policy from Old Republic Home Protection (ORHP) which included coverage for the repair or replacement cost of the home air conditioning system during the stated policy term. ORHP drafted this contract which included a provision that disputes between the parties would be resolved by arbitration under the Federal Arbitration Act. There is no evidence that this arbitration policy provision was independently discussed or negotiated between the parties. Almost six months after purchasing the coverage, the Plaintiffs alleged they suffered a covered loss. Specifically, Plaintiffs claimed that their home was extensively damaged as a result of problems that arose from faulty repair work to the air conditioning system. Plaintiffs notified ORHP when covered repairs were needed who then selected the repair company to be dispatched to their home. Plaintiffs alleged that ORHP engaged in a pattern and

practice of using unqualified contractors to perform work and deliberately sought contractors who would opine little or no work was needed. ORHP did not directly perform the home repair services. Homeowners asserted that ORHP was negligent in the selection and hiring of the repair company, and thus ORHP is liable to the Plaintiffs for damage to their home. On July 7, 2016, homeowners filed a lawsuit against ORHP for breach of contract and bad faith breach of contract.

¶3 The contract is titled as an "Oklahoma Home Warranty." The contract identifies the following advantages of an Old Republic Home Warranty Plan:[1]

> ***Home Buyers***
>
> In an ideal world, buying a home should be one of the most memorable and rewarding experiences of your life. However, the headaches caused by a heating system failure or a broken refrigerator could taint those memories forever.
>
> **Safeguard your budget** against expensive system and appliance failures with an Old Republic Home Warranty Plan. . . .
>
> What would you pay *without* a home warranty? Potential out-of-pocket repair or replacement costs for major systems and appliances:

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[1] Record, Exhibit 2, Defendant Old Republic Home Protection Co., Inc.'s Motion to Stay and Compel Arbitration, and Brief in Support, *William B. Sparks and Donna Sparks, Plaintiffs v. Old Republic Home Protection Company, Inc., Defendant,* CJ-16-795, District Court of Cleveland County.

Item	Repair/Replacement Cost without a Home Warranty
Heating System	$318 - $3,911
Air Conditioning	$360 - $5,100
Water Heater	$384 - $2,331
Oven/Range	$325 - $2,487
Refrigerator	$294 - $1,904
Washer/Dryer	$230 - $1,112

The rate sheet reflects the respective premium for each of the three different levels of coverage offered, Standard, Ultimate and Platinum. On the bottom corner of this page also appears an insignia with "Old Republic ***Insurance*** Group."[2] Plaintiffs purchased the Platinum coverage and the "Declaration of Coverage" identifies the contract as a "home warranty."[3]

¶4 Initially, ORHP pled that it was an insurance company and that the agreement between ORHP and the Plaintiffs was an "insurance" contract but later pled that it was *not* an insurance company and that this was simply a home service contract but *not insurance.* This change in position was reflected in an Amended Answer filed after the trial court's February 7, 2017 Order denying ORHP's motion to compel arbitration. There is no transcript of this hearing and

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[2] *Id*

[3] Record, Exhibit 3, Defendant Old Republic Home Protection Co., Inc.'s Motion to Stay and Compel Arbitration, and Brief in Support, *William B. Sparks and Donna Sparks, Plaintiffs v. Old Republic Home Protection Company, Inc., Defendant,* CJ-16-795, District Court of Cleveland County.

no evidence in the record reflecting that ORHP obtained leave of court to file the Amended Answer. Homeowners did not file an objection to the amended pleading.

¶5 On February 8, 2017 the trial court filed a summary order stating ORHP's "motion to compel arbitration denied- motion to stay denied."[4] The trial court made no other findings and the order is silent on the reason for the denial. An appeal may be taken from an order denying a motion to compel arbitration. 12 O.S. 2011 § 1879 (A) (1).

¶6 ORHP filed a Petition in Error on February 23, 2017 urging that it was error for the district court to deny the Motion for Arbitration and Motion to Stay "given the contract between the parties pursuant to the Federal Arbitration Act (9 U.S.C. § 1, *et seq.),* the Oklahoma Uniform Arbitration Act (12 O.S. § 1851 *et seq*.), and applicable case law interpreting those statutes."[5] On appeal, ORHP argued as follows: (1) the FAA controlled this dispute, (2) the Oklahoma Uniform Arbitration Act is preempted by the FAA, (3) McCarran-Ferguson Act does not apply because "Old Republic and the Plaintiffs chose the law that governs all disputes (the FAA)." ORHP did not dispute that the McCarran-Ferguson Act gives individual states the right to regulate insurance or that "12 O.S. § 1855 (D) purports to regulate insurance in

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[4] *William B. Sparks and Donna Sparks, Plaintiffs' v. Old Republic Home Protection Company, Inc., Defendant*, CJ-16-795, District Court of Cleveland County, Summary Order, 2-8-17.

[5] *William B. Sparks and Donna Sparks, Plaintiffs/Appellees, v. Old Republic Home Protection Company, Inc., Defendant/Appellant*, 115,789, Petition in Error.

Oklahoma."[6] However, ORHP argued that the "McCarran-Ferguson Act can only apply when interpreting a contract that does not contain a choice of law agreement,"[7] and therefore, it was not relevant to any issue before this Court. ORHP cited no legal authority to support this last argument. The *sole* support offered by ORHP was simply that "the FAA is not reverse preempted by the McCarran-Ferguson Act because this Contract chooses the FAA to the exclusion of any contradictory laws."[8] We are not persuaded by statements without legal authority.

¶7 ORHP drafted the preprinted policy issued to the Plaintiffs. ORHP inserted all language regarding the FAA choice of law. Contrary to ORHP's argument, *Dean Witter Reynolds, Inc. v. Shear,* 1990 OK 67, ¶ 1, 796 P.2d 296 does not support the argument that the FAA must control as the "choice of law" chosen by the parties in the contract; it offers no useful guidance in this regard. Dean Witter obtained an arbitration award against its customer and then brought an action pursuant to the Oklahoma Uniform Arbitration Act to obtain an executable judgment. On appeal, Shear sought relief on the single contention that the arbitration and the choice-of-law clauses were void under a provision of the Oklahoma constitution. We refused to consider this argument because Shear failed to timely preserve this issue by proper response to the summary judgment filed by Dean Witter. For that reason we held that Shear "cannot now invoke Oklahoma law to

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[6] *William B. Sparks and Donna Sparks, Plaintiffs/Appellees, v. Old Republic Home Protection Company, Inc., Defendant/Appellant*, 115,789, Appellant's Brief in Chief

[7] *Id*.

[8] *Id*.

test the validity of the arbitration clause of the State's fundamental law." *Dean Witter Reynolds,* 1990 OK 67, ¶ 7, 796 P.2d at 298. We *did not* hold, as urged by ORHP, that New York law and the arbitration clause applied because of the parties "choice of law" provision in the contract. Unlike the appellant in *Dean Witter Reynolds,* the Plaintiffs challenged the choice of law provision before the trial court, and this issue is fully preserved. We do not find *Dean Witter Reynolds* instructive on the issues before us.

¶8 ORHP further asserted that the application of 12 O.S. 2011 § 1855 conflicts with federal law, *i.e.* the FAA, which should preempt any conflicting state law under the pronouncements of *Manna Health Care Ct., Inc. v. Brown,* 565 U.S. 530, 132 S.Ct. 1201, 182 L.Ed.2d 42. In *Marmet,* the West Virginia court held that as a matter of public policy under West Virginia law, an arbitration clause in a nursing home agreement adopted prior to a negligent act shall not be enforced to compel arbitration. The state court went on to conclude that the FAA did not preempt the state public policy against predispute arbitration agreements as applied to claims for personal injury against a nursing home. The Supreme Court found that the FAA displaces a state law that prohibits outright the arbitration of a particular type of claim. *Id.,* 565 U.S. at 533, 132 S.Ct. at 1203. The *Marmet* court did not consider the reverse preemption granted to states under the McCarran-Ferguson Act for state law provisions relating to the business of insurance. For this reason, we do not find *Marmet* controlling.

¶9 Next ORHP argued that "home warranties" are really a 'home service contract' and therefore this type of contract by statutory definition is *not* insurance pursuant to the Oklahoma Home Service Contract Act,

36 O.S. §§ 6750 - 6755. ORHP further argued, if this contract is not "insurance" then Section 1855 of the Oklahoma Uniform Arbitration Act would not apply, which exempts any contract that "references insurance" from the provisions of that Act. If the contract at issue was not one that referenced insurance, then the McCarran-Ferguson Act would not apply to reverse preempt the Federal Arbitration Act. Stated differently, the FAA would preempt any state law that would be in conflict and this matter should be ordered to arbitration. As more fully discussed below, we find the home warranty is insurance and we reject these contentions from ORHP.

¶10 On November 19, 2018 the Court of Civil Appeals affirmed the lower court's order, with one judge dissenting. The majority concluded that Oklahoma state law, the Uniform Arbitration Act, 12 0.5. 2011 §1855 (D) prevented the trial court from compelling arbitration because the contract "referenced insurance" within the meaning of this Act and further that the Oklahoma legislature did not intend to exempt contracts made pursuant to the Oklahoma Home Service Contract Act[9] (HSCA) and the Service Warranty Act[10] (SWA)from this provision in the Uniform Arbitration Act. We agree.

¶11 On Petition for Certiorari, ORHP argued that COCA erred and this matter presented a case of first impression on whether an arbitration clause in a "home protection plan" could be disregarded under the Federal Arbitration Act (FAA). In addition, ORHP urged that the decision by the COCA determining that

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[9] Title 36 O.S. 2011 & Supp. 2012 §§ 6750-6755.

[10] Originally in Title 36, but revised and renumbered in 2012 as 15 O.S. §§ 141.1-141.35.

the home warranty in this case is a contract that "references insurance," and calling home warranty agreements "insurance": (1) departed from the accepted and usual course of judicial proceedings calling for this Court's power of supervision, (2) invaded the legislative prerogative and interpreted statutes contrary to the express language provided by the legislature, (3) deviated from federal and state case law by invalidating the choice of law clause in the contract, and the parties' agreement to utilize the Federal Arbitration Act, and (4) ignored the plain language of the home service contract statute declaring that "home service contracts are not insurance in this state."

¶12 Homeowners argued that the federal McCarran-Ferguson Act authorized the "reverse preemption" of the FAA in this instance. Because the FAA did not preempt relevant Oklahoma state law involving the regulation of insurance, Homeowners replied that the Court of Civil Appeals did not err in holding that § 1855 of the Oklahoma Uniform Arbitration Act barred the enforcement of arbitration in this matter. We agree.

¶13 We granted certiorari on May 28, 2019.

STANDARD OF REVIEW

¶14 ORHP urged that arbitration is the appropriate forum to resolve this matter. Homeowners disputed that ORHP was entitled to an order for arbitration under both Oklahoma law and federal precedent. As the party opposing the motion for arbitration, the Plaintiffs had the burden "to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue; an intention discernible from the statute's text or legislative history or an inherent conflict between arbitration and the statute's

underlying purposes." *Thompson v. Bar-S Foods Co.,* 2007 OK 75 8, 174 P.3d 567, 572. [11]The trial court's denial of a motion to compel arbitration is to be reviewed *de novo. Thompson,* 2007 OK 75, ¶ 9, 174 P. 3d at 572.[12]

FEDERAL LAW: REVERSE PREEMPTION UNDER McCARRAN-FERGUSON ACT WITH STATE LAWS INVOLVE]) IN REGULATION OF INSURANCE

¶15 Generally speaking, the Federal Arbitration Act (FAA) preempts any state law limiting the enforcement of arbitration. *See, eg., Preston v. Ferrer,* 552 U.S. 346, 35253, 128 S. Ct. 978, 169 L.Ed.2d 917 (2008). Preemption stems from the Supremacy Clause of the United States Constitution that insures federal law will prevail or "preempt" a conflicting state law. *Smith Cogeneration Mgmt., Inc. v. Corp, Comm'n,* 1993 OK 147, ¶ 21, 863 P.2d 1227, 1239. The foundation of ORHP's argument is grounded in the concept of preemption, namely that the FAA should have preempted § 1855 of the Uniform Arbitration Act to the extent it conflicted with the federal law, and the parties should have been ordered to arbitrate the claims. ORHP further urged that the COCA decision violated the Supremacy clause of the United States Constitution. However, ORHP' s argument ignores the clear mandates of another federal law, the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 - 1015, which bestows upon states *absolute authority* over matters relating to

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[11] Citing, *Bruner v. Timberlane Manor Ltd. Partnership,* 2006 OK 90, ¶ 22, 155 P.3d 16, 25, quoting *Shearson/American Express, Inc. v, McMahon,* 482 U.S. 220, 227,107 S.Ct. 2332, 2337, 96 L.Ed.2d 185.

[12] See also, *Fleming Companies, Inc. v. Tru Discount Foods,* 1999 OK CIV APP 18, 977 P.2d 367, certiorari denied (Feb. 10, 1999).

the regulation of insurance. *Minnieland Private Day School, Inc. v. Applied Underwriters Captive Risk Assur Co., Inc.,* 867 F. 3d 449 (4th Cir. 2017). This Act and its implications must be understood in the context of the issues material to this matter.

¶16 The McCarran-Ferguson Act was enacted in 1945 following a decision by the Supreme Court holding insurance was subject to federal regulations under the interstate commerce clause shifting control away from the states. *See United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944). Prior to this decision, "it had been assumed . . . that the issuance of an insurance policy was not a transaction in interstate commerce and that the States enjoyed a virtually exclusive domain over the insurance industry." *St. Paul Fire & Marine Ins. Co. v. Barry,* 438 U.S. 531, 538-39, 98 S. Ct. 2923, 57 L.Ed2d 932 (1978). In response to *South-Eastern. Underwriters,* Congress legislatively restored the States preeminent position with respect to the regulation of insurance through the adoption of McCarran-Ferguson. *See, U.S. Dep't of Treasury v. Fabe,* 508 U.S. 491, 500, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993).

¶17 This Act specifically states that "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." 15 U.S.C. § 1012. The landmark McCarran-Ferguson Act completely "transformed the legal landscape by overturning the normal rules of pre-emption." *U.S. Dep't of Treasury v. Fabe,* 508 U.S. 491, 500, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993). McCarran-Ferguson "authorizes 'reverse preemption' of generally applicable federal statutes by state laws enacted for the

purpose of regulating the business of insurance." *ESAB Grp. Inc. v. Zurich Ins. PLC,* 685 F.3d 376, 380 (4th Cir. 2012), *See also, Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London,* 587 F.3d 714, 720 (5th Cir. 2009) (en bane), *cert. denied,* 562 U.S. 827, 131 S.Ct. 65, 178 L.Ed.2d 22 (2010).

¶18 Almost simultaneously with congressional efforts to insure the states' dominance with respect to insurance regulation, Congress was also moving to federalize arbitration policy. In 1925, Congress enacted the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, establishing a liberal federal policy in favor of arbitration in maritime and commercial contracts. *ESAB,* 685 F.3d at 380.[13] The interplay between these two acts is considered with regard to the resolution of the issues before this Court.

McCARRAN FERGUSON ACT: CONTRACTS REGULATING THE 'BUSINESS OF INSURANCE' ARE PROTECTED FROM PREEMPTION BY THE FAA

¶19 The Supreme Court of the United States has not yet spoken on the specific interplay between the McCarran-Ferguson Act and the FAA. However, the high court has made clear that the FAA policy in favor of arbitration may not be asserted to resolve a foundational challenge to the validity of an arbitration agreement. *Granite Rock Co. v. Int'l Bhd. of Teamsters,* 561 U.S. 287, 130 S.Ct. 2847, 177 L. Ed2d 567 (2010). The Court explained that the presumption of favoring arbitration is applied "only where it reflects, and derives its legitimacy from a *judicial* conclusion that

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[13] See also, *CompuCredit Corp. v. Greenwood,* 565 U.S. 95, 132 S.Ct. 665, 181 L.Ed 2d 586.

arbitration of a particular dispute is what the parties intended *because their express agreement to arbitrate was validly formed* and (absent a provision clearly and *validly committing such issues to an arbitrator) is legally enforceable* and best construed to encompass that dispute. *Id.* 561 U.S. at 303, 130 S. Ct. 2847.

