

THE VALIDITY OF ARBITRATION AGREEMENTS  
IN INSURANCE POLICIES

By Keith A. Wenzel

Recently, the United States District Court for the Western District of Missouri decided a case involving a highly litigated issue concerning the interaction between state and federal law with respect to life insurance policies. The case, *Thrivent Financial for Lutherans v. Scott B. Lakin, Director, Missouri Department of Insurance*,<sup>1</sup> weighed the issue of whether or not the Missouri Department of Insurance could rely on Missouri law and public policy to invalidate a bylaw provision of a Wisconsin domiciled fraternal benefit society that provided for mandatory mediation and arbitration of disputes between the fraternal benefit society and its members. Although the case obviously deals with the unique situation of fraternal benefit societies, it has implications that may affect other insurers, such as whether or not arbitration provisions are valid in insurance contracts.

Thrivent Financial for Lutherans (Thrivent) is a fraternal benefit society organized under Wisconsin law.<sup>2</sup> As a fraternal benefit society, Thrivent issues life insurance policies that incorporate the society's bylaws. The bylaw provision at issue in the case provided for a three part dispute resolution process for addressing disputes between members, certificate holders or beneficiaries and the society. Included in the dispute resolution process was binding arbitration in instances where less formal steps did not adequately remedy the situation. This bylaw provision was adopted by the Board of Directors of Thrivent and was duly filed with the Wisconsin Commissioner of Insurance. The Wisconsin Commissioner did not disapprove the arbitration bylaw.

Following the adoption of the bylaw and filing with the Wisconsin Commissioner of Insurance, the members of the society and the other regulators, including Missouri, were notified of the bylaw provision. Pursuant to Section 435.350 RSMo., the Missouri Department of Insurance (Department) advised Thrivent that it opposed the enforcement of the bylaw provision for life insurance policies issued in Missouri, because it is the Department's practice to disapprove life insurance policies that include mandatory arbitration provisions. Section 435.350 RSMo., also known as the Uniform Arbitration Act, provides in part that "a written agreement to submit any existing controversy to arbitration or a provision in a written contract, **except contracts of insurance and contracts of adhesion**, to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable...." (emphasis added). The Department has consistently held that this statute prohibits any insurers from including in their insurance contracts a duty to arbitrate disputes.

Thrivent disagreed with the Department's response, arguing that Missouri had no authority to disapprove the bylaw provision. It filed a "friendly" declaratory judgment action in the United States District Court for the Western District of Missouri, seeking a declaration that Missouri's threatened regulatory action to disapprove the bylaws and policy forms pursuant to Missouri law violated the full faith and credit laws of the United States Constitution, the due process clause of the Fourteenth amendment to the Constitution, the supremacy clause of the United States Constitution and was preempted by the Federal Arbitration Act. The court addressed only the issues of full faith and credit and the application of the Federal Arbitration Act in its opinion.

The United States Supreme Court has repeatedly held that the validity of a fraternal benefit society bylaw must be exclusively determined under the law of a fraternal's domicile.<sup>3</sup> In all such cases, however, the bylaw provision was challenged by a policyholder or beneficiary. For instance, in *Wolf*, the Supreme Court held that South Dakota was required by the Full Faith and Credit Clause to honor a statute of limitations in the bylaws of an Ohio fraternal benefit society even though the limitations provision would be impermissible under South Dakota law.<sup>4</sup> The Supreme Court acknowledged the difference in status of a policyholder or beneficiary and that of a regulator, and implicitly acknowledged that state departments of insurance are not foreclosed from regulating fraternal benefit societies doing business in their states.<sup>5</sup>

In deciding the *Thrivent* case, the court considered the *Wolf* case and held that nothing in the full faith and credit cases would prevent defendant Missouri Department of Insurance from otherwise regulating fraternal benefit societies. The court refused to extend the Supreme Court's full faith and credit decisions especially given the specific findings in *Wolf*.<sup>6</sup>

A much more difficult question for the *Thrivent* court was whether the Federal Arbitration Act<sup>7</sup> applied. In answering this question, the court analyzed several different state and federal laws, including congressional intent under the Federal Arbitration Act, the McCarran-Ferguson Act, and the Missouri's Uniform Arbitration Act.

I would contend that the intent of Congress, under the Federal Arbitration Act, was to displace state laws and policies invalidating agreements to arbitrate even in those instances when an insurance company was involved. Federal law clearly favors the use of arbitration provisions in contracts for settling disputes. The United States Supreme Court has, in numerous instances, recognized that the Federal Arbitration Act "is a congressional declaration of a liberal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."<sup>8</sup>

The *Thrivent* Court, however, had to reconcile the mandates of the Federal Arbitration Act and its intent with the McCarran-Ferguson Act. The McCarran-Ferguson Act states that “no act of Congress should be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating the business of insurance ...”<sup>9</sup> The United States District Court for the Western District of Missouri previously held that the Missouri Legislature enacted the Uniform Arbitration Act for the purpose of regulating insurance.<sup>10</sup> Therefore, McCarran-Ferguson would not allow the Federal Arbitration Act to invalidate, impair or supersede Missouri’s Uniform Arbitration Act if this state law did, in fact, apply to fraternal benefit societies.

The *Thrivent* court next determined the applicability of Missouri’s Uniform Arbitration Act. It first considered Missouri statute Section 378.623 RSMo., a part of Missouri’s Fraternal Benefit Code. Section 378.623 provides in part “except as herein provided, societies shall be governed by this chapter and shall be exempt from all other provisions of the insurance laws of this state, except Chapters 374 and 375 RSMo., not only in governmental relations with this state, but for every other purpose, and no law hereafter enacted shall apply to them, unless expressly designated therein.” *Thrivent* argued that fraternal benefit societies are exempt from the insurance laws of this state except for those specifically enumerated in Section 378.623 RSMo.

