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COURT OF APPEALS

STATE OF NEW YORK

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MONARCH CONSULTING, INC., ET AL.,

Respondents,

-against-

No. 8

NATIONAL UNION FIRE INSURANCE CO.  
OF PITTSBURGH, PA,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
January 07, 2016

Before:

ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Penina Wolicki  
Official Court Transcriber

1                   JUDGE PIGOTT: We will now proceed with our  
2 calendar. And the first case today is number 8,  
3 Monarch Consulting v. National Union Fire Insurance  
4 Company.

5                   Mr. [Keesler] - - - am I pronouncing that  
6 correctly?

7                   MR. KEISLER: [Kysler], Your Honor.

8                   JUDGE PIGOTT: [Kysler]? Welcome.

9                   MR. KEISLER: Thank you, Your Honor. And I  
10 am Peter Keisler here on behalf of appellant National  
11 Union. May I reserve three minutes for rebuttal?

12                  JUDGE PIGOTT: Certainly.

13                  MR. KEISLER: Thank you, Your Honor. The  
14 question in this case is whether arbitrators or  
15 courts should decide the merits of the respondent  
16 company's challenge to the enforceability of the  
17 arbitration clauses in the agreements that they  
18 repeatedly signed over the course of many years.

19                  And we have two principal points. First,  
20 the basis of respondents' challenge to their  
21 enforceability clearly goes directly to the contracts  
22 as a whole, and therefore, as the Supreme Court has  
23 repeatedly held, that enforceability challenge has to  
24 be decided by arbitrators.

25                  And second, that adhering to that FAA

1 requirement doesn't impair, under the McCarran-  
2 Ferguson Act, any insurance law enacted by the state,  
3 because California doesn't have any insurance statute  
4 or regulation that provides for a contrary procedure  
5 for resolving enforceability disputes. And that's  
6 why every court other than the Appellate Division to  
7 have considered the interplay between the McCarran-  
8 Ferguson Act and filing statutes like the one at  
9 issue here, has held that the FAA requirement still  
10 governs and sent the enforceability issue for  
11 arbitration.

12 JUDGE RIVERA: So - - - so what would  
13 prohibit every - - - every one of the insurance  
14 companies to just not file? Because isn't that what  
15 California's trying to ensure that people file? And  
16 doesn't this insu - - - doesn't this incentivize them  
17 not to file so that they can start out in arbitration  
18 - - -

19 MR. KEISLER: I - - -

20 JUDGE RIVERA: - - - if there's a dispute?

21 MR. KEISLER: No, Your Honor. Because  
22 nothing in the argument we're making here prevents  
23 the CDI, the California Department of Insurance, from  
24 initiating an enforcement action. And they have a  
25 range of enforcement tools and very severe penalties

1           against any insurer who violates any of their  
2           regulations.  Nothing - - -

3                         JUDGE STEIN:  Well, and couldn't an  
4           arbitrator find that the - - - that the agreements  
5           are not enforceable?

6                         MR. KEISLER:  Yes, Your Honor.  In fact,  
7           that is all we're asking for.  We believe the court  
8           here should be agnostic on the ultimate question of  
9           enforceability.  That should go to the arbitrators,  
10          and they would be applying the same California  
11          insurance statutes, including the filing statute that  
12          a court would.

13                        But as to the CDI's authority, not only can  
14          they pursue an enforcement action against insurers  
15          who violate the law, in their views, we have filed  
16          the identical arbitration clause that's at issue here  
17          in other agreements more than a year ago.

18                        JUDGE RIVERA:  So let me understand this.  
19          You're saying that an arbitrator could determine that  
20          it's enforceable, and the CDI could determine it's  
21          not?

22                        MR. KEISLER:  The arbitrator could  
23          determine it's enforceable, because it's important to  
24          understand what the CDI position represents here and  
25          what it doesn't.  The CDI position is its position on

1 the issue, and it's entitled to respectful  
2 consideration by any court or arbitrator to consider  
3 the merits. But it is not itself something, the  
4 California Supreme Court has emphasized, that has the  
5 force of law. And so when we're talk - - -

6 JUDGE ABDUS-SALAAM: Counsel, I understand.  
7 Did you say that you had already filed these payment  
8 agreement now?

9 MR. KEISLER: I want to be clear, Judge  
10 Abdus-Salaam. I don't want to be misunderstood.  
11 These payment agreements were not filed. A year ago,  
12 we filed - - - we agreed to disagree with the state  
13 about the enforce - - - the - - - the filing  
14 requirement. We filed a payment agreement that had  
15 an identical arbitration clause. And I mention that  
16 only to make the point that they let that go into  
17 effect. They had no objection. They have no  
18 objection to the substantive arbitration provision in  
19 these agreements, including no objection to the  
20 provision in that clause that says that arbitrators  
21 decide the issues of arbitrability.

22 So with respect to Judge Rivera's - - -

23 JUDGE FAHEY: Well, there's no - - -  
24 there's no law - - - we understand that. But let's  
25 assume that the threshold question - - - question of

1           arbitrability that we agree with you on that.  Should  
2           this court, then, also address the applicability of  
3           McCarran-Ferguson itself?  Or is that up to the  
4           arbitrators to decide?

5                         MR. KEISLER:  Well, I - - - I would agree  
6           that McCarran-Ferguson is an issue for the court,  
7           that - - - because the respondents have claimed that  
8           because - - -

9                         JUDGE FAHEY:  So - - - so we should address  
10          the applicability of McCarran-Ferguson at the same  
11          time we address the threshold question of  
12          arbitrability.  You would agree with that?

