

Oklahoma Law Review

Volume 60 | Number 4

2007

Arbitration of Nursing Home Claims: Oklahoma Goes Its Own Way

Stanley A. Leasure

Missouri State University, stanleasure@missouristate.edu

Follow this and additional works at: <https://digitalcommons.law.ou.edu/olr>



Part of the [Contracts Commons](#), and the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Stanley A. Leasure, *Arbitration of Nursing Home Claims: Oklahoma Goes Its Own Way*, 60 OKLA. L. REV. 737 (2007),
<https://digitalcommons.law.ou.edu/olr/vol60/iss4/3>

This Article is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in Oklahoma Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact Law-LibraryDigitalCommons@ou.edu.

ARBITRATION OF NURSING HOME CLAIMS: OKLAHOMA GOES ITS OWN WAY

STANLEY A. LEASURE*

I. Introduction

Rejecting the majority rule, the Oklahoma Supreme Court in *Bruner v. Timberlane Manor Ltd. Partnership* unanimously ruled that provisions of Oklahoma law precluding enforcement of an arbitration clause in a nursing home admission contract were not preempted by the Federal Arbitration Act (FAA).¹ In a decision which has attracted national attention, the court concluded that the distribution of Medicare and Medicaid funds were not indicia of interstate commerce, triggering application of the FAA.² This decision of the Oklahoma Supreme Court is contrary to holdings of the supreme courts of Alabama, Mississippi, and Texas, all of which were specifically rejected in *Bruner*.³

Bruner represents a significant limitation on the applicability of the FAA, raising serious issues regarding the implementation of that legislation's purposes and benefits. This article examines the Oklahoma Supreme Court's opinion in *Bruner* and assesses the court's legal analysis leading to its conclusion that the FAA was not applicable and therefore not preemptive of Oklahoma's anti-arbitration statute. Preparatory to consideration of *Bruner*'s application of precedent from the United States Supreme Court and *Bruner*'s rejection of decisions by the supreme courts of three sister states, a review of

* Assistant Professor of Business Law, Missouri State University; J.D. University of Tulsa College of Law, 1980; member of the Oklahoma and Arkansas State Bar Associations.

1. *Bruner v. Timberlane Manor Ltd. P'ship*, 2006 OK 90, 155 P.3d 16. Section 2 of the FAA makes an arbitral provision in a written agreement "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Federal Arbitration Act § 2, 9 U.S.C. § 2 (2000). State law making such arbitration agreements unenforceable is deemed preempted by the FAA in cases in which interstate commerce is affected. *See infra* text accompanying notes 87-89.

2. *See Bruner*, 2006 OK 90, 155 P.3d 16; *see also* Plaintiffs' Motion for Reconsideration, or in the Alternative, Motion to Assess Arbitration Fees at 6-7, *Owens v. Nexion Health at Gilmer, Inc.*, No. 2:06-CV-519 (E.D. Tex. Apr. 6, 2007), 2007 WL 1238431; MICHAEL S. REEVES, *ELDERCARE & NURSING HOME LITIGATION IN GEORGIA WITH FORMS* § 3-5 (2007); William M. Howard, Annotation, *When Does Contract Evidence Transaction Involving Interstate Commerce Within the Meaning of Federal Arbitration Act (FAA)—Service Contracts*, 11 A.L.R. FED. 2D 233 (2006); *Oklahoma High Court: Care Homes Can't Impose Arbitration Agreements*, *ANDREWS HEALTH L. LITIG. REP.*, Jan. 2007, at 9; Lance K. Tanaka, *Determining Contract Validity and Arbitrability*, *COLO. LAW.*, Apr. 2007, at 15, 20.

3. *Bruner*, ¶ 34, 155 P.3d at 29.

the history of the relationship between the FAA and preemption under the Supremacy Clause will be presented. Finally, this article concludes with thoughts regarding the potentially far reaching effects of this decision, perhaps requiring resolution by the United States Supreme Court.

II. Bruner v. Timberlane Manor Ltd. Partnership

On June 22, 2004, Leola Bruner was admitted to the Grace Living Center (GLC); on July 17th she was hospitalized; and on August 31st she died.⁴ Detra Bruner, Mrs. Bruner's daughter filed a wrongful death suit against GLC seeking compensatory and punitive damages alleging negligence and violation of the Oklahoma Nursing Home Act's Patient Bill of Rights.⁵ Mrs. Bruner's admissions contract, however, contained an arbitration provision requiring disputes be resolved by binding arbitration.⁶

In response, the nursing home moved for the dismissal of the case or, alternatively, to compel arbitration and stay the proceedings under the FAA.⁷ The nursing home claimed that the FAA operated to preempt and displace Oklahoma's anti-arbitration statute.⁸ The linchpin of the defense argument was that the nursing home admission contract involved or affected interstate commerce because the nursing home: received Medicare payments originating outside Oklahoma; conformed to federal Medicare and Medicaid licensing

4. *Id.* ¶ 2, 155 P.3d at 19.

5. *Id.* ¶ 3, 155 P.3d at 19.

6. *Id.* ¶ 4 n.1, 155 P.3d at 19 n.1. The arbitration provision read:

NOTICE: BY SIGNING THIS AGREEMENT THE RESIDENT AGREES TO HAVE ANY RESIDENT/GLC [GRACE LIVING CENTER] DISPUTE DECIDED BY NEUTRAL BINDING ARBITRATION AND WAIVES ANY RIGHT TO TRIAL IN A COURT OF LAW OR EQUITY; PROVIDED; HOWEVER, THAT THE PARTIES MAY RESOLVE ANY RESIDENT/GLC DISPUTE BY NEGOTIATION BY AND BETWEEN THEMSELVES OR BY USE OF AN AGREED UPON THIRD PARTY MEDIATOR.

Id.

7. *Id.* ¶ 4, 155 P.3d at 19.

8. *Id.* ¶ 5, 155 P.3d at 19-20. The FAA provides:

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.

Federal Arbitration Act § 2, 9 U.S.C. § 2 (2000) (emphasis added); *see also* 63 OKLA. STAT. § 1-1939(D)-(E) (2001) (setting forth provisions regarding the waiver of rights of nursing home residents in Oklahoma).

rules and regulations, including inspections by out-of-state investigators; purchased supplies from out-of-state vendors; and used instruments of interstate commerce such as telephone lines, the internet, airlines, and the postal service.⁹ As such, according to the nursing home's argument, the FAA¹⁰ and the Oklahoma Uniform Arbitration Act¹¹ both govern the contract between the parties and the FAA is preemptive.¹² The trial court concluded that the care at issue did not involve interstate commerce and that the anti-arbitration statute in the Oklahoma Nursing Home Care Act was therefore not preempted.¹³ The court determined that the Oklahoma Nursing Home Care Act¹⁴ applied, making unenforceable the arbitration provision of the parties' agreement.¹⁵ The defendant's appeal came to the Oklahoma Supreme Court from this interlocutory order.¹⁶

The Oklahoma Supreme Court identified the following issues: (1) whether the nursing home care of Leola Bruner involved interstate commerce; (2) whether a strong federal interest is to be presumed when federal funds are utilized; (3) whether Oklahoma recognizes a strong public policy favoring arbitration agreements; and (4) whether the trial court erred in finding the arbitral provisions unenforceable under the Oklahoma Nursing Home Care Act.¹⁷

The court observed that the purpose of the adoption of the FAA in 1925 was to make arbitration agreements as enforceable as other contracts¹⁸ and that its primary objective is to compel the enforcement of arbitral agreements pertinent to transactions involving interstate commerce.¹⁹ Acknowledging that

9. *Bruner*, ¶ 5, 155 P.3d at 20.

10. 9 U.S.C. §§ 1-16.

11. 15 OKLA. STAT. §§ 801-818.

12. *Bruner*, ¶ 5, 155 P.3d at 20.

13. *Id.* ¶ 6, 155 P.3d at 20.

14. 63 OKLA. STAT. §§ 1-1901 to -1951.

15. *Bruner*, ¶ 6, 155 P.3d at 20; *see also* 63 OKLA. STAT. § 1-1939(D)-(E).

16. *Bruner*, ¶ 6, 155 P.3d at 20. The interlocutory order was appealable pursuant to 12 OKLA. STAT. § 1879 (Supp. 2005) and OKLA. SUP. CT. R. 1.60(i).

17. *Bruner*, ¶ 7, 155 P.3d at 20. The plaintiff did not controvert the evidence submitted by the defendant in support of defendant's argument that the care involved interstate commerce under the FAA. Accordingly, the court ruled that the controversy presented questions of law to be reviewed under a *de novo* standard, without deference to the trial court. *Id.* ¶ 9, 155 P.3d at 20.

18. *Id.* ¶ 11, 155 P.3d at 21 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404-05 nn.12-13 (1967)).

19. *Id.* (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985)). The "liberal federal policy favoring arbitration agreements" declared in the FAA was also recognized, as was the creation of "a body of federal substantive law of arbitrability applicable to any arbitration agreement within the coverage of the Act." *Id.* ¶ 12, 155 P.3d at 21 (citing

the FAA has been construed to apply to all arbitration agreements entered within the “full reach of the Commerce Clause,”²⁰ the court examined United States Supreme Court precedent dealing with the applicability of the FAA, including, *Citizens Bank v. Alafabco, Inc.*,²¹ *Bernhardt v. Polygraphic Co. of America*,²² and *Allied-Bruce Terminix Cos. v. Dobson*.²³

In its analysis of *Allied-Bruce Terminix*, the Oklahoma Supreme Court pointed out that the parties in that case did not contest the involvement of interstate commerce.²⁴ In *Allied-Bruce Terminix*, the United States Supreme Court found the termite treatment in question involved interstate commerce because Allied-Bruce and Terminix were both multi-state businesses and the materials used came from outside Allied-Bruce’s home state.²⁵ The Oklahoma Supreme Court attributed the adoption of the “commerce in fact” test by the United States Supreme Court in *Allied-Bruce Terminix* to the Court’s realization that Congress, in passing the FAA, was addressing the need for economical, expeditious, and flexible processes of dispute resolution while, at the same time, allowing states to enact laws to protect consumers from unfair pressure to engage in arbitration.²⁶

In *Citizens Bank*, the United States Supreme Court found “involving commerce” to be the functional equivalent of “affecting commerce,” aligning FAA interstate commerce principles with other federal legislation under the

Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)) (internal quotation marks omitted).

