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Issues in Pretrial Litigation

Casenote

***777 THE SUPREME COURT OF WASHINGTON MISTAKENLY APPLIES STATE LAW RESULTING IN
INVALIDATION OF ARBITRATION PROVISIONS IN KRUGER CLINIC ORTHOPAEDICS, LLC V.
REGENGE BLUESHIELD**

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INTRODUCTION

The litigation process has been characterized as lengthy, costly, and excessively formal. [\[FN1\]](#) As a result, parties have become increasingly eager to settle their disputes outside the courtroom through various forms of alternative dispute resolution (“ADR”). [\[FN2\]](#) Arbitration, a form of ADR in which judges are selected to preside over informal hearings, often proves to be economical and less time-consuming than litigation. [\[FN3\]](#) By creating arbitration provisions, parties to a contract can attempt to control the process and costs of any future controversies. [\[FN4\]](#) However, if a dispute arises, and one or both parties fail to comply with the terms of the arbitration provision, courts may have difficulty determining whether state law or federal law should govern arbitrability. [\[FN5\]](#)

In *Kruger Clinic Orthopaedics, LLC v. Regence Blueshield*, [\[FN6\]](#) the Supreme Court of Washington invalidated the arbitration provision between Kruger Clinic Orthopaedics (“Kruger”) and Regence Blueshield (“Blueshield”) under the [Revised Code of Washington § 48.43.055](#) (“RCW”) and the [Washington Administrative Code § 284-43-322\(4\)](#) (“WAC”). [\[FN7\]](#) The court also invalidated the arbitration provision between Tacoma Orthopaedic Surgeons (“Tacoma”) and Blueshield under the same Washington statute and regulation. [\[FN8\]](#) The Kruger-Blueshield arbitration provision mandated binding arbitration of any dispute, while the RCW and the WAC prohibited parties from requiring binding arbitration to the exclusion of judicial remedies; however, the RCW and the WAC allowed arbitration prior to judicial *778 remedies. [\[FN9\]](#) The Tacoma-Blueshield provision, however, did not compel binding arbitration to the exclusion of judicial remedies. [\[FN10\]](#)

Further, the Kruger court considered whether the McCarran-Ferguson Act protected the RCW and the WAC from preemption by the Federal Arbitration Act (“FAA”). [\[FN11\]](#) The McCarran-Ferguson Act declared that a state law enacted to regulate the business of insurance shall not be superseded by any act of Congress. [\[FN12\]](#) The court determined the RCW and the WAC regulated the business of insurance according to the McCarran-Ferguson Act because the RCW and the WAC served to strengthen the relationship between insurer and insured. [\[FN13\]](#) Therefore, the court held, by application of the McCarran-Ferguson Act, the FAA did not preempt the RCW and the WAC. [\[FN14\]](#) As a result, the court held the RCW and the WAC should be applied to invalidate the arbitration provisions in both the Kruger and Tacoma contracts because the provisions compelled binding arbitration and afforded only limited judicial review. [\[FN15\]](#)

This Note will first discuss the facts and holding of Kruger. [\[FN16\]](#) This Note will then consider other cases analyzing the validity of certain arbitration provisions. [\[FN17\]](#) This Note will demonstrate the Supreme Court of Washington correctly determined the Kruger-Blueshield arbitration provision would be invalid if the RCW and the WAC were correctly applied because the agreement compelled binding arbitration. [\[FN18\]](#) This Note will also demonstrate the Supreme Court of Washington erred by determining the Tacoma-Blueshield arbitration provision was invalid, even if the RCW and the WAC had been correctly applied, since that agreement did not compel binding arbitration.*779[\[FN19\]](#) This Note will then demonstrate that even if the court had been correct in determining the Tacoma-Blueshield provision compelled binding arbitration, the court erred by applying Washington state law to both Blueshield provisions since the McCarran-Ferguson Act did not protect the RCW and the WAC from preemption by the FAA. [\[FN20\]](#)

FACTS AND HOLDING

Kruger Clinic Orthopaedics, LLC (“Kruger”) and Tacoma Orthopaedic Surgeons, Inc. (“Tacoma”) were medical service providers for Regence BlueShield (“Blueshield”). [\[FN21\]](#) Both companies treated Blueshield's insureds and received compensation for their services according to participating provider agreements. [\[FN22\]](#)

In April 1995, Kruger executed an agreement with Blueshield wherein Kruger agreed to provide medical care to Blueshield's insureds. [\[FN23\]](#) In exchange, Blueshield agreed to compensate Kruger for treating Blueshield's insureds and to reimburse Kruger for medical devices used during surgery. [\[FN24\]](#) The agreement contained an arbitration clause that required the parties to arbitrate any disagreement. [\[FN25\]](#) The agreement also forbade either party from resorting to litigation after the arbitration process. [\[FN26\]](#)

A dispute arose in early 2000 regarding Kruger's compensation. [\[FN27\]](#) Blueshield forced Kruger to accept lower pay rates than Kruger had previously received, while Blueshield continued to pay other service providers higher rates for similar services. [\[FN28\]](#) Additionally, Kruger claimed Blueshield owed Kruger \$10,000 in reimbursements for medical devices. [\[FN29\]](#) Instead of proceeding with arbitration, as required by the contract, Kruger sued Blueshield for breach of contract in Snohomish County Superior Court. [\[FN30\]](#)

*780 Kruger argued the arbitration provision was invalid because it compelled binding arbitration to the exclusion of judicial remedies. [\[FN31\]](#) Kruger relied on the [Revised Code of Washington § 48.43.055](#)[\[FN32\]](#) (“RCW”) and the [Washington Administrative Code § 284-43-322\(4\)](#)[\[FN33\]](#) (“WAC”), which allowed arbitration provisions as long as the provisions did not exclude judicial remedies. [\[FN34\]](#) Kruger argued the RCW and the WAC should be applied according to the language of the McCarran-Ferguson Act. [\[FN35\]](#) The McCarran-Ferguson Act prohibited any act of Congress from superseding any state law enacted to regulate the business of insurance. [\[FN36\]](#) Kruger argued the RCW and the WAC were state insurance regulations that should be applied to invalidate the Kruger-Blueshield arbitration provision. [\[FN37\]](#)

Blueshield responded by filing a motion to compel arbitration based upon the parties' agreement. [\[FN38\]](#) Blueshield argued the Kruger-Blueshield agreement was governed by the Federal Arbitration Act [\[FN39\]](#) (“FAA”), which established a federal policy favoring arbitration. [\[FN40\]](#) Blueshield argued Kruger should be required to arbitrate its claim based upon Kruger's agreement to do so. [\[FN41\]](#) The court denied Blueshield's motion to compel arbitration without explanation. [\[FN42\]](#)

Blueshield appealed to the Court of Appeals of Washington, Division One, arguing the trial court erred in denying its motion to compel arbitration. [\[FN43\]](#) The court of appeals reversed the trial court's denial of Blueshield's motion to compel arbitration. [\[FN44\]](#) Chief Judge Ronald E. *781 Cox, writing for the majority, addressed the applicability of the FAA notwithstanding the language of the McCarran-Ferguson Act. [\[FN45\]](#) The court determined the McCarran-Ferguson Act did not apply to the Kruger-Blueshield case because the Kruger-Blueshield agreement did not relate to the business of insurance. [\[FN46\]](#) The court reasoned that because the

agreement was an agreement for the sale of goods and services, the agreement did not involve the business of insurance. [FN47] Additionally, the court reasoned the agreement involved the providing of medical services for compensation and did not involve underwriting or the spreading of risk; therefore, the court reasoned the agreement did not impact the business of insurance. [FN48] The court determined that because the Kruger-Blueshield agreement did not involve the business of insurance, the McCarran-Ferguson Act did not protect the RCW and the WAC from preemption by the FAA, and, therefore, the court upheld the Kruger-Blueshield arbitration provision. [FN49] Kruger filed a petition for a writ of certiorari, and the Washington Supreme Court granted it and consolidated the proceedings with those in another case on appeal involving the same issues: Tacoma Orthopaedic Surgeons, Inc. v. Regence Blueshield. [FN50]

Tacoma had also entered an agreement with Blueshield to treat Blueshield-insured patients and, as did Kruger, had executed a participating provider agreement containing an arbitration clause. [FN51] The Tacoma-Blueshield arbitration provision required the parties to arbitrate any dispute prior to seeking a judicial remedy. [FN52] A dispute arose when Blueshield continually reduced amounts paid to Tacoma for services provided. [FN53] Although the agreement between the parties required arbitration of all disputes, Tacoma sued Blueshield in Pierce County Superior Court for breach of the implied covenant of good faith and fair dealing and breach of contract. [FN54] Blueshield responded by filing a motion to compel arbitration, which the court granted. [FN55]

*782 Tacoma appealed the trial court's decision to the Washington Court of Appeals, Division Two. [FN56] On January 11, 2005, the court of appeals affirmed the decision of the trial court to uphold the arbitration clause set forth in the agreement between Tacoma and Blueshield. [FN57] Judge Elaine M. Houghton, writing for the majority, affirmed the trial court's decision to compel arbitration, reasoning because the arbitration clause did not forbid subsequent litigation, the agreement was not in violation of the RCW and the WAC. [FN58]

Tacoma filed a petition for a writ of certiorari with the Supreme Court of Washington, which granted certiorari to consider whether the McCarran-Ferguson Act protected the RCW and the WAC from preemption by the FAA. [FN59] The court also considered whether Blueshield's arbitration provisions were valid. [FN60] The court consolidated Kruger and Tacoma and reviewed them de novo. [FN61]