¶20 We acknowledge that by virtue of the Supremacy Clause, "we are governed by the decisions of the United States Supreme Court with respect to the federal constitution and federal law, and we must pronounce rules of law that conform to extant Supreme Court jurisprudence." *Rollaway v. UNUM Life Ins. Co. of America,* 2003 OK 90, ¶ 15, 89 P.3d 1022, 1027. Where the United States Supreme Court has not spoken on the direct issue, "we are free to promulgate judicial decisions grounded in our own interpretation of federal law." *Id.*

¶21 A number of federal courts who have considered the interplay between the FAA and the McCarran-Ferguson Act have held that state laws involving the business of insurance take precedence over the competing federal law, FAA favoring arbitration. *Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance,* 867 F.3d 449, 454 (4th Cir. 2017).[14] The Fourth Circuit acknowledged that the FAA generally preempts a state law limiting the enforcement of arbitration agreements. The *Minnieland* court discussed that it agreed with the district court's

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[14] See also, *Am. Bankers Ins. Co. Of Fla. v. Inman,* 436 F.3d 490, 494 (5th Cir. 2006), Mississippi statute prohibiting arbitration of disputes related to coverage provisions in personal automobile insurance policies reverse preempts the FAA; *Am. Health & Life Ins. Co. v. Heyward,* 272 F. Supp.2d 578, (D.S.C. 2003). South Carolina law prohibiting mandatory arbitration provisions in insurance contracts reverse preempts the FAA.

conclusion that mandatory arbitration provisions in insurance contracts were void pursuant to Va. Code Ann. § 38.2-312. On appeal, there was no disagreement that this state law provision, which we note is similar to the Oklahoma provision, reverse preempted the FAA.

¶22 Many other courts have concluded that state laws invalidating arbitration provisions in insurance contracts reverse preempt the FAA. *Am. Bankers ins. Co. of Fla. v. Inman,* 436 F.3d 490, 494 (5th Cir. 2006); *See also, Love v. Money Tree, Inc.,* 279 Ga. 476, 614 S.E.2d 47, automobile club memberships constituted insurance and the state law prohibiting arbitration in contracts of insurance was held to be a state law enacted for the purpose of regulating insurance, and thus, the McCarran-Ferguson Act precluded the FAA from preempting the conflicting state law; *State, Dept. of Transp. v. James River Ins. Co.,* 176 Wash.2d 390, 292 P.3d 118 (2013), state statute prohibiting any agreement in insurance contract which deprived court of jurisdiction against the insurer and void mandatory arbitration provisions constituted the business of regulating insurance, thereby shielding the state statute from preemption by the FAA under the McCarran-Ferguson Act.

¶23 In this matter, the judicial conclusion by the lower court was to deny ORHP' s request for arbitration. The COCA then held that the state law, § 1855 which plainly exempts "contracts which reference insurance" from arbitration is a state law regulating the business of insurance. Accordingly, under the the McCarran-Ferguson Act, the state law must prevail over the federal law, the FAA; *i.e.,* this state law enjoys the benefit of reverse preemption.

OKLAHOMA UNIFORM ARBITRATION ACT "SHALL NOT APPLY TO CONTRACTS WHICH REFERENCE INSURANCE"

¶24 Furthermore, for more than half a century, this Court has held that an insurance company's insertion of forced arbitration in an insurance contract deprived the insured of a judicial examination and determination of the issues and such policy provision was contrary to public policy and unenforceable. *Boughton v. Farmers Ins. Exch.,* 1960 OK 159, ¶ 13, 354 P.2d 1085, 1089. *Boughton* relied solely on the common law as Oklahoma had not yet enacted an arbitration statute.

¶25 After the adoption of our state Uniform Arbitration Act, we examined the predecessor to § 1855, 15 O.S. 1991 § 802 (A) (repealed 2006) which stated that the Act "shall not apply to . . . contracts with reference to insurance except for those contracts between insurance companies." *Cannon v. Lane,* 1993 OK 40, 867 P.2d 1235. In *Cannon,* we considered a binding arbitration provision in a health insurance contract and refused to enforce an order for arbitration because the contract between the parties "related to insurance" falling within this exception to the Act. We also noted that "under the authority of *Wilson, Boughton,* and 15 O.S. 1991 § 216, such a contract is void." 1993 OK 40, ¶ 11, 867 P.2d at 1239.

¶26 In 2006, the Act was recodified and 15 O.S. 1991 § 216 was replaced with the current law, 12 O.S. 2011 § 1855 (D) which provides:

> D. The Uniform Arbitration Act shall not apply to collective bargaining agreements and ***contracts which reference insurance,***

> except for those contracts between insurance companies. (Emphasis added).

Next, we examine whether the contract "references insurance" and therefore is exempt from the Oklahoma Uniform Arbitration Act. ORHP urged that the contract could not be treated as insurance because by statute, "home service contracts are not insurance in this state." 36 O.S. 2011 § 6752 (9). We disagree with this conclusion on the basis of several factors. The contract drafted by ORHP is titled a "home warranty" and not a home service contract, and it is unclear whether § 6752 (9) has any application to the instant matter. This will be discussed in more detail. In addition, § 1855 (D) is broader than advocated by ORHP. Section 1855 does not state that the Uniform Arbitration Act shall not apply to insurance contracts, rather it exempts contracts which simply reference insurance as defined by this Court's extensive jurisprudence. Finally, we look more closely at the nature of the home warranty before us and examine its nature in light of guidelines from the Supreme Court of the United States, Oklahoma statutes defining "insurance," and the wisdom of other Courts.

HOME WARRANTY CONTRACTS ARE CONTRACTS THAT "REFERENCE INSURANCE"

¶27 We have previously noted the initial admission by ORHP that the contract at issue was "insurance" and it was an "insurance company." Following the trial court's denial of the motion for arbitration, ORHP filed an Amended Answer stating the policy at issue is *not* insurance and it is *not* an insurance company. There was no objection filed to this amended response, and there is nothing in the record to reflect that ORHP obtained leave of court to file this amendment. It is evident from these contradictory pleadings that even

ORHP was confused about whether the home warranty was insurance and if it was an insurance company.

¶28 The record before us reflects that the Old Republic International Corporation (ORI) Annual Review, 2015, listed ORHP as a subsidiary and a member of the company's "General Insurance Group" with "premiums written" in 2015 that exceeded two hundred million dollars ($200,000,000.00).[15] ORI also listed ORHP as one of its 27 "insurance companies"[16] and referred to ORHP as part of the "General Insurance Group" selling policies accounting for 5% of all premium volume for the entire parent company.[17] Although this information is not determinative of whether the plan before us is "insurance" it does reflect how the parent company considered and treated ORHP. Furthermore, the actual contract with the Plaintiffs has an insignia clearly printed on it "Old Republic Insurance Group."

¶29 ORHP solely drafted the contract and ORHP determined the use of all terms including the following references within the contract: "Oklahoma Home Warranty," and "Old Republic Home Warranty Plan."[18] ORHP did not include the term "home service con-

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[15] Record, Exhibit 3 to Plaintiffs' Objection to Defendant Old Republic Home Protection Company's Motion to Stay Order Pending Appeal.

[16] *Id*.

[17] Record, Exhibit 4 to Plaintiffs' Plaintiffs' Objection to Defendant Old Republic Home Protection Company's Motion to Stay Order Pending Appeal, Record.

[18] Record, Exhibit B to Defendant Old Republic Home Protection Co., Inc.'s Motion to Stay and Compel Arbitration, and Brief in Support.

tract" in the contract before this Court; in fact those words are noticeably absent. Under the Old Republic Home Warranty Plan, the Plaintiffs agreed to pay a predetermined premium and, in exchange, ORHP agreed to assume the risk of paying for the repair and/or replacement of specifically identified appliances as well as heating and cooling systems. Although ORHP designated the contract as a "home warranty," it argued that the contract should instead be treated or deemed to be a "home service contract" governed by the Oklahoma Home Service Contract Act (HSCA), 36 O.S. 2011 §§ 6751 *et seq*.

¶30 Before we discuss what application, if any, the HSCA has in this matter, we examine more closely the terms and effect of the "home warranty plan" drafted by ORHP and whether this contract is one that "references" insurance. We note that even ORHP has convincingly argued that the company's "home warranty plans are analogous to insurance." *See, Campion v. Old Republic Home Protection Co., Inc.,* 561 F.Supp.2d 1139, 1144, (S.D. Cal. 2012). In this California case, ORHP was facing an action filed under the Consumer Legal Remedies Act. In *Campion,* identical to the instant contract before us, the ORHP home warranty plan provided that covered systems and appliances that become inoperable during the contract term due to normal wear and tear will be repaired or replaced at the expense of ORHP or the plan holder would be provided with payment in lieu of repair or replacement. Under the home warranty plan, ORHP did not perform the services but rather maintained a network of independent contractors that it dispatched to a planholder's home to perform the service. The plaintiff in *Campion* unsuccessfully argued that the home warranty contracts fell under the consumer act because they were "service" con-

tracts. ORHP advocated in the California case that the home warranty was *not* a service contract, but rather was insurance. The *Campion* court was swayed by ORHP's position and offered the following notable distinction:

> Defendant's home warranty plans are not contracts for repair or replacement *services* and Defendant does not itself provide these services. Instead the plans are designed to offer protection to home owners from potential future losses. The plans obligate Defendant to pay for the cost of the repair or replacement of covered systems and appliances that become inoperable due to normal wear and tear during the term of the contract. It is possible a claim may never be submitted and, thus, a homeowner may not receive any 'goods or services' under his or her plan. The home warranty plans provide for a transfer of risk that is not merely incidental, but rather is a central and relatively important element of the plans, and the relationship between Defendant and its plan holders and their respective obligations are consistent with the concept of 'insurance', as it is defined in the Insurance Code.

Campion, Id. at 1145-1146. The *Campion* court agreed with ORHP that the home warranty plan was consistent with the concept of insurance.

¶31 Likewise, ORHP's home warranty plan provides for the transfer of risk that is a central and important element of the plan. The plan reassured the Plaintiffs that this plan would "safeguard your budget against excessive system and appliance failures with an Old Republic Home Warranty Plan."

¶32 In *McMullan v. Enterprise Financial Group, Inc.,* 2011 OK 7, 247 P.3d 1173, we were asked to determine whether a 'vehicle service contract' met the definition of an insurance contract. In concluding that it was "insurance," we relied on the guidance from the United States Supreme Court, *Group Life & Health ins. Co. v. Royal Drug Co.,* 440 U.S. 205, 210, 228, 99 S.Ct. 1067, 59 L.Ed 2d 261 (1979) outlining the following necessary elements:

> . . . The primary elements of an insurance contract are the spreading and underwriting of a policy holder's risk. It is characteristic of insurance that a number of risks are accepted, some of which involve losses, and that such losses are spread over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it." (Citations omitted)

McMullan, 2011 OK 7, ¶ 11, 247 P.3d at 1178.

We also recognized that the *Royal Drug* court, quoting *Jordan v. Group Health Assn,* 71 App. D.C. 38, 107 F.2d 239 (1939) stated:

> Whether the contract is one of insurance or of indemnity there must be a risk of loss to which one party may be subjected by contingent or future events and an assumption of it by legally binding arrangement by another.

McMullan, 2011 OK 7, ¶ 12, 247 P.3d at 1178.

¶33 In *McMullan* we discussed that vehicle service contracts were written like insurance policies and that the "obvious purpose of a vehicle service contract is to protect the purchaser from the expenses associated with an unexpected mechanical breakdown or an

expensive but necessary repair." *McMullan,* 2011 OK 7, ¶ 13, 247 P.3d at 1178. In concluding that the contract was "insurance" we reflected that the "purchaser pays a premium and buys an agreement to shift any potential hazard they may face to the vehicle service provider." *Id.* Likewise, the primary feature of the ORHP home warranty plan was to "safeguard [the Plaintiffs'] budget against expensive system and appliance failures with an Old Republic Home Warranty Plan."[19] The Plaintiffs paid a premium to be insured that they would not have to pay the full repair costs in the event a covered system, like the air conditioning needed repair or replacing. In fact, the contract specifically notes the range of potential costs in the event of a covered system failure. By purchasing this policy, the Plaintiffs were relieved of this potential liability and instead this potential cost shifted to ORHP. Following our analysis in *McMullan,* the ORHP contract before us meets all the hallmarks of an insurance policy. Furthermore, this is the very conclusion reached by the *Campion* court when reviewing the ORHP home warranty policy, and as argued by ORHP in that matter.

¶34 We do not agree with the conclusion of ORHP that the contract is governed by the Oklahoma Home Service Contract Act. The legislature stated the purpose of the Oklahoma Home Service Contract Act "is to create an independent legal framework within which home service contracts are defined, may be sold and are regulated in this state." 36 O.S. 2011 § 6751

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[19] Record, Exhibit 2, Defendant Old Republic Home Protection Co., Inc.'s Motion to Stay and Compel Arbitration, and Brief in Support, *William B. Sparks and Donna Sparks, Plaintiffs v. Old Republic Home Protection Company, Inc., Defendant, CJ*-16-795, District Court of Cleveland County.

(A). The very next section, §6752 subpart (9), has three sentences that need to be separately examined. The first sentence in this subpart states as follows:

> "Home service contract" or "home warranty" means a contract or agreement for a separately stated consideration for a specific duration to perform the service, repair, replacement or maintenance of property or indemnification for service, repair, replacement or maintenance, for the operational or structural failure of any residential property due to a defect in materials, workmanship, inherent defect or normal wear and tear, with or without additional provisions for incidental payment or indemnity under limited circumstances. 36 O.S. 2011 §6752 (9)

The next sentence is directed only to "home service contracts" and does not include a reference to "home warranty" and states:

> Home service contracts may provide for the service, repair, replacement or maintenance of property for damage resulting from *power surges or interruption and accidental damage from handling and may provide for leak or repair coverage to house roofing systems.*

The final sentence provides:

> *Home service contracts* are not insurance in this state or otherwise regulated under the Insurance Code. 36 O.S. 2011 § 6752 (9)

We take note that this final sentence *does not state* that home service contracts *or home warranties* are not insurance in this state or otherwise regulated under the Insurance Code. The exclusionary language, *i.e. "not insurance,"* is limited solely to "home service

contracts." Within this definition section, the legislature provided a separate definition for "warranty" which states at § 6752 (11) as follows:

> "Warranty" means a warranty made solely by the manufacturer, importer or seller of property or services, including builders on new home construction, without consideration, that is not negotiated or separated from the sale of the product and is incidental to the sale of the product, that guarantees indemnity for defective parts, mechanical or electrical breakdown, labor or other remedial measures, such as repair or replacement of the property or repetition of services.

It is clear from this statutory scheme, that "home service contracts" are defined differently than a "home warranty." ORHP drafted this contract and identified this policy as a "home warranty" and never refers to this agreement as a "home service contract." We find that the Old Republic Home Warranty is not a home service contract as defined by this Act.

CONCLUSION

¶35 We hold that the Plaintiffs' home warranty plan meets the definition of insurance and as such is exempt from the Oklahoma Uniform Arbitration Act. We further hold that § 1855 of this Act is a state law enacted for the purpose of regulating insurance, and thus, the McCarran-Ferguson Act applies precluding the Federal Arbitration Act from preempting conflicting state law.

CONCUR: Gurich, C.J., Darby, V.C.J., Kauger, Edmondson, Colbert, and Combs, JJ., Reif, S.J. and Bass, S.J.

CONCURS IN RESULT: Winchester, J.

APPENDIX B

THIS OPINION HAS BEEN RELEASED
FOR PUBLICATION BY ORDER OF
THE COURT OF CIVIL APPEALS

IN THE COURT OF CIVIL APPEALS OF THE
STATE OF OKLAHOMA
DIVISION II

[Filed November 19, 2018]

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Case No. 115,789

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WILLIAM B. SPARKS and DONNA SPARKS,

Plaintiffs/Appellees,

vs.

OLD REPUBLIC HOME
PROTECTION COMPANY, INC.,

Defendant/Appellant,

and

OLD REPUBLIC INTERNATIONAL and
ALL SEASON'S HEATING AND AIR, LLC,

Defendants.