20. *Bruner*, ¶ 14, 155 P.3d at 22 (citing U.S. CONST. art. I, § 8, cl. 3; *Perry v. Thomas*, 482 U.S. 483, 491 (1987)).

21. 539 U.S. 52 (2003) (per curiam); see also *infra* Part IV.B.

22. 350 U.S. 198 (1956). The Oklahoma Supreme Court characterized the holding in *Bernhardt* as standing for the proposition that, at least with respect to an employment contract, interstate commerce was not involved without a showing that while performing duties under the contract the employee was working in commerce, was producing goods for commerce, or was engaging in an activity that affected commerce. *Bruner*, ¶ 15, 155 P.3d at 22-23; see also *infra* notes 136-39 and accompanying text.

23. 513 U.S. 265 (1995); see also *infra* Part IV.A.

24. *Bruner*, ¶ 17, 155 P.3d at 23.

25. *Id.*

26. *Id.* ¶ 18, 155 P.3d at 23 (“States may regulate contracts, including arbitration clauses, under general contract principles. . . . What states may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal ‘footing,’ directly contrary to the Act’s language and Congress’ intent.” (quoting *Allied-Bruce Terminix*, 513 U.S. 265, 281 (1995)) (alteration in original)).

broadest permissible exercise of the Commerce Clause power.²⁷ The issue in *Citizens Bank* was whether a debt restructuring agreement executed in Alabama between an Alabama bank and an Alabama construction company satisfied the “involving commerce” test, thereby triggering the FAA.²⁸ The United States Supreme Court concluded that it did because the commercial loans were the underlying economic activity which the construction company used in its business throughout the southeastern states, the restructured debt was secured by an inventory of goods assembled from out-of-state parts and raw materials, and commercial lending, as a general practice, has a broad impact on the national economy which Congress may regulate pursuant to Commerce Clause power.²⁹

According to the *Bruner* court, even under the FAA, such agreements are to be enforced according to their terms which may limit the issues to be arbitrated and may specify the applicable arbitral rules.³⁰ Further, the court found that the FAA may require the party opposing arbitration to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights in issue, which can be determined by either a review of the text and legislative history of the statute in question or by finding any inherent conflict between arbitration and the statute’s underlying purposes.³¹

The Oklahoma Supreme Court also examined the Oklahoma Uniform Arbitration Act (OUAA),³² Oklahoma’s counterpart to the FAA.³³ According

27. *Id.* ¶ 19, 155 P.3d at 23 (citing *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (per curiam)).

28. *Id.*; see also *Citizens Bank*, 539 U.S. at 53.

29. *Bruner*, ¶ 20, 155 P.3d at 24 (citing *Citizens Bank*, 539 U.S. 52). The Court in *Citizens Bank* instructed: “No elaborate explanation is needed to make evident the broad impact of commercial lending on the national economy or Congress’ power to regulate that activity pursuant to the Commerce Clause.” *Citizens Bank*, 539 U.S. at 58 (“[B]anking and related financial activities are of profound local concern. . . . Nonetheless, it does not follow that these same activities lack important interstate attributes.” (quoting *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27 (1980)) (alteration in original)).

30. *Bruner*, ¶ 21, 155 P.3d at 24-25 (“Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward. By permitting the courts to ‘rigorously enforce’ such agreements according to their terms, we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind by [sic] the FAA.” (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989)) (internal citation omitted) (alteration in original)).

31. *Bruner*, ¶ 22, 155 P.3d at 25 (citing *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226-27 (1987)).

32. 12 OKLA. STAT. § 1857(A) (Supp. 2005) (“An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in

to the court, the OUAA demonstrates the “clear expression of Oklahoma’s policy favoring arbitration agreements.”³⁴ However, the court pointed out a conflict between section 1-1939 of the Oklahoma Nursing Home Care Act and this provision of the OUAA, making void any purported waiver of the right to commence an action against a nursing home and representing a “clear rejection of arbitration agreements between nursing homes and their residents.”³⁵ Applying the principle that the specific governs the general, the court ruled that the more specific Oklahoma Nursing Home Care Act, addressing the right to commence an action with a jury trial, governed over the more general statutory provision favoring arbitration.³⁶

The Oklahoma high court also considered the myriad federal and state nursing home regulations particularly pertinent. Historically, health and safety regulation was a local issue.³⁷ The receipt of federal funds, however, came with strings attached, such as requiring state regulations to conform to federal regulations.³⁸ Pointing out that the Medicaid program in Oklahoma is governed by both federal law and by the Oklahoma Nursing Home Care Act

equity for the revocation of a contract.”). Also, the Oklahoma Nursing Home Care Act provides that “[a]ny waiver by a resident or his legal representative of the right to commence an action under this section, whether oral or in writing, shall be null and void, and without legal force or effect.” 63 OKLA. STAT. § 1-1939(D) (2001). Additionally, the Oklahoma Nursing Home Care Act provides that “[a]ny party to an action brought under this section shall be entitled to a trial by jury and any waiver of the right to a trial by jury, whether oral or in writing, prior to the commencement of an action, shall be null and void, and without legal force or effect.” *Id.* § 1-1939(E).

33. *Bruner*, ¶ 23, 155 P.3d at 25.

34. *Id.* (citing *Rollings v. Thermodyne Indust., Inc.*, 1996 OK 6, 910 P.2d 1030; *Voss v. City of Oklahoma City*, 1980 OK 148, 618 P.2d 925).

35. *Id.* ¶ 24, 155 P.3d at 25.

36. *Id.* ¶ 25, 155 P.3d at 25 (citing *Hall v. Globe Life & Accident Ins. Co. of Okla.*, 1999 OK 89, 998 P.2d 603; *Trimble v. City of Moore*, 1991 OK 97, 818 P.2d 889).

37. *Id.* ¶ 26, 155 P.3d at 25 (citing *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985)).

38. *Id.*, ¶ 26, 155 P.3d at 25-26 (“Medicaid is a cooperative federal-state program through which the Federal Government provides financial assistance to States so that they may furnish medical care to needy individuals. [42 U.S.C.] § 1396. Although participation in the program is voluntary, the participating States must comply with certain requirements imposed by the Act and regulations promulgated by the Secretary of Health and Human Services (Secretary). To qualify for federal assistance, a State must submit to the Secretary and have approved a ‘plan for medical assistance,’ § 1396a(a), that contains a comprehensive statement describing the nature and scope of the State’s Medicaid program. 42 CFR § 430.10 (1989).” (quoting *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 502 (1990)) (alteration in original)).

(NHCA),³⁹ the court catalogued a number of the federal regulations applicable to nursing homes.⁴⁰

The nursing home pointed to the applicability of the OUAA as well as the FAA, both of which strongly favor arbitration.⁴¹ The nursing home argued that the FAA preempts any state law hostile to arbitration and that its evidence met the “commerce in fact” test of *Allied-Bruce Terminix*.⁴² Relying on *Summit Health, Ltd. v. Pinhas*,⁴³ *McElhinney v. Medical Protective Co.*,⁴⁴ and *BCB Anesthesia Care, Ltd. v. Passavant Memorial Area Hospital Ass’n*,⁴⁵ as well as state court decisions from Alabama, Mississippi, and Texas; the nursing home urged that the indicia of interstate commerce include, perhaps most importantly, the receipt of Medicare payments.⁴⁶ The court was not persuaded.

39. *Id.* ¶ 28, 155 P.3d at 27; see also 63 OKLA. STAT. §§ 1-1901 to -1964 (2001). The Oklahoma NHCA likewise establishes a comprehensive regulatory framework, from a state perspective, including licensure and certification, *id.* § 1-1904; rights and responsibilities of residents, *id.* § 1-1918; a Patients’ Bill of Rights, *id.* § 1-1918(B); criminalization of violation of the Patients’ Bill of Rights with private causes of action with respect thereto, *id.* § 1-1918(F)-(G); requirement of written contracts between residents and nursing homes on a general form prescribed by the Department of Health, *id.* § 1-1921; liability upon the nursing home owner and licensed administrator for intentional or negligent injury to a resident and the declaration that a resident’s waiver of the right to commence an action against the owner or administrator or to have a jury trial of their own be null, void and without legal effect, *id.* § 1-1939.

40. *Bruner*, ¶ 27, 155 P.3d at 26. The court indicated that the most pertinent of these required

the facility to be licensed under applicable State and local law, to provide services in compliance with all applicable Federal, State, and local laws, regulations, and codes, and with accepted professional standards and principles that apply to professionals providing services within such a facility, and to provide each resident with a written statement of legal rights, including the right to file a complaint with the State survey and certification agency concerning resident abuse and neglect and the right to have the names and addresses of all pertinent state client advocacy groups such as the State survey and certification agency, the State licensure offices, the State ombudsman program, the protection and advocacy network, and the Medicaid fraud unit. Consistent with the federal statute permitting the states to devise a fair mechanism for hearing appeals on transfers and discharges of residents from nursing facilities, the appeal procedure regulations provide that a resident has a right to agency hearings and judicial review as allowed by law.

Id. (internal citations omitted).

41. *Id.* ¶ 30, 155 P.3d at 28.

42. *Id.*

43. 500 U.S. 322 (1991).

44. 549 F. Supp. 121 (E.D. Ky. 1982).