The court reversed the decisions of the court of appeals in both cases and invalidated the Kruger-Blueshield and Tacoma-Blueshield arbitration provisions. [FN62] The court concluded the RCW and the WAC were not superseded by the FAA, and therefore the arbitration clauses could not exclude judicial remedies. [FN63] The court reasoned that because the RCW and the WAC prohibited contractual provisions requiring binding arbitration to the exclusion of judicial remedies, the arbitration provisions were invalid. [FN64]

In determining which law should govern, the court examined the McCarran-Ferguson Act, which stated that no Congressional Act shall supersede any state law enacted to regulate the business of insurance. [FN65] The court noted the McCarran-Ferguson Act also mandated that the business of insurance be subject to state law. [FN66] The court rejected the view of the court of appeals that the agreement between the parties did not involve the business of insurance. [FN67] Citing *United States Department of Treasury v. Fabe*, [FN68] the court established its position. [FN69] The court reasoned that because Kruger provided medical treatment to Blueshield's insureds and processed insurance claims for *783 Blueshield, the agreement between the parties involved the business of insurance. [FN70] The court reasoned that because the agreement involved the business of insurance, the McCarran-Ferguson Act applied; therefore, according to the language of the McCarran-Ferguson Act, the RCW and the WAC could not be superseded by the FAA. [FN71]

The court examined the Kruger and Tacoma arbitration provisions to determine whether they violated the RCW and the WAC. [FN72] The court determined the Kruger-Blueshield arbitration provision expressly mandated binding arbitration to the exclusion of judicial remedies. [FN73] The court noted the RCW and the WAC authorized nonbinding arbitration and prohibited the exclusion of judicial remedies. [FN74] The court therefore held the Kruger-Blueshield arbitration clause was invalid because it specifically stated that arbitration would be binding

while expressly prohibiting subsequent litigation. [\[FN75\]](#)

The court also found the Tacoma-Blueshield agreement invalid although the arbitration clause did not explicitly exclude judicial remedies as did the Kruger agreement. [\[FN76\]](#) The court reasoned that because Blueshield's definition of judicial remedies was more limited than the definition in governing state law, the mentioning of judicial remedies in the agreement did not provide Tacoma with adequate protection. [\[FN77\]](#) The court therefore concluded the Tacoma-Blueshield agreement was unenforceable even though it did not expressly compel binding arbitration and even appeared to allow judicial remedies. [\[FN78\]](#)

BACKGROUND

A. The McCarran-Ferguson Act

The McCarran-Ferguson Act was created to assure that the states, as opposed to the Federal Government, would be allowed to regulate the activities between insurance companies and their policyholders. [\[FN79\]](#) The McCarran-Ferguson Act states, “[t]he 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 *784 such business.” [\[FN80\]](#) The McCarran-Ferguson Act also states, “[n]o 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.” [\[FN81\]](#)

B. Group Life & Health Insurance Co. v. Royal Drug Co.: The Supreme Court Held Agreements not Involving Underwriting or the Spreading of Risk are not the Business of Insurance

In Group Life & Health Insurance Co. v. Royal Drug Co., [\[FN82\]](#) the United States Supreme Court held agreements for the sale of goods and services that did not involve spreading of risk or underwriting were not considered the business of insurance and were therefore not exempt from federal regulation under the McCarran-Ferguson Act. [\[FN83\]](#) In Group Life, independent pharmacists sued Group Life & Health Insurance Company (“Group Life”) under federal antitrust law in the United States District Court for the Western District of Texas. [\[FN84\]](#) The pharmacists claimed Group Life had entered into agreements with certain pharmacies that caused Group Life's insureds to boycott other pharmacies. [\[FN85\]](#) The insurance policies issued by Group Life allowed its insureds to purchase prescription drugs for just two dollars if the purchase was made at a pharmacy that had an agreement with Group Life. [\[FN86\]](#) Because smaller pharmacies could not afford to sell prescriptions at such a reduced price, they were unable to enter such an agreement with Group Life. [\[FN87\]](#) If the prescription was purchased at a pharmacy that did not have an agreement with Group Life, the insured was forced to pay full price for the prescription and then obtain a partial reimbursement from Group Life. [\[FN88\]](#) The pharmacists argued these agreements would cause the insureds to boycott the pharmacies that had not entered into agreements with Group Life because of the savings available to the insureds. [\[FN89\]](#) Group Life claimed the agreements were exempt from federal regulation because they involved the *785 business of insurance, and the McCarran-Ferguson Act mandated the business of insurance was to be regulated by state law. [\[FN90\]](#)

The district court granted Group Life's motion for summary judgment. [\[FN91\]](#) Writing for the court, District Judge John H. Wood, Jr. concluded Group Life's pharmacy agreements constituted the business of insurance and therefore federal law was inapplicable. [\[FN92\]](#) The court cited language from SEC v. National Securities, Inc. [\[FN93\]](#) in which the United States Supreme Court stated the relationship between the insurer and the insured is part of the business of insurance. [\[FN94\]](#) The court noted that in Group Life, the pharmacy agreement pertained to the relationship between Group Life and its insureds. [\[FN95\]](#) The court therefore determined the agreements constituted the business of insurance and Group Life should not be liable under federal antitrust law. [\[FN96\]](#)

The pharmacists appealed the decision of the district court to the United States Court of Appeals for the Fifth Circuit, arguing the district court erred in concluding Group Life's pharmacy agreements were not subject to federal

antitrust law. [\[FN97\]](#) The pharmacists complained Group Life's pharmacy agreements created difficulty for small pharmacies competing with large pharmacies, since larger pharmacies could afford to sell prescriptions at a reduced price. [\[FN98\]](#) The Fifth Circuit reversed the district court's opinion, concluding Group Life's pharmacy agreements were not part of the business of insurance and should have been subject to federal law. [\[FN99\]](#) Circuit Judge James C. Hill delivered the opinion of the court and reasoned that although the pharmacy agreements affected the price of premiums, such agreements were not protected by the McCarran-Ferguson Act merely because Group Life had contracted for the sale of prescription drugs. [\[FN100\]](#) The court also stated the McCarran-Ferguson Act only protected activities "peculiar to the insurance industry," and the price-fixing agreements in this case could be typical of any industry. [\[FN101\]](#) Group Life filed a petition for a writ of certiorari with the United States Supreme Court, which granted certiorari to resolve conflicts between the *786 lower circuits regarding what constituted the business of insurance. [\[FN102\]](#)

The Supreme Court affirmed the decision of the Fifth Circuit, holding Group Life's pharmacy agreements were not the business of insurance within the meaning of the McCarran-Ferguson Act. [\[FN103\]](#) Justice Potter Stewart, writing for the majority, reasoned the spreading of risk was fundamental to an insurance agreement, and, in Group Life, the pharmacy agreements did not contain the risk-spreading element. [\[FN104\]](#) The Court noted Group Life's agreements merely contracted for the purchase of prescription drugs. [\[FN105\]](#) The Court also noted the main focus of Congress when enacting the McCarran-Ferguson Act was on the relationship between the insurer and the insured. [\[FN106\]](#) The Court stated the agreements in the present case were not between Group Life and its policyholders and therefore were not the business of insurance. [\[FN107\]](#)

C. SEC v. National Securities, Inc.: Statute Protecting Stockholders does not Regulate the Business of Insurance

In SEC v. National Securities, Inc., the United States Supreme Court declared a state law protecting an insurance company's stockholders did not regulate the business of insurance within the meaning of the McCarran-Ferguson Act. [\[FN108\]](#) In SEC, the Securities and Exchange Commission ("SEC") sued National Securities, Inc. ("National Securities"), a life insurance company, in the United States District Court for the District of Arizona alleging violations of the Securities Exchange Act. [\[FN109\]](#) The complaint by the SEC alleged National Securities fraudulently misrepresented important facts during the purchase of another company, and, as a result, shareholders of the purchased company were forced to pay part of the costs resulting from the purchase. [\[FN110\]](#)

The district court found for National Securities dismissing the complaint for failure to state a claim upon which relief could be granted. [\[FN111\]](#) The court stated the claim was barred by the language of *787 the McCarran-Ferguson Act, which required the business of insurance be regulated by the states. [\[FN112\]](#)

The SEC appealed the decision of the district court to the United States Court of Appeals for the Ninth Circuit, arguing the district court erred in determining, based on the McCarran-Ferguson Act, federal law did not apply. [\[FN113\]](#) The SEC argued the Arizona statute did not regulate the business of insurance because the statute benefited stockholders rather than policyholders. [\[FN114\]](#) The Ninth Circuit affirmed the decision of the district court, reasoning that if federal law were to be applied, state law would be superseded and the McCarran-Ferguson Act would be violated. [\[FN115\]](#) The SEC filed a petition for a writ of certiorari with the United States Supreme Court, which granted certiorari to consider the meaning of the McCarran-Ferguson Act. [\[FN116\]](#)

The Supreme Court reversed the decisions of both lower courts, stating the Arizona law protecting the National Securities stockholders did not regulate the business of insurance. [\[FN117\]](#) Justice Thurgood Marshall, writing for the majority, reasoned the McCarran-Ferguson Act was not intended to allow the states complete control over all acts of insurance companies. [\[FN118\]](#) Rather, the Court noted, the McCarran-Ferguson Act allowed the states to control only the business of insurance. [\[FN119\]](#) The Court stated insurance companies could engage in many activities subject to federal law, and the McCarran-Ferguson Act would only apply if such activities were the business of insurance. [\[FN120\]](#) The Court noted the McCarran-Ferguson Act was concerned with allowing states to regulate the association between the insurer and the insured, but, in the present case, the Arizona law focused on

regulating the association between the insurance company and its stockholders. [\[FN121\]](#) The Court declared that because the state law did not regulate the business of insurance, the McCarran-Ferguson Act did not prohibit the application of federal law. [\[FN122\]](#)