13                        MR. KEISLER:  Well, yes, in the following  
14          sense, which is that I think that there's really a  
15          two-step analysis here, which is that the first  
16          question is what would federal law require.  And the  
17          only requirement of federal law that's at issue here  
18          is the FAA requirement that arbitrators decide  
19          validity challenges that go to the contract as a  
20          whole.  It doesn't say what - - - how that should  
21          come out.  It just says that arbitrators decide that  
22          threshold issue.

23                        And then the second question is, would  
24          applying that here impair a provision of insurance  
25          law in California.  And - - -

1                   JUDGE PIGOTT:  If - - - I'm sorry.  I was  
2 going to say I think everything is yellowed with a  
3 jaundiced eye.  But I'm trying to think of an  
4 arbitrator who would not say I have jurisdiction.  
5 Can you give me a case in which - - - in which an  
6 arbitrator in one of these situations - - - in an  
7 insurance situation, would not have jurisdiction?

8                   MR. KEISLER:  Well, I - - - arbitrator  
9 decisions are generally unpublished, so I don't - - -  
10 there's no way for me to research that issue and give  
11 you an answer to that question.

12                   JUDGE PIGOTT:  In your - - - in your  
13 experience.  I mean, I - - - I would think that you  
14 can't get out from under an arbitrator.

15                   MR. KEISLER:  I - - - I would resist that  
16 suggestion, Your Honor.  You know, courts who have to  
17 determine their jurisdiction sometimes decide they  
18 have jurisdiction, sometimes they don't.

19                   JUDGE PIGOTT:  Well, we've got - - - we've  
20 got three of them here, don't we.

21                   MR. KEISLER:  It - - - it is the Supreme  
22 Court's jurisprudence that enforceability challenges  
23 go to the arbitrator as a whole.  And that reflects a  
24 view that arbitrators will apply those issues fairly  
25 and won't simply decide in favor of their

1 jurisdiction every time - - -

2 JUDGE RIVERA: Why is this not only about  
3 the ar - - - the enforcement of the arbitration  
4 clause? You're not trying to make the rest - - - or  
5 no one is arguing that the rest of the agreement is  
6 unenforceable, right?

7 MR. KEISLER: Because the Supreme Court's  
8 decisions say that it's when the ground - - - that's  
9 the Supreme Court's word - - - or basis for challenge  
10 goes to the agreement as a whole. What they have  
11 said is they want to choose among the different  
12 contractual provisions. And as Your Honor said, they  
13 want to eliminate the arbitration clause; they want  
14 to enforce everything else.

15 JUDGE RIVERA: They want to excise the  
16 arbitration clause - - -

17 MR. KEISLER: That's right.

18 JUDGE RIVERA: - - - basically.

19 MR. KEISLER: That's their remedy. That's  
20 their proposed remedy. But the Supreme Court says  
21 that when the basis for challenge, or the ground - -  
22 - goes to the contract as a whole, what's the  
23 underlying theory of their case?

24 The only claims they have that these  
25 arbitration provisions are unenforceable, it's

1 nothing in the provision itself. It's simply because  
2 they are part of a larger agreement which they say  
3 should have been filed and wasn't, and that is a  
4 ground that goes to the contract as a whole.

5 JUDGE STEIN: Can we go back to where you  
6 started where you said that the - - - the Insurance  
7 Department could still initiate enforcement  
8 proceedings. What - - - what could they do to  
9 enforce the filing agreement?

10 MR. KEISLER: They - - - they could do what  
11 they did with the Zurich company, Your Honor, which  
12 is they can file a complaint. It goes before an ALJ  
13 within the CDI and goes up to the Insurance  
14 Commissioner, and then of course, any ruling of the  
15 Insurance Commissioner is appealable to the  
16 California State Court system.

17 But they have a range of tools including  
18 revoking an insurer's license, if they believe that  
19 we have violated the law. And none of that is at  
20 issue here. Nothing this court would do would  
21 prevent that. The only question here is whether the  
22 parties' agreement which provides for arbitration,  
23 and the Federal Arbitration Act, which enforces that  
24 agreement, should be applied.

25 JUDGE ABDUS-SALAAM: Counsel I was - - -

1 since you mentioned the Zurich case, I was sort of  
2 curious. If the California Insurance Department, I  
3 guess, assumed or knew that or other insurers like  
4 National Union, other than Zurich, were not filing  
5 these agreements, why didn't they go after them  
6 globally. Why - - - why just go after Zurich?

7 MR. KEISLER: I - - - I don't know the  
8 answer to that question, Your Honor. But I will say  
9 that what happened in Zurich and what a lot of these  
10 other authorities indicate, is that there is no  
11 single categorical rule that says that all  
12 arbitration provisions in unfiled agreements in  
13 California are void and unenforceable.

14 What they did in Zurich is, I think, an  
15 example of that; because at the end of the day, they  
16 reached a settlement in which the past agreements did  
17 not have to be filed and those arbitration clauses  
18 were going to be enforced in some disputes - - - they  
19 said in new disputes and not in existing disputes.

20 So all of the authorities that they cite,  
21 the CDI letter, the Ceradyne case, all of them say  
22 that the facts and equities of a case are going to  
23 govern whether or not a particular provision is  
24 enforced. And once that's the case, once there's not  
25 a categorical principle that says all arbitration

1 provisions in unfiled agreements are unenforceable,  
2 then there is no reason not to keep the parties to  
3 their agreement and let that threshold enforceability  
4 challenge be decided as the FAA and the agreements  
5 provide.

