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**RESTRICTING THE REACH OF THE FEDERAL ARBITRATION ACT: SOUTH CAROLINA
SUPREME COURT APPLIES STATE LAW AND INVALIDATES AN ARBITRATION
AGREEMENT IN A RESIDENTIAL REAL ESTATE TRANSACTION**

Tiffany Bennett*

I. INTRODUCTION

The Federal Arbitration Act (hereinafter “FAA”) was enacted at a time in United State’s history where federal courts sitting in diversity applied a general federal common law.¹ Since 1925, the legal landscape of the country has changed dramatically.² In 1938, *Erie Railroad Co. v. Tompkins* eliminated the concept of federal common law and required courts sitting in diversity to apply state law.³ However, even in light of *Erie*, the FAA has been consistently applied to uphold arbitration contracts that would otherwise be invalidated by state law.⁴ The FAA has had a very liberal application in the United States law of arbitration. The FAA has been favored as the dominant force in governing enforcement of arbitration agreements; essentially, interpretation and application of the FAA has implied a federal right to arbitrate.⁵ In most cases, the FAA will preempt any state arbitration law that would void an otherwise valid arbitration agreement under the FAA.

In South Carolina, the Uniform Arbitration Act (hereinafter “SCUAA”) is the applicable state law for arbitration agreements.⁶ Arbitration has a history in South Carolina going back to 1795.⁷ Historically in South Carolina, arbitration was met with judicial hostility; since the passage of state arbitration legislation in 1978, this hostility has mostly given way to courts embracing and enforcing arbitral agreements.⁸

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¹ See *Swift v. Tyson*, 41 U.S. 1 (1842) (allowing for courts to develop federal common law where state legislatures did not specifically address the issue in contention).

² See *id.*

³ See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

⁴ See *Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983) (“Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.”); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (“In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and 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.”); see also CARBONNEAU, *infra* note 43, at 73.

⁵ See *Moses H. Cone Mem’l Hosp.*, 460 U.S. at n.32 (“The Arbitration Act is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction”).

⁶ See S.C. CODE ANN. §§ 15-48-10 – 15-48-22.

⁷ See Thad H. Westbrook, A. Mattison Bogan, *Arbitration Alive and Delivering Results in South Carolina*, S.C. LAW., Sep. 2008, at 24, 26.

⁸ *Id.*

In order for the FAA to preempt state law, one necessary condition must be present: the activity must involve interstate commerce.⁹ Just as the application of the FAA has been broadly construed, so too has the definition of interstate commerce.¹⁰ The Supreme Court's broad interpretation of the commerce notwithstanding, the South Carolina Supreme Court found that a residential real estate transaction between a South Carolina corporation and a South Carolina resident was purely intrastate commerce in *Bradley v. Brentwood Homes, Inc.*¹¹ Despite evidence of other aspects of the transaction involving other states, South Carolina refused to apply the FAA and instead chose to invalidate the agreement based on state law.¹²

II. FACTS

A. *The Agreement*

Fred Bradley and his wife contracted with Brentwood Homes to purchase a newly constructed home in North Myrtle Beach, South Carolina.¹³ Brentwood was clear in Section 22H of the contract that they were not to be treated as the contractor and only as the seller of a finished home for the specific sales transaction.¹⁴ The precise language of Section 22H was as follows:

It is understood that Purchaser is buying a completed dwelling and that Seller is not acting as a contractor for Purchaser in the construction of a dwelling. Purchaser will acquire no right, title or interest in the dwelling except the right and obligation to purchase the same in accordance with the terms of this Agreement upon the completion of the dwelling.¹⁵

The Home Purchase Agreement was entered into on January 31, 2007 and the Bradley's closed on the home on March 2, 2007.¹⁶

Approximately two years after purchasing the home, Bradley initiated a lawsuit against Brentwood on July 31, 2009.¹⁷ In the initial complaint, Bradley alleged fraud,

⁹ See 9 U.S.C. § 1 (2006) (defining interstate commerce: "means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation"); *Timms v. Greene*, 427 S.E.2d 642, 644 (S.C. 1993) (explaining "Interstate commerce is a necessary basis for application of the Federal Act, and a contract or agreement not so predicated must be governed by State Law").

¹⁰ See *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 273 (1995) ("[affecting commerce] normally signals Congress' intent to exercise its Commerce Clause powers to the full."); see generally *Bradley v. Brentwood Homes, Inc.*, 730 S.E.2d 312, 315 (S.C. 2012) (discussing the Supreme Court of the United States' decisions defining the correct interpretation of interstate commerce).