45. 36 F.3d 664 (7th Cir. 1994).

46. *Bruner*, ¶ 31, 155 P.3d at 28.

The *Bruner* court distinguished *Summit Health* on the basis that the *Summit Health* court only mentioned Medicare payments as an allegation in the complaint, and therefore its decision that Summit was engaged in interstate commerce was not based upon Medicare payments.⁴⁷ Additionally, the Oklahoma Supreme Court found *BCB Anesthesia Care* “inconsequential.”⁴⁸ In *BCB Anesthesia Care*, a group of nurse anesthetists filed their complaint under the Sherman Act, claiming an illegal restriction of their right to practice by an Illinois hospital.⁴⁹ The Seventh Circuit concluded that the receipt by the hospital of Medicare and Medicaid payments was sufficient to allege Sherman Act jurisdiction, but insufficient to state a claim under the Sherman Act itself.⁵⁰

The nursing home cited *McGuffey Health & Rehabilitation Center v. Gibson ex rel. Jackson*⁵¹ and *Owens v. Coosa Valley Health Care, Inc.*⁵² as standing for the proposition that receipt of Medicare establishes the connection between health care and interstate commerce relative to nursing home operations.⁵³ *McGuffey*, which relied on *Summit Health, Ltd. v. Pinhas*,⁵⁴ *BCB Anesthesia Care*,⁵⁵ and *McElhinney v. Medical Protective Co.*,⁵⁶ held that Medicare funds moving across state lines established the interstate commerce connection.⁵⁷ The Oklahoma Supreme Court rejected the argument that these cases support *McGuffey* noting that *Owens* followed *McGuffey* even though there was no proof of Medicare payments.⁵⁸ The Oklahoma Supreme Court also stated that the *Owens* court erroneously concluded “that any doubt as to whether providing nursing home services involved interstate commerce is put to rest by the fact that the transaction is unquestionably economic in nature under *Citizens Bank* and that purely

47. *Id.* ¶ 32, 155 P.3d at 28 (citing *Summit Health*, 500 U.S. at 327-28).

48. *Id.* ¶ 33, 155 P.3d at 29.

49. *BCB Anesthesia Care*, 36 F.3d at 664-65.

50. *Id.* at 666 (“Although we hesitate to say that [a staffing decision at one hospital] . . . can never state an antitrust claim, we believe that it is incumbent on the plaintiff to plead some additional facts from which it can be inferred that the case falls within the ambit of the Sherman Act. Before we enlist this court in the micromanagement of the staffing arrangement at Passavant under the aegis of the antitrust laws, we need better reasons than the plaintiffs have given us.” (citations omitted) (internal quotation marks omitted) (alterations in original)); *see also Bruner*, ¶ 32, 155 P.3d at 28.

51. 864 So. 2d 1061 (Ala. 2003); *see also infra* notes 163-69 and accompanying text.

52. 890 So. 2d 983 (Ala. 2004).

53. *Bruner*, ¶ 34, 155 P.3d at 29.

54. 500 U.S. 322 (1991).

55. 36 F.3d 664.

56. 549 F. Supp. 121 (E.D. Ky. 1982).

57. *McGuffey*, 864 So. 2d at 1063.

58. *Bruner*, ¶ 34, 155 P.3d at 29.

intrastate economic or commercial transactions can be within the reach of the Commerce Clause.”⁵⁹ The nursing home also placed significant reliance on *Vicksburg Partners, L.P. v. Stephens*⁶⁰ and its extension of *Citizens Bank* to nursing home contracts.⁶¹ The Oklahoma Supreme Court distinguished *Vicksburg Partners* on the basis that the nursing home operators in that case included corporations domiciled in Georgia, Tennessee, and Louisiana.⁶² Lastly, the court dispatched the nursing home’s reliance on *In re Nexion Health at Humble, Inc.*,⁶³ denigrating that holding as being “summarily ruled,” because the *Nexion Health* court had held that “[b]ecause ‘commerce’ is broadly construed, the evidence of Medicare payments . . . is sufficient to establish interstate commerce” and that the FAA was applicable.⁶⁴

The court called Medicare a “significant social security insurance program for the welfare of the aged and the disabled,” and the court recognized Medicaid as “a significant medical program carried out by the states for the welfare of the needy.”⁶⁵ It pointed out that Congress “has not declared the Medicare or Medicaid programs to be economic activity” subject to regulation under the Commerce Clause.⁶⁶ The court also pointed out that “[t]he United States Supreme Court has not decided that Medicare or Medicaid funding is an exercise of Congress’ Commerce Clause power, nor . . . that such payments are indicative of interstate commerce.”⁶⁷ The Oklahoma Supreme Court explicitly rejected the holdings of the supreme courts of Alabama, Mississippi, and Texas treating the federal distribution of Medicare funds and state distribution of Medicaid funds “as indicia of commerce that triggers the FAA.”⁶⁸

The Oklahoma Supreme Court seemed to place significant emphasis on the fact that the parties selected Oklahoma law to govern the arbitral provisions.⁶⁹ In addition, it pointed out that the arbitral agreement failed to mention the FAA.⁷⁰ The court referred to the fact that the agreement provided that the arbitration provisions were to be governed by Oklahoma law in at least eight

59. *Id.*

60. *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507 (Miss. 2005); *see also infra* notes 170-80 and accompanying text.

61. *Bruner*, ¶ 35, 155 P.3d at 29.

62. *Id.*

63. 173 S.W.3d 67 (Tex. 2005); *see also infra* text accompanying notes 181-88.

64. *Bruner*, ¶ 36, 155 P.3d at 29 (quoting *Nexion Health*, 173 S.W.3d at 69).

65. *Id.* ¶ 37, 155 P.3d at 29.

66. *Id.*

67. *Id.* ¶ 37, 155 P.3d at 29-30.

68. *Id.* ¶ 37, 155 P.3d at 30.

69. *Id.* ¶ 40, 155 P.3d at 30.

70. *Id.*

separate places.⁷¹ As a result, the enforcement of that agreement under Oklahoma law was found consistent with the FAA even though enforcement would not result in an arbitral proceeding otherwise permitted under the federal statutory provisions.⁷²

The court found evidence that some nursing home transactions affected interstate commerce insufficient to preempt Oklahoma law, given that the patient was an Oklahoma resident and the defendant an Oklahoma limited partnership with its principal place of business in Oklahoma operating under a Oklahoma license.⁷³ The court said the admission contract involved a “profoundly local transaction—in-state nursing home care provided to an Oklahoma individual by an Oklahoma entity licensed under Oklahoma law.”⁷⁴ The court observed that under *Citizens Bank*, “[t]he FAA reaches arbitration agreements in contracts evidencing a transaction that is (1) economic activity,

71. *Id.* The court described the important provisions of the agreement relating to Oklahoma law, noting:

Any claim or controversy “shall be determined by submission to neutral, binding arbitration pursuant to the guidelines and requirements promulgated in the laws of the State of Oklahoma and subject to appropriate judicial review of arbitration proceedings as authorized by Oklahoma law.”

“Oklahoma law, as well as the decisions of the United States Supreme Court, favor the enforcement of valid arbitration provisions . . . [and any] dispute shall be resolved by binding arbitration, which shall be conducted by a neutral arbitrator selected in accordance with the arbitration guidelines and requirements provided under Oklahoma law.”

Any award or “assessment of costs and attorney’s fees to be in accordance with the laws of the State of Oklahoma as govern the nature and/or type of claim, controversy, dispute or disagreement in issue.”

“The arbitrator(s) shall conduct the arbitration under the guidelines and requirements set forth in the laws of the State of Oklahoma. . . . In the event there is a discrepancy between the arbitration administrative service rules, or other arbitration administrator rules, and the requirements set forth in the laws of the state of Oklahoma, the requirements set forth in the laws of the State of Oklahoma shall control.”

“The arbitrator may award any remedies allowable by law, and shall comply with the laws of the State of Oklahoma in determining said remedies.”

Id. ¶ 40 n.24, 155 P.3d at 30 n.24 (emphasis omitted) (alterations in original).

72. *Id.* ¶ 41, 155 P.3d at 30. The court noted:

Enforcement of the arbitration agreement under Oklahoma law is also fully consistent with the federal nursing home regulation’s deference to state procedural law. Under Oklahoma law, § 1-1939 of the NHCA specifically addressing the right to commence an action and to have a jury trial must govern over § 1859 of the OUAA generally requiring the enforcement of arbitration agreements.

Id. (citing *Hall v. Globe Life & Accident Ins. Co. of Okla.*, 1999 OK 89, 998 P.2d 603).

73. *Id.* ¶ 42, 155 P.3d at 31.

74. *Id.* ¶ 43, 155 P.3d at 31.

(2) which in aggregate is a general practice subject to control under the Commerce Clause, and (3) which in aggregate has a substantial impact on interstate commerce.”⁷⁵ Obviously nursing home care for a fee is an economic activity, but the court held that this case failed the second and third prongs of the test.⁷⁶

With respect to the second prong, the court determined that the local economic activity must be subject to Congress’ Commerce Clause power.⁷⁷ While acknowledging that “Congress exercises control over the local activity of delivery of care and treatment to residents in nursing homes” through Medicare and Medicaid, the court emphasized that these statutes were passed through the exercise of Congress’ Spending Clause power rather than the Commerce Clause power.⁷⁸ Nothing in these statutes indicated a congressional finding of overriding national concern and substantial interstate commerce connection, or evidence of intent “to take nursing home care out of the health and safety local concern category and place nursing home care in the interstate commerce category.”⁷⁹ With respect to the third prong, the court said neither the distribution of Medicare funds by a federal agency nor distribution of Medicaid funds by a state agency evidence an effect on interstate commerce subject to federal control under the Commerce Clause.⁸⁰ The court found the evidence of impact on interstate commerce de minimus.⁸¹

The court concluded that even if the admission contract fell within the reach of the Commerce Clause, the FAA’s mandate was overridden by federal statutory provisions permitting states to develop mechanisms for hearing appeals on transfers and discharges of patients from nursing home facilities,⁸² and by virtue of federal regulations permitting appeal procedures, hearings and judicial review as allowed by state law.⁸³ The court summarized the basis for its decision in four points:

75. *Id.*

76. *Id.*

77. *Id.* ¶ 44, 155 P.3d at 31.