6 JUDGE FAHEY: Assuming - - - let's just  
7 assume for a second that we determine that the FAA  
8 was preempted here. New York law, the way I read it,  
9 at least as to severability, seems to be the same as  
10 the FA - - - as the federal law and the substantive  
11 federal law, and the FAA. The consequences may be  
12 different. What would be the effect on you if we  
13 applied New York law - - - said it was severable but  
14 applied New York law?

15 MR. KEISLER: Well, I mean, I think New  
16 York arbitration law is parallel to the Federal  
17 Arbitration Act, and it says that arbitration clauses  
18 are severable and valid apart - - - apart from the  
19 validity of the larger contract in which they're a  
20 part. And that's what the Supreme Court has said.

21 And so - - -

22 JUDGE FAHEY: Is that the way you read New  
23 York law?

24 MR. KEISLER: You know, I'm not certain  
25 there's a specific New York law that I'm familiar

1 with on that. But my understanding has been it's  
2 generally consistent with - - - with the federal law  
3 on that issue, and that's my understanding of federal  
4 law.

5 JUDGE FAHEY: Yeah, I - - - I was wondering  
6 about whether it would affect the illegality of the  
7 contract of the whole if you applied New York law as  
8 opposed to assuming that the FAA was preempted.  
9 That's why I asked the question.

10 MR. KEISLER: I don't know the answer to  
11 that, Your Honor.

12 JUDGE FAHEY: Thank you.

13 JUDGE PIGOTT: Thank you, Mr. Keisler. You  
14 have your three minutes.

15 Mr. Glen? Are you - - - are you taking the  
16 whole ten or are you dividing it up?

17 MR. GLEN: No, I'm taking the whole ten,  
18 Your Honor.

19 JUDGE PIGOTT: You know there was a - - -  
20 it was brought to my attention that there's a quote  
21 from a federal case that says our principal task is  
22 to determine what the New York courts would think the  
23 California courts would think on an issue about which  
24 neither has thought.

25 MR. GLEN: I'm afraid I must agree with you

1 on that.

2 JUDGE PIGOTT: I think - - - maybe you can  
3 straighten us out.

4 MR. GLEN: Well, let me start where my  
5 adversary ended. He said that if there were a  
6 categorical bar on all arbitrations in - - - from  
7 filed agreements that then McCarran-Ferguson would  
8 reverse preempt the FAA, because that's what the law  
9 - - - everybody agrees to. And that's correct.

10 There is a categorical bar on arbitration  
11 agreements in unfiled agreements. It is categorical,  
12 not case-by-case.

13 JUDGE PIGOTT: Well, when you mean - - -  
14 when you say "bar", the - - - when I was looking at  
15 this, knowing how Workers' Compensation works - - -  
16 and that's what we're talking about here - - - you've  
17 got all of these workers and companies and - - - and  
18 if you went to court on every single dispute with  
19 respect to Workers' Compensation, we would be  
20 overwhelmed - - - the courts would be.

21 And - - - and when there's an  
22 administrative structure to Workers' Comp and it - -  
23 - it seemed to me to make sense that - - - that  
24 disputes, then, would be arbitrable, because you  
25 would then be in an - - - in an area where

1 arbitrators would know what in the world was going on  
2 with respect to comp, and it would be a bad idea to  
3 have the courts deciding it.

4 And the fact that because of what I'll call  
5 a technical def - - - defect in this thing that they  
6 didn't file it, you get the benefit of seven years of  
7 - - - of Workers' Compensation insurance coverage and  
8 now you want to say well, you know, it's too bad,  
9 we're not paying for it.

10 MR. GLEN: No, that's not our - - -

11 JUDGE PIGOTT: Where's the flaw in the  
12 reasoning?

13 MR. GLEN: - - - that's not at all our  
14 position, Your Honor. We have to pay for our  
15 insurance coverage, not under the payment agreements,  
16 but under the insurance policy. The insurance policy  
17 is a policy that provides insurance. We have to pay  
18 premiums. The payment agreements are how you pay  
19 those premiums.

20 JUDGE PIGOTT: Um-hum.

21 JUDGE STEIN: So you're saying that the  
22 entire payment agreement doesn't apply since it's not  
23 filed? I mean, I know you're not raising those  
24 issues here, but - - - but that's your position,  
25 isn't it?

1                   MR. GLEN: Our position, comparable to the  
2 position of the - - - which is the position of the  
3 Commissioner of Insurance of California, is that an  
4 unfiled agreement is not enforceable.

5                   If the unfiled agreement is not  
6 enforceable, then the incidents of the unfiled  
7 agreement are not enforceable. We would agree with  
8 that. But that's the issue that we've presented  
9 here.

10                  JUDGE PIGOTT: So what - - - what would be  
11 coming - - - let's assume that's true. What then  
12 comes to the court?

13                  MR. GLEN: What comes to the court - - -

14                  JUDGE PIGOTT: They're going to say you  
15 didn't pay you didn't pay your premium, you're going  
16 to say yes, I did. That sounds like a summary  
17 judgment motion and we're out of here.

18                  MR. GLEN: No. What would come to the  
19 court in this situation could be, for example, a  
20 dispute, as is true between my client, Priority, and  
21 National Union, as to whether or not there was a  
22 proper evaluation of the requirement for security  
23 behind the underlying payments.