¹¹ *Bradley*, 730 S.E.2d at 318.

¹² *Id.*

¹³ *Id.* at 313.

¹⁴ *Id.*

¹⁵ *Id.* at 313, n.3.

¹⁶ *Bradley v. Brentwood Homes, Inc.*, 730 S.E.2d 312, 313 (S.C. 2012).

¹⁷ *Id.* at 314.

negligence, and breach of implied warranty.¹⁸ Bradley based his claims on alleged “construction defects” within the home.¹⁹ The action continued in state court for more than six months.²⁰ Amidst the discovery requests, Brentwood Homes filed an amended answer and motion to stay proceedings and compel arbitration based on a provision in the Home Purchase Agreement.²¹

Brentwood asserted that the court did not have jurisdiction over the case based on the arbitration clause in the Home Purchase Agreement.²² The pertinent language of the agreement provided:

Mandatory Binding Arbitration. Purchaser and Seller each agree that, to the maximum extent allowed by law, they desire to arbitrate all disputes between themselves. The list of disputes which shall be arbitrated in accordance with this paragraph include, but are not limited to: (1) any claim arising out of Seller's construction of the home, (2) Seller's performance under any Punch List or Inspection Agreement, (3) Seller's performance under any warranty contained in this Agreement or otherwise, and (4) any matters as to which Purchaser and Seller agree to arbitrate.²³

The agreement also included a choice of law clause that indicated the South Carolina Uniform Arbitration Act would apply to the current situation.²⁴ Because the SCUAA would clearly invalidate the arbitration provision,²⁵ Brentwood also argued that the FAA should apply in lieu of South Carolina law.²⁶

B. The Dispute

Bradley opposed the arbitration clause and asserted that the FAA should not apply in this situation because the transaction occurred entirely in South Carolina between a South Carolina resident and a South Carolina corporation concerning property located in South Carolina.²⁷ Additionally, Bradley argued that even if the court did not consider the transaction purely intrastate, that Brentwood had waived their right to arbitrate by failing to attempt to enforce the clause during more than six months of discovery requests.²⁸

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Bradley v. Brentwood Homes, Inc., 730 S.E.2d 312, 314 (S.C. 2012).

²² *Id.*

²³ *Id.*

²⁴ *See id.* at 314, n. 4 (reproducing part of the second page of the agreement: “THIS CONTRACT IS SUBJECT TO MANDATORY BINDING ARBITRATION PURSUANT TO THE SOUTH CAROLINA or NORTH CAROLINA UNIFORM ARBITRATION ACT, WHICHEVER IS APPLICABLE.”).

²⁵ *Id.* at 314, n. 5 (explaining the South Carolina provision requires strict adherence to technical requirements, including placement of the arbitration clause and typeface requirements).

²⁶ Bradley v. Brentwood Homes, Inc., 730 S.E.2d 312, 314, n. 5 (S.C. 2012).

²⁷ *Id.* at 314.

²⁸ *Id.*

Brentwood presented evidence that the contract required the purchase of a nationwide warranty that would involve submitting claims to an office in Georgia, and evidence that Bradley completed the purchase using financing from a bank in North Carolina.²⁹ Brentwood additionally contended that interstate commerce was used to purchase and transport the materials Brentwood used in the actual construction of the home.³⁰ Finally, Brentwood established that some of the labor involved in the construction of the home was subcontracted from outside of South Carolina.³¹

The lower court found the agreement to arbitrate was invalid under South Carolina law.³² Further, the lower court held that Brentwood had not satisfied the evidentiary burden to establish the presence of interstate commerce and applicability of the FAA.³³ The court gave very little weight to the evidence presented by Brentwood of the interstate nature of the construction of the house, because nothing indicating out of state supplies or labor was included in the contract.³⁴ Brentwood Homes appealed and the Supreme Court of South Carolina certified the appeal and analyzed the issue of whether the disputed transaction involved interstate commerce, or if the transaction was purely intrastate.³⁵

III. ANALYSIS

A. *The South Carolina Uniform Arbitration Act and Standard of Review*

In South Carolina, arbitration issues are reviewed *de novo*, however, the court will defer to all reasonable factual conclusions made by the lower court.³⁶ Because of this, even though Brentwood argued that the lower court did not consider certain evidence, the South Carolina Supreme Court chose not to reexamine the affidavit of a former employee, satisfied by the mention of the evidence in the lower court opinion.³⁷

Brentwood did not contest the finding that the SCUAA would invalidate the agreement for failing to meet the structuring formalities.³⁸ The SCUAA requires:

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped

²⁹ *Id.* at 314-15 (discussing the affidavits offered by Brentwood Homes).

