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Keystone, Inc. v. Triad Systems Corporation: Is the Montana Supreme Court Undermining the Federal Arbitration Act?

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NOTE

KEYSTONE, INC. V. TRIAD SYSTEMS CORPORATION: IS THE MONTANA SUPREME COURT UNDERMINING THE FEDERAL ARBITRATION ACT?

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I. INTRODUCTION

The Montana Supreme Court has refused to enforce arbitration agreements in contracts that call for Montanans to arbitrate outside of Montana.[1] Citing two state statutes, the Montana Supreme Court relied on public policy to find the arbitration agreement's forum selection clauses unenforceable, when such clause called for the parties to arbitrate outside of Montana.[2] The court has claimed that the statutes express a public policy against forum selection clauses, calling for forums outside of Montana, in both arbitration agreements and regular contractual agreements. Thus, because the public policy applies to all contracts (and not exclusively to arbitration agreements),

1. *See* Keystone, Inc. v. Triad Systems Corp., 1998 MT 326, ¶¶ 24-30, 292 Mont. 229, ¶¶ 24-30, 971 P.2d 1240, ¶¶ 24-30.

2. *See id.*

the statutes were neither preempted by the Federal Arbitration Act ("FAA"), nor in conflict with the intent of Congress and the FAA preferring enforceability of arbitration clauses.[3]

In *Keystone, Inc. v. Triad Systems Corporation*,[4] the Montana Supreme Court refused to enforce the parties' agreement to arbitrate in California and compelled arbitration in Montana[5] based upon the combination of Montana Code Annotated ("MCA") section 28-2-708[6] and MCA section 27-5-323.[7] However, the Montana Supreme Court misinterpreted prior U.S. Supreme Court precedent by ruling that the FAA did not preempt MCA section 28-2-708 and MCA section 27-5-323.[8] The Montana Supreme Court has initiated a trend of circumventing the intent of Congress expressed in the FAA,[9] as well as the Supremacy Clause[10] and the Commerce Clause,[11] and the precedent of the U.S. Supreme Court regarding the FAA.[12] In addition, the obvious distaste for the FAA expressed in *Casarotto v. Lombardi* by Justice Trieweiler[13] may demonstrate the true reason for the court's seeming unwillingness to apply the FAA correctly in all of the cases that

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3. *See id.*

4. 1998 MT 326, 292 Mont. 229, 971 P.2d 1240.

5. *Id.* ¶¶ 24-30.

6. *See* MONT. CODE ANN. § 28-2-708 (2001), stating:

> Every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings in ordinary tribunals or which limits the time within which he may thus enforce his rights is void. This section does not effect the validity of an agreement enforceable under Title 27, Chapter 5.

7. *See* MONT. CODE ANN. § 27-5-323 (2001), stating:

> An initial application must be made to the court of the county in which the agreement provides the arbitration hearing must be held or, if the hearing has been held, in the county in which it was held. Otherwise, the application must be made in the county where the adverse party resides or has a place of business or, if he has no residence or place of business in this state, to the court of any county. All subsequent applications must be made to the court hearing the initial application unless the court otherwise directs. No agreement concerning venue involving a resident of this state is valid unless the agreement requires that arbitration occur within the state of Montana. This requirement may only be waived upon the advice of counsel as evidenced by counsel's signature thereto.

8. *See* MONT. CODE ANN. §§ 28-2-708, 27-5-323.

9. *See* 9 U.S.C. § 2 (2002).

10. *See* U.S. CONST. art. VI. *See infra* Part III.A.

11. *See* U.S. CONST. art. I, § 8, cl. 3. *See also infra* Part III.A.

12. *See infra* Part III.A.

13. *See generally* Casarotto v. Lombardi, 268 Mont. 369, 382-85, 886 P.2d 931, 939-41 (1994) (Trieweiler, J., specially concurring).

have come before the court.[14]

This note will first examine how the Montana Supreme Court has contradicted the precedent established by the U.S. Supreme Court on the FAA. The note will also discuss how the Montana Supreme Court's opinions are contravening the congressional intent and purpose of the FAA. The note will identify the reasons for concern with the Montana Supreme Court's refusal to correctly apply the FAA to arbitration agreements. The note will conclude by explaining how this refusal might pose potential economic loss for Montana business interests and ventures.[15]

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14. The Restatement (Second) of Conflict of Laws §§ 187, 188 analysis is beyond the scope of this note. The conflict of laws question raised by the Montana Supreme Courts' use of the Restatement (Second) of Conflict of Laws §§ 187, 188 is a complicated and controversial one which would require its own separate analysis. The pre-emptive power of the FAA regarding forum selection in arbitration clauses is the purpose of this note and the controlling issue in *Keystone*. However, several scholars have called into question the inconsistent application of the Second Restatement by the Montana Supreme Court. The Montana Supreme Court has been viewed as adopting the Second Restatement for contract conflicts and applying it in *Casarotto*; however, "a closer reading of those decisions leaves serious doubts on whether they had actually followed the Restatement." Symeon C. Symeonides, *Choice of Law in the American Courts in 1998; Twelfth Annual Survey*, 47 AM. J. COMP. L. 327, 333 (1999). *See also infra* text accompanying note 22.

15. In *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the U.S. Supreme Court reviewed the importance of enforcing international arbitration agreements in the context of antitrust claims. The Court reasserted its reasoning from *Scherk v. Alberto-Culiver Co.*, 417 U.S. 506 (1974), in *Mitsubishi*, where the Court concluded:

> [T]hat concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. at 629.

The Court also took note of prior reasoning from *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), where the Court stated:

> The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts .... We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

Mitsubishi, 473 U.S. at 629 (citing *The Bremen*, 407 U.S. at 9).