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APPEAL FROM THE DISTRICT COURT OF
CLEVELAND COUNTY, OKLAHOMA

HONORABLE TRACY SCHUMACHER,
TRIAL JUDGE

AFFIRMED

Amy N. Bennett
John David Lackey
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and

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For Plaintiff/Appellee

OPINION BY P. THOMAS THORNBRUGH, CHIEF JUDGE:

¶1 Old Republic Home Protection Company, Inc. (Old Republic), appeals a decision of the district court finding that 12 O.S.2011 § 1855(D) prevented the court from compelling arbitration of the dispute arising from a home warranty/service contract between Old Republic and William B. Sparks and Donna Sparks (the Sparks). Section 1855(D) provides that "the Uniform Arbitration Act shall not apply to . . . contracts which reference insurance . . . ."

¶2 We conclude that when the Legislature enacted the "Oklahoma Home Service Contract Act"[1] (HSCA)

[1] Title 36 O.S.2011 & Supp. 2012 §§ 6750-6755.

and the "Service Warranty Act"[2] (SWA), it did not intend to exempt contracts made pursuant to these Acts from the provisions of 12 O.S.2011 § 1855(D), and that such contracts "reference insurance" for the purposes of § 1855(D).

BACKGROUND

¶3 This appeal arises from a dispute between the Sparks and Old Republic involving a "home warranty" contract, and a series of problems with the Sparks' air conditioning. The Sparks sued Old Republic, alleging a pattern and practice of using unqualified contractors to perform work pursuant to the contract, and of deliberately selecting contractors who would opine that little or no work was needed to repair any covered appliance or fitting while ignoring the opinion of contractors who believed that more substantive repair or replacement was necessary. Old Republic sought to compel arbitration of the dispute pursuant to a contractual arbitration clause. The Sparks argued that arbitration of the dispute is prohibited by 12 O.S.2011 § 1855(D) because the contract is one that "references insurance." The district court agreed, and refused to compel arbitration. Old Republic appealed. In April 2017, the Supreme Court stayed the district court case pending appeal.

STANDARD OF REVIEW

¶4 This appeal may be resolved by an interpretation of the phrase "references insurance" in 12 O.S.2011 § 1855(D). Statutory construction and interpretation is a question of law. *Mariani v. State ex rel. Oklahoma*

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[2] Originally in Title 36, but revised and renumbered in 2012 as 15 O.S. §§ 141.1-141.35.

State Univ., 2015 OK 13, ¶ 7, 348 P.3d 194. Our standard of review is *de novo* on a question of law, which we review without deference to the trial court's reasoning or result.

ANALYSIS

¶5 This case presents a singular question of law: was the contract sold to the Sparks by Old Republic a contract *"referencing insurance"* that is subject to the arbitration prohibition of 12 O.S.2011 § 1855(D), which provides that "the Uniform Arbitration Act shall not apply to . . . contracts which reference insurance. . . ." Old Republic brings three arguments contending that any dispute arising from the contract sold to the Sparks is subject to the mandatory arbitration provided for in the contract.[3] The first is that Oklahoma law is preempted by federal law in this matter. The second is that arbitration pursuant to the Federal Arbitration Act (FAA) is a contractual "choice of law" by the parties that the courts must enforce. The third is that the HSCA, 36 O.S.2011 & Supp. 2012 §§ 6750-6755, exempts the contract from the provisions of § 1855(D).

I. PREEMPTION

¶6 Old Republic first argues that § 1855(D) is preempted by federal law. Regulation of the business of insurance is traditionally reserved to the states, and Old Republic's argument has been persistently rejected by both Oklahoma and federal courts, based on an interpretation of the McCarran-Ferguson Act. This Act, at 15 U.S.C. § 1012(b), states that "no Act of

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[3] The record is clear that the contract in question explicitly provides that disputes arising from the contract be arbitrated pursuant to the Federal Arbitration Act (FAA).

Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." "Thus, McCarran-Ferguson authorizes `reverse preemption' of generally applicable federal statutes by state laws enacted for the purpose of regulating the business of insurance." *ESAB Grp., Inc. v. Zurich Ins. PLC,* 685 F.3d 376, 380 (4th Cir. 2012); *see also Am. Bankers Ins. Co. of Fla. v. Inman,* 436 F.3d 490, 494 (5th Cir. 2006) (holding that Mississippi statute prohibiting contractually required arbitration of disputes stemming from uninsured and underinsured motorist coverage provisions of personal automobile insurance policies reverse preempts FAA); *Am. Health & Life Ins. Co. v. Heyward,* 272 F.Supp.2d 578, 582 (D.S.C. 2003) (holding that South Carolina law prohibiting mandatory arbitration provisions in insurance contracts reverse preempts the FAA); and *Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co., Inc.,* 867 F.3d 449, 453-54 (4th Cir. 2017). We find this question well-settled in case law, and reject Old Republic's contention that § 1855(D) is preempted by federal law.

¶7 In addition we are not willing to read a federal preemption into the Oklahoma Legislature's statement that these contracts are "not insurance" for the purpose of certain state regulations. If the Legislature were to declare that an otherwise ordinary contract "was insurance" or "references insurance," this declaration would have *no effect whatsoever* on whether federal law would preempt the application of § 1855(D). The federal inquiry would simply ignore the statement of the Legislature, and determine if the law was "enacted by any State for the purpose of regulating the business of insurance" pursuant to federal standards. The same facts apply in the reverse situa-

tions. The application or preemption of § 1855(D) is based on an analysis of the *nature, operation, and purpose of the law* in question, not on how the Oklahoma Legislature chooses to characterize it.

II. CHOICE OF LAW

¶8 Old Republic next argues that the Oklahoma prohibition on arbitration of contracts with reference to insurance may be circumvented if an insurer "chooses" the FAA as the governing law of an (adhesive) insurance contract. The Oklahoma Supreme Court rejected this argument in *Cannon v. Lane,* 1993 OK 40, 867 P.2d 1235, holding that, if the parties agree in an insurance contract to submit controversies to arbitration that are otherwise barred by the public policy expressed in 15 O.S.1991 § 802(A) (now 12 O.S. § 1855(D)) such agreements are unenforceable. *Id*., ¶¶ 3, 11.

III. THE OKLAHOMA HOME SERVICE CONTRACT ACT

¶9 Old Republic's third argument is that that the contract in question is a "home service contract" or "home warranty," and hence it is exempt from the insurance arbitration prohibition of 12 O.S.2011 § 1855(D) because these contracts are statutorily "not insurance."[4] Oklahoma has created several statutory or common-law categories of contracts that provide non-traditional insurance coverage, and are regulated

[4] *See* SWA § 141.2(17)(f), stating that "service warranties are not insurance in this state or otherwise regulated under the Insurance Code," and HSCA § 6752(9), stating, "Home service contracts are not insurance in this state or otherwise regulated under the Insurance Code."

by a regime different from that applied to traditional insurance providers.

¶10 The Legislature created the SWA in 1993 (originally in Title 36, but revised and renumbered in 2012 as 15 O.S. §§ 141.1-141.35). In 2011, the Legislature created the HSCA, now codified at 36 O.S.2011 & Supp. 2012 §§ 6750-6755. No published case law has directly interpreted either of these Acts since they became law. It is clear that the Legislature intended that both "Home Service Contracts" and "Service Warranties" be subject to regulatory regimes separate from those governing general insurance, and also separate from each other.[5] The difference between the two Acts, and what types of contracts fall under each Act, is not immediately obvious, and some additional analysis is necessary because it is not clear whether the contract in question is legally a home service contract or a service warranty.

A. Home Warranty or Service Warranty?

¶11 Each Act contains a statement of what activities are covered by the respective Act, both of which are reproduced below with the differences highlighted:

HSCA § 6752(9) provides as follows:

> "Home service contract" or "home warranty" means a contract or agreement for a separately stated consideration for a specific duration to perform the **service**, repair, replacement or **maintenance** of property or indemnification for **service**, repair, replace-

[5] HSCA § 6753 is clear that "home service contract providers as defined in Section 6752 of this title and properly registered under this law are exempt from any treatment pursuant to the Service Warranty Act."

> ment or **maintenance**, for the operational or structural failure of any residential property due to a defect in materials, workmanship, **inherent defect or normal wear and tear**, with or without additional provisions for incidental payment or indemnity under limited circumstances. Home service contracts may provide for the service, repair, replacement, or maintenance of property for damage resulting from power surges or interruption and accidental damage from handling and may provide for leak or repair coverage to house roofing systems. Home service contracts are not insurance in this state or otherwise regulated under the Insurance Code. (Emphasis added.)

SWA §141.2(17) provides as follows:

> "Service warranty" means a contract or agreement for a separately stated consideration for a specific duration to perform the **repair or replacement** of property or indemnification for repair or replacement for the operational or structural failure due to a defect or failure in materials or workmanship, **with or without** additional provision for incidental payment of indemnity under limited circumstances, including, but not limited to, failure due to normal wear and tear, towing, rental and emergency road service, road hazard, power surge, and accidental damage from handling or as otherwise provided for in the contract or agreement. The term "service warranty" includes a contract or agreement to provide one or more motor vehicle ancillary

> service(s) as defined by this section. (Emphasis added.)

¶12 Hence, a "home service contract" or "home warranty" covers *"service,* repair, replacement or *maintenance"* while a "service warranty" covers only "repair or replacement." HSCA § 6752(4) and § 6751(B)(2) state that a contract "that provides for scheduled maintenance only and does not include repair or replacement" is a "maintenance agreement" and that maintenance agreements are excluded from the HSCA. Therefore, a home warranty must offer "repair and replacement" in addition to "maintenance."

¶13 Another statutory difference is that a home warranty covers inherent defects or normal wear and tear, while a service warranty *may* exist without provisions for payment of damage due to normal wear and tear. Further, a home warranty covers "residential property" while a "service warranty" covers "property." The two Acts clearly have a substantial overlap in definition.[6]

¶14 The singular clarity that is manifest is provided by HSCA § 6751(Purpose-Exemptions), which provides in part:

> A. The purpose of the Oklahoma Home Service Contract Act is to create an independent legal framework within which home service contracts are defined, may be sold and are regulated in this state.
>
> . . .

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[6] By example, the "service or maintenance" of equipment or fittings may, in the plain meaning of the words, involve "repair or replacement," and "property" may include "residential property."

> Proper registration under the Oklahoma Home Service Contract Act **exempts applicability** under the Service Warranty Act, **which may regulate extended warranty, retail, automobile and agreements not defined in the Oklahoma Home Service Contract Act.** Nothing in the Service Warranty Act is changed or amended by the Oklahoma Home Service Contract Act.

¶15 The latter section of HSCA § 6751 shows that, in 2011, the Legislature intended to remove the potential regulation of home warranties from the SWA and place them under a new legislative scheme. Hence, irrespective of the broad and potentially overlapping definitions contained in each, the legislative intent was evidently for the HSCA to regulate the sale of warranties or service agreements on real property and the associated attachments fittings, and appliances, while the SWA was intended to regulate the sale of retail extended warranties (such as warranties on consumer electronics), automobile service agreements and similar consumer agreements not involving real property. The contract in question bears all the hallmarks of a home warranty rather than a service warranty, and we find that it was both intended as, and statutorily is, a home warranty.

¶16 In short, we are faced with a contract that is fundamentally a "home warranty," written by a traditional insurer who is an "exempt" provider of service warranties. But what is the status of such a contract vis-à-vis the arbitration bar of 12 O.S. § 1855(D)? Does it "reference insurance" so as to invalidate the contractual arbitration provisions?

IV. DO CONTRACTS ISSUED PURSUANT TO THE HSCA OR SWA REFERENCE INSURANCE FOR THE PURPOSES OF 12 O.S. § 1855(D)?

¶17 Old Republic largely bases its argument on the definition found in 15 O.S. Supp. 2014 § 141.2(17)(0, which states that "service warranties are not insurance in this state or otherwise regulated under the Insurance Code" and interprets this as a legislative decision to remove such contracts from the requirement of 12 O.S.2011 § 1855(D) that "the Uniform Arbitration Act shall not apply to . . . contracts which reference insurance." We are not inclined to so readily interpret a tacit intention of the Legislature to remove what *are so clearly contracts of insurance* from the Oklahoma public policy regulating insurance expressed by § 1855.

V. DOES 15 O.S. SUPP. 2014 § 141.2(17)(f) PLACE HOME WARRANTIES OUTSIDE OF 2 O.S.2011 § 1855(D)?

¶18 The cardinal rule of statutory construction is to ascertain legislative intent. Both the SWA and the HSCA contain statements to the effect that home service contracts and/or service warranties are *not insurance* in this state. However, the same contracts are clearly designed to function and perform as "insurance," and are subject to a regulatory regime that is substantially identical to that applied to insurance under the authority of the State Insurance Commissioner. The requirements placed on vendors who sell such "warranty" or "service" contracts are unique to the regulation of "insurance" and are clearly rooted in the same public policy that overcomes the general freedom of contract and allows the state to strictly regulate the form and practice of insurance

agreements. And yet, the Legislature has stated that these contracts are "not insurance."

¶19 Did the Legislature simply declare that these agreements are regulated by special regimes similar to but apart from those applied to traditional insurance products, or did it intend to declare that such agreements do not *"reference insurance"* for purposes of 12 O.S.2011 § 1855(D) and thus are *not encompassed by the public policy embodied in § 1855(D)?*[7] An examination of the statutory text alone does not provide the answer to this question, which appears to be one of first impression. No published or unpublished decision found by this Court addresses either of the current Acts in any context.

¶20 For the reasons outlined below, we find the legislative intent expressed in the HSCA and SWA can be reconciled by recognizing that such contracts bear all the fundamental features of insurance and are regulated as insurance is regulated. **We conclude that the Legislature intended to create a separate regulatory regime for these contracts but did not intend to exempt them from the public policy embodied in the arbitration prohibition of § 1855(D).**

¶21 "'Insurance' is a contract whereby one undertakes to indemnify another or to pay a specified amount upon determinate contingencies." 36 O.S.2011 § 102. Both HSCA and SWA contracts display all the fundamental features of insurance. Both operate by risk pooling, which fundamentally distinguishes insurance contracts from ordinary contracts and is "an

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[7] Another option, of course, is that the Legislature did not consider § 1855(D) *at all* when constructing the SWA and HSCA, and had no intent to change its scope.

essential characteristic of the insurance industry." *Hollaway v. UNUM Life Ins. Co. of Am.,* 2003 OK 90, ¶ 22, 89 P.3d 1022.

¶22 The primary attributes of an insurance contract are the spreading and underwriting of a policyholder's risk. "It is characteristic of insurance that a number of risks are accepted, some of which involve losses, and that such losses are spread over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it." *Grp. Life & Health Ins. Co. v. Royal Drug Co.,* 440 U.S. 205, 211, 99 S. Ct. 1067, 1073 (1979)(quoting 1 G. Couch, *Cyclopedia of Insurance Law §* 1;3 (2d ed. 1959)). Examining the HSCA and SWA in detail, we note that "service warranties" and "home service contracts" not only are "insurance" by the classic definition, but they also are *regulated by the Legislature in the same manner as insurance contracts.* Providers must register, obtain a revocable license, and comply with numerous financial responsibility requirements regulating reserves. *(See* SWA §§ 144.4-144.7 and HSCA § 6753(C)). Enforcement is carried out by an insurance commissioner. All of these provisions are fundamental to insurance regulation and its unique position in state law.

¶23 Although HSCA and SWA vendors evidently are subjected to less stringent regulatory requirements than traditional insurance companies, "the extent of regulation is not what makes a service provider an 'insurance company' nor is it what makes a service agreement an 'insurance' contract." *McMullan v. Enter. Fin. Grp., Inc.,* 2011 OK 7, ¶ 10, 247 P.3d 1173. Such warranties clearly are not *ordinary contracts* under Oklahoma law, and, in the absence of the Legislature stating that they are "not insurance," they

would certainly be classed as contracts "which reference insurance." The question therefore becomes whether the Legislature, by stating that these contracts are *not insurance* for purposes of general insurance regulation, also intended to reverse the otherwise evident conclusion that they *"reference insurance"* for purposes of 12 O.S. § 1855(D)? We hold that it did not.