78. *Id.* (citing *Suter v. Artist M.*, 503 U.S. 347, 356 (1992)).

79. *Id.* (citing *Perez v. United States*, 402 U.S. 146, 156 (1971)).

80. *Id.* ¶ 45, 155 P.3d at 31.

81. *Id.* (citing *Maryland v. Wirtz*, 392 U.S. 188, 196 (1968), *overruled by Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976)). The purchasing of supplies out-of-state and the use of long-distance telephone lines and internet did “not demonstrate a substantial impact on interstate commerce,” and the court found them to be “insufficient to impress interstate commerce regulation upon the admission contract for residential care between [an] Oklahoma nursing home and [an] Oklahoma resident patient.” *Id.*

82. *Id.* ¶ 46, 155 P.3d at 31; *see also* 42 U.S.C. § 1396r(c)(2) & (f)(3) (2000) (describing rights of residents regarding transfers and discharges, and setting up appellate procedures).

83. *Bruner*, ¶ 46, 155 P.3d at 31; *see also* 42 C.F.R. § 431.245 (2007).

First, the arbitration agreement calls for Oklahoma law to govern. Second, Congress regulates nursing homes through its spending power rather than its power over interstate commerce. Third, Congress, in its nursing home regulations, left the states to devise the appropriate administrative or judicial review of nursing home residents' claims against nursing homes. Fourth, the evidence in this case is insufficient to connect the nursing home admission contract with interstate commerce under extant jurisprudence from the United States Supreme Court.⁸⁴

III. Brief History of the FAA and Preemption

Before considering the precedent from the United States Supreme Court and the high courts of three sister states as applied by the *Bruner* court, a review of the relationship between the FAA and preemption under the Supremacy Clause will be useful. Congress passed the FAA in 1925 in response to the persistent enmity of the courts toward enforcement of arbitral provisions and the political pressure brought to bear by the business community which was desirous of assuring the viability of such agreements.⁸⁵ The passage of the FAA evinced a strong national policy favoring arbitration as a means of dispute resolution which was considered quicker, cheaper, and simpler than litigation, with the added benefit of relieving congestion in the courts.⁸⁶ To accomplish these purposes, the FAA deemed written arbitral provisions within its scope (maritime transactions or contracts evidencing a transaction involving commerce) valid, irrevocable, and enforceable, except to the extent any contractual provision would be deemed unenforceable at law or in equity.⁸⁷ In addition, it established enforcement mechanisms authorizing

84. *Bruner*, ¶ 47, 155 P.3d at 32.

85. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001); Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 467 (1996).

86. *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 280 (1995); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1367 (11th Cir. 2005); *Hoffman v. Cargill Inc.*, 236 F.3d 458, 461 (8th Cir. 2001); *Dobbins v. Hawk's Enters.*, 198 F.3d 715, 717 (8th Cir. 1999).

87. The FAA specifically states:

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

the entry of orders staying litigation and compelling arbitration.⁸⁸ Commerce, in the FAA sense, was defined as “commerce among the several States” but excluding “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”⁸⁹

As previously discussed, the question in *Bruner* centered on preemption of Oklahoma statutory law precluding the right to enforce the arbitration provision in question under the Federal Constitution’s Supremacy Clause.⁹⁰ Nothing in the FAA expressly preempts state law; preemption, in this context, arises by virtue of the implied conflict between the state regulation of arbitration and the FAA such that the state regulation imposes an “obstacle to

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.

9 U.S.C. § 2.

88. The FAA provides:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3. Further, the FAA also provides:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . . If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. . . . If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance to the terms thereof.

9 U.S.C. § 4.

89. 9 U.S.C. § 1.

90. U.S. CONST. art. VI, cl. 2.; *Moses H. Cone*, 460 U.S. at 24.

the accomplishment and execution of the full purposes and objectives of Congress.”⁹¹

In a line of cases beginning in 1967 with *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,⁹² the United States Supreme Court has delineated the reach of the FAA and its relationship to state law. In *Prima Paint*, the plaintiffs sued to rescind the parties’ contract and stay arbitration, claiming that the contract was fraudulently induced.⁹³ Flood & Conklin argued that the question of fraud in the inducement was one for the arbitrator and not the federal court; the Second Circuit agreed.⁹⁴ The Supreme Court found the question of whether the federal court or the arbitrators should resolve the issue regarding fraudulent inducement to be explicitly answered by section 4 of the FAA.⁹⁵ According to the Court, a federal court is required to make the decision if the claim related to fraud in the inducement of the *arbitration clause*, but to defer to the arbitrators in circumstances as presented in *Prima Paint* where the claim related to fraud in the inducement of the *entire contract*.⁹⁶

Having determined in *Prima Paint* that the federal courts are bound by the FAA in diversity cases, the United States Supreme Court in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* took the first steps in the analysis of whether state courts are similarly bound.⁹⁷ Cone Memorial Hospital and Mercury Construction entered into a construction contract containing graduated steps of alternative dispute resolution.⁹⁸ A dispute arose

91. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

92. 388 U.S. 395 (1967).

93. *Id.* at 398.

94. *Id.* at 399-400.

95. *Id.* at 403. The Court also noted:

The question in this case, however, is not whether Congress may fashion federal substantive rules to govern questions arising in simple diversity cases. Rather, the question is whether Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate. The answer to that can only be in the affirmative. And it is clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable federal foundations of control over interstate commerce and over admiralty.

Id. at 405 (internal citation omitted) (internal quotation marks omitted).

96. *Id.* at 404.

97. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).

98. *Id.* at 4-5. The arbitration provision in question provided in pertinent part:

All claims, disputes and other matters in question arising out of, or relating to, this Contract or the breach thereof, . . . shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise. This

between the hospital and the contractor resulting in the filing of suit by the hospital in state court contending that the contractor's claims were without merit and barred by the statute of limitations.⁹⁹ The hospital further claimed that Mercury Construction had waived its right to arbitration.¹⁰⁰ Simultaneously, Mercury Construction served its demand for arbitration and filed suit in United States District Court, seeking an order compelling arbitration under the FAA.¹⁰¹

The district court stayed the federal litigation pending resolution of the hospital's state court action.¹⁰² The district court's stay order was reversed by the Fourth Circuit, which remanded the case with instructions to enter an order to arbitrate.¹⁰³ On appeal, the Supreme Court determined the FAA to be the governing law, regardless of whether it was raised in state or federal court.¹⁰⁴ The Court also held that the FAA created a body of substantive federal law applicable to all arbitration agreements within the scope of the FAA's coverage.¹⁰⁵

Any doubt left by the holding in *Moses H. Cone* as to the applicability of the FAA to litigation in state courts was resolved in *Southland Corp. v. Keating*.¹⁰⁶ Southland and several of its franchisees became embroiled in a dispute in which the franchisees alleged fraud, misrepresentation, breach of contract, and violation of the California Franchise Investment Law (CFIL), resulting in suits being filed against Southland in California state court.¹⁰⁷ The franchise agreement contained an arbitration provision.¹⁰⁸

After consolidation of a number of the suits, the state court granted Southland's request for an order compelling arbitration with respect to all

agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

Id. at 5.

99. *Id.* at 7.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 8.

104. *Id.* at 24 (citing 9 U.S.C. § 2 (2000)).

105. *Id.*

106. 465 U.S. 1 (1984).

107. *Id.*

108. *Id.* The franchise agreement's arbitration provision provided in pertinent part: "Any controversy or claim arising out of or relating to this Agreement or the breach thereof shall be settled by arbitration in accordance with the Rules of the American Arbitration Association . . . and judgment upon any award rendered by the arbitrator may be entered in any court having jurisdiction hereof." *Id.* (alteration in original).

claims except those based on CFIL.¹⁰⁹ Southland appealed the denial of its request for an order compelling arbitration of the statutory claims.¹¹⁰ The California Court of Appeal reversed, concluding that CFIL did not invalidate the parties' agreement to arbitrate.¹¹¹ Alternatively, the court commented that if the statute did purport to make the arbitration agreement (in interstate commerce) unenforceable, it would be contrary to section 2 of the FAA and invalid under the Supremacy Clause.¹¹² The California Supreme Court reversed the court of appeals and declared that the CFIL required judicial consideration of such claims and that the statute did not violate the FAA.¹¹³

Accepting the construction by the California Supreme Court of the CFIL as requiring judicial consideration of claims invalidating contractual agreements to arbitrate, the United States Supreme Court held that the statute conflicted with section 2 of the FAA, violated the Supremacy Clause, and was void.¹¹⁴ The Court noted that the national policy favoring arbitration had been declared by Congress which "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."¹¹⁵ The Court instructed that the foundation of the FAA was the authority of Congress to enact substantive rules pursuant to the Commerce Clause.¹¹⁶ The Court also referred to its holding in *Moses H. Cone* on the issue of arbitrability as a question of federal substantive law: "Federal law in the terms of the Arbitration Act governs that issue in either state or federal court."¹¹⁷ The intent of Congress, according to the Court, was to preclude state legislative efforts to thwart enforcement of arbitral provisions.¹¹⁸

109. *Id.* at 4.

110. *Id.*

111. *Id.* at 5. The California Franchise Investment Law states: "Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void." CAL. CORP. CODE § 31512 (West 1977), *recognized as preempted in* *Discover Bank v. Superior Court*, 129 Cal. Rptr. 2d 393 (Cal. Ct. App. 2003).

