

FILED

JUN 12 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 303578

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

TIMOTHY WEIDERT, individually and L.W. WEIDERT FARMS, INC.,
a Washington corporation,

Respondent,

v.

JERALD A. HANSON d/b/a WALLA WALLA INSURANCE
SERVICES, and JERALD and JANE DOE HANSON, Husband and Wife,

Defendant,

PRODUCERS AGRICULTURE INSURANCE COMPANY, a Florida
corporation,

Petitioner

REPLY BRIEF OF PETITIONER

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I. DISCUSSION

A. Federal Law Governs the Issue of Arbitrability.

1. The Federal Crop Insurance Act Requires Arbitration

ProAg does not argue that the Federal Crop Insurance Act wholly preempts state law; rather the FCIA preempts state law inconsistent with the purpose of the Act. *Holman v. Laulo-Rowe Agency*, 994 F.2d 666, 668 (9th Cir. 1993); *In re Hat*, 363 B.R. 123, 136 (Bankr. E.D. Cal. 2007) (citing 7 U.S.C. § 1506(1)). The FCIC promulgated regulations prescribing the terms for common crop insurance policies. See 7 C.F.R. part 457. The terms contain arbitration provisions for all policies reinsured by the Corporation. See 7 C.F.R. § 457.8(b). “State and local laws or rules shall not apply to contracts, agreements, or regulations of the Corporation or the parties thereto to the extent that such contracts, agreements, or regulations provide that such laws or rules shall not apply, or to the extent that such laws or rules are inconsistent with such contracts, agreements, or regulations.” 7 U.S.C. § 1506(1). In short, the FCIA and accompanying regulations do not necessarily bar the Weiderts’ claims, but it governs the issue of arbitration and requires that Weiderts’ claims be arbitrated.

The Weiderts rely upon *Nobles v. Rural Community Insurance Services*, 122 F. Supp. 2d 1290 (M.D. Ala. 2000) for the proposition that

they can ignore the arbitration provision and instead bring their claims in state court. However, *Nobles* offers no support for this proposition. In *Nobles*, the insureds brought state law claims similar to those asserted by the Weiderts, breach of contract, misrepresentation, bad faith and negligent distribution of information. The insureds' claims were based upon the insurer's act of telling them that their land was insurable and insurer's failure to tell them about a requirement for insurability. *Id.* at 1293. The court found that Federal Crop Insurance Act did not preempt the insureds' state law claims. *Id.* at 1295. However, the court went on to find that under the terms of the crop insurance policy all disputes about "factual determinations"¹ were subject to mandatory arbitration.

The *Nobles* court also found that under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, the court must "look[] to the wording of the arbitration clause and give[] all provisions of the contract their full effect." *Id.* 1295-96 (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59; 115 S. Ct. 1212; 131 L. Ed. 2d 76 (1995); *Reid v. Casey*, 339 So. 2d 79, 82 (Ala. Civ. App. 1976) ("[a]ll provisions of a contract must, if possible, be given effect.")). The court found that the arbitration

¹ The policy in *Nobles* provided for arbitration of "factual determinations." The policy has been amended since *Nobles* was decided and now reads: "If you and we fail to agree on any determination made by us," the disagreement "must be resolved through arbitration." 7 C.F.R. § 457.8, ¶ 20, CP 82.

agreement must be “rigorously enforce[d]. . . even if doing so means piecemeal litigation.” *Id.* at 1296 (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218–21; 105 S. Ct. 1238; 84 L. Ed. 2d 158 (1985)).

Weiderts also cite *Williams Farms of Homestead Inc. v. Rain & Hail Insurance Services, Inc.*, 121 F.3d 630 (11th Cir. 1997). In *Williams Farms*, the lower court dismissed an action against a private company reinsured by the FCIC, finding that the exclusive remedy to the insured was an action against the FCIC or the Secretary of Agriculture. The Eleventh Circuit concluded that the FCIA “intended to leave insureds with their traditional contract remedies” against private insurance companies. *Id.* at 635. However, the Eleventh Circuit was not called upon to determine whether the “traditional contract” claims left to the insureds were subject to arbitration. Accordingly, the *Williams Farms* decision has no bearing on the issues in this case.