B. *McMullan* - Bad Faith and Insurance Guarantees

¶24 A possible historical context can be found by examining the 2011 *McMullan* case. The SWA was enacted in 1993.[8] The 1993 version of the Act differs from the 2012 version in two important ways. The 1993 version did not contain the "shall not be deemed to create a special relationship between the parties which would give rise to an action in tort to recover for breach of the duty of good faith and fair dealing." Nor did the 1993 version require the policy disclosure statement warning required by current SWA § 141.21, that *"This is not an insurance contract. Coverage afforded under this contract is not guaranteed by the Oklahoma Insurance Guaranty Association."*

¶25 *McMullan* found that vehicle service contracts which fell under the SWA met the definition of and were designed to function and perform as "insurance," and, therefore, could support a cause of action for *bad faith.* The "no bad-faith" language subsequently added to the SWA was clearly intended to override *McMullan.* More importantly, because *McMullan* declared service warranties to be "insurance," the Legislature evidently also wished to clarify that, unlike traditional insurance policies, service warranties are

[8] The Act was originally part of Title 36 – Insurance. In 2012, it was recodifed as part of Title 15 – Contracts.

not subject to or guaranteed by the Oklahoma Property and Casualty Insurance Guaranty Association Act.[9] *It is in this context that the Legislature stated that such contracts are "not insurance,"* and required a warning to that effect.

C. We find No Explicit Exclusion of Service Warranties or Home Warranties from § 1855(D)

¶26 We conclude that, had the Legislature intended to exclude home and service warranties from § 1855(D), it would have clearly and explicitly stated so. Instead, it appears that the Legislature was primarily concerned with distinguishing the specific regulatory and guarantee regimes applied to home and service warranties from general insurance regulation when it stated that these contracts, which bear all the fundamental hallmarks of insurance, are "not insurance."

¶27 We further find no difference or rationale in public policy that would require § 1855(D) to apply to all contracts that reference insurance and function as insurance except home and service warranties.[10]

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[9] The Oklahoma Property and Casualty Insurance Guaranty Association Act, 36 O.S.2011 & Supp. 2014 §§ 2001-2020.2, created a nonprofit, unincorporated legal entity known as the Oklahoma Property and Casualty Insurance Guaranty Association. The Association collects assessments from any insurer writing the "kind of insurance to which the [Act] applies," and uses the funds to pay covered claims of insurers that have become insolvent. Although their activities have all the features of property/casualty insurance, we find no indication that service warranty providers traditionally paid assessments to the Association. Hence the Legislature's desire to specifically exclude these contracts from the definition of an "insurer" under the Act.

[10] The SWA covers contracts insuring against "accidental damage from handling or as *otherwise provided for in the contract or agreement."* This could open the door to all property insurance

Regulation under the SWA and HSCA clearly arises from the public policy regarding insurance. These contracts are regulated in the manner of insurance for the same policy purposes. Indeed, if the public policy that requires intrusive regulation of the insurance business is inapplicable because these contracts are *truly* "not insurance," or contracts that "reference insurance," it is difficult to discern how the Legislature could force such strict and intrusive regulation of *ordinary contracts* without interfering with the state policy of freedom of contract."

¶28 In the absence of clearly demonstrated legislative intent to exempt such contracts from § 1855(D), and because these contracts *clearly function as insurance and are subject to the public policy expressed in § 1855(D)*, we hold that such contracts "reference insurance" for purposes of that statute, and that any mandatory arbitration clause in such a contract is void.

VI. REGISTRATION ARGUMENTS

¶29 The record also indicates that Old Republic is not registered as a vendor of home warranties under the HSCA, although it is registered under the SCA. The Sparks argue that registration is a requirement to regulation under the Act, and therefore, even if we were to find that *registered* providers of home warranties are exempt from the arbitration bar of 12 O.S. § 1855(D), Old Republic would still not be not entitled to such an exemption, As we have previously found that contracts pursuant to the HSCA or SWA do "reference insurance" for the purposes of § 1855(D)

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being characterized as a "service warranty" by the vendor specifically to evade the public policy embodied in § 1855(D).

(irrespective of registration), we need not address this argument.

CONCLUSION

¶30 We find that contracts issued pursuant to the SWA and HSCA "reference insurance" for the purposes of 12 O.S. § 1855(D). Hence, disputes arising from those contracts are not subject to mandatory arbitration.

AFFIRMED.

WISEMAN, P.J., concurs, and FISCHER. J., dissents.

FISCHER, J., dissenting:

¶1 In my view, the Legislature has decided that the contract at issue in this case is not insurance. Therefore, arbitration of this dispute is not prohibited by section 1855(D) of the Oklahoma Uniform Arbitration Act, 12 O.S.2011 §§ 1851 through 1881, excluding from compelled arbitration contracts that reference insurance. I would reverse the order appealed and remand with instructions to grant Old Republic's motion to compel arbitration. Therefore, I respectfully dissent.

BACKGROUND

¶2 The parties entered into a contract to be effective from September 15, 2015, to September 15, 2016. The document describes the contract as an "Oklahoma Home Warranty." The contract provides for repair and/or replacement of certain home appliances located at the Sparks' residence in Moore, Oklahoma. Old Republic asserts that this was the sixth renewal of the Sparks' Home Warranty contract for appliances located at that residence, an assertion not disputed by the Sparks. The contract Declaration of Coverage page contains a "DISPUTE RESOLUTION" section, which

states that the contract is subject to an "Arbitration Provision outlined on Page 9;" but, if the Sparks did not want to be subject to the arbitration provision, they could cancel the contract within thirty days. "Otherwise, this arbitration provision will be applicable."

¶3 The arbitration provision referred to is on page nine of the contract and states that the parties agree to arbitrate all disputes or claims arising out of the contract or the parties' relationship. The arbitration provision invokes the rules for consumer disputes of the American Arbitration Association and provides that the arbitration of any dispute will be "governed by the Federal Arbitration Act (9 U.S.C. § 1, et seq.) to the exclusion of any different or inconsistent state or local law, ordinance or judicial rule."

¶4 The Sparks allege that on March 11, 2016, they had a loss to their air conditioning system covered by the Home Warranty, and that Old Republic was unable to repair the air conditioning system to their satisfaction. Old Republic does not dispute this allegation. Nor is there any disagreement regarding whether this dispute is covered by the parties' arbitration clause. This dispute concerns the enforceability of the parties' agreement to arbitrate this dispute. The Sparks sued Old Republic for breach of contract and the tort of breach of duty to deal fairly and in good faith. Old Republic filed a motion to compel arbitration pursuant to the arbitration clause in the parties' Home Warranty contract. Old Republic appeals the district court's order denying its motion to compel arbitration.

I. The Parties' Contract Is Not Insurance

¶5 Section 1855(D) provides: "The Uniform Arbitration Act shall not apply to . . . contracts which

reference insurance, except for those contracts between insurance companies." The Sparks contend that their Home Warranty is a contract of insurance and, therefore, arbitration of this dispute is prohibited by section 1855(D). As authority for this proposition, the Sparks cite *McMullan v. Enterprise Financial Group, Inc.,* 2011 OK 7, 247 P.3d 1173, which held that a vehicle service warranty contract was an insurance contract for purposes of the Oklahoma Service Warranty Insurance Act, 36 O.S.2001 §§ 6601 through 6639. The Sparks contend that we should follow *McMullan* and hold that this Home Warranty is an insurance contract. To do so would ignore what is, in my view, the Legislature's clear intent to the contrary.

¶6 The Oklahoma Service Warranty Insurance Act at issue in *McMullan* was repealed in 2012 and replaced by the Service Warranty Act, 15 O.S. Supp. 2012 §§ 141.1 through 141.35, the applicable legislation in this case. The definition of a "service warranty" is identical in both statutes, with one critical exception. The new Service Warranty Act added a provision to the definition of "service warranty" making it clear that a service warranty contract is not an insurance contract.[1] That provision states that "service warranties are not insurance in this state or otherwise regulated under the Insurance Code." 15 O.S. Supp. 2012 § 141.2(14)(f) (renumbered as § 142(17)(f)). In my view, it is clear that the Service Warranty Act was adopted in response to the *McMullan* decision and for the purpose of changing the "existing law," as interpreted by the *McMullan*

[1] The Sparks' counsel's failure to note this fact or comment on the effect of the repeal of the Oklahoma Service Warranty Insurance Act on the continued viability of the *McMullan* holding is a disservice to this Court and the district court.

Court, to exclude service warranties from the kinds of contracts that do constitute insurance. *See Blitz U.S.A., Inc. v. Okla. Tax Comm'n,* 2003 OK 50, ¶ 19, 75 P.3d 883 (by amending a statute the Legislature may intend to change existing law).

¶7 There are two statutory regimes potentially applicable to the parties' contract, the Service Warranty Act (15 O.S. Supp. 2012 §§ 141.1 through 141.35) and the Home Service Contract Act (36 O.S.2011 §§ 6750 through 6755). As the Majority correctly points out, there is some overlap but also there are some differences between the kinds of contracts covered by the two acts. The parties' Home Warranty contract contains provisions that are covered by both acts.

¶8 However, I find it unnecessary to determine whether the parties' Home Warranty contract is governed by one Act to the exclusion of the other because the Legislature has excluded both types of contracts from the definition of "insurance." Both statutes declare that home service contracts and service warranty contracts O.S.2011 § 6752(9). "The law-making body is presumed to have expressed its intent in a statute's language and to have intended what the text expresses." *Yocum v. Greenbriar Nursing Home,* 2005 OK 27, ¶ 9, 130 P.3d 213. "When statutory language is unambiguous, no further construction is needed . . . ." *St. John Med. Ctr. v. Bilby,* 2007 OK 37,¶ 6, 160 P.3d 978. Because the Legislature has declared that the parties' contract is not "insurance," arbitration of this dispute is not prohibited by section 1855(D) of the Uniform Arbitration Act.

II. McCarran-Ferguson Preemption

¶9 The Sparks also argue, in essence, that even if their Home Warranty is not an insurance contract (1) it is, nonetheless, a contract which references insurance; (2) contracts which reference insurance are excluded from the application of the Uniform Arbitration Act pursuant to section 1855(D); (3) section 1855(D) is a state law regulating insurance and, therefore, (4) the McCarran-Ferguson Act, 15 U.S.C. §§ 1010 through 1015, preempts the Federal Arbitration Act, 9 U.S.C. §§ 1 through 16, and any effort to compel arbitration of this dispute. That interpretation of section 1855(D) directly conflicts with the Federal Arbitration Act's well-established national policy applicable in state and federal courts, "foreclose[ing] state legislative attempts to undercut the enforceability of arbitration agreements." *Preston v. Ferrer,* 552 U.S. 346, 353, 128 S. Ct. 978, 983 (2008).

¶10 The Majority finds this issue "well settled" in case law from four federal courts. I do not. Neither this Court, the Oklahoma Supreme Court, nor the United States Supreme Court has directly addressed the potential conflict between the McCarran-Ferguson Act and the Federal Arbitration Act.

¶11 Section 2 of the Federal Arbitration Act states:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

15 U.S.C. § 2. Section 1012 of the McCarran-Ferguson Act preempts any "Act of Congress" which invalidates, impairs, or supersedes a State law enacted for the purpose of regulating "the business of insurance." 15 U.S.C. § 1012(b).[2] The United States Supreme Court has invoked the McCarran-Ferguson Act to hold that a state creditor priority law applicable to insolvent insurance companies was not preempted by a federal creditor priority statute because the state law's protection of the claims of insurance policyholders involved "the actual performance of an insurance contract . . . an essential part of the 'business of insurance.' *United States Dep 't of Treasury v. Fabe,* 508 U.S. 491, 505, 113 S. Ct. 2202, 2210 (1993). But *Fabe* did not involve an agreement to arbitrate or the applicability of the Federal Arbitration Act, Nonetheless, Congress did not intend to "cede the field of insur-

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[2] (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.

ance regulation to the States" by enacting the McCarran-Ferguson Act. *Humana Inc. v. Forsyth,* 525 U.S. 299, 308, 119 S. Ct. 710, 717 (1999).

¶12 Although no United States Supreme Court decision has addressed the potential conflict between the McCarran-Ferguson Act and the Federal Arbitration Act, with respect to any conflict between the Federal Arbitration Act and state law, that Court's position is clear: "[W]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Marmet Health Care Ctr. Inc. v. Brown,* 565 U.S. 530, 533, 132 S. Ct. 1201, 1204 (2012) (invalidating a state law prohibition on arbitration of nursing home disputes) (citing *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 341, 131 S. Ct. 1740, 1747 (2011) (state law doctrine prohibiting waiver of the right to file class actions and invalidating a contract containing an arbitration agreement was displaced by the Federal Arbitration Act)). *See also Preston v. Ferrer,* 552 U.S. 346, 128 S. Ct. 978 (2008) (state law granting labor commissioner exclusive jurisdiction of labor disputes is superseded by the Federal Arbitration Act when the parties agree to arbitrate those disputes). The cases cited by the Majority holding that the McCarran-Ferguson Act preempts application of the Federal Arbitration Act if the contract containing the arbitration clause involves insurance either predate or do not discuss *Marmet Health Care Ctr. Inc. v. Brown.*

¶13 Clearly, section 1855(D) of the Oklahoma Arbitration Act is a state law that "prohibits outright the arbitration of a particular type of claim," that is, claims which arise from contracts which reference insurance. *Marmet*, 565 U.S. at 533, 132 S. Ct. at 1204.

Although there is no controlling authority resolving any conflict between the McCarran-Ferguson Act and the Federal Arbitration Act, resolution of that issue in this case is not required unless the McCarran-Ferguson Act applies.

¶14 For purposes of the McCarran analysis, the initial question is not whether the contract between the Sparks and Old Republic is a contract referencing insurance according to Oklahoma law. Contracts which "reference insurance," as that term is used in section 1855(D), but which do not involve the business of insurance, are not contracts which invoke McCarran preemption. *See, e.g., Union Labor Life Ins. Co. v. Pireno,* 458 U.S. 119, 102 S. Ct. 3002 (1982) (agreement between insurer and professional organization to determine the reasonable costs of chiropractic services for health insurance policy reimbursement purposes did not involve the business of insurance); *Group Life & Health Ins. Co. v. Royal Drug Co.,* 440 U.S. 205, 99 S. Ct. 1067 (1979) (holding that agreements between insurer and pharmacies, which reduced the costs of health insurance to policyholders, did not involve the business of insurance).

¶15 The initial McCarran question is whether Old Republic's practice of issuing home warranty contracts, like the one issued to the Sparks, constitutes the "business of insurance." 15 U.S.C. § 1012(b). The analysis for determining what constitutes the "business of insurance" is summarized in *Pireno:*

> [T]hree criteria [are] relevant in determining whether a particular practice is part of the "business of insurance" . . . *first,* whether the practice has the effect of transferring or spreading a policyholder's risk; *second,* whether the practice is an integral part of the

> policy relationship between the insurer and the insured; and *third,* whether the practice is limited to entities within the insurance industry.

Pireno, 458 U.S. at 129, 102 S. Ct. at 3009 (citing *Group Life & Health Ins. Co. v. Royal Drug Co.,* 440 U.S. 205, 99 S. Ct. 1067 (1979)). The Home Warranty contract between the Sparks and Old Republic satisfies this analysis. Subject to agreed limits, the Home Warranty contract transfers the risk of repairing or replacing certain home appliances from the Sparks to Old Republic. That risk transfer is central to the relationship between the Sparks and Old Republic. And, only entities licensed by or registered with the Oklahoma Insurance Commissioner may lawfully issue home warranty policies in Oklahoma. *See* 36 O.S. Supp. 2014 § 6753(B), and 15 O.S. Supp. 2012 § 141.4(A). Consequently, for McCarran purposes, it does not matter whether this is a "Home Service Contract," 36 O.S.2011 § 6752(9), or a "Service Warranty" contract, 15 O.S. Supp. 2014 § 141.2(17). The parties' Home Warranty contract was issued as part of the business of insurance.

¶16 A federal statute that would otherwise supplant a state statute is preempted by the McCarran-Ferguson Act if the federal statute (1) does not "specifically relate[ ] to the business of insurance"; (2) the state statute was enacted "for the purpose of regulating the *business* of insurance"; and (3) the federal statute would "invalidate, impair or supersede" the state statute. *US. Dep't of Treasury v. Fabe,* 508 U.S. 491, 501, 113 S. Ct. 2202, 2208 (1993). The first *Fabe* factor is satisfied. There is nothing in the Federal Arbitration Act that specifically mentions or relates to the business of insurance.