24                  JUDGE PIGOTT: The one that made the  
25 advance?

1 MR. GLEN: The one that made the advance.  
2 That's not summary judgment. That's qu - - - that's  
3 expert testimony on the actuarials involved and all  
4 that. That - - - that could be done by a court. It  
5 could be done by an arbitrator. But the point here  
6 is according to the State of California, that is an  
7 unenfor - - - the arbitration provision is  
8 unenforceable because that's how the regulatory  
9 agency in California - - -

10 JUDGE RIVERA: It's - - - it's  
11 unenforceable until the CDI says it is. I mean,  
12 isn't that his point?

13 MR. GLEN: Well - - -

14 JUDGE RIVERA: Yes.

15 MR. GLEN: Yes - - -

16 JUDGE RIVERA: That yes, you have, right  
17 now, language that says you don't file it's  
18 unenforceable, but the reality is that the regulator  
19 then, on a case-by-case basis, makes a determination  
20 whether to enforce and what provisions to enforce.

21 MR. GLEN: No.

22 JUDGE RIVERA: Or have I misunderstood what  
23 goes on in California?

24 MR. GLEN: I believe you've misunderstood.

25 JUDGE RIVERA: Okay. Correct me.

1 MR. GLEN: The regulator doesn't make that  
2 decision.

3 JUDGE RIVERA: Um-hum.

4 MR. GLEN: The regulator says if you want  
5 to have a payment agreement which is the equivalent  
6 of an endorsement to an insurance policy, and that's  
7 where you place your arbitration agreement - - -

8 JUDGE RIVERA: Okay.

9 MR. GLEN: - - - you have to give us a look  
10 at it first.

11 JUDGE RIVERA: Okay.

12 MR. GLEN: If we look at it - - -

13 JUDGE RIVERA: Yes.

14 MR. GLEN: - - - we may agree with it, we  
15 may not. But if we don't look at it, it is not - - -  
16 you cannot include it in your policy. You cannot - -  
17 -

18 JUDGE RIVERA: So when - - - so when they  
19 didn't file - - -

20 MR. GLEN: Yes. They didn't file - - -

21 JUDGE RIVERA: - - - you're say - - -  
22 you're saying the - - - the CDI now could never make  
23 a determination that parts of it - - - of the  
24 agreement are enforceable?

25 MR. GLEN: Not parts of our agreement,

1 because they never filed it. It was unfiled, and  
2 therefore - - -

3 JUDGE RIVERA: But if they give - - - and  
4 if they file it afterwards, I mean, it's untimely  
5 filed, could the CDI then decide we're going to let  
6 parts of it be enforced?

7 MR. GLEN: I don't think that the CDI could  
8 permit the enforcement of a provision of an unfiled  
9 agreement after - - -

10 JUDGE RIVERA: What's the Zurich settlement  
11 - - -

12 MR. GLEN: - - - the end of the - - -

13 JUDGE RIVERA: - - - I'm sorry. Then  
14 what's the settlement agreement? I've misunderstood  
15 the settlement agreement.

16 MR. GLEN: The settlement agreement's  
17 prospective. The settlement agreement with Zurich  
18 says that if any insurance company wishes to file  
19 going forward - - -

20 JUDGE RIVERA: Forward.

21 MR. GLEN: - - - on - - - with a - - - with  
22 a dispute resolution provision in it, we will look at  
23 it.

24 JUDGE RIVERA: What happened to all the  
25 other ones that were not filed?

1 MR. GLEN: Under the Zurich agreement,  
2 there's a one-time opt-out.

3 JUDGE RIVERA: I see.

4 MR. GLEN: It's in the agreement itself.

5 JUDGE ABDUS-SALAAM: What happened in the  
6 Zurich agreement that generated this directive and  
7 the settlement with Zurich? Was the - - - the  
8 agreement decided - - - or was it determined to be  
9 unenforceable, or did Zurich just have to pay a fine?

10 MR. GLEN: No, my understanding - - - and  
11 I'm not the representative of the State of California  
12 here - - - is that Zurich, unlike National Union,  
13 decided we will agree that as to all of our current  
14 disputed claims under payment agreements, we will  
15 give a one-time opt-out. The State said, if you are  
16 going to do that and you agree to these changes in  
17 the future, then we will change our system in the  
18 future.

19 JUDGE PIGOTT: Can you - - - can you keep a  
20 contract in force for seven years knowing that  
21 there's a flaw in it like failure to file, and then  
22 just kind of keep it in your pocket, and if it ever  
23 needs to be raised, you can raise it?

24 MR. GLEN: That's what National Union did.  
25 It's not our obligation to file, it's their

1 obligation.

2 JUDGE PIGOTT: I know. But let's assume  
3 you know that. Let's assume you know that - - - that  
4 they have failed to file their arbit - - - their  
5 payment agreement, and therefore any time you want to  
6 pull the trigger you can say we're not going to  
7 arbitration because you didn't file. Can you - - -  
8 can you sleep on those rights?

9 MR. GLEN: Absolutely, for the following  
10 reason. The - - - the underlying dispute is not a  
11 dispute over arbitrability, it's a dispute over who  
12 owes money at what time. We did not have a dispute  
13 with National Union for six years. The dispute came  
14 up because over the course of time, the way these  
15 insurance policies work, there is a congruence that  
16 eventually occurs when all of the insureds have died.  
17 At that point, the amount of money owed by the  
18 insurance company and the amount of the reimbursement  
19 collide.

20 JUDGE ABDUS-SALAAM: But you were aware - -  
21 - piggybacking on Judge Pigott's question, you were  
22 aware that in order for them to enforce the  
23 arbitration provision, they had to file the payment  
24 agreements, were you not?