***788 D. Union Labor Life Insurance Co. v. Pireno: Test Established to Determine What Constituted the Business of Insurance**

In *Union Labor Life Insurance Co. v. Pireno*, [\[FN123\]](#) the United States Supreme Court established a three-part test for determining whether or not an action by an insurer or insured constituted the business of insurance. [\[FN124\]](#) In *Pireno, A. Alexander Pireno* (“Pireno”), a chiropractor, filed an action for injunctive relief against the New York State Chiropractic Association (“Chiropractic Association”) and Union Labor Life Insurance Company (“Union Labor”). [\[FN125\]](#) Pireno filed this action in the United States District Court for the Southern District of New York, alleging violations of federal antitrust law. [\[FN126\]](#) In *Pireno*, the Chiropractic Association instituted a peer review program to help insurance companies determine whether patients' visits were reasonable and customary. [\[FN127\]](#) The Chiropractic Association determined some of Pireno's charges were unusually high and unreasonable. [\[FN128\]](#) Union Labor began to deny insurance claims from Pireno's patients. [\[FN129\]](#) Pireno complained Union Labor also sent letters to Pireno's patients regarding the unusually high fees. [\[FN130\]](#) In his complaint, Pireno alleged the Chiropractic Association and Union Labor combined to restrict trade and fix prices in the chiropractic industry. [\[FN131\]](#)

The Chiropractic Association and Union Labor filed a motion for summary judgment, and the district court granted the motion. [\[FN132\]](#) The court reasoned federal antitrust law did not apply to the actions of the Chiropractic Association and Union Labor because of the McCarran-Ferguson Act. [\[FN133\]](#) The district court noted the peer review program involved the spreading of risk and therefore met the definition of the business of insurance. [\[FN134\]](#)

Pireno appealed the decision of the district court to the United States Court of Appeals for the Second Circuit, arguing peer review by the Chiropractic Association was not the business of insurance as defined***789** by the Supreme Court. [\[FN135\]](#) The Second Circuit reversed the district court's opinion, determining an action of an insurance company that does not involve either the spreading of risk among policyholders or the transfer of risk from policyholders to insurer, is not the business of insurance. [\[FN136\]](#) The court noted peer review did not spread or transfer risk, and therefore was not the business of insurance. [\[FN137\]](#) Union Labor filed a petition for a writ of certiorari with the United States Supreme Court, which granted certiorari to determine whether peer review constituted the business of insurance. [\[FN138\]](#)

The Supreme Court affirmed the decision of the Second Circuit, holding that because peer review was not the business of insurance under the McCarran-Ferguson Act, peer review by the Chiropractic Association was not exempt from federal law. [\[FN139\]](#) Justice William J. Brennan, Jr., writing for the majority, discussed three factors courts should consider when determining whether the McCarran-Ferguson Act applies. [\[FN140\]](#) Justice Brennan stated courts should consider (1) whether there is a transferring or spreading of risk, (2) whether the practice is part of the relationship between the policyholder and insurer, and (3) whether the practice is peculiar to the insurance industry. [\[FN141\]](#) Regarding the first requirement, the Court determined peer review did not involve transferring or spreading of risk because peer review was not connected with the signing of the insurance policy. [\[FN142\]](#) The Court noted the second requirement was not fulfilled since the agreements regarding peer review were not between the insurer and the policyholders. [\[FN143\]](#) The Court also noted the third requirement was not fulfilled since the peer review agreements involved third parties clearly outside the insurance industry. [\[FN144\]](#) Accordingly, the Court concluded the Chiropractic Association's peer review was not the business of insurance within the purview of the McCarran-Ferguson Act. [\[FN145\]](#)

***790 E. United States Department of Treasury v. Fabe: Statute Protecting Policyholders Regulates the Business of Insurance**

In *United States Department of Treasury v. Fabe*, [\[FN146\]](#) the United States Supreme Court held an Ohio statute was enacted to regulate the business of insurance within the meaning of the McCarran-Ferguson Act to the extent the statute regulated policyholders. [\[FN147\]](#) In *Fabe*, George Fabe (“Fabe”), the liquidator of an insolvent insurance company, filed a declaratory judgment action against the Department of the Treasury in the United States District Court for the Southern District of Ohio in an attempt to establish priority of claims in a liquidation proceeding. [\[FN148\]](#) The insolvent insurance company had surety bonds that would be distributed during the liquidation process, and the Department of the Treasury claimed to have first priority over the bonds according to federal law. [\[FN149\]](#) Fabe claimed the Department of the Treasury was fifth in line to receive the bonds according to Ohio state law. [\[FN150\]](#) Fabe also argued the McCarran-Ferguson Act protected state law from preemption by federal law since the Ohio law regulated the business of insurance. [\[FN151\]](#)

The district court granted summary judgment for the Department of the Treasury, stating federal law should apply because the Ohio statute did not regulate the business of insurance and was therefore not protected by the McCarran-Ferguson Act. [\[FN152\]](#)

Fabe appealed the decision of the district court to the United States Court of Appeals for the Sixth Circuit, arguing the district court erred in granting summary judgment for the Department of the Treasury. [\[FN153\]](#) Fabe argued the Ohio statute regulating the distribution of assets during liquidation regulated the business of insurance. [\[FN154\]](#) The Sixth Circuit reversed the decision of the district court, holding the Ohio statute regulated the business of insurance because it protected the policyholders. [\[FN155\]](#) Contrary to the district court, the Sixth Circuit determined the Ohio statute fulfilled the requirements of the *791 Pireno test. [\[FN156\]](#) The court applied the elements of the Pireno test to determine the Ohio statute regulated the business of insurance because it (1) allocated the risk of the insureds, (2) focused on the relationship between the policyholders and the insurer, and (3) operated exclusively in the insurance industry. [\[FN157\]](#) The Department of the Treasury filed a petition for a writ of certiorari with the United States Supreme Court, which granted certiorari to determine whether the Ohio statute was protected by the McCarran-Ferguson Act. [\[FN158\]](#)

The Supreme Court affirmed the decision of the Sixth Circuit, holding the Ohio statute was enacted to regulate the business of insurance because the statute indirectly protected policyholders. [\[FN159\]](#) Justice Harry A. Blackmun, writing for the majority, reasoned the primary purpose of the McCarran-Ferguson Act was to allow the states to regulate the insurance industry. [\[FN160\]](#) To further this discussion, the Court cited its own language from SEC in which the Court determined a state law enacted to directly or indirectly regulate the relationship between policyholders and the insurance company was the business of insurance. [\[FN161\]](#) The Court noted in the present case, the state statute was enacted to ensure the performance of insurance contracts after the company went into liquidation. [\[FN162\]](#) The Court further noted that because the performance of these contracts affected the policyholders, the state law regulated the business of insurance according to the McCarran-Ferguson Act. [\[FN163\]](#)

Justice Anthony M. Kennedy, joined by Justices Antonin Scalia, David H. Souter, and Clarence Thomas, dissented, reasoning the majority decision ran contrary to the Court's holding in SEC. [\[FN164\]](#) The dissent noted the purpose of the Ohio statute was to prioritize competing claims of creditors during liquidation proceedings. [\[FN165\]](#) The dissent noted further such a purpose did not regulate the relationship between insurer and insured, rather the relationship between insurer and creditor. [\[FN166\]](#) The dissent stated that although policyholders may benefit from this Ohio statute, the statute did not focus on the relationship between insurer and insured as required by the Court's decision*792 in SEC. [\[FN167\]](#) The dissent also emphasized prioritizing creditors' claims during liquidation did not involve the essential element of the business of insurance: transfer of risk from policyholder to insurer. [\[FN168\]](#) Accordingly, the dissent reasoned the McCarran-Ferguson Act should not protect the Ohio statute from federal preemption. [\[FN169\]](#)

F. *Doctor's Associates v. Casarotto*: Statutes Applicable Only to Arbitration Provisions Cannot Be Used to Invalidate Arbitration Provisions

In *Doctor's Associates v. Casarotto*, [\[FN170\]](#) the United States Supreme Court determined courts could not invalidate arbitration provisions under state laws that applied solely to arbitration. [\[FN171\]](#) In *Casarotto*, franchise owner Paul Casarotto (“Casarotto”) sued franchisor, Doctor's Associates, Inc. (“DAI”), in Montana district court for Cascade County. [\[FN172\]](#) Casarotto and DAI entered into a standard franchise agreement in April 1988 that allowed Casarotto to open a Subway sandwich shop in Great Falls, Montana. [\[FN173\]](#) The franchise agreement contained an arbitration provision that required both parties to settle any dispute through arbitration. [\[FN174\]](#) However, Montana law required that any agreement subject to an arbitration provision must clearly indicate on page one that the agreement was subject to such a provision. [\[FN175\]](#) In October 1992, Casarotto sued DAI, alleging breach of contract and tortious conduct. [\[FN176\]](#) Casarotto alleged in the franchise agreement he agreed to open his Subway in a less desirable location in exchange for DAI's promise that when a more desirable location became available Casarotto would have the exclusive right to move his business to that location. [\[FN177\]](#) However, when a more desirable location became available, DAI sold it to another franchisee. [\[FN178\]](#) Casarotto alleged that because of this breach of contract and other tortious conduct he lost his business and defaulted on his loan. [\[FN179\]](#) Casarotto sued *793 for damages, and DAI moved the court to compel arbitration according to the franchise agreement. [\[FN180\]](#)