¶17 The second *Fabe* factor is more difficult. Unlike the "actual performance of an insurance contract" found to be an essential part of the business of insurance in *Fabe,* section 1855(D) does not affect the allocation of risk between the Sparks and Old Republic, and is not "an integral part of the policy relationship." *Union Labor Life Ins. Co. v. Pireno,* 458 U.S. 119, 129, 102 S. Ct. 3002, 3009 (1982). Section 1855(D) merely determines where the Sparks and Old Republic will settle their to entities within the insurance industry." *Id.* Consequently, section 1855(D) cannot have been enacted for the purpose of regulating the business of insurance, and, therefore, does not satisfy the second *Pireno* requirement.

¶18 The third *Fabe* factor is lacking as well. Application of the Federal Arbitration Act would not "invalidate, impair or supersede" section 1855(D). 15 U.S.C. § 1012(b). There is nothing in the express language of the Federal Arbitration Act that would "invalidate" or "supersede" section 1855(D). Nonetheless, if compelling arbitration in this case would "impair" the effect of section 1855(D), the McCarran Act may apply.

¶19 A federal statute can "impair" a state statute if it frustrates a declared state policy or if it interferes with a state regulatory regime. *Humana Inc. v. Forsyth,* 525 U.S. 299, 310, 119 S. Ct. 710, 717 (1999). The Federal Arbitration Act does not frustrate Oklahoma's public policy, nor is it inconsistent with that declared State policy. In this area, the policies are the same. *Compare* 12 O.S.2011 § 1857(A): "An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists

at law or in equity for the revocation of a contract," *with* 9 U.S.C. § 2: "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The Federal Arbitration Act "'reflects an emphatic federal policy in favor of arbitral dispute resolution.'" *KPMG LLP v. Cocchi,* 565 U.S. 18, 21, 132 S. Ct. 23, 25 (2011) (per curiam) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 631, 105 S. Ct. 3346, 3356 (1985)). Likewise, "[n]o longer does Oklahoma disfavor arbitration. In fact, we have a strong public policy which favors it." *Rollings v. Thermodyne Indus., Inc.,* 1996 OK 6, ¶ 32, 910 P.2d 1030.

¶20 As to whether the Federal Arbitration Act would interfere with Oklahoma's regulatory regime, the Oklahoma Legislature has answered that question. "The marketing, sale, offering for sale, issuance, making, proposing to make and administration of service warranties . . . shall be exempt from all provisions of the Insurance Code." 15 O.S. Supp. 2012 § 141.4(E). And, "service warranties are not insurance in this state or otherwise regulated under the Insurance Code." 15 O.S. Supp. 2014 § 141.2(17)(f). Similarly, the "Oklahoma Home Service Contract Act declares that home service contracts, as defined in Section 6752 of this title, are not insurance and not otherwise subject to the Insurance Code." 36 O.S. Supp. 2012 § 6751(A). *See* 36 O.S.2011 § 6752(9) ("Home service contracts are not insurance in this state or otherwise regulated under the Insurance Code.") Further, the "marketing, sale, offering for sale, issuance, making, proposing to make and administra-

tion of home service contracts. shall be exempt from all other provisions of the Insurance Code." 36 O.S. Supp. 2012 § 6753(F).[3]

¶21 "When federal law does not directly conflict with state regulation, and when application of the federal law would not frustrate any declared state policy or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application." *Humana, Inc. v. Forsyth,* 525 U.S. 299, 310, 119 S. Ct., 710, 717 (1999) (holding that federal RICO statute did not impair Nevada criminal statutes and was not preempted by McCarran-Ferguson). Because the Oklahoma Legislature has specifically chosen to exclude home warranty contracts from the State's laws regulating insurance, enforcement of the arbitration provision in the Sparks' contract will not "frustrate" State public policy or "interfere with" Oklahoma's statutory insurance regulatory regime. *Id.* As a result, enforcement of the Federal Arbitration Act and the parties' agreement to arbitrate this dispute will not "impair" any Oklahoma statute "enacted . . . for the purpose of regulating the business of insurance . . . ." 15 U.S.C. § 1012(b). Therefore, the McCarran-Ferguson Act does not apply to section 1855(D), and does not

[3] The Oklahoma Supreme Court has also implied, without directly deciding the issue, that Oklahoma law does not prohibit the arbitration of disputes arising from insurance contracts. "In the present matter, it must be shown that the arbitration clause applies to the issue of underpayment of insurance coverage in the [GAP insurance] policy. If this cannot be shown, the Court will not impose arbitration upon the parties." *Harris v. David Stanley Chevrolet, Inc.,* 2012 OK 9, ¶ 7, 273 P.3d 877. *See also Embry v. Innovative Aftermarket Sys.,* 2008 OK CIV APP 92, 198 P.3d 388, (holding that a GAP policy is a contract of insurance).

preempt enforcement of the Federal Arbitration Act in this case.

¶22 For these reasons, I would reverse the order appealed and remand with instructions to grant Old Republic's motion to compel arbitration.

November 19, 2018

APPENDIX C

IN THE DISTRICT OF CLEVLAND COUNTY,
STATE OF OKLAHOMA

[Filed] February 8, 2017]

Sparks	Little
Plaintiff(s)	Attorney(s) for Plaintiffs
Old Republic	Smith/Waddell
Defendant(s)	Attorney(s) for Defendants

SUMMARY ORDER

Date: 2/7/17 Court Reporter: _____ Judge: _____

counsel appear mtn to compel arbitration denied mtn to stay denied

/s/ [Illegible]
Judge

APPENDIX D

IN THE DISTRICT COURT OF
CLEVELAND COUNTY
STATE OF OKLAHOMA

[Filed January 19, 2017]

Case No. CJ-16-795-TS

WILLIAM B. SPARKS and DONNA SPARKS,

Plaintiffs,

vs.

OLD REPUBLIC HOME PROTECTION COMPANY, INC. (A Foreign Insurance Company), OLD REPUBLIC INTERNATIONAL (A Foreign Insurance Company) and ALL SEASON'S HEATING AND AIR, LLC.,

Defendants.

DEFENDANT OLD REPUBLIC HOME PROTECTION CO., INC.'S MOTION TO STAY AND COMPEL ARBITRATION, AND BRIEF IN SUPPORT

TO THE HONORABLE JUDGE:

COMES NOW Defendant Old Republic Home Protection Co., Inc. ("Defendant" or "ORHP")[1] and files

[1] In their lawsuit, Plaintiffs also named a separate and independent Old Republic entity, Old Republic International ("ORI"), as a Defendant. ORI does not join in the filing of this motion, however. because it is not a proper party to this lawsuit. ORI is a

this Motion to Stay and Compel Arbitration and Stay, and Brief in Support, and would respectfully show the Court as follows:

I.

INTRODUCTION

Plaintiffs agreed, and are contractually bound, to submit any dispute involving ORHP to binding arbitration. Plaintiffs and ORHP are parties to a home warranty plan that includes, among other things, a binding arbitration provision. And despite ORHP's request that Plaintiffs refer the matter to arbitration, Plaintiffs have refused to honor their agreement; instead, electing to proceed with their state court action, causing ORHP to needlessly incur substantial additional costs and expenses. The arbitration provision contained the parties' home warranty plan is binding and enforceable and this action should be stayed and the matter referred to arbitration without further delay.

II.

FACTUAL BACKGROUND

On July 7, 2016 Plaintiffs filed their Petition against ORHP, among others, in which they allege that they suffered a "covered loss." based on some alleged damage caused to their home by their air conditioning system. Plaintiffs' Pet. at 1-2. Plaintiffs allege that,

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non-operating entity that did not sponsor/issue the home warranty, did not provide any services or have any connection to the home warranty and/or have any knowledge regarding the warranty and/or any of the facts or allegations that form the sole basis of Plaintiffs' claims against ORHP. Plaintiffs' counsel has been notified that ORI is an incorrect party but, as of the filing of this motion, has not agreed to dismiss ORI from this lawsuit.

pursuant to a Home Warranty Plan (the "Plan") they obtained from ORHP, they reported the loss to ORHP but ORHP failed to act in a timely manner, wrongfully refused to pay for Plaintiffs' alleged losses, and was negligent in retaining co-Defendant All Season's Heating and Air, LLC ("All Seasons") to perform the repairs. *Id.* at 2. True and correct copies of the Home Warranty Plan and the Declaration of Coverage are attached hereto as Exhibits A and B, respectively. In connection with their alleged losses, Plaintiffs asserted a bad faith cause of action against all defendants and seek recovery of punitive damages in connection with those allegations. *Id.* at 2-3.[2]

Regardless of the merits of Plaintiffs' allegations, all of their claims against ORHP flow from and arise out of rights and obligations allegedly contained in the Plan. Accordingly, the terms and conditions of the Plan govern all substantive and procedural aspects of Plaintiffs' claims against ORHP.

The contract that forms the basis of Plaintiff's' claims against ORHP contains a broad and enforceable arbitration provision. *See* Ex. A, at 9; E. B. To date, no written discovery has been exchanged, no depositions have been scheduled, and the only pleading that ORHP has submitted to this Court is its Answer. Thus, ORHP has not taken advantage of any aspects of the judicial process.

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[2] ORHP does not concede or otherwise admit or acknowledge that it is, with respect to Plaintiffs' bad faith cause of action, an insurance company. That issue, however, is beyond the scope of this Motion and has no bearing on the determination of whether this proceeding should be stayed and the matter referred to binding arbitration.

II.

ARGUMENTS AND AUTHORITIES

A. Plaintiffs' Claims Against ORHP Should Be Referred To Arbitration.

The Plan that was expressly invoked by Plaintiff's and which forms the sole basis for the allegations against ORCP contains the following binding arbitration provision:

> *Arbitration:* By entering into this Agreement the parties agree and acknowledge that all dispute they have that involve us, or arise out of action that we did or did not take, shall be arbitrated as set forth herein as long as the claim is in excess of the applicable claims court jurisdictional limit. *The parties further agree that they are giving up the right to a jury trial, and the right to participate in any class action, private attorney general action, or other representative or consolidated action including any class arbitration or consolidated arbitration proceeding.*
>
> All disputes or claims between the parties arising out of the agreement or the parties' relationship shall be settled as follows:
>
> 1) Small claims court; for claims within the applicable small claims court jurisdictional limit, or
>
> 2) Final and binding arbitration held in the county of the covered property address (or other location mutually agreed upon by both parties) for claims in excess of the Small Claims Court jurisdictional limit.

> The arbitration shall be conducted by the American Arbitration Association pursuant to its rules for consumer disputes.
>
> The parties expressly agree that this Agreement and this arbitration provision involve and concern interstate commerce and are governed by the provisions of the Federal Arbitration Act . . . to the exclusion of any different or inconsistent state or local law, ordinance or judicial rule.

Ex. A at 9 (emphasis in original). Additionally, as indicated by the Declaration of Coverage, Plaintiffs were not only provided with additional notice of the arbitration provision and given thirty (30) additional days to cancel the Plan if they did not wish to agree to arbitration. *See* Ex. B. Plaintiffs chose not to cancel the Plan and agreed to be bound by the arbitration plan provided therein.

Although the Plan explicitly requires the parties to submit any disputes to arbitration, Plaintiffs elected instead to file a Petition in State Court. Thus far, Plaintiffs have refused—and continue to refuse—to arbitrate. ORHP sent a written demand to arbitrate to counsel for Plaintiffs on January 5, 2017 in an effort to convince them to accept arbitration. A true and correct copy of this letter is attached to this Motion as Exhibit C and is incorporated fully by reference. Upon receipt of ORHP's arbitration demand. rather than respond directly to ORHP's demand, Plaintiffs immediately filed a motion seeking to have the case set for trial on the Court's jury docket. As of the date of this filing, Plaintiffs' actions demonstrate their outright refusal to abide by the arbitration provision in the Plan and have reaffirmed their intent to ignore the

plain language of the Plan and continue to prosecute their claims against ORI HP before this Court.

Plaintiffs' claims against ORHP indisputably arise out of or relate to the Plan. and, therefore, fall squarely within the parameters of the arbitration provision contained in that agreement. Plaintiffs' allegations specifically invoke language of the claim and are based on allegations as to ORHP's "treatment of Plaintiffs and the handling of their claims . . . ." Plaintiff's Pct. at 3. Plaintiffs and ORHP are equally bound under the Plan to arbitrate. Thus, the agreement to arbitrate, as contained in the Plan, was supported by consideration. Accordingly, all of the claims asserted against ORHP arise out of or relate to the binding and enforceable arbitration provision contained in the Plan and Plaintiffs' should be compelled to submit their claims to arbitration.

B. <u>These Proceedings Should Be Stayed Pending Arbitration.</u>

The plain language of the Plan provides that it and the included arbitration provision are governed by the provisions of the Federal Arbitration Act ("FAA"). Ex. A at 9. Section 3 of the FAA provides as follows:

> If any suit or proceeding is brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing

> the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3. Because Plaintiffs' allege that ORHP failed to comply with the terms of the Plan, their claims and causes of action clearly present an issue referable to arbitration under the Plan's plain language. Accordingly, as provided by the FAA, a stay of these proceedings is appropriate until the arbitration has been conducted as the parties agreed.

III.

CONCLUSION

Based on the foregoing, ORHP respectfully requests that the Court stay these proceedings and order Plaintiffs to submit the entire controversy between the parties to arbitration in accordance with arbitration agreement contained in the Plan.

Respectfully submitted,

/s/ Jason Waddell

Jason Waddell, CBA# #30761
Jason Waddell, PLLC
222 NW 13th St.
Oklahoma City, OK 73103
(405) 232-5291
Fax (405) 708-7871
Jason@JasonWaddellLaw.com

ATTORNEYS FOR DEFENDANT
OLD REPUBLIC HOME
PROTECTION COMPANY, INC.

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that a conference was held with counsel for Plaintiffs regarding the merits of this Motion and relief requested herein by Defendant Old Republic Home Protection Co., Inc. Agreement could not be reached, and therefore the Motion is presented to the court for determination.

/s/ Jason Waddell
Jason Waddell

CERTIFICATE OF MAILING

This is to certify that on the 19 day of January, 2017, a true and correct copy of the above and foregoing instrument was mailed, postage prepaid, to:

David W. Little, Esq.
115 E. California Ave. — Bricktown
Miller-Jackson Building, Suite 350
Oklahoma City, OK 73104-2418

Mark E. Bialick
R. Ryan Deligans
DURBIN, LARIMORE & BIALICK
920 NORTH HARVEY
OKLAHOMA CITY, OK 73102

/s/ Jason Waddell
Jason Waddell

APPENDIX E

OLD REPUBLIC HOME PROTECTION COMPANY, INC.

Declaration of Coverage

DONNA SPARKS
1500 SW 38TH ST
MOORE OK 73160-2905

Covered Property:	1500 SW 38TH ST MOORE, OK 73160-2905
Property Type*:	Single-Family Dwelling under 5,000 Sq. Ft.
Plan Fee Amount:	$750.00
Plan Ordered By:	
Plan Contact Number:	23245840 Renewal PP
Registration Code:	MAM7TU
Effective Date:	09/15/2016
Expiration Date:	11/04/2016
Trade Call Fee:	$75.00

CONFIRMATION OF COVERAGE: To obtain the most value from this Contract, it is important that you understand the coverage that is offered, as well as the limitations. Please read the enclosed Plan and then, keep it handy throughout the term of coverage. The Contract has been designed to provide coverage for covered systems and appliances that become inoperable due to norm wear and use during the term of the Contract. The Contract does not cover defects which were known prior to the effective date of coverage.

*__IMPORTANT:__ Plan fees are based on property type/ square footage, and if the property type/square footage listed is not accurate additional Plan fees (or a refund) may be due. To make corrections, please call us at 800-445-6999. Please be advised that i during the performance of service, we identify that additional Plan fees are due, they must be paid at the time of service.