112. *Southland Corp.*, 465 U.S. at 5.

113. *Id.*

114. *Id.* at 10.

115. *Id.*

116. *Id.* at 11 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)).

117. *Id.* at 12 (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

118. *Id.* at 16.

IV. United States Supreme Court Precedent Applied in Bruner

In reaching its decision that the provisions of Oklahoma law precluding enforcement of an arbitration clause in a nursing home admission contract were not preempted by the FAA, the Oklahoma Supreme Court examined and applied the holdings of the United States Supreme Court in two major cases: *Allied-Bruce Terminix Cos. v. Dobson*¹¹⁹ and *Citizens Bank v. Alafabco, Inc.*¹²⁰

In *Allied-Bruce Terminix*, the United States Supreme Court ruled that the provisions of the Federal Arbitration Act calling for the enforcement of arbitral provisions “evidencing a transaction involving commerce” extends the reach of the FAA to the limits of the power of Congress to regulate commerce under the Commerce Clause.¹²¹ In *Citizens Bank*, the United States Supreme Court instructed that the term “involving commerce” contained in the FAA is the functional equivalent of “affecting commerce.”¹²²

A. Allied-Bruce Terminix Cos. v. Dobson

In *Allied-Bruce Terminix*, the trial court denied Allied-Bruce’s request for a stay to permit arbitration and on appeal the Alabama Supreme Court upheld the denial on the basis of an Alabama statute making such arbitration agreements invalid and unenforceable.¹²³ The Alabama Supreme Court ruled the FAA inapplicable to the subject contract and, therefore, not preemptive of the anti-arbitration provisions of Alabama law.¹²⁴ According to the Alabama Supreme Court, the FAA applied only to contracts in which the parties “contemplated substantial interstate activity” at the time they entered into the contract.¹²⁵ The court found that the transaction “contemplated” by the parties was primarily local and not “substantially” interstate.¹²⁶

119. 513 U.S. 265 (1995).

120. 539 U.S. 52 (2003) (per curiam); see also *infra* Part IV.B.

121. *Allied-Bruce Terminix*, 513 U.S. at 268 (emphasis omitted). Justice Breyer, writing for the majority, summarized the issue and the Court’s holding as follows:

This case concerns the reach of § 2 of the Federal Arbitration Act. That section makes enforceable a written arbitration provision in “a contract *evidencing* a transaction *involving* commerce.” Should we read this phrase broadly, extending the Act’s reach to the limits of Congress’ Commerce Clause power? Or, do the two italicized words—“involving” and “evidencing”—significantly restrict the Act’s application? We conclude that the broader reading of the Act is the correct one, and we reverse a State Supreme Court judgment to the contrary.

Id. at 268-69 (internal citation omitted).

122. *Citizens Bank*, 539 U.S. at 56.

123. *Allied-Bruce Terminix*, 513 U.S. at 269.

124. *Id.*

125. *Id.*

126. *Id.*

The United States Supreme Court granted certiorari to resolve conflicts between the circuits as to the interpretation of this aspect of the FAA.¹²⁷ The Court pointed to three items of historical importance relative to the legal issues involved: (1) the principal goal of the FAA is to compel enforcement of agreements to arbitrate;¹²⁸ (2) the FAA is based upon the Commerce Clause;¹²⁹ and (3) the FAA preempts state law and state law cannot apply state statutes that invalidate arbitration agreements.¹³⁰ With this historical background, Justice Breyer observed:

We therefore proceed to the basic interpretive questions aware that we are interpreting an Act that seeks broadly to overcome judicial hostility to arbitration agreements and that applies in both federal and state courts. We must decide in this case whether that Act used language about interstate commerce that nonetheless limits the Act's application, thereby carving out an important statutory niche in which a State remains free to apply its antiarbitration law or policy. We conclude that it does not.¹³¹

The Court had previously set the boundary of the FAA as coinciding with that of the Commerce Clause,¹³² concluding that the term "involving commerce" contained in section 2 of the FAA is very broad and the functional equivalent of "affecting commerce."¹³³ Given the basic purpose of the FAA of putting arbitration provisions "on the same footing" as the other contractual

127. *Id.* at 269-70. The Court recognized that a number of lower federal courts and several state courts had adopted a similar interpretation of the FAA, *id.* (citing *Lachney v. ProfitKey Int'l, Inc.*, 818 F. Supp. 922, 924 (E.D. Va. 1993); *R.J. Palmer Constr. Co. v. Wichita Band Instrument Co.*, 642 P.2d 127, 130 (Kan. Ct. App. 1982); *Burke County Pub. Schs. Bd. of Educ. v. Shaver P'ship*, 279 S.E.2d 816, 822-23 (N.C. 1981)), but that a number of federal appellate courts had interpreted the same language as reaching the limits of Congress' power under the Commerce Clause, *id.* (citing *Foster v. Turley*, 808 F.2d 38, 40 (10th Cir. 1986); *Snyder v. Smith*, 736 F.2d 409, 417-18 (7th Cir. 1984), *overruled by* *Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998); *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406-07 (2d Cir. 1959)).

128. *Allied-Bruce Terminix*, 513 U.S. at 270 (citing *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989)).

129. *Id.* at 271 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967)).

130. *Id.* at 271-72 (citing *Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984)).

131. *Id.* at 272-73.

132. *Id.* at 274-75 (citing *Perry v. Thomas*, 482 U.S. 483, 490 (1987); *Southland Corp.*, 465 U.S. at 14-15; *Prima Paint*, 388 U.S. at 407; *Robert Lawrence Co.*, 271 F.2d at 407).

133. *Id.* at 273-74. The Court's conclusion was based on the substantial equivalence of the dictionary definitions of "involved" and "affect" as well as its conclusion that the legislative history of the Federal Arbitration Act evinces an expansive congressional intent. *Id.* at 274.

terms, the Court in *Allied-Bruce Terminix* felt a robust interpretation of the breadth of the Act's language appropriate.¹³⁴ The Court found the scope of the FAA should expand in step with the expansion of the Commerce Clause power.¹³⁵

The Court rejected the appellees' contention that the holding in *Bernhardt v. Polygraphic Co. of America*¹³⁶ required a narrow interpretation of the word "involving"¹³⁷ because in *Bernhardt* the FAA was not applied to the subject contract since there was "no showing that petitioner while performing his duties under the employment contract was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce, within the meaning of our decisions."¹³⁸ As a result, the Court concluded that in *Bernhardt* the words "involving commerce" were interpreted as broadly as the words "affecting commerce," meaning a full exercise of the constitutional power.¹³⁹

The next interpretive task undertaken was to determine the meaning of the words "evidencing a transaction" in that portion of 9 U.S.C. § 2 which provides for the applicability of § 2 in situations in which there is "a contract evidencing a transaction involving commerce."¹⁴⁰ The issue was whether "evidencing a transaction" requires that the transaction in fact involve interstate commerce.¹⁴¹ The Court acknowledged that the Alabama Supreme Court and others followed the more expansive view espoused by the Second Circuit in *Metro Industrial Painting Corp. v. Terminal Construction Co.*¹⁴² Recognizing the choice to be difficult, the Supreme Court rejected the "contemplation of the parties" interpretation and adopted the "commerce in

134. *Id.* at 275 (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)).

135. *Id.* (citing *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 241 (1980); *Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 743 n.2 (1976)).

136. 350 U.S. 198 (1956).

137. *Allied-Bruce Terminix*, 513 U.S. at 277.

138. *Id.* at 276-77 (citing *Bernhardt*, 350 U.S. at 200-01).

139. *Id.* at 277.

140. *Id.*

141. *Id.*

142. 287 F.2d 382 (2d Cir. 1961). According to the Second Circuit:

The significant question . . . is not whether, in carrying out the terms of the contract, the parties *did* cross state lines, but whether, at the time they entered into it and accepted the arbitration clause, they *contemplated* substantial interstate activity. Cogent evidence regarding their state of mind at the time would be the terms of the contract, and if it, on its face, evidences interstate traffic . . . the contract should come within § 2. In addition, evidence as to how the parties expected the contract to be performed and how it was performed is relevant to whether substantial interstate activity was contemplated.

Id. at 387 (Lumbard, C.J., concurring).

fact” view, holding that the former view would foster litigation over the contemplation of the parties, a result Congress could not intend with respect to an Act designed to reduce the costs and delay of litigation.¹⁴³

The Court emphasized that states were free to protect consumers against unfair pressure to agree to arbitral provisions in their contracts under the express provisions of the FAA allowing invalidation of arbitration clauses on grounds applicable to any contractual provision.¹⁴⁴ The Act does prohibit the states from vitiating an arbitration clause while enforcing the remainder of the contract.¹⁴⁵ As such, the “commerce in fact” test interprets the language of the FAA as requiring that the transaction involve interstate commerce even if the parties never specifically considered that issue.¹⁴⁶

B. Citizens Bank v. Alafabco, Inc.

As described in the per curiam opinion, the issue in *Citizens Bank v. Alafabco, Inc.* was “whether the parties’ debt-restructuring agreement is ‘a contract evidencing a transaction involving commerce’ within the meaning of the Federal Arbitration Act.”¹⁴⁷ Reversing the decision of the Alabama Supreme Court, the Court determined that the arbitration clauses were enforceable under the FAA.¹⁴⁸

A series of loans were made by Citizens Bank to Alafabco.¹⁴⁹ The loans became delinquent and the parties attempted to restructure the outstanding indebtedness.¹⁵⁰ As part of the documentation of the debt restructuring, Citizens Bank entered into an arbitration agreement with Alafabco.¹⁵¹ Subsequently, Alafabco suffered significant business reversals and sued Citizens Bank in Alabama state court under numerous theories including breach of contract, fraud, and interference with a business relationship.¹⁵² The trial court, in response to the bank’s motion, ordered arbitration pursuant to the terms of the agreement between the parties.¹⁵³ The Alabama Supreme

143. *Allied-Bruce Terminix*, 513 U.S. at 278-79.