³⁰ *Id.* at 315.

³¹ *Bradley v. Brentwood Homes, Inc.*, 730 S.E.2d 312, 315 (S.C. 2012).

³² *Id.* at 315.

³³ *Id.* at 317-18.

³⁴ *Id.*

³⁵ *Id.* at 315.

³⁶ *Bradley v. Brentwood Homes, Inc.*, 730 S.E.2d 312, 315 (S.C. 2012).

³⁷ *Id.* at 315.

³⁸ *Id.* (admitting that the agreement was not present or noticed on the first page of the contract and did not adhere to the typeface requirements of S.C. Code Ann. § 15-48-10 (2012)).

prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.³⁹

However, Brentwood argued, and the South Carolina Supreme Court agreed, that state arbitration laws will usually only apply when in accordance with the FAA.⁴⁰ The FAA has been interpreted by the Supreme Court of the United States to preempt any state law provisions that invalidate arbitration agreements.⁴¹ The decision to apply the FAA to enforce otherwise invalid arbitration clauses is part of the strong federal policy supporting the “rapid” and “unobstructed” enforcement of agreements to arbitrate.⁴² The Supreme Court of the United States has continually reaffirmed federalization and supported arbitration as an effective alternative method of dispute resolution.⁴³

B. Nature of the Commerce Involved in a Residential Real Estate Agreement and the Applicability of the FAA

South Carolina recognizes the preemptive effect of the FAA, however only in instances where interstate commerce is a feature of the transaction.⁴⁴ To determine whether interstate commerce was involved in the disputed transaction, the court evaluated the “essential character” of the contract, including both the text of the contract and the circumstances surrounding the transaction.⁴⁵

The South Carolina Supreme Court considered the evidence offered in the lower court pertaining to incidents of interstate commerce and agreed with the lower court that Brentwood had not carried its burden of proving that the contract for the sale of the home involved interstate commerce.⁴⁶ Notably, the court expressly mentioned that the analysis would have been different, and the FAA may have applied, had the contract at issue been for the construction of the home and not solely for the sale.⁴⁷ However, the inclusion of clause 22H (discussed *supra*), prevented the South Carolina Supreme Court from applying that analysis.⁴⁸

Historically, South Carolina has treated real estate issues as the “quintessential example of a purely intrastate activity” even when instances of interstate commerce occurred because of a sale contract.⁴⁹ The court agrees with precedent that establishes

³⁹ S.C. CODE ANN. § 15-48-10 (2012).

⁴⁰ *Bradley*, 730 S.E.2d at 315.

⁴¹ *See Southland Corp. v. Keating*, 465 U.S. 1 (1984).

⁴² *See Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 103 S. Ct. 927, 941 (1983) (discussing the federal policy favoring arbitration and rationale behind federalization).

⁴³ *See THOMAS E. CARBONNEAU, CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE* 121-23 (6th ed., Thomson/West 2012) (describing the history, importance, and continued application of federalization).

⁴⁴ *Bradley v. Brentwood Homes, Inc.*, 730 S.E.2d 312, 315 (2012) (explaining the applicability and use of preemption regarding certain state laws where interstate commerce exists in the disputed transaction).

⁴⁵ *Id.* at 316 (citing a discussion of how to assess the extent of the commerce involved in a contract from *Thornton v. Trident Med. Ctr., LLC*, 592 S.E.2d 50, 52 (S.C. Ct.App.2003)).

⁴⁶ *Id.* at 317-18.

⁴⁷ *Id.* at 318, n.8.

⁴⁸ *Id.*

⁴⁹ *Zabinski v. Bright Acres Assocs.*, 553 S.E.2d 110, 117-18 (S.C. 2001) (propounding a general discussion of the treatment of real estate transactions in South Carolina).

that the use of an out of state engineer and out of state financing in a commercial transaction were tangential occurrences of interstate commerce and not central to the issue of whether interstate commerce was involved in the contract.⁵⁰

The South Carolina Supreme Court adhered to the *Mathews*⁵¹ analysis and additionally relied on reasoning from a similar Kentucky case, which held that residential real estate sales do not involve interstate commerce even if diversity of citizenship exists among the parties.⁵² The Kentucky courts cited uniformity in the law as a policy rationale for their decision,⁵³ a concept that South Carolina echoed by grounding their decision in a desire to avoid “[eviscerating] the well-established real estate exception to the FAA.”⁵⁴