25 MR. GLEN: I don't know the answer to that

1 as a matter of what counsel actually knew. But let  
2 us assume that the agreements are what they say and  
3 that the law of California is published as it was.  
4 The insurance company elected not to file.

5 In 2011, DOI, learning however it did, that  
6 these payment agreements existed, because they were  
7 never filed, found out about them and issued a  
8 directive, the CitCo (ph.) directive in the file,  
9 saying failure to file payment agreements is failure  
10 to file an endorsement. That is are regulatory  
11 determination of an agency. And if it were in New  
12 York, that would be challenged under an Article 78,  
13 and it would be an arbitrary and capricious review,  
14 not a best-evidence, not a who-wins kind of review.

15 And in that situation, when the Department  
16 of Insurance learned that there were unfiled  
17 agreements, it said we will not enforce them.

18 JUDGE STEIN: But that - - - but doesn't  
19 your entire argument depend upon an assumption of the  
20 merits of the underlying argument and that that's  
21 something that has not been determined conclusively  
22 by the California courts; in other words, whether it  
23 is or isn't enforceable?

24 I mean, I know that the law was amended  
25 subsequently. And that's a different issue, because

1 that - - - that doesn't apply here. But as to the  
2 time frame we're talking about here, there is no  
3 definitive Ca - - - California law on the  
4 enforceability of these clauses - - -

5 MR. GLEN: Well, I will - - -

6 THE COURT: - - - absent - - - absent a  
7 filing. And that's the issue that - - - that we  
8 haven't - - - nobody's gotten to yet.

9 MR. GLEN: May I disagree, Your Honor? The  
10 only appellate decision in California that deals with  
11 the question of whether payment agreements of our  
12 type must be filed with the Department of Insurance,  
13 and the penalty is that if they are not, the  
14 arbitration provision is void, is the Ceradyne case.

15 JUDGE STEIN: But Ceradyne isn't binding on  
16 California - - -

17 MR. GLEN: It is - - -

18 JUDGE STEIN: - - - as I understand it.

19 MR. GLEN: No, it's not quotable in  
20 California. It is - - -

21 JUDGE PIGOTT: Not citable, it said, right?

22 MR. GLEN: Not - - -

23 JUDGE STEIN: Citable?

24 MR. GLEN: - - - citable.

25 JUDGE PIGOTT: You can't cite to it.

1                   MR. GLEN:  It's uncitable, if that is an  
2                   English word.  The - - - that does not mean it is not  
3                   a decision of an appellate court of a sister state.  
4                   And we are the court - - - you are the Court of  
5                   Appeals of the State of New York.  You're being  
6                   asked, in this situation, to make an adjudication as  
7                   to what California's law is regarding an  
8                   administrative determination by the agency that runs  
9                   their insurance system - - -

10                   JUDGE PIGOTT:  It would be - - -

11                   MR. GLEN:  - - - as to how - - -

12                   JUDGE PIGOTT:  - - - trouble though.  I  
13                   mean, if they say it's not be cited as precedent, why  
14                   would we treat it as precedent?  I would think we'd  
15                   be getting in trouble with our sister state.

16                   MR. GLEN:  I believe that the First  
17                   Department treated it correctly as persuasive  
18                   authority.

19                   JUDGE PIGOTT:  Okay.

20                   MR. GLEN:  The Federal District Court in  
21                   California, after the - - - the Department of  
22                   Insurance, in 2011 made its determination that these  
23                   are required to filed, found that Ceradyne was appro  
24                   - - - was persuasive authority.  The First Department  
25                   found that it was persuasive authority.  This is not

1 the Supreme Court of California. The - - - the state  
2 courts of California may not be in a position to know  
3 that there is an uncited opinion, which may account  
4 for the fact that there's some confusion at the  
5 superior court level out there. But we know it - - -

6 JUDGE ABDUS-SALAAM: Aren't we getting into  
7 - - -

8 MR. GLEN: - - - because we have no rule in  
9 New York Against it.

10 JUDGE ABDUS-SALAAM: - - - counsel - - -  
11 counsel, aren't we getting into the merits as - - -  
12 as the Appellate Division majority did, rather than  
13 determining whether this is an arbitration or not?  
14 The - - - Ceradyne goes to the merits of whether the  
15 - - - essentially whether this arbitration clause can  
16 be enforced. And isn't that really something that -  
17 - - if we're talking about the agreement itself and  
18 whether it needs to be filed and whether the  
19 arbitration clause is enforceable, aren't we thinking  
20 more in terms of the McCarran-Ferguson Act and the  
21 FAA as opposed to the California Law?

22 MR. GLEN: May I respond in two - - - two  
23 fashions to that? Yes. McCarran-Ferguson governs  
24 when there is state insurance regulation. The FAA is  
25 the cart, McCarran-Ferguson is the horse. Under



1 California doesn't - - - California's insurance law,  
2 unlike some other states, doesn't say we're against  
3 arbitration. It doesn't say it anywhere.

4 MR. GLEN: I beg to differ, Your Honor.  
5 The Commissioner of Insurance of California has  
6 issued a regulation that says - - -

7 JUDGE STEIN: It says you have to take  
8 certain steps before you - - - before you include  
9 arbitration in your - - - in your agreements.

10 MR. GLEN: And one of those steps is  
11 filing.

12 JUDGE STEIN: And which, by the way, that  
13 law wasn't in effect when - - - when these events  
14 occurred. But - - - but it doesn't say we're against  
15 arbitration.