DISPUTE RESOLUTION: While no one likes to receive a complaint or to be involved in a dispute, it can happen. If we are unable to resolve a dispute through discussion, conciliation or mediation (each of which are alternatives that we encourage), we are committed to a quick, inexpensive dispute resolution mechanism through arbitration. We do not believe that costly, time consuming, and complex court cases are an effective means for resolving disputes.

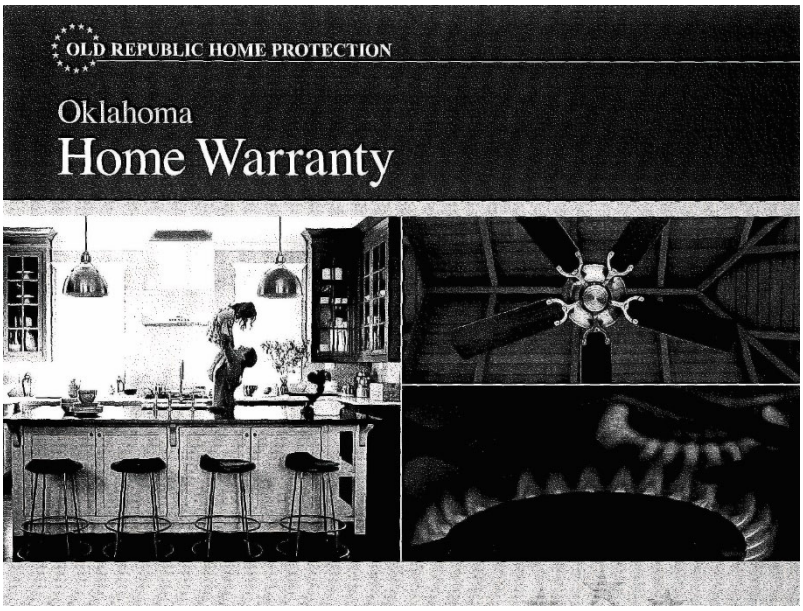
Accordingly, this Contract will be subject to the Arbitration Provision outlined on Page 9. Please read it carefully. Under this provision, you will be giving up certain rights to have a dispute settled in court and/or settled as a part of a multi party or class proceeding. Georgia, Kentucky, South Carolina, Utah Residents: Nothing contained in this provision will affect your right to file direct claim against Old Republic Surety.

If you do not want to agree to this provision, you may cancel your Plan by contacting us at arbitration@orhp.com within 30 days of purchase of your Home Protection Plan. Otherwise, this arbitration provision will be applicable.

OPTIONAL COVERAGE: Optional coverage that has already been paid for is noted below. No other options can be added at time of renewal.

Options already paid for and included in your Plan: Platinum Protection

APPENDIX F



People Helping People

NHSCA Company Code 121424

Welcome! You've come to the right place for *superior budget protection*, *convenience*, and *peace of mind*.

Both home sellers and buyers greatly benefit from an Old Republic Home Warranty Plan!

Home Sellers

Make your home more attractive to buyers by offering the budget protection and peace of mind that comes with an Old Republic Home Warranty Plan. Buyers can relax knowing that a covered system or appliance failure won't break the bank, and including

a home warranty in your listing may help your home **sell faster. . . at top market value!**

In addition, **Seller's Coverage** can help you breathe easier by **reducing your risk of experiencing closing delays and incurring extra expenses** caused by home system and appliance breakdowns during the listing and selling periods.

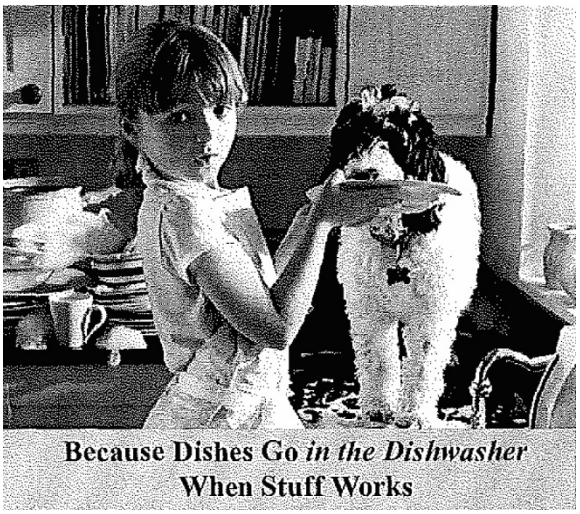
Home Buyers

In an ideal world, buying a home should be one of the most memorable and rewarding experiences of your life. However, the headaches caused by a heating system failure or a broken refrigerator could taint those memories forever.

Safeguard your budget against expensive system and appliance failures with an Old Republic Home Warranty Plan. Enjoy exceptional **peace of mind** and keep everything running smoothly long after you've unpacked your boxes and settled into your American dream.

Whether you are selling or buying a home,

you're in excellent hands with Old Republic Home Protection and our network of qualified Service Providers. Experience peace of mind knowing that **help is just a phone call away**—24 hours a day, 365 days a year!



Item*	Repair/Replacement Cost Without a Home Warranty†
Heating System	$318-$3,911
Air Conditioning	$360-$5,100
Water Heater	$384-$2,331
Oven/Range	$325-$2,487
Refrigerator	$294-$1,904
Washer/Dryer	$230-$1,112

* Some items may be Optional Coverage items. See Plan for terms and conditions of coverage.

† Costs based on actual invoices paid by ORHP in 2014. Costs may vary in your area.

Why choose Old Republic Home Protection?

We've provided caring, dependable service for **more than 40 years**, and our vision of "People Helping People" is reflected in our **A+ rating with the Better Business Bureau.**

How do we earn this distinction? We understand that behind every service request—every dishwasher or water heater failure—are real people with busy lives and pressing needs. We're committed to providing effective, efficient solutions that help you celebrate the joy of homeownership!

When you turn to us, our caring staff and skilled Service Providers make it their mission to get your life back to normal as quickly as possible.

People Helping People

We Care – we handle claims on a case-by-case basis: fast, friendly, efficiently.

We Listen – we understand there is a human side to home warranties.

We're Dependable – we want to give solutions, not excuses.

We're Helpful and Sincere – we take pride in the service we offer.

We Know – there is a difference between "company policy" and "customer service."

We Set the Premier Example – by offering comprehensive coverage and quality service at reasonable rates.

Our Goal – *is* to create a positive difference in your life.

We're just a phone call – or a click-away!

Place Applications:

Online
www.orhp.com

Phone
800.445.6999

Fax
800.866.2488

Mail
P.O. Box 5017
San Ramon, CA 94583-0917

Place Service Requests:

Online
www.orhp.com

Phone
800.972.5985

Standard Coverage

This section of the Plan outlines Standard Coverage by trade. Please Note: Universal Exclusion and limitations of liability apply. Coverage for Home Buyer only unless Optional Seller's Coverage Selected

Coverage Subject to Terms and Conditions summarized herein, and will be contained in the Plan Contract to be mailed to Home Buyer upon payment of Plan fee.

HEATING SYSTEM/DUCTWORK COVERAGE

Primary gas, oil, or electric heating system✦, built-in wail or Boor heater, heat pump✦, thermostat, ductwork, accessible heat pump refrigerant lines and condensate drain lines. If necessary, as part of a covered replacement, we will upgrade a heat pump system to federally mandated HSPF standards.

Coverage is available for heating systems with capacity not exceeding five (5) tons per unit. There is no limit to the number of covered heating units. For heat pumps and heat pump package units: Coverage under Central Air Conditioner/Cooler applies.

NOT COVERED: Timers/clocks that do not affect the heating/cooling operation of the unit; vents; flues; fuel storage tanks; freestanding/window units; cable heat; zoning controls and respective equipment; secondary drain pan; insulation; dampers; filters; diagnostic testing of or locating leaks in ductwork (as required by any federal, state or local regulation, or when required due to the installation or replacement of system

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✦We cover items located on the exterior or outside of the home that service only the main home or other structure covered by us.

equipment); fireplaces and key valves; grain, wood or pellet stoves (even if primary source of heat); mini-split ductless systems; use of cranes or other lifting equipment to repair or replace units/system components; electronic air filters/cleaners; humidifiers and respective equipment; chillers and respective equipment; condensate drain pump,

AIR CONDITIONER/COOLER✦
(For ductwork. see Heating System Coverage)

Central air conditioner, wall or through the wall air conditioner and evaporative coder (including primary drain pan), condenser (including compressor), evaporative coil/air handler, thermostat refrigerant lines, leaks or stoppages in accessible condensate drain lines, metering device (e.g. evaporative coil piston or thermal expansion valve).

When a condenser replacement is necessary, in order to maintain system operational compatibility and operating efficiency that meets or exceeds that of the original equipment, we will replace any covered component as well as modify the plenum, indoor electrical, air handling transition, duct connections, and the installation of metering devices, as necessary.

- SEER Coverage: When unit/component replacement is required, we will upgrade to federally mandated SEER standards to ensure operational compatibility and functionality with existing equipment.
- R410A Coverage: For units using R22 refrigerant repair/replacement will be performed with R410A equipment when R22 replacement equipment is not available, including covered components required to ensure system operational compatibility.

Coverage is available for cooling systems with capacity not exceeding five (5) tons per unit. There is no limit to the number of covered air conditioning units,

NOT COVERED: Gas air conditioning units; portable units; zoning controls and respective equipment; window units; cooler pads; secondary drain pan; mini-split ductless systems; use of cranes or other lifting equipment to repair or replace units/system components; chillers and respective equipment; condensate drain pump.

PLUMBING COVERAGE

- Drain line Stoppages✦ which can be cleared through an accessible, existing ground level cleanout (main line) or removable p-trap (branch line) with sewer cable; including hydrojetting if stoppage is unable to be cleared with cable (unless stoppage is due to roots).
- Water, Drain, Gas or Vent Pipe Leaks or Breaks (including Polybutylene) Toilet Tanks, Bowls, Flushing Mechanisms and Wax Ring Seals
- Water Heater+ (including tankless, power vent, and direct vent unit)
- Built-in Jetted Bathtub Motor, Pump and Air Switch Assemblies
- Shower and Bathtub Valves, including Diverter Valves
- Recirculating Pump
- Instant Hot/Cold Water Dispenser
- Garbage Disposal
- Risers and Gate Valves
- Stop & Waste Valves✦
- Angle Stops
- Water Pressure Regulator✦
- Sump Pump (for ground water only)

NOT COVERED: Fixtures; faucets; hose bibbs; multi-valve manifolds and other attachments to pipes; gas log tighter; toilet lids and seats; water heater vents and flues; shower pans; stoppages due to roots; leaks/damage caused by roots; stoppages that cannot be cleared with cable or hydrojetting; water heater heat pump attachment; holding, storage or expansion tanks; bathtub jets; tub spout or tub spout diverter; basket strainer; fire suppression systems; pop-up assemblies; noises or odors without a related malfunction; caulking or grouting; inadequate or excessive water pressure. In the event of a stoppage: access to drain tines from vent; removal of toilet; and costs to locate, access or install a ground level clean-out.

NOTE: 1. Toilet tanks and bowls replaced with white builder's standard, when necessary.

2. Valves will be replaced with chrome builder's standard, when necessary.

ELECTRICAL COVERAGE

Light Switches, Electrical Outlets, Main Electrical Panel/Sub Panel✦, Meter Base/Socket/Pedestal✦, Breakers✦, Fuses✦ and Interior Wiring, Bath Exhaust Fans, Ceiling Fans, Attic Fans, Whole House Fans,

NOT COVERED: Light fixtures, including those on ceiling fans; bulbs; ballasts; heat lamps; doorbells; telephone, audio, video, computer, intercom, and alarm security wiring and systems; law voltage relay systems; smoke detectors; inadequate wiring capacity; power surges; overload; remote controls; vents; light sockets.

✦We cover items located on the exterior or outside of the home that service only the main home or other structure covered by us.

GARAGE DOOR OPENER COVERAGE

All components of the Opener Unit including motor, logic board, gear assembly, capacitor, raft assembly, sensors.

NOT COVERED: Garage doors; hinges; springs; remote transmitters; key pads; light sockets.

CENTRAL VACUUM COVERAGE

Power unit including motor and electrical components, dirt canister.

NOT COVERED: Attachments; removable components; accessories; hoses; vents; stoppages.

APPLIANCE COVERAGE

Dishwasher

All components that affect the cleaning operation of the unit including the pump, motor, gasket, tub, timer, fill valve, seal, door latch, air gap, control board and touch pad.

Trash Compactor

All components that affect the compacting operation of the unit including motor, ram assembly switch and door latch.

Kitchen Exhaust Fan

All components that affect the exhaust operation of the unit including motor, selector switch and fan.

Oven, Range, Cooktop, Built-in Microwave Oven

All components that affect the heating/cleaning operation of the unit including heating element, thermostat, burner, control board and touch pad, Timer and clock are covered if they affect the heating or cleaning of the unit.

NOT COVERED: Timers; clocks; halogen units; magnetic induction cooktops; refrigerator/ oven combination unit; microwave/cooktop drawer combination unit; portable or freestanding microwave; sensi-heat burners.

Kitchen Refrigerator Located in Kitchen. Coverage for Home Buyer Only. Coverage for one Freestanding or one Built-in Unit (Single or Dual Compressor), and Ice Maker. All components that affect the cooling operation of the unit including compressor, thermostat, condenser coil, evaporator and defrost system.

NOTE: Repair or replacement of ice makers, ice crushers, beverage dispensers and their respective equipment are covered for Kitchen Refrigerator only, providing parts are available, II pans are not available, our obligation is limited to cash in lieu of repair.

NOT COVERED: Filter; interior thermal shell; food spoilage; insulation; multi-media centers; wine vaults; cost of recapture or disposal of refrigerant; refrigerator/oven combination units; removable components which do not affect the primary function; kegerator.

Washer/Dryer (One Set) Coverage for Home Buyer Only.

All components that affect the washing or drying operation of the unit including belts, pump, motor, tub, timer, drum, thermostat, transmission, heating element, control board and touch pad.

NOT COVERED: Plastic mini-tub; venting; filter; lint screen; all-in-one-tub wash/dry unit; soap dispenser,

NOT COVERED ON ALL APPLIANCES: Detachable components; baskets; buckets; dials; knobs; handles; door glass; lights; light sockets; light switches;

pans; trays; rollers; racks; shelves; runner guards; interior lining; trim kits; vents; flues; drawers; lock and key assemblies.

Coverage Plan Limits: **All Home Warranty Plans have limits to coverage. We have clearly identified our limits for your convenience**.	
Access, Diagnosis, Repair and/or Replacement of the following items are limited as follows:	**Dollar Limit per Plan Term:**
<u>During Seller's Coverage:</u>	
When Optional Seller's Coverage selected: Heating, Ductwork, A/C: (including water heater/heating combination units)	$1,500
Plumbing pipe leaks in water, drain or gas lines located under, encased in, or covered by, concrete. Plumbing pipe leaks in Polybutylene piping	$500
<u>During Buyer's Coverage:</u>	
Diesel, oil, Glycol, hot water, steam, radiant, geothermal, water cooled and water source systems, and water heater/ heating combination units	$1,500
Ductwork, air transfer systems	$500
Kitchen Refrigerator	$2,500
Plumbing pipe leaks in water, drain or gas lines located under, encased in, or covered by, concrete. Plumbing pipe leaks in Polybutylene piping	$500

INCREASE YOUR COVERAGE with
Ultimate or Platinum Protection!

Ultimate Protection
(*Available to Home Buyer Only*) $550

Includes: Standard Coverage PLUS these enhancements:

1) **Plumbing:** faucets, shower heads, and shower arms replaced with chrome builder's standard, as necessary. Interior hose bibbs. Toilet replacement up to $600 per toilet, when necessary, including toilet seats and lids.

2) **Heating System:**

   a) disposable titters, heat lamps, and cost related to refrigerant recapture, reclaim and disposal when required for diagnosis, repair or replacement of heat pumps. Provide for the use of cranes to complete a heating repair/replacement.

3) **Water Healer:** expansion tanks✦.

4) **Dishwasher:** baskets, rollers, racks, runner guards.

5) **Oven/Microwave/Range/Cooktop:** racks, handles, knobs, intoner lining.

6) **Trash Compactor:** lock and key assemblies, buckets.

7) **Smoke Detector:** both battery operated and hard-wired systems.

