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Binding Arbitration Clauses Held to be Prohibited Under Washington Law

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In *Washington State Dept. of Trans. v. James River Ins. Co.*, Wash. No. 87644-4 (January 17, 2013), a recent Washington decision, the court held that unless the Washington State legislature specifically provides otherwise, RCW 48.18.200 prohibits binding arbitration clauses in insurance contracts. Although the prohibition on such clauses may conflict with federal law, the prohibition is shielded from preemption by federal law because it falls within the "business of insurance" exception set forth under the McCarran-Ferguson Act.

James River Insurance Company ("James River") issued two insurance policies to Scarsella Brothers Inc. ("Scarsella") that provided coverage related to Scarsella's work on a highway project for the Washington State Department of Transportation ("WSDOT"). At Scarsella's request, James River added WSDOT as an insured under the policies.

In 2009, a traffic accident injured and killed multiple people at or near Scarsella's highway project. The victim's representatives filed suit in King County against WSDOT. The plaintiffs later amended their complaint to add Scarsella as a defendant. WSDOT tendered to Scarsella, who forwarded the letter to James River. James River accepted the tender under a reservation of all rights. James River also informed WSDOT that the policies contained mandatory arbitration provisions, and demanded arbitration of the parties' coverage disputes.

The court began by analyzing whether arbitration clauses are prohibited in Washington under RCW 48.18.200.

RCW 48.18.200 states:

> (1) No insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state, shall contain any condition, stipulation or agreement
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> (a) requiring it to be construed according to the laws of any other state or country except as necessary to meet the requirements of the motor vehicle financial responsibility laws of such other state or country; or
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> (b) *depriving the courts of this state of the jurisdiction of action against the insurer*; or

> (c) limiting right of action against the insurer to a period of less than one year from the time when the cause of action accrues in connection with all insurances other than property and marine and transportation insurances. In contracts of property insurance, or of marine and transportation insurance, such limitation shall not be to a period of less than one year from the date of the loss.
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> (2) Any such condition, stipulation, or agreement in violation of this section shall be void, but such voiding shall not affect the validity of the other provisions of the contract.

RCW 48.18.200 (emphasis added). The Court analyzed the meaning of RCW 48.18.200(1)(b), which prohibits agreements "depriving the courts of this state of the jurisdiction of action against the insurer." WSDOT argued that the provision is meant to prohibit mandatory binding arbitration actions, because such actions would deprive Washington policyholders of the right to bring an original action against the insurer. James River argued that the provision is a forum selection provision.

The Court agreed with WSDOT and determined that the provision demonstrated the legislature's intent to protect the right of policyholders to bring an original "action against the insurer" in the courts of the state. The Court held that, unless the legislature specifically provides otherwise, RCW 48.18.200(1)(b) is properly interpreted as a prohibition on binding arbitration agreements.

Next, the court analyzed whether RCW 48.18.200 is preempted by federal law. Generally, when a state enacts a statute of general applicability prohibiting arbitration agreements, the statute may be preempted by federal law. However, there is an exception to this general rule when the state statute was enacted "for the purpose of regulating the business of insurance" within the meaning of the McCarran-Ferguson Act. The McCarron-Ferguson Act states, in 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…unless such Act specifically relates to the business of insurance: *Provided*, That [the federal antitrust statutes] shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

15 U.S.C. § 1012(b). WSDOT argued that RCW 48.18.200(1)(b) regulates the "business of insurance" because the statute regulates the insurer-insured relationship. James River argued that the statute does not regulate the "business of insurance" because it is a choice of forum provision, which does not concern the relationship between the insurer and the insured.

The Court agreed with WSDOT in holding that RCW 48.18.200(1)(b) regulates the "business of insurance" because it is "aimed at protecting the performance of an insurance contract by ensuring the right of the policyholder to bring an action in state court to enforce the contract." Therefore, the Court concluded that RCW 48.18.200(1)(b) is shielded from preemption by federal law under the McCarron-Ferguson Act.