144. *Id.* at 281.

145. *Id.*

146. *Id.*

147. *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 53 (2003) (per curiam).

148. *Id.*

149. *Id.*

150. *Id.* at 53-54.

151. *Id.* at 54. The arbitral provisions covered “all disputes, claims, or controversies” and provided that the FAA “shall apply to [its] construction, interpretation, and enforcement.” *Id.* (quoting *Alfabaco, Inc. v. Citizens Bank*, 872 So. 2d 798, 799 (Ala. 2002)) (internal quotation marks omitted) (alteration in original).

152. *Id.*

153. *Id.*

Court reversed, ruling that the FAA was inapplicable because there was an insufficient connection between the dispute and interstate commerce.¹⁵⁴ The Alabama Supreme Court found no evidence that the debt was attributable to interstate transactions, that the funds constituting the debt originated outside of Alabama, or that the debt was attributable to an out-of-state project.¹⁵⁵ On review, the United States Supreme Court concluded that the state high court had given an overly narrow view of the FAA's "involving commerce" language in construing it to necessitate that the contract in question must alone have a substantial effect on interstate commerce.¹⁵⁶ The Court indicated that in *Allied-Bruce Terminix Cos. v. Dobson*,¹⁵⁷ it had given that term a more expansive reading, signaling the broadest permissible exercise by Congress of the Commerce Clause power.¹⁵⁸ As such, the Alabama Supreme Court erred in requiring that the restructured debt of Alafabco be attributable to interstate transactions, originate outside Alabama, or be inseparable from out-of-state projects.¹⁵⁹ Since the Court had determined that the FAA was not restricted to transactions actually "in commerce," such findings were unnecessary.¹⁶⁰ Furthermore, since the economic activity in question, in the aggregate, constitutes "a general practice . . . subject to federal control," the fact that the individual Alafabco debt restructuring transactions, in isolation, had no substantial effect on interstate commerce was not determinative.¹⁶¹ Notwithstanding the fact that the contracts were executed in Alabama by Alabamans, the Court found that they met the "involving commerce" test because: (1) "Alafabco engaged in business throughout the southeastern United States using substantial loans from [Citizens Bank] that were renegotiated and redocumented in the debt-restructuring agreements"; (2) the debt was secured by all of Alafabco's assets, including inventory assembled from out-of-state parts and raw materials; and (3) commercial lending, as presented in *Citizens Bank*, has a broad impact on the national economy invoking the power of Congress to regulate it under the Commerce Clause.¹⁶²

154. *Id.* at 55.

155. *Id.*

156. *Id.* at 56-57.

157. 513 U.S. 265, 273-74 (1995).

158. *Citizens Bank*, 539 U.S. at 56.

159. *Id.*

160. *Id.* (citing *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195-96 (1974)).

161. *Id.* at 56-57 (quoting *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)) (alteration in original).

162. *Id.* at 57-58 (citing *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 38-39 (1980); *Katzenbach v. McClung*, 379 U.S. 294, 304-05 (1964); *Mandeville Island Farms*, 334 U.S. at 236).

V. Jurisprudence of Sister States Rejected in Bruner

McGuffey Health & Rehabilitation Center v. Gibson ex rel. Jackson involved a medical malpractice action against an Alabama nursing home.¹⁶³ The admission agreement contained an arbitration clause compelling arbitration.¹⁶⁴ If the admission agreement evidenced a transaction substantially affecting interstate commerce, the arbitration provision would be enforceable according to the Alabama Supreme Court.¹⁶⁵

Medicare and Medicaid paid funds to the nursing home for Gibson's care and treatment.¹⁶⁶ The Medicare funds came from the federal government through an insurance company located in Omaha, Nebraska and then to the nursing home in Alabama.¹⁶⁷ Identifying the issue as one of first impression, the state court held that Medicare funds moving across state lines should be considered in determining whether the admission agreement had a substantial effect on interstate commerce.¹⁶⁸ The court said that the admission agreement had a substantial effect on interstate commerce because the majority of the funds received by the nursing home for the care of Gibson came from out-of-state and that goods were purchased from out-of-state vendors to feed Gibson, provide her bedding, and keep her surroundings clean.¹⁶⁹

The Supreme Court of Mississippi faced a similar issue and reached a similar result in *Vicksburg Partners, L.P. v. Stephens*.¹⁷⁰ The nursing home admissions agreement in that case contained a broad arbitration clause.¹⁷¹ The

163. 864 So. 2d 1061, 1061 (Ala. 2003).

164. *Id.* at 1062.

165. *Id.*

166. *Id.* at 1063.

167. *Id.*

168. *Id.*

169. *Id.*

170. 911 So. 2d 507 (Miss. 2005).

171. *Id.* at 510. The arbitration clause provided:

The Patient and Responsible Party agree that any and all claims, dispute and/or controversies between them and the Facility shall be resolved by binding arbitration administered by the American Arbitration Association. The Arbitration shall be heard and decided by one qualified Arbitrator selected by the Facility. The Parties agree that the decision of the Arbitrator shall be final. All Parties hereto agree to arbitration for their individual respective anticipated benefit of reduced costs of pursuing resolution of a claim, dispute or controversy, should one arise. All Parties hereto are hereby waiving all rights to a jural trial.

Id. In addition, immediately above the signature lines, the following notice appeared: "THE UNDERSIGNED ACKNOWLEDGE THAT EACH OF THEM HAS READ AND UNDERSTOOD THIS AGREEMENT, INCLUDING THE ARBITRATION PROVISION AND HAS RECEIVED A COPY OF THIS AGREEMENT, AND THAT EACH OF THEM VOLUNTARILY CONSENTS TO AND ACCEPTS ALL OF ITS TERMS AND

plaintiff filed suit against the nursing home defendants alleging, inter alia, negligence, medical malpractice, fraud, and wrongful death.¹⁷² The defendants asked the trial court to stay the litigation and enforce the arbitration provisions of the admission agreement. The trial court denied this request, prompting the Mississippi Supreme Court to grant an interlocutory appeal.¹⁷³ The Mississippi high court noted arbitration's favored status under Mississippi law.¹⁷⁴ Relying on *Allied-Bruce Terminix Cos. v. Dobson*¹⁷⁵ and *Citizens Bank v. Alafabco, Inc.*,¹⁷⁶ the court, without apparent hesitation, found that the instant case fell within the "broad purview" of the FAA since admission agreements of nursing homes, taken in the aggregate, affect interstate commerce and under the broad language of *Citizens Bank* "[o]nly the general practice need bear on interstate commerce in a substantial way."¹⁷⁷ The court noted that the routine operation of receiving supplies from out-of-

CONDITIONS." *Id.*

Subsequently, the parties executed another arbitration agreement which provided:

The Resident and Responsible Party agree that any and all claims and/or controversies between them and the Facility or its Owners, officers, directors or employees shall be resolved by binding arbitration administered by the American Arbitration Association and its rules and procedures. The Arbitration shall be heard and decided by one qualified Arbitrator selected by mutual agreement of the parties. Failing such agreement each party shall select one qualified Arbitrator and the two selected shall select a third. The Parties agree that the decision of the Arbitrator(s) shall be final. The Parties further agree that the Arbitrators shall have all authority necessary to render a final, binding decision of all claims and/or controversies and shall have all requisite powers and obligations. If the agreed method of selecting an Arbitrator(s) fails for any reason or the Arbitrator(s) appointed fails or is unable to act or the successor(s) has not been duly appointed, the appropriate circuit court, on application of a party, shall appoint one Arbitrator to arbitrate the issue. An Arbitrator so appointed shall have all the powers of the one named in this Agreement. All Parties hereto agree to arbitration for their individual respective anticipated benefit of reduced costs of pursuing a timely resolution of a claim, dispute or controversy, should one arise. The Parties agree to share equally the costs of such arbitration regardless of the outcome. Consistent with the terms and conditions of this Agreement, the Parties agree that the Arbitrator(s) may not award punitive damages and actual damages awarded, if any, shall be awarded pursuant to Section E.7.

Id. at 510-11.

172. *Id.* at 511-12.

173. *Id.* at 512.

174. *Id.* at 513 (citing *Pass Termite & Pest Control, Inc. v. Walker*, 904 So. 2d 1030, 1032-33 (Miss. 2004)).

175. 513 U.S. 265 (1995).

176. 539 U.S. 52 (2003) (per curiam).

177. *Vicksburg Partners*, 911 So. 2d at 515 (citing *Citizens Bank*, 539 U.S. at 57) (internal quotation marks omitted) (alteration in original).

state vendors and payments from out-of-state insurance companies and the federal Medicare program affect interstate commerce.¹⁷⁸ The court specifically observed that the defendants consisted of corporations from Georgia, Tennessee, and Louisiana, and that Vicksburg Partners receives services and goods from out-of-state vendors, takes in out-of-state residents, and receives payments from out-of-state insurance carriers including Medicare and Medicaid.¹⁷⁹ This required the parties to “undertake arbitration as agreed and avail themselves of the federally endorsed and substantively benign arbitration clause contained in the body of their contract.”¹⁸⁰

The issue of the enforceability of arbitration agreements in nursing home contracts was also addressed by the Supreme Court of Texas in the case of *In re Nexion Health at Humble, Inc.* decided in 2005.¹⁸¹ The Texas Supreme Court joined the high courts of Alabama and Mississippi in holding that the transfer of Medicare funds across state lines constituted interstate commerce evoking application of the FAA, thereby preempting certain provisions of the Texas Arbitration Act.¹⁸² A patient was admitted to Humble Healthcare Center under an admission agreement containing an arbitration provision.¹⁸³ The patient died and his wife filed a wrongful death action against the nursing home.¹⁸⁴ The trial court rejected the nursing home’s request that it order arbitration.¹⁸⁵ On appeal, the plaintiff contended that there was insufficient evidence of interstate commerce to invoke application of the FAA.¹⁸⁶ The Texas Supreme Court held that the FAA “extends to any contract affecting commerce, as far as the Commerce Clause of the United States Constitution will reach.”¹⁸⁷ According to the Texas Supreme Court, Medicare payments made to the defendant on behalf of the deceased were sufficient to establish interstate commerce.¹⁸⁸

VI. Selection of Oklahoma Law in Bruner

In *Bruner*, the Oklahoma Supreme Court opted not to follow its Alabama, Mississippi, and Texas counterparts, and instead, placed great importance on

178. *Id.*

179. *Id.*

180. *Id.* at 526.