16 MR. GLEN: No, Your Honor, it says that  
17 unless you give us pre-filing and thirty days to  
18 review an insurance agreement or an endorsement  
19 thereto.

20 JUDGE STEIN: That's under current law.

21 MR. GLEN: That's under all - - - that's  
22 under law from 1946, Your Honor. The law has been in  
23 California - - -

24 JUDGE RIVERA: But it - - - isn't what  
25 matter here - - - as Judge Stein I think is pointing

1 out - - - is what the legislature has decided? And  
2 the legislature has not taken a position, as Judge  
3 Stein has pointed out, as have other legislatures,  
4 that they think arbitration is inappropriate in the  
5 insurance market.

6 So whatever the regulator may say about its  
7 concerns, about the actual text of an arbitration  
8 provision, the - - - the policy choice that the  
9 legislature in California has made at this point, is  
10 that there's no problem with having an arbitration  
11 provision?

12 MR. GLEN: Your Honor, there is nothing in  
13 McCarran-Ferguson that says that the only state  
14 deference that is due in insurance disputes is the  
15 state insurance law. Rather, under Humana, what the  
16 federal courts must do or the state courts must do,  
17 is look at the state administrative regime - - - is  
18 the words from - - -

19 JUDGE RIVERA: I understand. But the  
20 administrative regime could change with the next - -  
21 - right, with the next - - - whoever is next in the  
22 legislature.

23 MR. GLEN: You're absolutely right. And  
24 that's precisely what McCarran-Ferguson is designed  
25 to do.

1                   JUDGE PIGOTT: Just leave it alone? Let me  
2 ask you this. You mentioned that these - - - these  
3 requirements are that you've got to file this and  
4 what, wait thirty days?

5                   MR. GLEN: You file with the WIC - - - it's  
6 some incredible acronym that I - - -

7                   JUDGE PIGOTT: Right.

8                   MR. GLEN: - - - can't remember. You file  
9 with the agency that sets the - - - that does the  
10 research.

11                  JUDGE PIGOTT: Right.

12                  MR. GLEN: They send it on to the  
13 Department of Insurance. The Department of Insurance  
14 has thirty days to either accept, reject, or modify.

15                  JUDGE PIGOTT: All right. Let's assume  
16 that for some reason there's a dispute over whether  
17 the thirty days came or went. It landed on a weekend  
18 or something. Does that - - - does that mean that  
19 it's - - - it's now a court issue as to whether or  
20 not that payment agreement is going to apply, or does  
21 it go to an arbitrator who says, you know, Sundays  
22 don't count, it's thirty days? I mean, or - - - or  
23 what?

24                  MR. GLEN: Oh, I would think the answer to  
25 that, if - - - if New York were to apply, if a New

1 York regulatory agency said we don't count the  
2 thirtieth day if it lands on a Sunday when you're  
3 applying for a liquor license - - -

4 JUDGE PIGOTT: Right.

5 MR. GLEN: - - - the agency would make the  
6 decision. It would be reviewed on - - -

7 JUDGE PIGOTT: So that would be - - - that  
8 would be - - -

9 MR. GLEN: - - - Article 78.

10 JUDGE PIGOTT: - - - that would be an  
11 arbitrable thing?

12 MR. GLEN: No, it would be - - - the agency  
13 decision reviewed by the court on an Article 78  
14 proceeding.

15 JUDGE PIGOTT: So you're saying that - - -  
16 that even - - - even those type of issues take it out  
17 of the - - - out of the contract and out of the issue  
18 of - - - of arbitration?

19 MR. GLEN: Yes, because it's insurance.  
20 We're not talking about the endless series of Supreme  
21 Court cases that talk about when there's going to be  
22 an arbitration can you have a class arbitration or  
23 not. There's going to be an arbitration in those  
24 cases.

25 In our case, there is not going to be an

1 arbitration if the California Department of Insurance

2 - - -

3 JUDGE PIGOTT: I guess, you're missing my  
4 point.

5 MR. GLEN: - - - is correct.

6 JUDGE PIGOTT: My point is this. Who says  
7 that? You say it. Right? But can an arbitrator say  
8 that? I'm not a big fan of arbitrators deciding  
9 whether or not they have jurisdiction, because if I  
10 was getting paid, and I'm arbitrator, I would think I  
11 had jurisdiction. But that's my - - - that's my  
12 colored view of the thing.

13 But why would an arbitrator says this is  
14 not before me? I - - - let me finish - - -

15 MR. GLEN: I'm sorry, Your Honor.

16 JUDGE PIGOTT: I can't - - - I can't decide  
17 this, because this is the - - - whether it's thirty  
18 days or thirty-one days, that's outside of my  
19 jurisdiction. You're going to have to go to court.  
20 And if the court says it's within my jurisdiction,  
21 come on back and I'll decide it. Right?

22 MR. GLEN: Well, this court last month  
23 faced that issue in the Cusimano case. Cusimano was  
24 a case in which this court held that the FAA applies.

25 JUDGE PIGOTT: Right.

1                   MR. GLEN:  It doesn't happen to be an  
2                   insurance case, it happens to be whether your  
3                   interstate commerce or not.  And it then went on to  
4                   decide - - - this court - - - didn't even remand - -  
5                   - it decided that the arbitration had been waived.

6                   Well, if that's not a case-by-case  
7                   adjudication, what is?  And that was not for the  
8                   arbitrator.