The Weiderts further rely upon *Hobbs v. IGF Insurance Co.*, 834 So.2d 1069 (La. App. 2002), a case decided by the Louisiana Court of Appeals. *Hobbs* is very different from the case at hand. Louisiana has a statute prohibiting mandatory arbitration clauses in an insurance policy. The Louisiana court found that “arbitration clauses in contracts of insurance are prohibited as a matter of public policy because if enforced would deny Louisiana citizens free access to its courts—a right guaranteed

by the state's constitution.....". *Id.* at 1071. Washington does not have a statute prohibiting arbitration² and, in addition, Washington has a strong public policy favoring arbitration of disputes. *Munsey v. Walla Walla Coll.*, 80 Wn. App. 92, 94, 906 P.2d 988 (1995).

Not surprisingly, no case outside of Louisiana has cited *Hobbs* as authority. Moreover, the approach has been rejected by other courts. For example, the Supreme Court of Nebraska reached a different result in *Kremer v. Rural Community Insurance*, 280 Neb. 591, 788 N.W.2d 538 (2010). The court in *Kremer* found that FCIA and its regulations preempted Nebraska's prohibition against agreements to arbitrate future controversies. *Id.* at 610. The reasoning in *Hobbs* is limited to its unique circumstances and the State of Louisiana. It has no bearing on the issues here.

The FCIA and accompanying regulations mandate arbitration. See 7 C.F.R. § 457.8. Washington law does not and cannot preempt the FCIA and cannot and does not invalidate the arbitration provision.

² Even if Washington had similar prohibitions on arbitration clauses in insurance contracts, under *AT&T Mobility LLC v. Concepcion*, — U.S. —, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011), the Federal Arbitration Act would likely preempt state law. See *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1161 (9th Cir. 2012) (the FAA preempts the Washington state law invalidating the class-action waiver).

2. The Federal Arbitration Act Requires Arbitration.

The Weiderts incorrectly state that “the provisions of the FAA only apply if the court would have had subject matter jurisdiction over the underl[y]ing civil action.” Respondent’s Brief, p. 14. The Weiderts confuse federal *jurisdictional* requirements with the *applicability* of the Federal Arbitration Act.

Federal courts are courts of limited jurisdiction. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552; 125 S. Ct. 2611; 162 L. Ed. 2d 502 (2005). Unlike other federal statutes, the FAA does not create an independent basis for federal courts’ subject matter jurisdiction. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581; 128 S. Ct. 1396; 170 L. Ed. 2d 254 (2008) (noting that the FAA is “something of an anomaly in the field of federal-court jurisdiction”) (citation omitted); see also 9 U.S.C. § 4 (permitting a court to compel arbitration pursuant to an agreement if the court, “save for such agreement, would have jurisdiction”). The parties cannot properly proceed in federal court simply by asserting that the FAA applies to their arbitration agreement; instead they must assert an independent basis for subject matter jurisdiction, such as diversity of citizenship or a question of federal law. *Hall Street*, 552 U.S. at 581-82. Due to the FAA's independent jurisdictional requirement, state courts are frequently required to apply the FAA.

Whether the federal *court* would have jurisdiction in this matter has no bearing on the whether federal *law* requires arbitration. The Federal Arbitration Act applies to “[a] written provision in any. . . contract evidencing a transaction involving commerce to settle by arbitration. . . .” 9 U.S.C. § 2. The United States Supreme Court has construed “involving commerce” as expansively as possible, as broadly as the words “affecting commerce.” *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 798, 225 P.3d 213 (2009) (citing *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56; 123 S. Ct. 2037; 156 L. Ed. 2d 46 (2003) (citing *Allied–Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273–74; 115 S. Ct. 834; 130 L. Ed. 2d 753 (1995))). When a commercial transaction involving interstate commerce includes an agreement to arbitrate disputes, federal law controls the enforcement of the arbitration agreement. 9 U.S.C. § 1, *et seq.* “Both state and federal courts must enforce this body of substantive arbitrability law.” *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 301, 103 P.3d 753 (2004) (citations omitted).

B. This Dispute Involves a “Determination” Made By ProAg.

The arbitration provision in the policy states “[i]f you and we fail to agree on any determination made by us [and] resolution cannot be reached through mediation. . . the disagreement must be resolved through arbitration.” CP 82 (7 C.F.R. § 457.8 ¶ 20). The Weiderts assert their

claims fall outside of the scope of the arbitration provision. They argue that despite the use of the term “any determination,” the arbitration clause actually excludes some determinations. It does not.