The Montana state court found for DAI and stayed the lawsuit pending arbitration of the dispute. [\[FN181\]](#) The court reasoned that because the parties had agreed to arbitrate their disputes, the agreement was enforceable under the FAA. [\[FN182\]](#) The court noted the FAA allowed courts to stay the trial of an action until arbitration was completed if the parties had agreed to arbitrate their disputes. [\[FN183\]](#) Accordingly, because the parties had agreed to an arbitration provision, the court enforced it under the FAA. [\[FN184\]](#)

Casarotto appealed the decision of the district court to the Supreme Court of Montana, arguing the arbitration provision was unenforceable because notice of the provision was not given on page one of the agreement according to Montana law. [\[FN185\]](#) DAI argued Montana law was preempted by the FAA and the arbitration provision should be enforced regardless of the failure to give notice on page one of the franchise agreement. [\[FN186\]](#) The Supreme Court of Montana reversed the district court's decision, holding the Montana statute, requiring notice of the arbitration provision, was not preempted by the FAA. [\[FN187\]](#) The court concluded Montana's notice requirement did not conflict with the policies of the FAA; therefore, the notice requirement should be enforced. [\[FN188\]](#) The court determined the arbitration provision was inapplicable because the parties did not comply with Montana's notice requirement. [\[FN189\]](#) DAI filed a petition for a writ of certiorari with the United States Supreme Court, which granted certiorari to consider whether Montana's notice requirement was preempted by the FAA. [\[FN190\]](#)

The United States Supreme Court reversed the decision of the Montana Supreme Court, holding Montana's notice requirement conflicted with the FAA. [\[FN191\]](#) Justice Ruth Bader Ginsburg, writing for the majority, reasoned that according to prior Supreme Court decisions, courts were not allowed to invalidate arbitration provisions using state laws applying solely to arbitration provisions. [\[FN192\]](#) The Court *794 noted Montana's notice requirement was applicable only to arbitration provisions and was therefore displaced by the FAA. [\[FN193\]](#)

ANALYSIS

In *Kruger Clinic Orthopaedics, LLC v. Regence Blueshield*, [\[FN194\]](#) the Supreme Court of Washington determined Washington state law should be applied when considering whether binding arbitration was appropriate between health insurance carriers and health care providers. [\[FN195\]](#) In *Kruger, Regence Blueshield* (“Blueshield”) sought to enforce two separate arbitration provisions: one against Kruger Clinic Orthopaedics (“Kruger”), and the other against Tacoma Orthopaedic Surgeons (“Tacoma”). [\[FN196\]](#) Relying on the [Revised Code of Washington § 48.43.055](#) (“RCW”) and the [Washington Administrative Code § 284-43-322\(4\)](#) (“WAC”), which prohibit binding arbitration, the court examined the arbitration provisions contained in each health care provider agreement. [\[FN197\]](#) The court first invalidated the arbitration provision between Kruger and Blueshield because that provision mandated binding arbitration of any dispute and prohibited either party from subsequently litigating the dispute. [\[FN198\]](#) The

court then invalidated the arbitration provision between Tacoma and Blueshield using the same Washington state statute and regulation, even though the Tacoma-Blueshield provision did not compel binding arbitration to the exclusion of judicial remedies. [\[FN199\]](#)

Further, the Kruger court considered whether the McCarran-Ferguson Act protected the RCW and the WAC from preemption by the Federal Arbitration Act (“FAA”). [\[FN200\]](#) The McCarran-Ferguson Act declared a state law enacted to regulate the business of insurance shall *795 not be superseded by any act of Congress. [\[FN201\]](#) The court held the RCW and the WAC regulated the business of insurance within the meaning of the McCarran-Ferguson Act because the statute and regulation served to strengthen the relationship between insurer and insured. [\[FN202\]](#) Therefore, the court held the FAA did not preempt the RCW and the WAC under the McCarran-Ferguson Act. [\[FN203\]](#) As a result, the court reasoned the RCW and the WAC should be applied to invalidate both arbitration provisions because the provisions compelled binding arbitration and afforded only limited judicial review. [\[FN204\]](#)

This Analysis will demonstrate the Supreme Court of Washington correctly determined the Kruger-Blueshield arbitration provision would be invalid if the RCW and the WAC were correctly applied. [\[FN205\]](#) This Analysis will also demonstrate the Supreme Court of Washington erred by determining the Tacoma-Blueshield arbitration provision was invalid, even if the RCW and the WAC had been correctly applied, since this agreement did not require binding arbitration. [\[FN206\]](#) This Analysis will then demonstrate, even if the court had been correct in determining the Tacoma-Blueshield provision required binding arbitration, the court erred by applying Washington state law to both Blueshield provisions since the McCarran-Ferguson Act did not protect the RCW and the WAC from preemption by the FAA. [\[FN207\]](#)

A. The Supreme Court of Washington Correctly Determined the Arbitration Agreement Between Kruger and Blueshield Would Be Invalid Under Washington State Law

The Supreme Court of Washington correctly determined the arbitration agreement between Kruger and Blueshield would be invalid under the RCW and the WAC. [\[FN208\]](#) In Kruger, the court examined the arbitration provision agreed to by Kruger and Blueshield, which explicitly stated any dispute would be arbitrated and the arbitration results would be binding on both parties. [\[FN209\]](#) The arbitration provision *796 further prohibited either party from litigating a dispute after arbitration was completed. [\[FN210\]](#)

The RCW allowed health care providers, such as Kruger, to engage in nonbinding mediation with health carriers, such as Blueshield. [\[FN211\]](#) The WAC further explained any form of binding alternative dispute resolution (“ADR”) was prohibited by the RCW. [\[FN212\]](#) Contrary to the RCW and the WAC, which expressly prohibit binding arbitration, the Kruger-Blueshield arbitration agreement mandated binding arbitration. [\[FN213\]](#) Accordingly, the Supreme Court of Washington correctly determined that under the RCW and the WAC, the Kruger-Blueshield arbitration provision invalidly mandated binding arbitration. [\[FN214\]](#)

B. The Supreme Court of Washington Incorrectly Invalidated the Arbitration Agreement Between Tacoma and Blueshield Under Washington State Law

The Supreme Court of Washington erroneously invalidated the arbitration provision between Tacoma and Blueshield under Washington state law. [\[FN215\]](#) The court relied on language from the arbitration provision in the health care provider agreement between Tacoma and Blueshield, which required the parties to arbitrate any disputes prior to seeking a judicial remedy. [\[FN216\]](#) The court acknowledged Blueshield’s agreement with Tacoma did not specifically mandate binding arbitration, and, in fact, the court noted the arbitration provision appeared to allow a judicial remedy if arbitration proved unsuccessful. [\[FN217\]](#) The court failed to recognize the Tacoma-Blueshield agreement did not violate the RCW and the WAC. [\[FN218\]](#) The court noted the Tacoma-Blueshield agreement merely required that the parties arbitrate any dispute prior to seeking a judicial remedy. [\[FN219\]](#) The RCW allowed disputes*797 to be submitted to nonbinding mediation. [\[FN220\]](#) Similarly, the WAC stated agreements could not

require ADR to the exclusion of judicial remedies. [FN221] In compliance with the RCW and the WAC, which prohibit binding arbitration, the Tacoma-Blueshield arbitration provision required nonbinding arbitration and allowed judicial remedies. [FN222] Therefore, the court failed to recognize the arbitration provision complied with the RCW and the WAC. [FN223] Because the Tacoma-Blueshield arbitration agreement actually complied with the RCW and the WAC by not requiring the parties to engage in binding arbitration, the Kruger court erred by invalidating the arbitration agreement. [FN224]

C. Even If the Supreme Court of Washington Had Been Correct in Determining the Tacoma Agreement Mandated Binding Arbitration, the Court Incorrectly Applied State Law That Was Superseded by Federal Law Under the McCarran-Ferguson Act

In Kruger, the Supreme Court of Washington erred by applying Washington state law when determining the validity of the agreements between Blueshield and health care providers, Kruger and Tacoma, because Federal law preempted the RCW and the WAC. [FN225] The court erred in determining Blueshield's health care provider agreements constituted the business of insurance and were therefore subject to Washington's laws regulating insurance. [FN226] The court erroneously applied the RCW and the WAC based on the court's incorrect interpretation of the McCarran-Ferguson Act. [FN227]

The McCarran-Ferguson Act allowed the states to regulate the business of insurance without federal preemption. [FN228] As the Kruger court noted, the McCarran-Ferguson Act stated that no Congressional Act shall invalidate or supersede any state law enacted to regulate the *798 business of insurance. [FN229] The McCarran-Ferguson Act further declared the business of insurance and any person engaged in the business of insurance shall be subject to state laws regulating insurance. [FN230] However, because the RCW and the WAC did not protect the relationship between insurer and insured, the court erred by determining the RCW and the WAC were enacted for the purpose of regulating the business of insurance. [FN231] The court further erred by determining Blueshield's health care provider agreements constituted the business of insurance, subjecting them to regulation by the RCW and the WAC, because the agreements were contracts for the sale of goods and services and not for the transferring or spreading of risk. [FN232]

1. The Supreme Court of Washington Incorrectly Applied Fabe in Determining Whether the RCW and the WAC were Enacted to Regulate the Business of Insurance.