181. *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67, 67 (Tex. 2005).

182. *Id.* at 69.

183. *Id.* at 68.

184. *Id.*

185. *Id.*

186. *Id.* at 69.

187. *Id.* (citing *In re L&L Kempwood Assocs.*, 9 S.W.3d 125, 127 (Tex. 1999) (per curiam)).

188. *Id.*

the choice of law provisions in the admissions contract. Relying on *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*,¹⁸⁹ the court declared that under the FAA, arbitration agreements are to be enforced according to their terms, even when they limit the issues to be arbitrated.¹⁹⁰ In *Volt*, the parties entered into a construction contract in which they agreed to arbitrate.¹⁹¹ A dispute arose and Volt demanded arbitration.¹⁹² Stanford responded by filing suit in California state court alleging fraud and breach of contract and demanding indemnity from other parties with whom it had no arbitration agreement.¹⁹³ In state court, Volt sought the entry of an order compelling arbitration.¹⁹⁴ Stanford requested that the arbitration be stayed pursuant to the provisions of a rule of California civil procedure.¹⁹⁵ The trial court stayed arbitration subject to the outcome of the related litigation not involving parties to the arbitral agreement between Volt and Stanford.¹⁹⁶

On appeal, the California Court of Appeal acknowledged that the contract involved interstate commerce, the FAA governs contracts in interstate commerce, and the FAA contains no provision permitting a court to stay arbitration pending resolution of related litigation involving third-parties not bound by the arbitration agreement.¹⁹⁷ Nevertheless, the California Court of Appeal affirmed the decision of the trial court on the basis that the parties had incorporated the California Rules of Arbitration (including section 1281.2(c) of the California Civil Procedure Code) by specifying in the contract that the agreement would be governed by “the law of the place where the project is located”¹⁹⁸ The court also found the FAA not preemptive of this California procedural rule, even though the contract involved interstate commerce.¹⁹⁹ Volt contended this was error because the court’s construction of the choice of law clause constituted a finding of waiver of a “federally

189. 489 U.S. 468, 479 (1989).

190. *Bruner v. Timberlane Manor Ltd. P’ship*, 2006 OK 90, ¶ 21, 155 P.3d 16, 24-25; *see also supra* text accompanying note 30.

191. *Volt*, 489 U.S. at 470.

192. *Id.*

193. *Id.* at 470-71.

194. *Id.* at 471.

195. *Id.*

196. *Id.*

197. *Id.* at 471-72. The rule of civil procedure upon which Stanford relied in its motion to stay arbitration was CAL. CIV. PROC. CODE § 1281.2(c) (West 1982). This rule allows a court to stay arbitration pending the resolution of related litigation involving parties not subject to the arbitration agreement. *Id.* at 471.

198. *Id.* at 472 (internal quotation marks omitted).

199. *Id.*

guaranteed right to compel arbitration of the parties' dispute" to be judged by federal law rather than state law,²⁰⁰ and that such construction flies in the face of the national policy favoring arbitration established by the FAA.²⁰¹

In an opinion written by Chief Justice Rehnquist, the United States Supreme Court affirmed the decision of the California Court of Appeal, declaring that when parties to an arbitration agreement agree to abide by state rules, the enforcement of such rules does no violence to the goals of the FAA, even if the arbitration is stayed as a result thereof.²⁰² The Court emphasized that the FAA only guarantees the right to obtain an order compelling arbitration to the extent provided in the parties' agreement.²⁰³ According to the Court, the decision of the California Court of Appeal was not a finding of waiver of an FAA right, but rather a finding that, under the circumstances, no right to arbitration existed within the ambit of section 1281.2(c) of the California Civil Procedure Code.²⁰⁴ The United States Supreme Court concluded that these principles were not violated by the California Court of Appeal:

There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate. Interpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration—rules which are manifestly designed to encourage resort to the arbitral process—simply does not offend the rule of liberal construction set forth in *Moses H. Cone*, nor does it offend any other policy embodied in the FAA.²⁰⁵

Finally, the Supreme Court held that application of the California statute to stay arbitration was not precluded in the instant circumstances because the parties agreed to arbitrate under California law.²⁰⁶ The FAA does not expressly preempt state law and does not represent an expression of congressional intent to occupy the entire field of arbitration, leaving nothing for the states to regulate.²⁰⁷ Thus, the Court instructed that state law is subject

200. *Id.* at 474 (internal quotation marks omitted).

201. *Id.* at 475.

202. *Id.* at 479.

203. *Id.* at 474-75 (citing 9 U.S.C. § 4 (2000)).

204. *Id.* at 475.

205. *Id.* at 476-77.

206. *Id.* at 476.

207. *Id.* at 477 (citing *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198 (1956)).

to preemption only when it impairs the purposes and objectives of Congress in conflict with federal law.²⁰⁸

In 1995, the United States Supreme Court took another opportunity to address this issue in *Mastrobuono v. Shearson Lehman Hutton, Inc.*²⁰⁹ The Mastrobuonos established a brokerage account with Shearson, executing a standard agreement.²¹⁰ They sued Shearson in the United States District Court claiming to have sustained significant damage as a result of Shearson's mishandling of the account.²¹¹ The agreement contained two provisions important to the litigation: an arbitration provision and a choice of law provision.²¹² The district court granted Shearson's request to stay the litigation and compel arbitration.²¹³ The arbitration panel awarded the Mastrobuonos almost \$160,000 in compensatory damages and \$400,000 in punitive damages.²¹⁴ The district court's vacatur of the punitive damages award was affirmed by the Seventh Circuit.²¹⁵ The choice of law provision in the parties' contract directing that New York law apply (which precludes arbitral awards of punitive damages) was the cornerstone of the disallowance of the arbitrators' award of punitive damages.²¹⁶ The Supreme Court granted

208. *Id.* (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

209. 514 U.S. 52 (1995).

210. *Id.* at 54.

211. *Id.*

212. *Id.* The arbitration and choice of law provisions were both contained in paragraph 13 of the agreement which provided:

This agreement shall inure to the benefit of your [Shearson's] successors and assigns[,] shall be binding on the undersigned, my [petitioners'] heirs, executors, administrators and assigns, and shall be governed by the laws of the State of New York. Unless unenforceable due to federal or state law, any controversy arising out of or relating to [my] accounts, to transactions with you, your officers, directors, agents and/or employees for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules then in effect, of the National Association of Securities Dealers, Inc. or the Boards of Directors of the New York Stock Exchange, Inc. and/or the American Stock Exchange, Inc. as I may elect. If I do not make such election by registered mail addressed to you at your main office within 5 days after demand by you that I make such election, then you may make such election. Judgment upon any award rendered by the arbitrators may be entered in any court having jurisdiction thereof. This agreement to arbitrate does not apply to future disputes arising under certain of the federal securities laws to the extent it has been determined as a matter of law that I cannot be compelled to arbitrate such claims.

Id. at 58 n.2.

213. *Id.* at 54.

214. *Id.*

215. *Id.*

216. *Id.* at 54-55. This common law rule was established in New York in *Garrity v. Lyle*

certiorari to resolve a conflict between the circuits on this issue.²¹⁷ In reversing the Seventh Circuit's decision, the Court said the issue was "what the contract has to say about the arbitrability of petitioners' claim for punitive damages,"²¹⁸ noting that the policies underlying the FAA do not overcome the wishes of the contracting parties.²¹⁹

The Supreme Court rejected the argument of Shearson that the holding in *Allied-Bruce Terminix Cos. v. Dobson*,²²⁰ decided earlier in the same term, should be applied here to uphold the arbitration agreement, despite New York common law providing that arbitrators may not award punitive damages.²²¹ It pointed out that the terms of the agreement between the contracting parties are essential to delineating the limits of the application of the FAA's pro-arbitration policy.²²² Going back to its original premise that the contract provisions themselves are determinative, the Court examined that language.²²³ Considering the choice of law and arbitration provisions separately, the Court concluded that these provisions, in isolation, could be read in two ways: (1) As a substitute for the analysis that would determine what state's law to apply and, under such an interpretation, no exclusionary intent could be found and, accordingly, punitive damages would be permitted to be awarded by the arbitrator because the FAA would preempt New York's *Garrity* Rule (no arbitral awards of punitive damages); or (2) More than a substitute for traditional conflict of laws analysis because of the caveat "detached from otherwise-applicable federal law" and, under such interpretation, the provision would include only New York's substantive law and not allocation of authority between alternative tribunals and, as such, punitive damages would not be precluded in the arbitral setting.²²⁴ Under either analysis, the Court concluded, the choice of law provision was no "unequivocal exclusion of

Stuart, Inc., 353 N.E.2d 793 (N.Y. 1976), *superseded by statute*, Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2000).

217. *Mastrobuono*, 514 U.S. at 55 (citing *Lee v. Chica*, 983 F.2d 883 (8th Cir. 1993); *Barbier v. Shearson Lehman Hutton Inc.*, 948 F.2d 117 (2d Cir. 1991); *Raytheon Co. v. Automated Bus. Sys., Inc.*, 882 F.2d 6 (1st Cir. 1989); *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1386-88 (11th Cir. 1988); *Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334 (7th Cir. 1984)).