IV. SIGNIFICANCE

As an issue of first impression in South Carolina, this decision has important implications for drafters of arbitration clauses and real estate contracts alike. Parties who prefer to implement a choice of law clause that selects the South Carolina Uniform Arbitration Act as the applicable law must also follow the technical requirements imposed by the legislation; otherwise they risk invalidation of the agreement. Alternatively, real estate contract drafters may opt to include specific information in the contract that directly references interstate commerce to ensure the FAA will govern the agreement in the event it fails under some other state law provision. Seemingly, interstate commerce that results from the sale contract will be considered tangential and not be enough to invoke the protection of the FAA.

Additionally companies that act as both the contractor and the seller may choose to formulate their contracts differently, for example, omitting the 22H provision that was present in Brentwood’s contract, and be afforded a presumption of interstate commerce.⁵⁵ Further, by advancing the “real estate exception,”⁵⁶ the South Carolina Supreme Court has diminished the traditional broad interpretation of the nature of interstate commerce, and by using persuasive authority from other states, the decision seems to encourage other states to continue to carve-out a residential real estate exception.⁵⁷

⁵⁰ See *Mathews v. Fluor Corp.*, 440 S.E.2d 880 (S.C. 1994), *overruled on other grounds by* *Munoz v. Green Tree Fin. Corp.*, 542 S.E.2d 360, 363 n. 3 (S.C. 2001).

⁵¹ *Id.*

⁵² *Bradley v. Brentwood Homes, Inc.*, 730 S.E.2d 312, 317 (S.C. 2012) (discussing the analysis in *Saneii v. Robards*, 289 F.Supp.2d 855 (W.D. Ky. 2003)).

⁵³ See *Saneii*, 289 F.Supp.2d at 859.

⁵⁴ *Bradley*, 730 S.E.2d at 317.

⁵⁵ *Id.* at 318, n.8 (explaining South Carolina law that presumes interstate commerce is necessary in the construction of certain structures).

⁵⁶ *Id.* at 317.

⁵⁷ See generally 11 A.L.R. Fed. 2d 233 (Originally published in 2006) (providing a list and summary of real estate contract disputes where courts held that interstate commerce was not a component of the particular transaction and applying state law).

V. CRITIQUE

In light of the United States Supreme Court's liberal policy favoring arbitration, decisions that appear antithetical to arbitration must be carefully scrutinized. The major objective of the FAA is to enforce parties' agreements to arbitrate.⁵⁸ The Supreme Court of the United States has emphasized the importance of freedom of contract by stating, "private agreements to arbitrate are enforced according to their terms."⁵⁹ However, the Supreme Court retreated slightly from the absolute freedom of contract view expressed in *Volt*, and qualified the right to freedom of contract by proclaiming that individuals have contract freedom as long as your provisions do not impede the ability to arbitrate.⁶⁰

South Carolina also recognizes that arbitration is a matter of contract, and when reviewing arbitration clauses relies on the principles announced in *Zabinski*, namely that "Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit."⁶¹ However, in *Bradley*, both parties signed the agreement, including the arbitration agreement.⁶² The agreement expressly provided the buyer and seller would arbitrate all claims, including claims related to the construction of the home.⁶³ However, Brentwood's expectation to arbitrate any claim arising from the construction of the home, which Bradley had agreed to by executing the contract, was eliminated by the court because the placement of the otherwise valid arbitration agreement within the contract did not conform to the applicable state law formatting requirements. Although South Carolina's hostility toward arbitration has lessened since 1795, in 2007 the South Carolina Supreme Court announced their "skepticism" toward adhesive contracts between a consumer and an automobile dealer with unequal bargaining power when the arbitration provision is not conspicuous in *Simpson v. MSA of Myrtle Beach*.⁶⁴ The South Carolina Supreme Court used the "skepticism" in that case to render an adhesive arbitration provision invalid because it

⁵⁸See 9 U.S.C. §2 (2006) (stating "A written provision in ... 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, ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

⁵⁹See *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (allowing parties freedom to construct their arbitration clauses to meet their preference and include or exclude issues subject to arbitration).

⁶⁰See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 66 (1995) (invalidating a choice of law clause that would have limited the award of punitive damages).

⁶¹*Zabinski v. Bright Acres Assocs.*, 553 S.E.2d 110, 118 (S.C. 2001) (discussing South Carolina's precedent for determining the scope of arbitration agreements and honoring arbitration clauses in situations that parties anticipated the clause would govern).