In Kruger, the Supreme Court of Washington incorrectly applied the reasoning of United States Department of Treasury v. Fabe [FN233] in determining the RCW and the WAC were enacted to regulate the business of insurance. [FN234] The Kruger court stated Fabe was the controlling case for determining whether a state law was enacted to regulate the business of insurance within the meaning of the McCarran-Ferguson Act. [FN235] In Kruger, the court concluded the RCW and the WAC were enacted to help resolve disputes between health insurance carriers and health care providers. [FN236] The court therefore stated the RCW and the WAC indirectly benefited policyholders by increasing the reliability of promises made by insurance carriers. [FN237] Because of this indirect benefit, the court held that the purpose of the RCW and the WAC was to regulate the business of insurance and that the McCarran-Ferguson Act shielded the RCW and the WAC from preemption by the FAA. [FN238] As a result, the court applied the RCW and the WAC, which prohibit binding arbitration, and invalidated the arbitration provisions in Blueshield's health care provider agreements. [FN239]

In Fabe, the United States Supreme Court examined an Ohio statute, along with the McCarran-Ferguson Act, to determine whether *799 the Ohio statute had been enacted to regulate the business of insurance. [FN240] The Court noted the Ohio statute regulated the distribution of assets during the liquidation of an insolvent insurance company and ranked the interests of policyholders above governmental interests. [FN241] The Fabe Court held the Ohio statute was enacted to regulate the business of insurance to the extent the statute protected policyholders; however, the Court noted further that the statute would not regulate the business of insurance if it was created to further the interests of non-policyholders. [FN242] The dissent in Fabe emphasized that although policyholders might benefit

from the Ohio statute, the statute did not directly focus on the relationship between insurer and insured and therefore did not regulate the business of insurance within the meaning of the McCarran-Ferguson Act. [FN243] The dissent contended the McCarran-Ferguson Act should not have been applied to a statute that did not regulate the business of insurance. [FN244]

Dissimilar to the Ohio statute considered in Fabe, which intended to protect policyholders by putting their interests above governmental interests, the RCW and the WAC in Kruger were not intended to confer any benefit on policyholders. [FN245] The Ohio statute in Fabe was enacted for the purpose of protecting the interests of the insureds, whereas the RCW was enacted solely for the purpose of resolving health care provider complaints. [FN246] Therefore, the court incorrectly determined the purpose of the RCW and the WAC was to regulate the business of insurance. [FN247]

The Kruger court claimed the RCW and the WAC met the standard set forth in Fabe for determining whether a statute was enacted to regulate the business of insurance. [FN248] The court claimed the standard was met because the RCW and the WAC assisted in resolving *800 disputes between health insurance providers and health care providers, thereby indirectly protecting the promises made by health carriers to their policyholders. [FN249] However, the standard set forth in Fabe declared the statute must be aimed at directly or indirectly protecting the relationship between insurer and insured. [FN250] Unlike the Ohio statute in Fabe, which was aimed at directly protecting policyholders, the RCW and the WAC were aimed at protecting health care providers, not policyholders. [FN251] Therefore, because the RCW and the WAC were not aimed at protecting the relationship between insurer and insured, the court erred by determining the RCW and the WAC met the standard set forth in Fabe. [FN252]

The Kruger court incorrectly applied the reasoning of Fabe when considering whether the RCW and the WAC were enacted for the purpose of regulating the business of insurance. [FN253] The Fabe Court determined that in order to regulate the business of insurance a statute must be aimed at protecting the relationship between insurer and insured. [FN254] In Kruger, the court claimed the RCW and the WAC regulated the business of insurance although the RCW and the WAC were aimed at protecting health care providers, not policyholders. [FN255] The Kruger court erred in applying the McCarran-Ferguson Act, which shielded the RCW and the WAC from preemption by the FAA, because the RCW and the WAC did not regulate the business of insurance. [FN256] Therefore, the Kruger court erred by applying the RCW and the WAC to invalidate the arbitration provisions in Blueshield's health care provider agreements with Kruger and Tacoma. [FN257]

2. The Supreme Court of Washington Incorrectly Determined Blueshield's Health Care Provider Agreements Constituted the Business of Insurance

The Supreme Court of Washington erred by determining Blueshield's health care provider agreements were sufficiently linked to the business of insurance because the agreements were contracts for the sale of goods and services and not for the transferring or *801 spreading of risk. [FN258] The Kruger court stated Blueshield's health care provider agreements were sufficiently linked to the business of insurance because Kruger assisted Blueshield's policyholders in the claims process by filling out forms and filing claims. [FN259] Therefore, the court concluded Washington state law should be applied to Blueshield's health care provider agreements under the McCarran-Ferguson Act. [FN260]

In Kruger, Kruger and Tacoma each agreed to provide medical services to Blueshield's policyholders in exchange for compensation from Blueshield. [FN261] Blueshield also agreed to compensate Kruger for medical devices implanted during surgery. [FN262] Although the Supreme Court of Washington failed to discuss how these facts related to the business of insurance, the Court of Appeals of Washington cited Group Life & Health Insurance Co. v. Royal Drug Co. [FN263] in determining the agreement between Kruger and Blueshield did not impact the business of insurance because it involved the providing of services in exchange for compensation and did not involve underwriting or the spreading of risk. [FN264]

In *Group Life*, the United States Supreme Court determined an agreement between a pharmacy and an insurance company, which established the maximum price the insurance company would pay for drugs, was not the business of insurance because the agreement was simply an arrangement for the sale of goods and services. [FN265] The *Group Life* Court stated the agreement was not the business of insurance because the pricing arrangement had no effect on underwriting or spreading of risk. [FN266] Thus, the *Group Life* Court determined where there was no underwriting or spreading of risk, there was no regulation of the business of insurance. [FN267]

In *Group Life*, the Court noted the McCarran-Ferguson Act exempted from federal regulation the business of insurance, not the business of insurers. [FN268] The Court further explained an essential characteristic of the business of insurance was the spreading of risk. [FN269] The *Group Life* Court stated agreements allowing an insurance*802 company to maximize profits may benefit policyholders by lowering premiums; however, such agreements were not the business of insurance. [FN270] Because the Court determined the pharmacy agreement was not the business of insurance, the Court did not allow the McCarran-Ferguson Act to protect state law from being preempted by federal law. [FN271] Accordingly, the *Group Life* Court held contracts merely for the sale of goods and services did not constitute the business of insurance within the meaning of the McCarran-Ferguson Act. [FN272]

Similar to the pharmacy agreement in *Group Life*, which established a maximum price for drugs, the health care provider agreements in *Kruger* provided for the sale of goods and services. [FN273] However, the *Kruger* court determined the health care provider agreements were sufficiently linked to the business of insurance, whereas, in *Group Life*, the United States Supreme Court determined the pharmacy agreement was not connected to the business of insurance. [FN274] As a result, the *Kruger* court concluded that Washington state law should be applied when evaluating the arbitration provisions in *Blueshield's* health care provider agreements. [FN275]

In *Kruger*, the Washington Supreme Court failed to take into account the purpose for which *Blueshield's* health care provider agreements were entered into by *Kruger* and *Tacoma*. [FN276] The court incorrectly determined *Blueshield's* health care provider agreements were sufficiently linked to the business of insurance, although such agreements were merely contracts for the sale of goods and services. [FN277] Thus, because *Blueshield's* agreements did not constitute the business of insurance, the *Kruger* court erred by determining the McCarran-Ferguson Act protected Washington state law from federal preemption. [FN278]

***803 D.** The Supreme Court of Washington Incorrectly Applied Washington State Law in Invalidating *Blueshield's* Arbitration Agreements According to the United States Supreme Court's Decision in *Casarotto*

In *Kruger*, the Supreme Court of Washington erred by applying the RCW and the WAC to invalidate *Blueshield's* arbitration agreements because, as the United States Supreme Court determined in *Doctor's Associates v. Casarotto*, [FN279] courts cannot invalidate arbitration provisions under state statutes applicable only to arbitration provisions. [FN280] In *Kruger*, *Blueshield* entered into agreements with *Kruger* and *Tacoma* that contained arbitration provisions. [FN281] The *Kruger* court invalidated these arbitration provisions as violating the RCW and the WAC. [FN282] The RCW and the WAC explicitly prohibited arbitration provisions that required binding arbitration to the exclusion of judicial remedies. [FN283]

In *Casarotto*, the United States Supreme Court invalidated a Montana state statute that was incompatible with the FAA. [FN284] The *Casarotto* Court noted a state law governing the enforceability of contracts generally could be used to invalidate an arbitration provision, whereas a state law enacted solely to govern arbitration provisions could not be used to invalidate such a provision. [FN285] The Court further noted an arbitration provision shall be valid unless general contract laws apply to invalidate the provision. [FN286] The *Casarotto* Court determined this rule prohibited courts from invalidating a contract's arbitration provision as unenforceable while enforcing the rest of the contract. [FN287]

Unlike the Court in Casarotto, which determined an arbitration provision could only be invalidated by state laws enacted to govern contracts generally, the court in Kruger invalidated Blueshield's arbitration provisions under state laws enacted to govern solely arbitration provisions. [FN288] In Casarotto, the Court noted the FAA prohibited *804 courts from singling out arbitration provisions while enforcing all other terms of the contract. [FN289] The Court noted such state policy would be unlawful and contrary to the FAA. [FN290] However, the Kruger court did exactly what the Casarotto Court determined unlawful when the RCW and the WAC were used to invalidate Blueshield's arbitration provisions. [FN291]

In Kruger, the Supreme Court of Washington invalidated Blueshield's arbitration provisions by applying the RCW and the WAC, which prohibited binding arbitration to the exclusion of judicial remedies. [FN292] Thus, the Kruger court erred by invalidating the arbitration provisions in Blueshield's health care provider agreements under the RCW and the WAC. [FN293]

CONCLUSION

In Kruger Clinic Orthopaedics, LLC v. Regence Blueshield, [FN294] the Supreme Court of Washington considered whether Washington state law should be protected by the McCarran-Ferguson Act from preemption by federal law. [FN295] The court held the [Revised Code of Washington § 48.43.055](#) ("RCW") and the [Washington Administrative Code § 284-43-322\(4\)](#) ("WAC") were not preempted by the Federal Arbitration Act ("FAA") under the language of the McCarran-Ferguson Act. [FN296] Therefore, the court applied the RCW and the WAC to Blueshield's health care provider agreements to invalidate the arbitration provisions contained therein. [FN297]

The Supreme Court of Washington was correct in determining the arbitration agreement between Kruger and Blueshield would be invalid if Washington state law was applied. [FN298] However, the court incorrectly determined the arbitration agreement between Blueshield and Tacoma was invalid since that agreement did not require binding arbitration. [FN299] Moreover, even if the court were correct in determining that Blueshield's arbitration agreement with Tacoma required binding*805 arbitration, the court erred in applying Washington state law to both arbitration agreements. [FN300]

The RCW and the WAC should have been preempted by the FAA since the RCW and the WAC were not enacted to regulate the business of insurance within the meaning of the McCarran-Ferguson Act. [FN301] The FAA was created to allow parties to exercise more control over the process and costs of their disputes. By expanding the business-of-insurance clause in the McCarran-Ferguson Act and invalidating a valid arbitration provision, the Supreme Court of Washington undermined the main purpose of the FAA and created difficulties for insurance companies wishing to create arbitration provisions. Because of this decision, insurance companies will now be forced to guess at whether courts will enforce their arbitration provisions.