9                   JUDGE PIGOTT:  Well, that's why I was  
10                  asking.

11                  MR. GLEN:  You did that one.

12                  JUDGE PIGOTT:  Okay.

13                  MR. GLEN:  Excuse me.  This court did that  
14                  6-0, and I don't think that there was anything - - -  
15                  there's - - - you - - - there's a footnote in that  
16                  case that says we may have said in dicta before that  
17                  this is before the arbitrators, but we don't agree  
18                  with it anymore.  That's the same concept that you're  
19                  raising here, Your Honor, I think.

20                  JUDGE PIGOTT:  All right, let's see if Mr.  
21                  Keisler agrees.

22                  MR. GLEN:  Thank you.

23                  JUDGE PIGOTT:  Thank you.

24                  MR. KEISLER:  I think what respondents are  
25                  asking for is what Judge Abdus-Salaam and Judge Stein



1 Division in this case, every one of the courts has  
2 gone the same way. The Eighth Circuit in the St.  
3 Paul case; Judge Rakoff for the Southern District in  
4 Personnel Plus; the California State Court in Adir  
5 (ph.); and the California Federal District Court in  
6 Grove Lumber all sent the issue to arbitration.

7 JUDGE RIVERA: That - - - the breach of - -  
8 - of the provision ensures you get what the provision  
9 is set to do. Right? So the - - - the requirement  
10 to file - - - by not filing you ensure you get the  
11 arbitration - - -

12 MR. KEISLER: No.

13 JUDGE RIVERA: - - - whereas if you file,  
14 CDI is going to decide at least initially, whether or  
15 not they have a problem with this provision as  
16 written. So I'm going back to what incentivizes the  
17 industry to file?

18 MR. KEISLER: Because you don't ensure you  
19 get the arbitration. All you get is the arbitrators  
20 deciding that initial question of - - -

21 JUDGE RIVERA: I know, but - - -

22 MR. KEISLER: - - - unenforce - - -

23 JUDGE RIVERA: - - - that may be of some  
24 value to you. I understand that.

25 MR. KEISLER: It - - - it may. But - - -

1 but they can decide that it's unenforceable, in which  
2 case, that's what you risk.

3 JUDGE RIVERA: I mean, obviously it's of  
4 value, since you're both fighting about it.

5 MR. KEISLER: That's right. But you do - -  
6 -

7 JUDGE RIVERA: Right? Otherwise you  
8 wouldn't care.

9 MR. KEISLER: But you do risk them not fi -  
10 - - them deciding against you. You also risk - - -

11 JUDGE RIVERA: That's a risk you take in  
12 court too.

13 MR. KEISLER: But you also risk the  
14 insurance action from the CDI, which nothing here  
15 would invoke - - - would - - - would prevent them  
16 from invoking. And at the end of the day, every case  
17 to - - -

18 JUDGE RIVERA: So you're saying even - - -  
19 even with the hypothetical as posed, the reality is  
20 that the regulator will have some say in this,  
21 potentially, if it chooses?

22 MR. KEISLER: They can revoke our license,  
23 Your Honor. They can do all sorts of things to us if  
24 they think we have not complied with the law. And  
25 those are - - -

1                   JUDGE RIVERA:  Although, I guess if you  
2                   have courts or an arbitrator saying that you didn't  
3                   have to file - - -

4                   MR. KEISLER:  Well - - -

5                   JUDGE RIVERA:  - - - you're in good shape?

6                   MR. KEISLER:  I don't know that an  
7                   arbitrator's decision would have any influence on  
8                   what the CDI would later be able to assert in court.  
9                   Certainly if it went up to the California Supreme  
10                  Court and they ruled in our favor, that would govern  
11                  the CDI.

12                  But nothing we do in arbitration can in any  
13                  way impair the CDI's power to initiate an enforcement  
14                  action.

15                  JUDGE FAHEY:  There's a whole line of cases  
16                  - - - California cases - - - I think they're called  
17                  the Smith-Imbler cases, that seem to say the FAA is  
18                  preempted here directly by statute.

19                  MR. KEISLER:  Those cases, Your Honor,  
20                  involved exactly what is missing here.

21                  JUDGE FAHEY:  What's that?

22                  MR. KEISLER:  There - - - there was a  
23                  provision of California law which specifically  
24                  governed arbitration in insurance provisions - - -  
25                  this was a statute - - - which said that you had to

1           make certain disclosures under the statute. And  
2           given that, there was a specific provision of  
3           insurance law with the force of law that the court  
4           held reverse preempted the Federal Arbitration Act.

5                        But that's what's missing here as Judge  
6           Stein said. The - - - the distinction the case law  
7           has drawn on McCarran-Ferguson is that only something  
8           with the force of law can count for McCarran-Ferguson  
9           purposes. So in those states like those that Judge  
10          Stein mentioned, where there is a prohibition on  
11          arbitration of insurance dispute or, Judge Fahey, a  
12          more narrow prohibition of the sort in the Smith-  
13          Imbler cases, that is specifically addressed to  
14          arbitration and is statutory, then the courts have  
15          held that there is reverse preemption, like in Smith  
16          Imbler and like in the McKnight case from the Eighth  
17          Circuit.

18                       But where, instead, you have simply a  
19          filing statute which doesn't itself establish any  
20          competing procedural framework for resolving disputes  
21          as to whether it was broken and what the remedy is if  
22          it has, when you have a statute like that, all the  
23          courts, except the one below, have held that is not  
24          sufficient to trigger McCarran-Ferguson, regardless  
25          of whether it is the position of the regulator that

1           it should be interpreted to render the arbitration  
2           clause unenforceable. That becomes a merits decision  
3           that is decided under the agreement and the FAA by  
4           the arbitrators.