218. *Id.* at 58.

219. *Id.* at 57.

220. 513 U.S. 265 (1995).

221. *Mastrobuono*, 514 U.S. at 55-56.

222. *Id.* at 57 (citing *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989)).

223. *Id.* at 58-59.

224. *Id.* at 59-60.

punitive damages claims.”²²⁵ The Court also said the arbitration clause, considered in isolation, implicates the propriety of an arbitral award of punitive damages because it authorizes arbitration under NASD rules which allow the award of “damages and other relief” by the arbitrators.²²⁶ Using this analysis, the Court held that the arbitration provision was broad enough to contemplate an award of punitive damages and contradicted any indication of an attempt to foreclose claims for punitive damages.²²⁷

The Court concluded that while the choice of law clause may introduce ambiguity into the agreement otherwise allowing punitive damages, under the *Volt* decision the construction and interpretation of such arbitration provisions must be done in light of the federal policy favoring arbitration, resolving ambiguities as to the scope of the arbitration provision in favor of arbitration.²²⁸ Likewise, the Court mentioned that ambiguous language is to be construed against Shearson which drafted the language in question.²²⁹

After observing that the Client Agreement makes no reference to the question of recoverability of punitive damages, the Supreme Court focused, first separately and then conjunctively, on the arbitration and choice of law provisions in the Client Agreement.²³⁰ The Court reasoned that Shearson’s reading of the two clauses failed to give effect to all of the provisions and failed to render them consistent with each other.²³¹ The Court concluded that the best way to harmonize the choice of law provision with the arbitration provision was to interpret “laws of the State of New York” to mean the substantive principles that New York courts would apply but not include special rules limiting the authority of arbitrators.²³² Accordingly, the Court held that the court of appeals had misinterpreted the agreement and the arbitral award of punitive damages should be enforced.²³³

225. *Id.* at 60.

226. *Id.* at 61 (quoting NAT’L ASS’N OF SEC. DEALERS, CODE OF ARBITRATION PROCEDURE ¶ 3741(e) (1993)).

227. *Id.* at 61.

228. *Id.* at 62 (citing *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.* 489 U.S. 468, 476 (1989)).

229. *Id.* at 62 (citing *United States v. Seckinger*, 397 U.S. 203, 210 (1970); *U.S. Fire Ins. Co. v. Schnackenberg*, 429 N.E.2d 1203, 1205 (Ill. 1981); *Graff v. Billet*, 477 N.E.2d 212, 213-14 (N.Y. 1984); RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981)).

230. *Id.* at 58-60.

231. *Id.* at 63.

232. *Id.* at 63-64.

233. *Id.* at 64.

VII. Potential Limitations on Bruner's Reach

Those desirous of advancing the minority view that the FAA is inapplicable to an arbitration clause in a nursing home contract have already begun to cite *Bruner* in support of this proposition.²³⁴ On the other hand, those wanting to resist these efforts may attempt to distinguish *Bruner* based on what appears to be the opinion's self-limiting language. In holding the FAA inapplicable and not preemptive of the anti-arbitration provisions of the Oklahoma Nursing Home Care Act,²³⁵ the Oklahoma Supreme Court placed great emphasis on the language of the agreement calling for the application of Oklahoma law.²³⁶ The court went to great lengths to point out that the arbitration agreement did not reference the FAA but in a number of places did recognize the applicability of Oklahoma law.²³⁷ One would anticipate that in many instances arising in later litigation, the arbitral provision in question will specifically provide for the applicability of the FAA.²³⁸ In fact, under the holding in *Volt*, even parties to arbitral provisions which do not involve interstate commerce can agree to the applicability of the FAA.²³⁹

Another important factor in finding that the FAA was not applicable was the court's conclusion that "the evidence in this case is insufficient to connect the nursing home admission contract with interstate commerce under extant jurisprudence from the United States Supreme Court."²⁴⁰ It is apparent that one of the primary factors compelling this particular conclusion was that parties on both sides of this litigation had direct and exclusive contacts with Oklahoma.²⁴¹ In reaching its conclusion that the defendant's proof was insufficient to establish a substantial affect on interstate commerce, the court apparently balanced that proof on the one hand against the proof that Mrs. Bruner was an Oklahoma resident, the nursing home was an Oklahoma limited partnership, the nursing home's principal place of business was in Oklahoma, and the nursing home was licensed by the state of Oklahoma.²⁴² The

234. See *supra* text accompanying note 2.

235. 63 OKLA. STAT. §§ 1-1901 to -1939 (2001).

236. *Bruner v. Timberlane Manor Ltd. P'ship*, 2006 OK 90, ¶ 47, 155 P.3d 16, 32.

237. See *supra* note 71.

238. See, e.g., *Rainbow Health Care Ctr., Inc. v. Crutcher*, No. 07-CV-194-JHP, 2008 WL 268321, at *6 (N.D. Okla. Jan. 29, 2008) (distinguishing *Bruner* on the grounds that the arbitration provision at issue there called for the application of Oklahoma law, whereas the parties in *Crutcher* selected the FAA to govern, and on the additional basis that the *Crutcher* admission agreement evidenced "a transaction involving interstate commerce").

239. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478-79 (1989); see also *In re Alamo Lumber Co.*, 23 S.W.3d 577, 579 (Tex. App. 2000).

240. *Bruner*, ¶ 47, 155 P.3d at 32.

241. *Id.* ¶ 42, 155 P.3d at 31.

242. *Id.*

exclusivity of these Oklahoma contacts will likely also be used to distinguish *Bruner* in subsequent cases.

VIII. Conclusion

The aforementioned case-specific factors notwithstanding, the holding in *Bruner* was ultimately founded on the conclusions that the FAA was inapplicable because the contract failed to evidence a transaction that in the aggregate was a general practice subject to control under the Commerce Clause with a substantial impact on interstate commerce.²⁴³ Rejecting jurisprudence of the supreme courts of Texas, Alabama, and Mississippi, the Oklahoma Supreme Court concluded that the distribution of Medicare and Medicaid funds does not evidence an effect on interstate commerce subject to federal control under the Commerce Clause.²⁴⁴ That is the linchpin of the court's decision and the import of this holding cannot be marginalized by the case-specific factors referred to above. Further evidence of the determination of this court to enforce the anti-arbitration provisions of the Oklahoma Nursing Home Care Act can be found in dicta contained in the penultimate paragraph of its opinion, where the court said that even if the admission contract was within the reach of the Commerce Clause, the mandate of the FAA "has been overridden by a contrary congressional command."²⁴⁵

Nursing home cases are hotly contested, high-stakes litigation, often yielding record jury verdicts. Many times the seminal—and exquisitely important—question is whether a jury or a panel of arbitrators will be “the decider.” This issue is so important as to be worthy, in its own right, of much litigation and legal scholarship. For example, the three cases specifically rejected by the Oklahoma Supreme Court in *Bruner: McGuffey Health &*

243. *Id.* ¶ 43, 155 P.3d at 31.

244. *Id.* ¶¶ 44-45, 155 P.3d at 31.

245. *Id.* ¶ 46, 155 P.3d at 31 (citing *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226-27 (1987)). The Oklahoma Supreme Court was apparently relying on the following language in *McMahon*:

The Arbitration Act, standing alone, therefore mandates enforcement of agreements to arbitrate statutory claims. Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command. The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent “will be deducible from [the statute's] text or legislative history,” or from an inherent conflict between arbitration and the statute's underlying purposes.

McMahon, 482 U.S. at 226-27 (citations omitted) (alteration in original).

Rehabilitation Center v. Gibson ex rel. Jackson,²⁴⁶ *In re Nexion Health at Humble, Inc.*,²⁴⁷ and *Vicksburg Partners, L.P. v. Stephens*²⁴⁸ have been cited many times in both primary and secondary sources around the country.²⁴⁹ While these cases have at times been distinguished, it appears that the only case in which they have been specifically rejected is *Bruner*.²⁵⁰ It is almost certain that *Bruner* will receive similar attention in the continuing battle over the forum in which nursing home liability issues are to be decided.²⁵¹

As can be seen from the cases discussed herein, a number of state legislatures and courts have been persuaded that the arbitration of nursing home liability issues should be limited, if not precluded.²⁵² For those cases falling within its ambit, the FAA provides otherwise and has been deemed to trump contrary state legislation.²⁵³ The broader concern raised by the holding of the Oklahoma Supreme Court in *Bruner* is the impact of this significant limitation on the applicability of the FAA on the purposes and benefits of that statute. In its opinion, the Oklahoma Supreme Court pointed out that the United States Supreme Court has yet to address the relationship between the provision of Medicare and Medicaid benefits and the existence of an effect on interstate commerce sufficient to trigger the application of the preemptive aspects of the FAA.²⁵⁴ Perhaps, due to the Oklahoma Supreme Court's ruling in *Bruner*, the Court will take the opportunity to do so sooner, rather than later.

246. 864 So. 2d 1061 (Ala. 2003).

247. 173 S.W.3d 67 (Tex. 2005).

248. 911 So. 2d 507 (Miss. 2005).

249. According to the Westlaw database, last searched March 22, 2008, *McGuffey*, 864 So. 2d 1061, had citing references showing fifty-six documents; *Nexion Health*, 173 S.W.3d 67, had citing references showing 133 documents; and, *Vicksburg Partners*, 911 So. 2d 507, had citing references showing 197 documents.

250. *Bruner*, 2006 OK 90, 155 P.3d 15.

251. According to the Westlaw database, last searched March 22, 2008, *Bruner*, 2006 OK 90, 155 P.3d 15, already had citing references showing forty-two documents.

252. See *supra* notes 32, 39-40, 72, 111, 123, 142, 163-188 and accompanying text.

253. See *supra* Part III.

254. See *supra* text accompanying note 67.