[FN1]. Thomas J. Stipanowich, [Rethinking American Arbitration](#), 63 *Ind. L.J.* 425, 427-28 (1988).

[FN2]. *Id.* at 428.

[FN3]. *Id.* at 429-30.

[FN4]. 4 *Am. Jur. 2d Alternative Dispute Resolution* § 70 (1995 & Supp. 2006).

[FN5]. See *infra* notes 193-293 and accompanying text.

[FN6]. 138 P.3d 936 (Wash. 2006).

[FN7]. [Kruger Clinic Orthopaedics, LLC v. Regence Blueshield, 138 P.3d 936, 937 \(Wash. 2006\)](#).

[FN8]. [Kruger, 138 P.3d at 937](#).

[FN9]. [Id. at 937, 938](#). The agreement between Kruger and Blueshield stated “[i]n the event that any problem or dispute concerning the terms of this agreement is not satisfactorily resolved, the Company and Provider agree to arbitrate such problem or dispute.” [Id. at 938](#). The agreement further stated “[t]he results of the arbitration shall be binding on both parties, and... [n]either party subsequently shall commence an action to litigate the dispute.” [Id.](#)

[FN10]. [Id. at 938, 943](#). The agreement between Tacoma and Blueshield provided “[p]rior to seeking judicial remedy, any claims or disputes between the parties arising out of or relating to this agreement that cannot be resolved through the internal appeals process shall be submitted to arbitration in accordance with the Commercial Arbitration rules and regulations of the American Arbitration Association then in effect.” [Id. at 938](#).

[FN11]. [Id. at 939](#).

[FN12]. See McCarran-Ferguson Act, [15 U.S.C. § 1012\(b\) \(2000\)](#) (stating “[n]o 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”).

[FN13]. [Kruger, 138 P.3d at 943](#).

[FN14]. [Id.](#)

[FN15]. [Id.](#)

[FN16]. See [infra notes 21-78 and accompanying text](#).

[FN17]. See [infra notes 79-193 and accompanying text](#).

[FN18]. See [infra notes 208-14 and accompanying text](#).

[FN19]. See [infra notes 215-24 and accompanying text](#).

[FN20]. See [infra notes 225-93 and accompanying text](#).

[FN21]. [Kruger Clinic Orthopaedics, LLC v. Regence Blueshield, 138 P.3d 936, 937 \(Wash. 2006\)](#).

[FN22]. [Kruger, 138 P.3d at 937](#).

[FN23]. [Kruger Clinic Orthopaedics, LLC v. Regence Blueshield, 98 P.3d 66, 68 \(Wash. Ct. App. 2004\)](#), [rev'd, 138 P.3d 936 \(Wash. 2006\)](#).

[FN24]. [Kruger, 98 P.3d at 68](#).

[FN25]. [Id. at 68, 69](#).

[FN26]. [Id. at 69.](#)

[FN27]. [Kruger, 138 P.3d at 937-38.](#)

[FN28]. [Id.](#)

[FN29]. [Kruger, 98 P.3d at 68.](#)

[FN30]. [Kruger, 138 P.3d at 938.](#)

[FN31]. Respondent's Brief at 11-12, [Kruger Clinic Orthopaedics, LLC v. Regence Blueshield, 98 P.3d 66 \(Wash. Ct. App. 2004\)](#) (No. 51452-1-I).

[FN32]. See [Wash. Rev. Code Ann. § 48.43.055 \(West 1999 & Supp. 2007\)](#) (stating “[a] complaint that has been rejected by the health carrier may be submitted to nonbinding mediation”).

[FN33]. See [Wash. Admin. Code 284-43-322\(4\) \(1999\)](#) (stating “[c]arriers may not require alternative dispute resolution to the exclusion of judicial remedies; however, carriers may require alternative dispute resolution prior to judicial remedies”).

[FN34]. Respondent's Brief at 9, [Kruger, 98 P.3d 66 \(No. 51452-1-I\)](#).

[FN35]. [Id. at 9-10.](#)

[FN36]. McCarran-Ferguson Act, [15 U.S.C. § 1012\(b\) \(2000\)](#).

[FN37]. Respondent's Brief at 9-10, [Kruger, 98 P.3d 66 \(No. 51452-1-I\)](#).

[FN38]. [Kruger, 138 P.3d at 938.](#)

[FN39]. See Federal Arbitration Act, [9 U.S.C. § 2 \(2000\)](#) (stating “[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”).

[FN40]. Appellant's Opening Brief at 8, [Kruger Clinic Orthopaedics, LLC v. Regence Blueshield, 98 P.3d 66 \(Wash. Ct. App. 2004\)](#) (No. 51452-1-I).

[FN41]. Appellant's Opening Brief at 6, [Kruger, 98 P.3d 66 \(No. 51452-1-I\)](#).

[FN42]. [Id. at 4.](#)

[FN43]. [Kruger, 98 P.3d at 66-68.](#)

[FN44]. [Id. at 68.](#)

[\[FN45\]](#). [Id. at 66, 70.](#)

[\[FN46\]](#). [Id. at 70.](#)

[\[FN47\]](#). [Id. at 70-71.](#)

[\[FN48\]](#). [Id. at 71.](#)

[\[FN49\]](#). [Id.](#)

[\[FN50\]](#). [No. 30526-7-II125, 2005 WL 45551 \(Wash. Ct. App. Jan. 11, 2005\), rev'd, Kruger Clinic Orthopaedics, LLC v. Regence Blueshield, 138 P.3d 936 \(Wash. 2006\).](#)

[\[FN51\]](#). [Kruger, 138 P.3d at 938.](#)

[\[FN52\]](#). [Id.](#) The Tacoma-Blueshield agreement stated “[p]rior to seeking judicial remedy, any claims or disputes between the parties arising out of or relating to this agreement that cannot be resolved through the internal appeals process shall be submitted to arbitration.” [Id.](#)

[\[FN53\]](#). [Id.](#)

[\[FN54\]](#). [Tacoma Orthopaedic Surgeons, Inc. v. Regence Blueshield, No. 30526-7-II125, 2005 WL 45551, at *1 \(Wash. Ct. App. Jan. 11, 2005\), rev'd, Kruger Clinic Orthopaedics, LLC v. Regence Blueshield, 138 P.3d 936 \(Wash. 2006\).](#)

[\[FN55\]](#). [Id.](#)

[\[FN56\]](#). [Kruger, 138 P.3d at 938-39.](#)

[\[FN57\]](#). [Id. at 939.](#)

[\[FN58\]](#). [Tacoma Orthopaedic Surgeons, 2005 WL 45551, at *1.](#)

[\[FN59\]](#). [Kruger, 138 P.3d at 936, 939.](#)

[\[FN60\]](#). [Id. at 939.](#)

[\[FN61\]](#). [Id.](#)

[\[FN62\]](#). [Id. at 937.](#)

[\[FN63\]](#). [Id.](#)

[\[FN64\]](#). [Id.](#)

[\[FN65\]](#). [Id. at 940 \(quoting McCarran-Ferguson Act, 15 U.S.C. § 1012\(b\) \(2000\)\).](#)

[\[FN66\]](#). [Id.](#)

[FN67]. [Id. at 943.](#)

[FN68]. [508 U.S. 491 \(1993\).](#)

[FN69]. [Kruger, 138 P.3d at 940-41.](#)

[FN70]. [Id. at 941.](#)

[FN71]. [Id.](#)

[FN72]. [Id. at 938-43.](#)

[FN73]. [Id. at 937, 943.](#)

[FN74]. [Id. at 941.](#)

[FN75]. [Id. at 943.](#)

[FN76]. [Id.](#) The agreement between Tacoma and Regence stated “[p]rior to seeking a judicial remedy, any claims or disputes between the parties... shall be submitted to arbitration.” [Id. at 938.](#)

[FN77]. [Id. at 943.](#)

[FN78]. [Id.](#)

[FN79]. [SEC v. Nat'l Sec., Inc., 393 U.S. 453, 459-60 \(1969\).](#)

[FN80]. [McCarran-Ferguson Act, 15 U.S.C. § 1012\(a\) \(2000\).](#)

[FN81]. [15 U.S.C. § 1012\(b\).](#)

[FN82]. [440 U.S. 205 \(1979\).](#)

[FN83]. [Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 205 \(1979\).](#)

[FN84]. [Group Life, 440 U.S. at 205.](#)

[FN85]. [Id. at 207.](#)

[FN86]. [Id. at 209.](#)