5                     JUDGE PIGOTT: Thank you, Mr. Keiser.

6                     MR. KEISLER: Thank you, Your Honor.

7                     JUDGE PIGOTT: Judge Rivera has a question.

8                     JUDGE RIVERA: If I may, gentlemen, before  
9           you leave.

10                    JUDGE PIGOTT: Hold on.

11                    JUDGE RIVERA: My understanding is that  
12           there's a representative from the California  
13           Commissioner here. Is that correct?

14                    MR. GLEN: Yes, there is, Your Honor. Mr.  
15           Lew is in the audience. Would you like to hear from  
16           him?

17                    JUDGE RIVERA: I'd - - -

18                    JUDGE PIGOTT: Come on up, Mr. Lew.

19                    JUDGE RIVERA: I had a question. If you  
20           could approach? Thank you so much for being here, by  
21           the way.

22                    MR. LEW: Thank you, Your Honors.

23                    JUDGE RIVERA: I know it's a little warmer  
24           on your side of the coast,

25                    MR. LEW: It's about the same, Your Honor.

1 It's a privilege to - - - I'm glad to be - - -

2 JUDGE RIVERA: Well, it's warmer in this  
3 courthouse, right?

4 MR. LEW: I'm glad to be back before this  
5 court again. It's - - - thirty years ago was my first  
6 appearance here.

7 JUDGE PIGOTT: Oh, wonderful.

8 JUDGE RIVERA: Oh.

9 JUDGE PIGOTT: Judge Rivera?

10 JUDGE RIVERA: Good. So I was just curious  
11 as to this statement that any determination by the  
12 arbitrator or this arbitration process would not, in  
13 any way, impair the enforcement or whatever choices  
14 the regulator may have with respect to acting against  
15 an entity who has not filed?

16 MR. LEW: Let me - - - let me respond this  
17 way, Your Honor.

18 JUDGE RIVERA: Um-hum.

19 MR. LEW: Until Mr. Citco issued his 2011  
20 directive, the Department had no idea that these side  
21 agreements were being used and issued to insureds.

22 Mr. Keisler mentioned the possibility of  
23 enforcement action by the California Department of  
24 Insurance. The Agency can't enforce what it doesn't  
25 know is going on. If these payment agreements are

1 not being filed, how on earth would the Commissioner  
2 or the Department of Insurance know they exist?

3 JUDGE STEIN: Well, couldn't the insureds  
4 notify you?

5 MR. LEW: They could. But we can't rely -  
6 - -

7 JUDGE STEIN: And once you got that - - -

8 MR. LEW: - - - on that as - - -

9 JUDGE ABDUS-SALAAM: - - - once the  
10 Department brought the - - -

11 MR. LEW: - - - an enforcement mech - - -

12 JUDGE ABDUS-SALAAM: - - - enforcement  
13 action against Zurich, did they think Zurich was the  
14 only insurer doing what Zurich was doing?

15 MR. LEW: Well, Your Honor, there are - - -  
16 the Department of Insurance has a host of other  
17 responsibilities. And they're not a police agency,  
18 Your Honor. And they depend - - - there is a  
19 regulatory system in place. And we have to rely on  
20 the integrity and the honesty of the entities that  
21 they regulate to comply with the regulations - - -

22 JUDGE ABDUS-SALAAM: Well, is my - - -

23 MR. LEW: - - - and statutes.

24 JUDGE ABDUS-SALAAM: - - - is my  
25 understanding correct, that part of the settlement

1 was that the California Insurance Department promised  
2 Zurich that it would treat its rivals the same way it  
3 was treating Zurich?

4 MR. LEW: That - - - it certainly is, Your  
5 Honor. But - - -

6 JUDGE ABDUS-SALAAM: So they knew they had  
7 rivals?

8 MR. LEW: Well - - - well, they knew - - -  
9 there are rival insurance agencies, Your Honors. But  
10 how - - - how is the Agency supposed to know that  
11 other insurance companies have unfiled payment  
12 agreements with other insured, unless - - - unless -  
13 - -

14 JUDGE RIVERA: I guess like most regulators  
15 you could, perhaps assume that well, this is probably  
16 not the only player in town conducting themselves  
17 this, way and perhaps it would be a wise course to  
18 now take action?

19 MR. LEW: It pro - - - probably would be,  
20 Your Honor.

21 JUDGE PIGOTT: Well, the simple fact is, I  
22 mean, you've got a private cause of action here  
23 between these two, whatever happens, and you're an  
24 enforcement agency over the entire thing, and you  
25 can't watch every single thing that's going on.

1 MR. LEW: Correct, Your Honor. There's a -  
2 - - there's also an issue of public resources  
3 available - - -

4 JUDGE PIGOTT: Right.

5 MR. LEW: - - - for us to do the police  
6 function - - -

7 JUDGE PIGOTT: I think - - -

8 MR. LEW: - - - that you'd like us to do.

9 JUDGE PIGOTT: - - - we have your - - -  
10 your argument. Judge Rivera?

11 JUDGE RIVERA: Thank you.

12 JUDGE PIGOTT: Thank you.

13 MR. LEW: Thank you - - -

14 JUDGE PIGOTT: Thank you for your time.  
15 Thank you, gentlemen.

16 MR. LEW: - - - for the opportunity, Your  
17 Honor.

18 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Monarch Consulting, Inc., et al. v. National Union Fire Insurance Co. of Pittsburgh, PA, No. 8 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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