⁶²*Bradley v. Brentwood Homes, Inc.*, 730 S.E.2d 312, 314 (S.C. 2012).

⁶³*Id.*

⁶⁴*Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 670 (S.C. 2007) ("[We] proceed to analyze this contract between a consumer and automobile retailer with "considerable skepticism." Under this approach, we first observe that the contract between Simpson and Addy involved a vehicle intended for use as Simpson's primary transportation, which is critically important in modern day society. Applying the factors considered by the Fourth Circuit in analyzing arbitration clauses, we also acknowledge Simpson's claim that she did not possess the business judgment necessary to make her aware of the implications of the arbitration agreement, and that she did not have a lawyer present to provide any assistance in the matter.").

lacked mutuality and was unconscionable because of three oppressive terms.⁶⁵ The holding in *Bradley* furthers the skepticism of the court when reviewing arbitration agreements not by finding the inconspicuous agreement unconscionable, rather it accomplishes this by restricting the application of the FAA to residential real estate contracts based on an interpretation of “commerce” inconsistent with United States Supreme Court’s jurisprudence.

Additionally, the South Carolina Supreme Court had the opportunity to avoid analyzing the applicability of the FAA and instead address the issue of waiver. In South Carolina, whether a party has waived their right to arbitrate is a fact intensive inquiry where the party seeking to establish waiver has the burden of establishing that the delay in compelling arbitration proceedings caused undue hardship.⁶⁶ Courts will evaluate the length of the delay, the number of times the parties sought the court’s assistance, the number and nature of motions filed, and the expenses incurred by the parties.⁶⁷ Because the court dispenses of this argument in a footnote by finding the inapplicability of the FAA dispositive, the facts do not indicate what evidence, if any, was provided at the trial court level on the issue of waiver.⁶⁸ Because the prejudice to a party is relative to the unique situation, the six-month delay may have been long enough for *Bradley* to establish that *Brentwood* waived the right to arbitrate.⁶⁹ However, because the court did not analyze the issue, the record does not indicate whether the court may have found for *Bradley* without undercutting the reach and applicability of the FAA in South Carolina.

The Supreme Court of the United States has also expressed its disapproval of state laws requiring the type of notice that the South Carolina law requires.⁷⁰ Because arbitration is an expert driven, efficient, and economical way to resolve disputes and provide a meaningful alternative to litigation and because arbitration reduces the strain on the overburdened state court systems, honoring the bargain to arbitrate is vital to

⁶⁵ *Id.* at 670-73. (reasoning that limitation on statutory remedies, availability of some judicial remedies to the dealer during the arbitration proceedings, and restricting warranty claims to arbitration are all unconscionable terms included in the arbitration provision which was found in small print toward the end of the agreement).

⁶⁶ *See Gen. Equip. & Supply Co., Inc. v. Keller Rigging & Const., SC, Inc.*, 544 S.E.2d 643, 645 (S.C. Ct. App. 2001); *Liberty Builders, Inc. v. Horton*, 521 S.E.2d 749, 753-54 (S.C. Ct. App. 1999).

⁶⁷ *See, e.g., General Equip. & Supply Co.*, 554 S.E.2d. at 645; *Liberty Builders, Inc.*, 521 S.E.2d at 753-54 (“The circuit judge found “[o]n approximately forty occasions, the parties over the [more than two] years have sought assistance from the Court including but not limited to motions to amend, compel, dismiss, add parties and to restore under SCRCF 40(j).” The delays in resolving these issues and the attorney fees incurred by the Hortons during this lengthy litigation were sufficient to support the circuit judge’s finding of prejudice”).

⁶⁸ *Bradley v. Brentwood Homes, Inc.*, 730 S.E.2d 312, 318, n.9 (S.C. 2012).

⁶⁹ *See General Equip. & Supply Co.*, 554 S.E.2d. at 646 (an 8 month delay was not sufficient to establish waiver based on the additional facts); *Evans v. Accent Manufactured Homes, Inc.*, 575 S.E.2d 74, 76 (S.C. Ct. App. 2003) (a nineteen month delay in seeking arbitration, when viewed in the specific circumstances did constitute waiver of the right to arbitrate when a homeowner sued the seller of a mobile home for breach of express warranty, breach of implied warranty of fitness, negligence, and fraud).