[FN87]. [Royal Drug Co. v. Group Life & Health Ins. Co., 556 F.2d 1375, 1378 \(5th Cir. 1977\), aff'd, 440 U.S. 205 \(1979\).](#)

[FN88]. [Group Life, 440 U.S. at 209.](#)

[\[FN89\]](#). [Id. at 207.](#)

[\[FN90\]](#). [Id.](#)

[\[FN91\]](#). [Royal Drug Co. v. Group Life & Health Ins. Co., 415 F. Supp. 343, 351 \(W.D. Tex. 1976\), rev'd, 556 F.2d 1375 \(5th Cir. 1977\), aff'd, 440 U.S. 205 \(1979\).](#)

[\[FN92\]](#). [Royal Drug, 415 F. Supp. at 343, 348.](#)

[\[FN93\]](#). [393 U.S. 453 \(1969\).](#)

[\[FN94\]](#). [Royal Drug, 415 F. Supp. at 347 \(citing SEC v. Nat'l Sec., Inc., 393 U.S. 453, 460 \(1969\)\).](#)

[\[FN95\]](#). [Id.](#)

[\[FN96\]](#). [Id. at 348.](#)

[\[FN97\]](#). [Royal Drug, 556 F.2d at 1375, 1379.](#)

[\[FN98\]](#). [Id. at 1378.](#)

[\[FN99\]](#). [Id.](#)

[\[FN100\]](#). [Id. at 1386.](#)

[\[FN101\]](#). [Id.](#)

[\[FN102\]](#). [Group Life, 440 U.S. at 205.](#)

[\[FN103\]](#). [Id. at 205.](#)

[\[FN104\]](#). [Id. at 205, 220-21.](#)

[\[FN105\]](#). [Id. at 214.](#)

[\[FN106\]](#). [Id. at 216.](#)

[\[FN107\]](#). [Id. at 216, 217.](#)

[\[FN108\]](#). [SEC v. Nat'l Sec., Inc., 393 U.S. 453, 453 \(1969\).](#)

[\[FN109\]](#). [Nat'l Sec., 393 U.S. at 455.](#)

[\[FN110\]](#). [Id.](#)

[\[FN111\]](#). [SEC v. Nat'l Sec., Inc., 252 F. Supp. 623, 626 \(D. Ariz. 1966\), aff'd, 387 F.2d 25 \(9th Cir. 1967\), rev'd, 393 U.S. 453 \(1969\).](#)

[\[FN112\]](#). [Nat'l Sec., 252 F. Supp. at 626.](#)

[\[FN113\]](#). [SEC v. Nat'l Sec., Inc., 387 F.2d 25, 28 \(9th Cir. 1967\), rev'd, 393 U.S. 453 \(1969\).](#)

[\[FN114\]](#). [Nat'l Sec., 393 U.S. at 460.](#)

[\[FN115\]](#). [Nat'l Sec., 387 F.2d at 32.](#)

[\[FN116\]](#). [Nat'l Sec., 393 U.S. at 456-57.](#)

[\[FN117\]](#). [Id. at 457, 469.](#)

[\[FN118\]](#). [Id. at 454, 459.](#)

[\[FN119\]](#). [Id. at 459.](#)

[\[FN120\]](#). [Id. at 459-60.](#)

[\[FN121\]](#). [Id. at 460.](#)

[\[FN122\]](#). [Id. at 457, 460.](#)

[\[FN123\]](#). [458 U.S. 119 \(1982\).](#)

[\[FN124\]](#). [Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 \(1982\).](#)

[\[FN125\]](#). [Pireno, 458 U.S. at 119.](#)

[\[FN126\]](#). [Pireno v. N.Y. State Chiropractic Ass'n, 650 F.2d 387, 387 \(2d Cir. 1981\), aff'd sub nom. Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119 \(1982\).](#)

[\[FN127\]](#). [Pireno, 650 F.2d at 387-88.](#)

[\[FN128\]](#). [Pireno, 458 U.S. at 122-23.](#)

[\[FN129\]](#). [Pireno, 650 F.2d at 389.](#)

[\[FN130\]](#). [Id.](#)

[\[FN131\]](#). [Id.](#)

[\[FN132\]](#). [Id.](#)

[\[FN133\]](#). [Id. at 387, 389.](#)

[\[FN134\]](#). [Id. at 387, 390.](#)

[\[FN135\]](#). [Id. at 393, 395.](#)

[\[FN136\]](#). [Id. at 393.](#)

[\[FN137\]](#). [Id.](#)

[\[FN138\]](#). [Pireno, 458 U.S. at 125-26.](#)

[\[FN139\]](#). [Id. at 119.](#)

[\[FN140\]](#). [Id. at 119, 120.](#)

[\[FN141\]](#). [Id. at 120.](#)

[\[FN142\]](#). [Id.](#)

[\[FN143\]](#). [Id.](#)

[\[FN144\]](#). [Id. at 132.](#)

[\[FN145\]](#). [Id. at 134.](#)

[\[FN146\]](#). [508 U.S. 491 \(1993\).](#)

[\[FN147\]](#). [U.S. Dep't of Treasury v. Fabe, 508 U.S. 491, 508 \(1993\).](#)

[\[FN148\]](#). [Fabe, 508 U.S. at 491.](#)

[\[FN149\]](#). [Id.](#)

[\[FN150\]](#). [Id.](#) The Ohio statute “ranks governmental claims behind (1) administrative expenses, (2) specified wage claims, (3) policyholders' claims, and (4) general creditors' claims.” [Id.](#)

[\[FN151\]](#). [Id.](#)

[\[FN152\]](#). [Fabe v. U.S. Dep't of Treasury, 939 F.2d 341, 343 \(6th Cir. 1991\), aff'd in part, rev'd in part, 508 U.S. 491 \(1993\).](#)

[\[FN153\]](#). [Fabe, 508 U.S. at 491.](#)

[\[FN154\]](#). [Fabe, 939 F.2d at 343.](#)

[\[FN155\]](#). [Id. at 350-51, 352.](#)

[\[FN156\]](#). [Id. at 352.](#)

[FN157]. [Id. at 351.](#)

[FN158]. [Fabe, 508 U.S. at 491.](#)

[FN159]. [Id. at 491, 501.](#)

[FN160]. [Id. at 491, 499-500.](#)

[FN161]. [Id. at 501](#) (quoting [SEC v. Nat'l Sec., Inc., 393 U.S. 453, 460 \(1969\)](#)).

[FN162]. [Id. at 504.](#)

[FN163]. [Id.](#)

[FN164]. [Id. at 510, 512](#) (Kennedy, J., dissenting).

[FN165]. [Id. at 512](#) (Kennedy, J., dissenting).

[FN166]. [Id. at 512-13](#) (Kennedy, J., dissenting).

[FN167]. [Id. at 512](#) (Kennedy, J., dissenting).

[FN168]. [Id. at 512-13](#) (Kennedy, J., dissenting).

[FN169]. [Id. at 513, 517](#) (Kennedy, J., dissenting).

[FN170]. [517 U.S. 681 \(1996\).](#)

[FN171]. [Doctor's Assocs. v. Casarotto, 517 U.S. 681, 687 \(1996\).](#)

[FN172]. [Casarotto v. Lombardi, 886 P.2d 931, 931 \(Mont. 1994\)](#), rev'd sub nom. [Doctor's Assocs. v. Casarotto, 517 U.S. 681 \(1996\)](#).

[FN173]. [Casarotto, 517 U.S. at 683.](#)

[FN174]. [Id.](#)

[FN175]. [Id.](#)

[FN176]. [Id.](#)

[FN177]. [Lombardi, 886 P.2d at 932.](#)

[FN178]. [Id. at 933.](#)

[FN179]. [Id.](#)

[FN180]. [Casarotto, 517 U.S. at 683.](#)

[FN181]. [Lombardi, 886 P.2d at 933.](#)

[FN182]. [Id.](#)

[FN183]. [Id.](#)

[FN184]. [Id.](#)

[FN185]. [Casarotto, 517 U.S. at 684.](#)

[FN186]. [Id. at 683, 684.](#)

[FN187]. [Lombardi, 886 P.2d at 931.](#)

[FN188]. [Id. at 938, 939.](#)

[FN189]. [Id. at 939.](#)

[FN190]. [Casarotto, 517 U.S. at 681.](#)

[FN191]. [Id. at 681, 687, 689.](#)

[FN192]. [Id. at 681, 687.](#)

[FN193]. [Id. at 687.](#)

[FN194]. [138 P.3d 936 \(Wash. 2006\).](#)

[FN195]. [Kruger Clinic Orthopaedics, LLC v. Regence Blueshield, 138 P.3d 936, 936, 937 \(Wash. 2006\).](#)

[FN196]. [Kruger, 138 P.3d at 937.](#)

[FN197]. [Id. at 937-38.](#)

[FN198]. [Id. at 937.](#) The agreement between Kruger and Blueshield stated “[i]n the event that any problem or dispute concerning the terms of this agreement is not satisfactorily resolved, the Company and Provider agree to arbitrate such problem or dispute.” [Id. at 938.](#) The agreement further stated “[t]he results of the arbitration shall be binding on both parties, and... [n]either party subsequently shall commence an action to litigate the dispute.” [Id.](#)

[FN199]. [Id. at 937, 938.](#) The agreement between Tacoma and Blueshield provided “[p]rior to seeking judicial remedy, any claims or disputes between the parties arising out of or relating to this agreement that cannot be resolved through the internal appeals process shall be submitted to arbitration in accordance with the Commercial Arbitration rules and regulations of the American Arbitration Association then in effect.” [Id. at 938.](#)

[FN200]. [Id. at 939-41.](#)

[FN201]. McCarran-Ferguson Act, [15 U.S.C. § 1012\(b\) \(2000\)](#). The McCarran-Ferguson Act states in part, “[n]o 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\(b\)](#).