8) **Garage Door Opener:** hinges, springs, remote transmitters, key pads.

9) **Air Conditioner:**

   a) disposable filters, condensate drain pumps, secondary drain pans, window units, and costs related to refrigerant recapture, reclaim and disposal when required for diagnosis, repair or replacement

   b) Provide for the use of cranes to complete an A/C repair/replacement.

10) **Other Enhanced Coverage included in Ultimate Protection:** When required to render a covered repair or replacement, we will:

   a) Provide up to $250 per Plan to correct code violations.

   b) Provide up to $250 per occurrence for required permits.

   c) Provide haul away of a covered appliance, system or component when replacing that covered appliance, system or component.

   d) Correct an improper installation/repair/modifi cation of a system or appliance, or correct any mismatch condition in terms of capacity/ efficiency in order to ensure system operational compatibility and functionality. Coverage does not apply if the cause of failure of the system or appliance is solely due to the improper installation/repair/modification or mismatch condition, or if the system is undersized relative to the square footage of the area being heated/cooled. All other terms and conditions of the Plan apply. if the improper installation/ repair/modification or mismatch condition is in violation of a code requirement see 10a above.

Platinum Protection
(Available to Home Buyer Only).....$650

Most Comprehensive Coverage Available!

Includes: Ultimate Protection (above) PLUS these *additional* enhancements:

1) Plumbing Items: tub spouts (replaced with chrome builder's standard, as necessary), tub spout diverter, basket strainer.

2) Other Enhanced Coverage included in Platinum Protection:

   When required to render a covered service, we will:

   a) Provide up to $250 per Plan to clear stoppages due to roots or toward removal of toilets or other access to clear a stoppage, including cost to install a ground level cleanout.

      Not Covered: Collapsed or broken lines outside the main foundation; excavation.

   b) Provide up to $1,000 per Plan for construction/ carpentry or other related costs necessary to effect a covered repair or replacement (including the correction of code violations). Not Covered: Restoration of any wall, ceiling, or floor coverings, cabinets, counter tops, tile, paint, or the tike.

   c) Provide up to $500 per Plan for repair/replacement of vents/flues, as necessary, as part of a covered service.

   d) Increase the Standard Plan limit per Plan Term by $1,000 ($2,500 in total) for the repair/ replacement of diesel, oil, Glycol, hot water, steam, radiant, geothermal, water cooled and water sourced heating and air conditioner systems.

Optional Home Buyer Coverage

Buyer's Optional Coverage Plan Limits (With purchase of appropriate Option)

All Home Warranty Plans have limits to coverage. We have clearly identified our limits for your convenience.

Access, Diagnosis, Repair and/or Replacement of the following Options are limited as follows:	Dollar Limit per Optional Coverage Plan Term
Salt Water Circuit Board and Cell	$1,500
Limited Roof Leak Repair	$1,000
Additional Refrigeration Units (in total)	$1,000
Well Pump and/or Booster Pump	$1,500
Enhanced Slab leak Limit/ External Pipe Leak (in total)	$2,500
Septic System/Sewage Ejector Pump	$500

SWIMMING POOL/SPA EQUIPMENT✦.....$180
No additional charge if separate equipment

SALTWATER EQUIPMENT
CIRCUIT BOARD AND CELL✦.....$175
Only available with Pool/Spa Equipment Coverage

Above ground and accessible working parts and components of heating and filtration system, including heater, motor, filter, filter timer, diatomaceous filter grid, pump, gaskets, timer, backwash/flush/check valve, pool sweep motor and pump/booster pump, above ground plumbing pipes and wiring, control panel. Coverage also includes spa blower. With purchase of appropriate option: salt water circuit board and cell.

NOT COVERED: Remote control panel and switches; air switches; water chemistry control equipment and materials (e.g. chlorinators, ionizers, ozonators, etc.); disposable filtration mediums (sand, diatomaceous earth, filter cartridges, etc.); skimmer; heat pump; valve actuator motor; salt; salt water circuit board; salt water cell; cleaning equipment including pop-up heads, turbo valves, creepy crawlers and the like; swim jet/resistance pool and respective equipment; damage or failure as a result of chemical imbalance; underground water, gas, and electrical lines; lights, jets; ornamental fountain motors and pumps.

LIMITED ROOF LEAK REPAIR $100

The repair of specific leaks that occur in the roof located over the occupied living area of the main dwelling (excluding garage), provided the leaks are the result of rain and/or normal wear and deterioration

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✦We cover items located on the exterior or outside of the home that service the main home or other structure covered by us.

and the roof was watertight and in good condition on the effective date of the Plan.

NOT COVERED: Gutters; drain lines; flashing; skylights; patio covers; scuppers; glass; sheet metal; roof mounted installations; leaks that occur in a deck or balcony when deck or balcony serves as the roof of the structure below; leaks that result from or that are caused by roof mounted installations; improper construction or repairs; missing or broken roof shingles or tiles; damage caused by persons walking or standing on the roof; failure to perform normal maintenance to roof and gutters; improper installation; leaks manifested prior to the effective date of the Plan.

NOTE: An actual water leak must occur during the coverage period for coverage to apply under this Plan. If the area of the roof that is leaking has deteriorated to such an extent that the leak cannot be repaired without partial replacement of the roof, the company's obligation is limited to the cost of repair if such leak had been repairable. In the event the roof has exceeded its life expectancy and must be replaced, this coverage will not apply.

Since not every home is the same Optional Coverage outlined in this section is available to meet the needs of your specific home. Optional Coverage may be added at any time prior to close of sale and up to 60 days after close of safe. For homes not going through a Real Estate *transaction,* Optional Coverage cannot be added after the initial payment of Plan fee. Optional Coverage not selected will be unavailable at time of renewal. Please Note: Universal exclusions and limitations of liability apply.

ADDITIONAL REFRIGERATION $50
Single Compressor Units Only,

Provides coverage for up to four additional refrigeration systems, such as Additional refrigerator, wet bar refrigerator, wine refrigerator, freestanding freezer and freestanding ice maker.

All components that affect the cooling operation of the unit including compressor, thermostat, condenser coil, evaporator and defrost system.

Freestanding ice maker includes coverage for ice maker, ice crusher, beverage dispenser and respective equipment.

NOT COVERED: Ice maker; ice crusher; beverage dispenser and their respective equipment; filter: interior thermal shell; food spoilage; insulation; multimedia centers; wine vaults; cost of recapture or disposal of refrigerant; refrigerator/oven combination units; removable components which do not affect the primary function; dual compressor units; kegerator.

NOT COVERED ON ALL APPLIANCES: Detachable components; baskets; buckets; dials; knobs; handles; door glass; lights; light sockets; light switches; pans; trays; rollers; racks; shelves; runner guards; interior lining; trim kits; vents; flues; drawers; lock and key assemblies.

WELL PUMP✦ $100

BOOSTER PUMP✦ $75

Pump servicing only the home or other structure covered by us. Domestic use only. One well pump/booster pump per Plan,

NOT COVERED: Control boxes; pressure switches; capacitors or relays; cost of locating pump.

ENHANCED SLAB LEAK LIMIT
EXTERNAL PIPE LEAK COVERAGE✦.....$100
NOT AVAILABLE TO CONDOS OR MULTI-UNIT BUILDINGS

When required to render a covered service, we will:

Internal Slab Leak Limit (Add a Maximum $1,000 to Standard Plan Limit).

a) Increase the Standard Plan limit per Plan Term by $1,000 for the repair/replacement of plumbing pipe leaks in water, drain or gas lines located under, encased in, or covered by, concrete that are located within the interior of the main foundation of the home and garage (inside the load-bearing walls of the structure).

External Pipe Leak Limit (Maximum $1,000).

b) Provide coverage up to $1,000 for external pipe leaks located outside the foundation of the covered structure, including water, gas and drain lines that service only the main home or other structure covered by us. Repair or replace exterior hose bibbs and main shut off valve,

NOT COVERED: Faucets; sprinkler systems; swimming pool/built-in pool piping; downspout landscape drain lines; damage due to roots.

SEPTIC TANK PUMPING/SEPTIC SYSTEMS INCLUDING SEWAGE EJECTOR $75
NOT AVAILABLE ON NEW CONSTRUCTION PLAN

(Basement Bath? Check out this coverage!)

Septic Tank Pumping (For Single or Dual Compartment Tanks): Septic tank must service only the main home or other structure covered by us. If a stoppage is due to a septic tank back-up, we will pump the septic

tank (and dispose of waste) one time during the term of the Plan.

Septic System/Sewage Ejector Pump:

Aerobic pump, jet pump, grinder pump, sewage ejector pump, septic tank and line kern house to tank.

NOT COVERED: Seepage pits; stoppage or damage due to roots; the cost of locating tank; chemical treatments; tile fields and leach beds; leach lines; lateral lines; insufficient capacity; level sensors/switches; control panels; associated electrical lines.

When You Need Us

It can be inconvenient when a home system or appliance unexpectedly breaks down. When you need service, we are here to provide you with a helping hand and peace of mind. Please take a few moments to become familiar with the Plan and keep it handy. as it will save you both time and money. This entire document explains all the terms and conditions of coverage, with distinct sections to make the Plan easy to understand and simple to use. If you have any questions about coverage, please visit www.orhp.com or contact us directly at **1.800.972.5985.**

Review the "ABC's of Coverage" to ensure your service issue is covered by the Plan. In accordance with the terms and conditions of the Plan, we will repair or replace systems and appliances mentioned as covered and we exclude all others. Coverage is subject to limitations.

We will provide service for covered systems or appliances which malfunction, and are reported, during the term of the Plan that:

A) Are installed for diagnosis and located within the interior of the main foundation of the home and garage (inside the load-bearing walls of the structure). Systems or appliances located on the exterior or outside of the home (including porch, patio, etc.) are not covered with the exception of covered items marked with a ✦,

B) Were correctly installed and working properly on the effective date of the Plan, and

C) Have become inoperable due to normal wear and use (including rust, corrosion, and chemical or sediment build-up). after the effective date of coverage. Pre-existing conditions are not covered.

Coverage may apply to a malfunction which existed at the effective date of the transfer of ownership if, at that time, 1) the malfunction was unknown to the home seller, agent, buyer, or home inspector, AND 2) the malfunction was undetectable and would not have been detectable by visual inspection and simple mechanical test. A visual inspection of the covered item verifies that it appears structurally intact and without damage or missing parts that would indicate inoperability. A simple mechanical test consists of turning the unit on and off, verifying the unit operates without irregular sounds, smoke or other abnormal outcome.

For Service: Place service requests online at www.orhp.com

or call us at **1.800.972.5985**

- ✓ We accept service requests 24 hours a day, 365 days a year.
- ✓ We require you to contact us so we may have the opportunity to select a Service Provider.
- ✓ We will not reimburse you for services performed without our prior authorization.

When you place a service request we will notify an **INDEPENDENT CONTRACTOR** (Service Provider) who will contact you directly to schedule a convenient appointment during normal business hours. Under normal circumstances, our service effort will be initiated within 48 hours. Throughout the service effort, we urge you to take reasonable measures to prevent secondary damage (e.g. turning off water to the home in the case of a major pipe teak),

In cases of **EMERGENCY**, we will make reasonable efforts to expedite service, including initiating our service effort within 24 hours. An emergency is defined as a service issue resulting in 1) No electricity, gas, water or toilet facilities to the entire home; 2) A condition that immediately endangers health and safety; 3) A condition that interferes with healthcare support of occupants; and/or 4) A system malfunction that is causing ongoing damage to the home. Other conditions may, at our discretion, be considered an emergency. If you should request non-emergency service outside of normal business hours, you will be responsible for additional fees, including overtime.

If you experience any difficulties during the service process, you can contact the Service Provider or us directly for assistance.

You are responsible to pay a **TRADE (SERVICE) CALL FEE (TCF)** when the Service Provider arrives at your home, The TCF (or the actual cost of service. whichever is less) is due for each dispatched service request by trade (plumbing, electrical, appliance, heating/air conditioning, etc.). Service work is guaranteed for 30 days. The TCF is due whether service is covered or denied. Essentially, when we incur a cost of service. you are responsible for a TCF. A TCF may be due if you fail to be present at the scheduled appointment time, if you cancel your request once the Service Provider is in route to your home, or you request a second opinion of the Service Provider's diagnosis. Failure to pay the TCF can result in suspension of coverage until such time as the proper fee is paid. At that time, coverage will be reinstated but the term will not be extended. You will be responsible for any fees incurred for collection efforts, if required. We will not respond to a new service request until all previous Trade Call Fees are paid.

To ensure you receive reputable and unbiased service, we have built an extensive network of **SERVICE PROVIDERS** who provide service to our Plan Holders at fair and reasonable rates. Our network, however, is not all inclusive for every trade, in every town, across the nation. For that reason, we may authorize you to contact an Independent Out-of-Network Contractor directly to obtain service.

When we request or authorize you to obtain an **INDEPENDENT OUT-OF-NETWORK CONTRACTOR** to perform diagnosis and/or service: 1) The Contractor must be qualified, licensed, and insured, and charge

fair and reasonable rates for parts and service, 2) Once the technician is at the home, and prior to any services being rendered, you must call our Authorization Department with the technician's diagnosis and dollar amount of services required. 3) We will provide an Authorization Number for the covered services and dollar amount that we have authorized. Failure to contact us as outlined may result in denial of coverage. 4) Upon completion of the authorized services, the Contractor must provide you an itemized invoice for the authorized charges. 5) You must submit the itemized invoice, including the Authorization Number provided by us, for reimbursement. 6) A Trade Call Fee is due per trade, and will be deducted from any reimbursement provided. 7) You are expected to pay the Independent Out-of-Network Contractor directly for the services rendered and then submit the invoice to us for reimbursement We accept invoices by fax (1.877.445.6999), post (P.O. Box 5017, San Ramon, CA 94583-0917) or email to: easyas123@orhp.com.

We have the sole right to determine whether a covered system, appliance or component will be repaired or replaced. We reserve the right to send a second opinion at our expense. We are not responsible for non-covered work performed or non-covered costs.

We reserve the right to provide CASH IN LIEU of repair or replacement in the amount of our actual cost. Payment will be provided based on our negotiated rates with our Service Provider and/or Supplier network, which may be less than retail. We are not responsible for work performed once you accept cash in lieu of service. To ensure continued coverage of the system or appliance for which we provide a cash in lieu settlement, either during the current or future term of coverage between you and us. you must provide proof

of repair or replacement that meets our reasonable satisfaction. You may send proof to ProofofRepair@orhp.com.

If we provide reimbursement or cash in lieu of service, our normal processing time, from date of receipt of invoice/your acceptance to the issuance of a check, is approximately two weeks.

Obligations under this service contract are backed by the full faith and credit of Old Republic Home Protection, Co., Inc.

Limitations of Liability

It is important that you understand the Plan coverage as well as its limitations, as it may affect the coverage that will be provided for any service requested.

This Plan Contract is intended to provide quality protection against the high cost of home repair. It is intended to help reduce the Plan Holder's out-of-pocket costs for covered services. Coverage is not all inclusive; there may be situations in which you will be responsible to pay additional costs for parts or services not covered by the Plan. In those situations, we will work with you to determine the best course of action to reasonably minimize your out-of-pocket costs.

1. **GENERAL LIMITATIONS. THIS. PLAN. DOES NOT COVER:**

    A. System or appliance repairs, replacements or upgrades required as a result of:

        1. A malfunction due to missing components or equipment;

        2. A malfunction due to lack of capacity of the existing system or appliance;

3. A malfunction due to a system or appliance with mismatched components in terms of capacity or efficiency*;
4. Any federal, state, or local regulations or ordinances; utility regulations; building or zoning code.

B. Routine maintenance or cleaning.

C. Damage caused by people, pests, or pets.

D. Missing components.

E. Improper repair/installation/modification of the covered item.*

F. Systems. appliances or components covered by an existing manufacturer/ distributor/ or other warranty.

G. Repair, replacement, installation, or modification of any covered system or component for which a manufacturer has issued a warning, recall, or other design flaw or determination of defect.

H. Cosmetic or other defects that do not affect the functioning of the unit.

I. Solar systems and components, including holding tanks.

J. Electronic, computerized, pneumatic, energy, or manual management systems.

K. Systems or appliances classified by the manufacturer as commercial, or commercial equipment modified for domestic use.