When interpreting a contractual provision regarding arbitration, courts must indulge every presumption “in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25; 103 S. Ct. 927; 74 L. Ed. 2d 765 (1983). The presumption applies under both federal and state law. In *Chelan County v. Chelan County Deputy Sheriff's Ass'n*, 162 Wn. App. 176, 182, 252 P.3d 421 (2011), this Court found:

We presume, strongly presume, that a controversy between parties is covered by their arbitration agreement. That presumption is rebutted only by evidence that shows expressly or by clear implication that the controversy is not covered. Thus, apart from matters that the parties specifically exclude, the questions on which they disagree must come within the scope of the . . . arbitration provisions. . . .

Id. (citations omitted). If the presumption favoring arbitration is applied, the term “any determination” means all decisions.

The meaning of “any determination” is also clear when the history of the arbitration provision is examined. In interpreting a statute, a court’s primary goal is to ascertain the intent of the Legislature. *State, Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). Absent ambiguity, the court determines the plain meaning of the statute. *Id.* at 11. If there is ambiguity, the court may construe the meaning of the statute with the aid of other sources of interpretation, such as legislative history. *Id.* at 12. See also *Flores–Arellano v. I.N.S.*, 5 F.3d 360, 363 (9th Cir. 1993) (“Under the established approach to statutory interpretation, we rely on plain language in the first instance, but always look to legislative history in order to determine whether there is a clear indication of contrary intent.”) (Reinhardt, specially concurring);

Mandatory arbitration of all *factual* disputes between the reinsured private providers and FCIC policyholders began in 1994. See *Common Crop Insurance Regulations; Regulations for the 1994 and Subsequent Crop Years*, 59 Fed. Reg. 42751 (Aug. 19, 1994) (amending 7 C.F.R. § 457.8). Under this policy term, factual questions were arbitrated, and once the factual questions were arbitrated, legal questions were litigated. See *In re 2000 Sugar Beet Crop Ins. Litig.*, 228 F. Supp. 2d 992, 999 (D. Minn. 2002) (staying the pending litigation because “the contract only provides for arbitration of factual disputes, the arbiter cannot resolve the

plaintiffs' state law claims). Parties trying to avoid arbitration would assert that their dispute was a legal dispute rather than a factual dispute. *Id.*; *Ledford Farms, Inc. v. Fireman's Fund Ins. Co.*, 184 F. Supp. 2d 1242 (S.D. Fla. 2001); *Nobles v. Rural Cmty. Ins. Servs.*, 122 F. Supp. 2d 1290 (M.D. Ala. 2000). In response, the policy provision was changed to require arbitration of "any determination" made by the insurer in 2004. *See General Administrative Regulations, Catastrophic Risk Protection Endorsement, Group Risk Plain of Insurance Regulations for the 2004 and Succeeding Crop Years; and the Common Crop Insurance Regulations, Basic Provisions*, 69 Fed. Reg. 48652, 48714 (Aug. 10, 2004). The logical conclusion is that the arbitration clause no longer applies to only factual determinations, but now applies to any and all determinations made by the insurer.

The Weiderts also argue that because the basis of their claims are misrepresentations, that their dispute does not involve a "determination." Courts have rejected similar arguments. In *In re 2000 Sugar Beet Crop*, 228 F. Supp. 2d 992, the insured claimed that the insurance company made no factual determination because it failed to even adjust the claimed losses. The court disagreed:

Plaintiffs' argument proves too much. It appears to the Court that defendants did, indeed, make an

insurance coverage decision: they denied plaintiffs' claims; their offer, perforce, is zero. In correspondence to plaintiffs' attorney, defendants set forth a number of reasons for denying coverage. While plaintiffs may term these "perfunctory denials," even perfunctory denials are based on factual determinations. For purposes of this case, a determination has plainly been made.

Id. at 995. Determinations have been made in the case at hand as well.

The Weiderts' own complaint states that "ProAg **determined** that the FCIC "cup" protection was not available to Plaintiffs. . . . " CP 3, ¶ 3.8 (emphasis added). And further that "[t]his **determination** resulted in a change in approximate yields and a significant reduction of coverage for both Plaintiffs." CP 4, ¶ 3.8 (emphasis added). As a result, ProAg determined the Weiderts would "only be indemnified for approximately \$522,306.00 by the crop insurance because of the change in coverage." CP 4, ¶ 3.10. Denial of coverage is a determination. *In re 2000 Sugar Beet Crop Ins.*, 228 F. Supp. 2d at 995. ProAg made determinations which are the center of this dispute and they are subject to arbitration under the policy terms.