[FN202]. [Kruger, 138 P.3d at 943](#).

[FN203]. Id.

[FN204]. Id.

[FN205]. See infra notes 208-14 and accompanying text.

[FN206]. See infra notes 215-24 and accompanying text.

[FN207]. See infra notes 225-93 and accompanying text.

[FN208]. See infra notes 209-14 and accompanying text.

[FN209]. [Kruger, 138 P.3d at 938](#).

[FN210]. Id.

[FN211]. [Wash. Rev. Code Ann. § 48.43.055 \(West 1999 & Supp. 2007\)](#).

[FN212]. [Wash. Admin. Code 284-43-322\(4\) \(1999\)](#).

[FN213]. Compare [Kruger, 138 P.3d at 938](#) (demonstrating the health care provider agreement between Kruger and Blueshield compelled binding arbitration while prohibiting either party from subsequently litigating the dispute), with [Wash. Rev. Code Ann. § 48.43.055](#) (stating provider complaints may be submitted to nonbinding mediation), and [Wash. Admin. Code 284-43-322\(4\)](#) (explaining insurance carriers are prohibited from requiring ADR to the exclusion of judicial remedies, although carriers may require ADR prior to judicial remedies).

[FN214]. See supra notes 208-13 and accompanying text.

[FN215]. See infra notes 216-24 and accompanying text.

[FN216]. [Kruger, 138 P.3d at 938](#).

[FN217]. Id. at 943.

[FN218]. See infra notes 219-24 and accompanying text.

[FN219]. [Kruger, 138 P.3d at 938](#).

[FN220]. [Wash. Rev. Code Ann. § 48.43.055](#).

[FN221]. [Wash. Admin. Code 284-43-322\(4\)](#).

[FN222]. Compare [Wash. Rev. Code Ann. § 48.43.055](#) (stating provider complaints may be submitted to nonbinding mediation), with [Wash. Admin. Code 284-43-322\(4\)](#) (explaining insurance carriers are prohibited from requiring ADR to the exclusion of judicial remedies, although carriers may require ADR prior to judicial remedies), and [Kruger, 138 P.3d at 938](#) (citing the arbitration provision agreed to by Tacoma and Blueshield, which stated “[p]rior to seeking judicial remedy, any claims or disputes between the parties arising out of or relating to this agreement that cannot be resolved through the internal appeals process shall be submitted to arbitration” (emphasis added)).

[FN223]. See supra notes 215-22 and accompanying text.

[FN224]. See supra notes 215-23 and accompanying text.

[FN225]. See infra notes 226-93 and accompanying text.

[FN226]. See infra notes 258-78 and accompanying text.

[FN227]. See infra notes 228-78 and accompanying text.

[FN228]. [Kruger, 98 P.3d at 70.](#)

[FN229]. [Kruger, 138 P.3d at 940.](#)

[FN230]. McCarran-Ferguson Act, [15 U.S.C. § 1012\(a\) \(2000\).](#)

[FN231]. See infra notes 234-57 and accompanying text.

[FN232]. See infra notes 258-78 and accompanying text.

[FN233]. [508 U.S. 491 \(1993\).](#)

[FN234]. See infra notes 235-57 and accompanying text.

[FN235]. [Kruger, 138 P.3d at 940.](#)

[FN236]. [Id. at 941.](#)

[FN237]. [Id.](#)

[FN238]. [Id.](#)

[FN239]. [Id. at 937, 941.](#)

[FN240]. [U.S. Dep’t of Treasury v. Fabe, 508 U.S. 491, 491 \(1993\).](#)

[FN241]. [Fabe, 508 U.S. at 491, 504.](#)

[FN242]. [Id. at 508.](#)

[FN243]. [Id. at 512](#) (Kennedy, J., dissenting).

[FN244]. [Id. at 519](#) (Kennedy, J., dissenting).

[FN245]. Compare [Fabe, 508 U.S. at 491](#) (citing [Ohio Rev. Code Ann. § 3903.42 \(1989\)](#), which gives priority to policyholder claims above governmental claims during a liquidation proceeding involving an insolvent insurance company), with [Wash. Rev. Code Ann. § 48.43.055 \(West 1999 & Supp. 2007\)](#) (stating health care provider complaints may be submitted to nonbinding mediation, while complaints by policyholders shall be governed by a separate section of the statute), and [Wash. Admin. Code 284-43-322\(4\) \(1999\)](#) (explaining insurance carriers are prohibited from requiring ADR to the exclusion of judicial remedies, although carriers may require ADR prior to judicial remedies).

[FN246]. Compare [Fabe, 508 U.S. at 494](#) (stating the Ohio statute protects the interests of “insureds, claimants, creditors, and the public generally”), with [Wash. Rev. Code Ann. § 48.43.055](#) (stating the RCW is specifically for resolving health care provider complaints, not complaints by policyholders).

[FN247]. See supra notes 234-46 and accompanying text.

[FN248]. [Kruger, 138 P.3d at 941](#).

[FN249]. *Id.*

[FN250]. [Fabe, 508 U.S. at 491](#).

[FN251]. Compare [Ohio Rev. Code Ann. § 3903.02\(D\)](#) (West 2005) (stating the purpose of the statute was to protect the interests of insureds), with [Kruger, 138 P.3d at 941](#) (explaining the RCW and the WAC discussed the resolution of disputes between insurance companies and health care providers).

[FN252]. See supra notes 240-51 and accompanying text.

[FN253]. See supra notes 235-52 and accompanying text.

[FN254]. [Kruger, 138 P.3d at 940](#).

[FN255]. [Id. at 941](#).

[FN256]. See supra notes 234-47 and accompanying text.

[FN257]. See supra notes 234-52 and accompanying text.

[FN258]. See infra notes 261-78 and accompanying text.

[FN259]. [Kruger, 138 P.3d at 941](#).

[FN260]. *Id.*

[FN261]. *Id.* at 937.

[FN262]. *Id.* at 938.

[FN263]. [440 U.S. 205 \(1979\)](#).

[FN264]. [Kruger, 98 P.3d at 70](#).

[FN265]. [Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 205, 214 \(1979\)](#).

[FN266]. [Group Life, 440 U.S. at 214](#).

[FN267]. [Id.](#)

[FN268]. [Id. at 210-11](#).

[FN269]. [Id. at 212](#).

[FN270]. [Id. at 214](#).

[FN271]. [Id. at 232-33](#)

[FN272]. [Id. at 205](#).

[FN273]. [Compare Group Life, 440 U.S. at 209](#) (stating Blueshield's policyholders would be allowed to purchase prescription drugs for two dollars, and the pharmacy could obtain a reimbursement from [Blueshield for the remainder of the cost](#)), with [Kruger, 98 P.3d at 68](#) (stating Blueshield contracted with health care providers that would provide medical services for Blueshield's insureds; the health care providers would then receive compensation for services rendered and for medical devices used during surgery).

[FN274]. Compare [Kruger, 138 P.3d at 941](#) (stating the contract between Kruger and Blueshield was closely related to contracts between an insurance carrier and its insureds), with [Group Life, 440 U.S. at 205](#) (stating arrangements for the sale of goods and services that did not involve spreading of risk do not involve the business of insurance, and such arrangements are not exempt from federal law).

[FN275]. [Kruger, 138 P.3d at 941](#).

[FN276]. See supra notes 261-75 and accompanying text.

[FN277]. See supra notes 261-75 and accompanying text.

[FN278]. See supra notes 261-75 and accompanying text.

[FN279]. [517 U.S. 681 \(1996\)](#).

[FN280]. See infra notes 281-93 and accompanying text.

[FN281]. [Kruger, 138 P.3d at 937](#).

[FN282]. [Id. at 943](#).

[\[FN283\]](#). [Id. at 939.](#)

[\[FN284\]](#). [Doctor's Assocs. v. Casarotto, 517 U.S. 681, 687 \(1996\).](#)

[\[FN285\]](#). [Casarotto, 517 U.S. at 687.](#)

[\[FN286\]](#). [Id. at 686-87.](#)

[\[FN287\]](#). [Id. at 687.](#)

[\[FN288\]](#). Compare [Casarotto, 517 U.S. at 687](#) (stating applying contract defenses such as unconscionability and fraud to invalidate arbitration provisions is not contrary to the FAA since such defenses apply to all contracts generally), with [Kruger, 138 P.3d at 943](#) (stating the arbitration provisions in Kruger and Tacoma violate the RCW and the WAC), and [Kruger, 98 P.3d at 72](#) (concluding WAC applies solely to arbitration and not to contracts generally).

[\[FN289\]](#). [Casarotto, 517 U.S. at 686.](#)

[\[FN290\]](#). [Id. at 688.](#)

[\[FN291\]](#). See supra notes 288-90 and accompanying text.

[\[FN292\]](#). [Kruger, 138 P.3d at 943.](#)

[\[FN293\]](#). See supra notes 280-92 and accompanying text.

[\[FN294\]](#). [138 P.3d 936 \(Wash. 2006\).](#)

[\[FN295\]](#). [Kruger Clinic Orthopaedics, LLC v. Regence Blueshield, 138 P.3d 936, 936, 943 \(Wash. 2006\).](#)

[\[FN296\]](#). [Kruger, 138 P.3d at 943.](#)

[\[FN297\]](#). [Id.](#)

[\[FN298\]](#). See supra notes 208-14 and accompanying text.

[\[FN299\]](#). See supra notes 215-24 and accompanying text.

[\[FN300\]](#). See supra notes 225-93 and accompanying text.

[\[FN301\]](#). See supra notes 225-93 and accompanying text.