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*Additional Coverage may be available with Ultimate Protection.

L. Electrolysis.

M. Outside or underground piping and components for geothermal and water source heat pumps, including well pumps and respective equipment.

N. Matching dimensions, color (including stainless steel) or brand. We are responsible for providing installation of equipment comparable in features (features that affect the operation of the system or appliance), capacity and efficiency only.

O. Systems and appliances that have no malfunction, that have not failed due to normal wear and use, or that are not installed for diagnosis.

P. Services requested prior to the effective date of the coverage or after the expiration date of coverage.

Q. Services requested for Optional Coverage not purchased, or for Options not available to Home Seller.

2. PERMITS AND OTHER FEES:

A. You may be responsible for the payment of additional fees not covered according to the terms and conditions of the Plan. These fees may include, but are not limited to:

1. The cost of permits and code upgrades.*

2. The cost to haul away components, systems or appliances that have been replaced under the terms of coverage.*

3. The cost for cranes* or other lifting equipment

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* Additional Coverage may be available with Ultimate Protection.

4. The cost of construction, carpentry or other modifications made necessary by existing or installing different equipment**
5. Relocation of equipment.**
6. Costs related to refrigerant recapture, reclaim and disposal.*

3. ACCESS:

A. When covered heating and plumbing service is performed, access will be provided through unobstructed walls, ceilings and floors only. In that case, we will return access opening to a rough finish condition (concrete, mud, wire, drywall and tape).

B. We do not cover the restoration of any wall, ceiling, or floor coverings, cabinets, counter tops, tile, paint, or the like.

C. We are not responsible for providing or closing access to covered items, except as noted above or in Coverage Plan Limits.

D. We do not pay additional charges to remove or install systems, appliances, or non-related equipment in order to make a covered repair.

4. GENERAL EXCLUSIONS:

A. This Plan does not cover services required as a result of:

1. Accidents; water damage; failure due to power surge or overload; or structural damage or defect.
2. Lightning; mud; earthquake; fire; flood; freezing; ice; snow; sail movement; storms; or acts of nature.

** Additional Coverage may be available with Platinum Protection.

B. Except where noted, we do not pay for upgrades; components; or equipment required due to the incompatibility of the existing equipment with the replacement system; appliance; or component; or with new types of chemicals or material utilized to operate the replacement equipment. This includes without limitation, differences in technology; refrigerant requirements; or efficiency as mandated by federal, state or local governments. If upgrades are required, we cannot perform service until you complete corrective work. If additional costs are incurred in order to comply with regulations, we will not *be* responsible for the added expense.

C. We reserve the right to repair systems and appliances with non-original manufacturer's parts, including rebuilt or refurbished parts.

D. We do not pay, nor are we liable, for secondary or consequential loss or damage; personal or property loss or damage; or bodily injury of any kind.

E. We are not responsible for a Service Provider's neglect or delay; or their failure to provide service, repair or replacement; nor are we responsible for any delay in service, or failure to provide service, which may be caused by conditions beyond our control, such as, but not limited to, parts on order, labor difficulties, or weather.

F. We do not pay for food spoilage; loss of income; utility bills; or living expenses.

G. We are not responsible to perform service involving, providing disposal of, or remediation for, contaminants/hazardous/toxic materials,

such as, but not limited to: asbestos; mold; sewage spills; or lead paint.

H. We do not pay, nor are we liable, for any claim arising as a result of any pathogenic organism such as; bacteria; yeast; mildew; virus; rot or fungus; mold or their spores; mycotoxins; or other metabolic products. We are not, under any circumstances, responsible for:

1. Diagnosis, repair, removal or remediation of such substances;
2. Damages resulting from such substances, even when caused by or related to a covered malfunction;
3. Damages resulting from such substances, regardless of any event or cause that contributed in any sequence to damage or injury.

Items You Should Know

Coverage Subject to Terms and Conditions of Coverage summarized herein, and will be contained in the Plan Contract to be mailed to Home Buyer upon payment of Plan fee. ***Please see Cancellation and Arbitration clause below.***

PLAN EFFECTIVE DATES:

Your Plan term (effective and expiration date) will be indicated on the Declaration of Coverage, mailed to you upon our receipt of payment.

We provide coverage for single family residential-use resale and new construction homes less than 5,000 sq. ft, unless amended by us prior to the effective date of coverage. Resale and New Construction homes 5,000 sq. ft or more, multiple units, mother-in-law-units, guest houses. casitas, and other structures are covered

if appropriate fee is paid. Please call for quote. Coverage for homes 10.000 sq. ft. or over is not available. NOTE: Home Seller's Coverage is not available on homes 5,000 sq. ft. or over, multi-unit dwellings, guest houses, casitas, properties not going through a Real Estate transaction, For Sale by Owner properties, and lease-purchase properties.

This coverage is for **residential-use property** only. It does not cover commercial property or homes used as a business, such as: nursing/care homes, fraternity/sorority houses or day care centers.

If this Plan is for a duplex, triplex or four-plex, then all units within the dwelling must be covered by an ORHP Plan for applicable coverage to apply to shared systems and appliances. For cost of Optional Coverage. multiply option cost by the number of units. Common grounds and facilities are excluded.

HOME BUYER'S COVERAGE:

Home Buyer's Coverage is effective for the term indicated on the Declaration of Coverage. Coverage is normally effective upon close of sale for a one-year term. Your Plan effective date and term may vary. **The Plan fee must be received within 14 days after close of sale.** If you take possession prior to close of sale (or obtain possession through rental or lease agreement), the Plan fee is due upon occupancy and coverage will begin upon receipt of Plan fee by ORHP. We offer a 60 day grace period from the close of sale during which you may add Optional Coverage. You must request and pay for Optional Coverage within the 60 day grace period or it shall be conclusively presumed that you do not wish to add additional Optional Coverage. Upon receipt of additional Plan fee. an updated Declaration of Coverage

will be issued to confirm the coverage provided. Optional Coverage not selected will be unavailable at time of renewal.

HOME SELLERS COVERAGE
(for listing/closing period):

Seller's coverage is available only in conjunction with the purchase of coverage for Home Buyer. Coverage becomes effective the day the application is received by us, and continues until the expiration of the initial fisting period (up to 180 days), close of sale, or listing termination; whichever occurs first. Should close of sale not occur in the 180-day period, we may, at our sole discretion, extend the seller's coverage period. **Pre-existing conditions are not covered for the Home Seller.** Known defects of covered items found at the time of home inspection are excluded from coverage until proof of repair or replacement is received by us. You may send proof to ProofofRepair@orhp.com.

FOR HOMES NOT GOING THROUGH A REAL ESTATE TRANSACTION:

Plans are normally purchased as part of a Real Estate transaction. If you are not involved in a resale transaction, Plan fees, terms or coverage may vary. Please call for a quote. Coverage is effective 30 days following receipt of payment by us. The effective date will be confirmed on the Declaration of Coverage. Optional Coverage cannot be added after the initial payment of Plan fee. **Pre-existing conditions are not covered for homes not going through a real estate transaction.**

RENEWALS:

The Plan will be renewed at our discretion. If your Plan is eligible for renewal, we will notify you of the Plan fee and terms of renewal approximately 60 days prior to expiration of coverage. To ensure there is no lapse of coverage, payment must be received prior to Plan expiration. Plan fees may increase upon renewal.

TRANSFER BY PLAN HOLDER:

This Plan is transferable to a new owner. In that event, please notify us.

Cancellation: This Plan is non-cancelable, except for 1) nonpayment of fees; 2) fraud or misrepresentation of facts material to the Plan; 3) upon mutual agreement between you and ORHP; or 4) if you harm or threaten the safety or well-being of ORHP, any employee of ORHP, a Service Provider, or any property of ORHP or of the Service Provider. If Plan is cancelled, you shall be entitled to a pro-rata refund of the paid Plan fee for the unexpired term less service cost, any other unpaid charges and a $50 processing fee.

Oklahoma Residents: Coverage afforded under this contract is not guaranteed by the Oklahoma insurance Guaranty Association

Arbitration: By entering into this Agreement the parties agree and acknowledge that all disputes they have that involve us, or arise out of actions that we did or did not take, shall be arbitrated as set forth herein as long as the claim is in excess of the applicable small claims court jurisdictional limit. *The parties further agree that they are giving up the right to a jury trial, and the right to participate in any class action, private attorney general action, or other representative or*

consolidated action, including any class arbitration or consolidated arbitration proceeding.

All disputes or claims between the parties arising out of the agreement or the parties' relationship shall be settled as follows:

1) Small claims court; for claims within the applicable small claims court jurisdictional limit, or

2) Final and binding arbitration held in the county of the covered property address (or other location mutually agreed upon by both parties) for claims in excess of the Small Claims Court jurisdictional limit.

The arbitration shall be conducted by the American Arbitration Association pursuant to its rules for consumer disputes. Copies of the AAA Rules and forms can be located at www.adr.org, or by calling 800.778.7879. The Company agrees to pay the initial filing fee if the customer cannot afford to pay the fee or to reimburse the customer for filing fees unless the arbitrator determines that the claim is frivolous.

The parties expressly agree that this Agreement and this arbitration provision involve and concern interstate commerce and are governed by the provisions of the Federal Arbitration Act (9 U.S.C. § 1, et seq.) to the exclusion of any different or inconsistent state or local law, ordinance or judicial rule.

Application Plan #_____

Please give your client a sample Plan Contract.

To Order

Internet: www.orhp.com
Phone: 800.445.6999 • Fax: 800.866.2488
Mail: P.O. Box 5017, San Ramon, CA 94583-0917

Select Plan Coverage (Pick One)

Coverage is for homes less than 5,000 sq. ft. • For homes 5,000 sq. ft or over, please call for quote.

Standard Coverage for Home Buyer
☐ $450 / $60 Trade Call Fee — $450 ____

Ultimate Protection for Home Buyer
☐ $550 / $60 Trade Call Fee — $550 ____

Platinum Protection for Home Buyer
☐ $650 / $60 Trade Call Fee — $650 ____

☐ **New Construction** (Years 1-4 or 2-5) ($100 Trade Call Fee) $580 ____

Multi-Units ($60 Trade Call Fee)
☐ Duplex–$750 ☐ Triplex–$1,060 ☐ Fourplex–$1,480 (Buyer only) ____
For cost of Optional Coverage for multiple unit buildings, multiply option cost by the number of units.

☐ **Standard Coverage for Home Seller** $ 60 ____

Select Buyer's Options

☐ Swimming Pool/Spa Equipment $ 180 ____
(No additional charge if separate equipment)
$355
☐ Salt Water Circuit Board and Cell $ 175 ____
(Only available with Pool/Spa Equipment Coverage)

☐ Limited Roof Leak Repair $ 100 ____

☐ Additional Refrigeration (four units total) $ 50 ____

☐ Well Pump $ 100 ____

☐ Booster Pump $ 75 ____

☐ Enhanced Slab Leak Limit/External Pipe Leak Coverage $ 100 ____

☐ Septic Tank Pumping/Septic System/Sewage Ejector Pump $ 75 ____

TOTAL COST (Due at Close of Sale) $ ____

Covered Property

Street_____
City_____ State_____ Zip _____

Home Buyer/Seller Information

Buyer Name _____
Buyer Mailing Address _____
Phone # ( ) _____
Buyer E-Mail _____
Seller Name _____

Agent/Closing Information

Initiating Agent Information ☐ Seller's Agent ☐ Buyer's Agent
Main Office Phone # ( ) _____
RE Company Name_____City _____
Initiating Agent _____

Cooperating Agent Information
Main Office Phone # ( ) _____
RE Company Name_____City _____
Cooperating Agent _____

Closing Company Information
Closing Company Name_____City _____
Officer _____
Main Office Phone # ( ) _____
File #_____Estimated Close_____

Acknowledgement

I desire:
☐ Coverage as indicated.
☐ To decline the benefits of coverage.
☐ To decline the Optional Coverage benefits of: _____

I agree not to hold the above real estate company, broker, and/or agents liable for the repair/replacement of a system or appliance that would have been covered by this Plan. The real estate agent offering this Plan does so as a service to protect their client's best interest.

Signature_____ Date _____

I also acknowledge that:

1) The terms of our Agreement, and the coverage I will receive, will be governed by a Plan Contract that will be mailed to the Home Buyer upon receipt of the Plan fee.
2) Coverage is not all inclusive; and contains specific exclusions and limitations.
3) I have read and accept the terms of cancellation and arbitration stated herein.

Affordable Coverage You Can *Rely On!*

	HOME SELLER COVERAGE	*Includes Washer/Dryer Refrigerator!*	HOME BUYER COVERAGE	*An Industry Exclusive!*
Select Plan Coverage	Standard Home Seller Coverage **$60** Seller's coverage is available only in conjunction with the purchase of Coverage for Home Buyer	Standard Coverage **$450** $60 Trade Call Fee	Ultimate Protection **$550** $60 Trade Call Fee	Platinum Protection **$650** $60 Trade Call Fee *Best Value!*
COVERED				
Primary Gas, Oil or Electric Heater	✔	✔	✔	✔
Air Conditioner/Cooler	✔	✔	✔	✔
Ductwork	✔	✔	✔	✔
Drain Line Stoppages	✔	✔	✔	✔
Plumbing Pipe Leaks (including Polybutylene)	✔	✔	✔	✔
Toilets	✔	✔	✔	✔
Water Heater	✔	✔	✔	✔
Built-in Jetted Bathtub Motor & Pump	✔	✔	✔	✔
Recirculating Pump	✔	✔	✔	✔
Instant Hot/Cold Water Dispenser	✔	✔	✔	✔
Garbage Disposal	✔	✔	✔	✔
Water Pressure Regulator	✔	✔	✔	✔
Sump Pump	✔	✔	✔	✔
Electrical System	✔	✔	✔	✔
Exhaust, Attic, Ceiling, Whole House Fans	✔	✔	✔	✔
Garage Door Opener	✔	✔	✔	✔
Central Vacuum	✔	✔	✔	✔
Dishwasher	✔	✔	✔	✔
Trash Compactor	✔	✔	✔	✔
Kitchen Exhaust Fan	✔	✔	✔	✔
Oven/Range/Cooktop	✔	✔	✔	✔
Built-in Microwave Oven	✔	✔	✔	✔
Washer/Dryer/Kitchen Refrigerator (with Ice Maker)		✔	✔	✔
Ultimate Protection				
Ultimate Enhancements			✔	✔
Refrigerant Recapture, Reclaim and Disposal			✔	✔
Code Upgrades			✔	✔
Permits			✔	✔
Haul Away			✔	✔
Cranes			✔	✔
Improper Installation			✔	✔
Mismatched Systems			✔	✔
Platinum Protection				
Increased Coverage for Plumbing Items				✔
Increased Coverage for Stoppages				✔
Modification (with Additional Code Upgrades)				✔
Increased Coverage for specific HVAC Systems				✔

OK 4.3 (11/15) See Plan for details of coverage.

OPTIONAL COVERAGE • HOME BUYER ONLY	
Swimming Pool/Spa Equipment (No additional charge if separate equipment)	$ 180
• Salt Water Circuit Board and Cell (Only available with Pool/Spa Equipment Coverage) — $355	$ 175
Limited Roof Leak Repair	$ 100
Additional Refrigeration Units (See Plan for details)	$ 50
Well Pump	$ 100
Booster Pump	$ 75
Enhanced Slab Leak Limit/ External Pipe Leak Coverage	$ 100
Septic Tank Pumping/ Septic System/Sewage Ejector Pump — *Basement Bath? Check out this coverage!*	$ 75

ADDITIONAL PLAN TYPES FOR HOME BUYER ONLY	STANDARD
New Construction (Years 1-4 or 2-5) $100 Trade Call Fee	$ 580
Multiple Unit Properties $60 Trade Call Fee	
Duplex	$ 750
Triplex	$1,060
Fourplex	$1,480

For cost of Optional Coverage for multiple unit buildings, multiply option cost by the number of units
Ultimate and Platinum Protection:
Not available to Multiple Units or New Construction

For homes 5,000 sq. ft. or over, or guest homes, please call for quote.

OLD REPUBLIC INSURANCE GROUP

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