C. Equity Does Not Prevent Arbitration.

The Weiderts assert that because there is a third party defendant not subject to the arbitration agreement that equity requires the arbitration

agreement be disregarded.³ The “principal purpose” of the FAA is to “ensur[e] that private arbitration agreements are enforced according to their terms.” *AT&T Mobility v. Concepcion*, 131 S. Ct. at 1749 (citations and internal quotations omitted). The savings clause allows arbitration agreements to be invalidated by “generally applicable contract defenses such as fraud, duress, or unconscionability.” *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87, 116 S. Ct. 1652, 1655, 134 L. Ed. 2d 902 (1996).

The Weiderts have not raised a generally applicable contract defense which would prevent the enforcement of the arbitration clause. Judicial economy is not relevant to the issue of whether the Court should send this case to arbitration. The FAA⁴ not only contemplates piecemeal litigation, but “requires piecemeal resolution when necessary to give effect to an arbitration agreement.” See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20; 103 S. Ct. 927; 74 L. Ed. 2d 765 (1983). See also *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 223-24; 105 S. Ct. 1238; 84 L. Ed. 2d 158 (1985) (holding it was error to deny a

³ The Weiderts further assert that arbitration will subject them to “extreme costs”. However, the Weiderts admitted in the proceedings at the trial court that “prohibitive entry costs are not a significant factor.” CP 125, ln. 23.

⁴ The FCIA also contemplates piecemeal litigation. Although the reinsurer is subject to the arbitration agreement, the FCIC, is not. *Olsen v. U.S. ex rel. U.S. Dept. of Agriculture*, 546 F. Supp. 2d 1122 (E.D. Wash. 2008).

motion to compel arbitration on grounds that arbitration would result in possibly inefficient maintenance in two forums). Any inefficiency that results from piecemeal litigation is overcome by the strong bias in favor of arbitration.

D. The Case Should Be Stayed Pending Arbitration

There is a strong policy, under both federal and state law, in favor of arbitration. The law manifests a clear preference for arbitration over lawsuits. Therefore, when a case is to be arbitrated, under both the FAA and the FCIA, it is proper to stay litigation until arbitration is complete. See *In re 2000 Sugar Beet Crop Ins. Litig.*, 228 F. Supp. 2d 992, 999 (D. Minn. 2002); 9 U.S.C. § 3; FAD-013.

Without expressly stating that they advocate the idea of arbitration after litigation, the Weiderts cite *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989). In *Volt*, arbitration was stayed pending litigation. *Id.* at 470-71. However, in *Volt*, the parties specified that the contract would be governed by California law. Under California law, (Cal. Civ. Proc. Code Ann. § 1281.2(c)) when a court determines that a “party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common

issue of law or fact. . . [the] court . . . may stay the arbitration pending the outcome of the court action or special proceeding.” *Id.* at 471 n.3.

The Supreme Court upheld the stay and the court's construction of the choice-of-law provision noting that federal policy favoring arbitration did not require a certain set of procedural rules, “even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward.” *Id.* at 479.

The Court noted that “the thrust of federal law is that arbitration is strictly a matter of contract.” *Id.* at 472 (citations omitted). In *Volt*, the parties agreed to arbitrate under California rules. Here, the parties did not intend or agree to apply Washington law to their arbitration agreement, and even if they had, there is no Washington law which allows arbitration to be stayed while litigation proceeds. The Weiderts must arbitrate their claims. The arbitration proceedings will determine if anything remains to be litigated and then litigation can go forward on any remaining claims.

II. CONCLUSION

Arbitration is a matter of contract. The parties agreed to arbitrate “any determination” made by ProAg. Federal law mandates arbitration. Judicial economy is not grounds for invalidating the contract under either federal or state law. ProAg respectfully requests that the Court compel

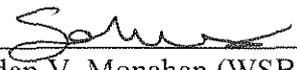
arbitration in this matter and stay the litigation until the arbitration is complete.

Accordingly, ProAg respectfully requests the Court reverse the finding of the trial court and allow this case to proceed to arbitration.

DATED this 11 day of June, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 11 day of June, 2012, I caused a true and correct copy of the foregoing document, "Reply Brief of Appellant," to be mailed by United States mail postage prepaid to the following counsel of record:

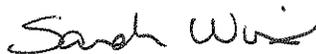
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