⁷⁰ *See, e.g., Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) (discussing a state requirement that the arbitration clause be provided on the first page of the agreement: “Montana’s first-page notice requirement would invalidate the clause. The “goals and policies” of the FAA, this Court’s precedent indicates, are antithetical to threshold limitations placed specifically and solely on arbitration provisions”).

providing parties access to final, binding solutions to their disputes.⁷¹ South Carolina has recognized arbitration as a viable alternative to judicial proceedings,⁷² yet the state statutory scheme limits parties' abilities to enforce arbitration agreements. Moreover, the court decisions undermine both the bargain for arbitration and the Supreme Court of the United States's jurisprudence related to federalization. The South Carolina Supreme Court should have used the approach announced in *Vaden v. Discover Bank* and "looked through" the petition to find federal jurisdiction and compel the arbitration.⁷³

An additional attack on federalization comes with the South Carolina Supreme Court's adoption of the reasoning in *Saneii*, which goes even farther than the analysis in *Bradley* requires by reasoning that addressing the citizenship of the parties is not enough to evidence interstate commerce in a transaction. This was clearly announced by the Supreme Court of the United States when the issue of diversity of citizenship had previously come before the court: "This Court responded by agreeing that the Act set forth substantive law, but concluding that, nonetheless, the Act applied in diversity cases because Congress had so intended."⁷⁴ *Terminix* also stands for the understanding that if interstate commerce is even questionably related to a transaction, courts should invoke the commerce clause and apply the FAA.⁷⁵ The United States Supreme Court's reasoning in *Terminix* was meant to streamline the law and prevent complication and litigation.⁷⁶

In *Bradley*, the court cites a similar desire to achieve uniformity and stability in the law by promoting the "well-established real estate exception."⁷⁷ However, the only evidence of the so-called exception the court offers is the short summary of a United States District Court in Puerto Rico's analysis of two other cases.⁷⁸ The exception is neither well established nor in accordance with the views the Supreme Court of the United States has continually expressed in the establishment and reaffirmation of the policy of federalization.

Furthermore, neither Congress nor the Supreme Court of the United States has granted state courts the authority to create or propagate exceptions to the FAA.⁷⁹ The real

⁷¹ See generally CARBONNEAU, *supra* note 43, at 1-6 (defining arbitration and discussing the nature and importance of the arbitral trial as an efficient cost-effective dispute resolution mechanism in the United States).

⁷² See *White v. Preferred Research, Inc.*, 432 S.E.2d 506, 508 (S.C. Ct. App. 1993) ("arbitration is not litigation carried on by other means. It is intended to be, and it is, an alternative means for resolving disputes without the cost and delay of a lawsuit.").

⁷³ See *Vaden v. Discover Bank*, 556 U.S. 49, 62 (2009) ("The text of § 4 drives our conclusion that a federal court should determine its jurisdiction by "looking through" a § 4 petition to the parties' underlying substantive controversy. We reiterate § 4's relevant instruction: When one party seeks arbitration pursuant to a written agreement and the other resists, the proponent of arbitration may petition for an order compelling arbitration").

⁷⁴ *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 271 (1995) (reaffirming the federalism trilogy and expanding the interpretation of the commerce clause).

⁷⁵ See generally CARBONNEAU, *supra* note 43, at 197.

⁷⁶ *Allied-Bruce Terminix Cos., Inc.*, 513 U.S. at 275.

⁷⁷ *Bradley v. Brentwood Homes, Inc.*, 730 S.E.2d 312, 317 (S.C. 2012).

⁷⁸ *Id.* at 317 (citing the proclamation in *Garrison v. Palmas Del Mar Homeowners Ass'n, Inc.*, 538 F. Supp. 2d 468, 473 (D.P.R. 2008) "FAA generally does not apply to residential real estate transactions that have no substantial or direct connection to interstate commerce").

⁷⁹ *Southland Corp. v. Keating*, 465 U.S. 1, 10-11 (1984) ("We discern only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: they must be part of a written maritime contract or a contract "evidencing a transaction involving commerce"⁵ and such clauses

estate exception does not appear anywhere in the FAA.⁸⁰ The United States Supreme Court has not announced a real estate exception in any arbitration jurisprudence. Even in light of the disparity in reasoning between the two courts, *Bradley* continues to be good law in South Carolina and practitioners must be aware of the judicial hostility toward arbitration that pervades the area of real estate contracts and take great care to draft agreements accordingly.

may be revoked upon “grounds as exist at law or in equity for the revocation of any contract.” We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under State law”).

⁸⁰ See 9 U.S.C. §§1-16 (2006).