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Supreme Court Asks for Solicitor General's Opinion in Insurance Arbitration Case

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LOUISIANA SAFETY ASS'N OF TIMBERMAN V. CERTAIN UNDERWRITERS AT LONDON (U.S. MAY 17, 2010)

The Supreme Court recently invited the Solicitor General to file a brief expressing the views of the United States in Louisiana Safety Ass'n v. Certain Underwriters at Lloyd's, London. The case centers on whether the Federal Arbitration Act preempts the McCarran-Ferguson Act, which grants states the authority to regulate insurance. In Louisiana Safety, the Fifth Circuit held that the McCarran-Ferguson Act does not authorize state law to reverse-preempt international treaties, including the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The McCarran-Ferguson act allows Congress to pass laws that regulate the "business of insurance."

It also provides that federal acts that do not expressly purport to regulate the "business of insurance" will not preempt state laws or regulations that regulate the "business of insurance." Federal courts have consistently backed state prohibitions on arbitration agreements in insurance contracts as laws that regulate the "business of insurance" under the McCarran-Ferguson Act and, therefore, are protected from preemption. Courts have applied this rule to reinsurance agreements as well.

The Fifth Circuit, however, split with other federal courts in finding that the McCarran-Ferguson Act does not reverse-preempt the International Arbitration Convention. The Fifth Circuit's decision created a circuit split because the Second Circuit previously held that a state law can reverse-preempt the Convention Act under the McCarran-Ferguson Act. While the Supreme Court has not decided whether to hear the dispute, it appears that the Solicitor General's brief on the subject may persuade the justices to consider it. Given the recent nomination of Solicitor General Elena Kagan to the Supreme Court, it is unclear when the Solicitor General's office will file a brief.

IMPACT (ARBITRATION): One month after the Stotl-Nielsen decision by the Supreme Court, the Supreme Court again is seeking to frame the scope and power of the Federal Arbitration Act. It will be interesting to see how the court decides but if recent precedent is any indication, the Court will decline to preempt the McCarran-Ferguson Act absent clear language contained in the Federal Arbitration Act.

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Article By [Thomas F. Segalla](#)
[Jeffrey L. KingsleyGoldberg Segalla LLP](#)

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