The Missouri Department of Insurance took the position that fraternal benefit societies are not exempt from the laws regulating life insurance contracts, and that those laws prohibit arbitration provisions in life insurance policies. The Department argued that although Chapter 376 of the Missouri statutes relating to life and health insurance is “not specifically enumerated in the list of applicable laws governing fraternal benefit societies,” those statutes and regulations must, none the less, be referred to as applicable to fraternal benefit societies operating in Missouri.<sup>11</sup> In furtherance of their position, the Department relied on Missouri Statute Section 378.619.6 RSMo., which provides that life insurance contracts issued by fraternal benefit societies “shall meet the standard contract provision requirements not inconsistent with this chapter for like policies issued by life insurers in this state.”

The *Thrivent* Court, therefore, had to again reconcile the exemption in the Fraternal Benefit Code with Missouri laws regulating life insurance contracts. The court agreed with *Thrivent*, and concluded that since Missouri’s Uniform Arbitration Act has been determined to be a law regulating the business of insurance or an insurance law of Missouri, but one not specifically enumerated in Missouri’s Fraternal Benefit Code, the society would be exempt from the restrictions contained in Missouri’s Uniform Arbitration Act. The court determined that “because Section 453.350 RSMo. [Uniform Arbitration Act] does not apply to fraternal benefit societies, any

regulation by defendant [Missouri Department of Insurance] must be based upon a policy or opinion of defendant (not a state law).”<sup>12</sup>

Further, although the McCarran-Ferguson Act provides that state laws regulating the business of insurance are not preempted by federal law in some circumstances, the McCarran-Ferguson Act does not insulate a State’s regulatory stance or opinion from preemption.”<sup>13</sup> The court did not make any specific finding in regard to whether the insurance laws regulating life insurance contracts prohibit arbitration provisions but did hold that the Uniform Arbitration Act did not apply to fraternal benefit societies.

In *American Heritage Life Insurance Company v. Orr*, the 5<sup>th</sup> Circuit determined that where no statute barred arbitration of insurance disputes, McCarran-Ferguson would not apply because McCarran-Ferguson “bars application of the FAA to insurance contracts only in the context of a state statute evincing the same, not mere policy statements of state officials of administration rule interpretations of governmental entities.”<sup>14</sup> In *Thrivent*, since no state law was invalidated, impaired or superseded by the Federal Arbitration Act in Missouri, the McCarran-Ferguson was not a consideration. The *Thrivent* court reasoned that if the Department of Insurance was allowed to apply the anti-arbitration policy contained in the Uniform Arbitration Act to fraternal benefit societies, “it is no exaggeration to say that under [the Missouri Department of Insurance’s] interpretation of Missouri law, every statute that applied to conventional insurers would also apply to fraternal benefit societies.”<sup>15</sup> The *Thrivent* Court therefore held that the Uniform Arbitration Act does not apply to fraternal benefit societies. “Because of the strong public policy evinced in the FAA supporting arbitration and the lack of any applicable state law to the contrary, this court believes that [the Missouri Department of Insurance] does not have the authority to invalidate the arbitration agreement found in plaintiff’s Bylaw.”<sup>16</sup>

The court therefore concluded that fraternal benefit societies may include binding arbitration agreements in their bylaws which, in effect, would also be in the policies of insurance if the bylaw is determined to be valid in the fraternal’s state of domicile.

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1 *Thrivent Financial for Lutherans v. Scott B. Lakin*, 322 F Supp 2d, 1017, 1023 (W.D. Mo. 2004)  
2 Thrivent Financial for Lutherans was originally organized as Aid Association for Lutherans which merged  
with Lutheran Brotherhood in 2002 and changed its name to Thrivent.  
3 *Order of United Commercial Travelers v. Wolf*, 331 U.S. 586 (1947); *Sovereign Camp W.O.W. v. Bolen*,  
305 U.S. 66 (1933), *Modern Woodmen v. Mixer*, 267 U.S. 544 (1925); *Supreme Council of the Royal*  
*Arcanum v. Green*, 237 U.S. 531 (1915)  
4 *Order of United Commercial Travelers*, 331 U.S. 592  
5 *Order of United Commercial Travelers*, 331 U.S. 624-25  
6 *Thrivent Financial for Lutherans v. Scott B. Lakin*, 322 F. Supp 2d, 1023  
7 See 9 USC §2 “a written provision in any maritime transaction or a 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 such grounds as exist at law or in equity for the revocation of any  
contract”  
8 *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1, 24 (1983)  
9 15 USC Section 1012(b)  
10 *Standard Security Life Insurance Company v. West*, 127 F Supp 2d 1064, 1066-67 (W.D. Mo. 2000)  
11 *Thrivent Financial for Lutherans*, 322 F. Supp 2d, 1024  
12 *Thrivent Financial for Lutherans*, 322 F. Supp 2d, 1024  
13 See *American Heritage Life Insurance Company v. Orr*, 294 F 3<sup>rd</sup> 702, (5<sup>th</sup> Circuit 2002); *Thrivent*  
*Financial for Lutherans*, 322 F Supp 2d, 1024  
14 *American Heritage Life Insurance Company*, 294 F 3<sup>rd</sup> at 708  
15 *Thrivent Financial for Lutherans*, 322 F. Supp 2d, 1024  
16 *Thrivent Financial for Lutherans*, 322 F. Supp 2d,1024