The Montana Supreme Court needs to realize that such concerns are not exclusive to international markets, business, or industries. Finally, in *Mitsubishi*, the Court noted its emphasis from *Scherk*:

> A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is ... an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. .... A parochial refusal by the courts of

II. THE MONTANA SUPREME COURT VERSUS THE PREEMPTIVE POWER OF THE FAA

A. The Factual and Procedural Background of Keystone, Inc. v. Triad Systems Corporation

In November 1994, Keystone, Inc. ("Keystone"), a Montana corporation, and Triad Systems Corporation ("Triad"), a California corporation, entered into a contract. These sophisticated commercial parties (not private parties) negotiated the terms of the contract for many months.[16] The contract required the parties to arbitrate any dispute before the American Arbitration Association in California.[17] The terms of the contract provided any dispute "will be governed by and construed in accordance with the laws of the United States and the State of California."[18]

In November 1996, Keystone filed a complaint in Montana district court against Triad for breach of warranty, breach of contract, negligence, and negligent misrepresentation. Triad responded by arguing that the parties' contract required the arbitration of a dispute before the American Arbitration Association in California.[19]

Keystone, relying on MCA section 28-2-708, moved the district court to compel arbitration in Montana, and Triad filed a cross-motion to compel arbitration in California pursuant to the terms of the arbitration agreement.[20] A Montana district court held that section 28-2-708 was preempted by the FAA and

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> one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages .... [It would] damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.

See id. at 631 (quoting *Scherk*, 417 U.S. at 516-17).

Although commerce, business relations, and business transactions are far more secure within the United States, and do not have the potential explosive political influences, the major concerns of the U.S. Supreme Court in enforcing arbitration agreements should not be lost on the Montana Supreme Court. Montana has its own concerns for attracting and obtaining profitable companies for its workforce and profitable ventures for its existing corporations in the state.

16. *See Keystone*, 1998 MT 326, ¶ 12.
17. *See id.* ¶ 5.
18. *Id.* ¶ 9.
19. *Id.* ¶ 5.
20. *Id.* ¶ 6

granted Triad's motion to compel arbitration in California; Keystone appealed.[21]

B. The Montana Supreme Court's holding in Keystone v. Triad

On appeal, the Montana Supreme Court reversed the district court's holding. In an opinion written by Justice Trieweiler, the Montana Supreme Court concluded that Montana law governed the interpretation of the contract and refused to apply California law as agreed by the parties.[22] The court reasoned that MCA section 28-2-708 had historically been applied for two reasons: "(1) *to protect Montana residents from having to litigate outside of Montana*; and (2) *to invalidate pre-dispute arbitration agreements*."[23] The court further determined

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21. *Keystone*, 1998 MT 326, ¶ 6.

22. *See id.*, ¶ 14. The Court held the choice of law provisions in *Casarotto v. Lombardi*, 268 Mont. 369, 886 P.2d 931 (1994), *rev'd on other grounds by Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996), governed the case and resolved the question that Montana law was to interpret the contract is a separate controversial issue not discussed in this note. The U.S. Supreme Court never ruled either way on the Montana Supreme Court's choice of law analysis and application of the Restatement (Second) of Conflicts of Law § 188. The Court could have ruled on the conflicts of law analysis, but probably found it unnecessary since the application of the FAA determined the outcome of *Casarotto*. However, the Montana Supreme Court mistakes the Court's silence on its application of § 188 as an approval. In *Keystone*, the court points to the analysis in *Casarotto* as still valid precedent, but fails to do any true independent analysis of § 188 on the facts in *Keystone*. The Montana Supreme Court spent seven paragraphs laying out its choice of law precedent, as determined in *Casarotto*, but in reality it read as an attempt to recover *Casarotto* from the U.S. Supreme Court's overruling. Yet, the Montana Supreme Court spent only one cursory paragraph to say that because the computer system was to distribute auto parts across Montana, and Montana employees were trained by Keystone, that somehow all five factors of the Second Restatement were satisfied in order for Montana law to control. *See Keystone*, 1998 MT 326, ¶¶ 4-17. In *Keystone*, the court stated:

> We rely on [the Restatement (Second) of Conflicts of Laws] § 188 to determine which state has a materially greater interest in the particular contract issue and which state's law would apply *in the absence of an effective choice of law by the parties*. The factors from § 188 that we consider include: (a) *the place of contracting*, (b) *the place of negotiation of the contract*, (c) *the place of performance*, (d) *the location of the subject matter of the contract*, and (e) *the domicile, residence, nationality, place of incorporation and place of business of the parties*.

Id. ¶ 10 (emphasis added). The court stated that "[m]ost significantly, however, the contract was performed almost exclusively in Montana." *Id.* ¶ 12. However, this factual determination is questionable given the district court's findings. In addition, the court failed to do any analysis on any of the five factors, and at best mentions only facts to be analyzed under (c), and possibly (b). *See also supra* text accompanying note14.

23. *Keystone*, 1998 MT 326, ¶ 17 (emphasis added). The court clearly states that the statute had the historical purpose to find arbitration agreements invalid. These type of state statutes were the very basis for Congress' enactment of the FAA. In addition,

that whether MCA section 28-2-708 pertained to arbitration contracts was unimportant because MCA section 27-5-323 provided the same protection for arbitration agreements, based on a fundamental public policy which did not conflict with the goals and policies of the FAA.[24] The court concluded that the combined effect of the two statutes invalidated "only the portion of the agreement which requires Keystone to arbitrate the dispute outside of Montana."[25]

III. THE FEDERAL ARBITRATION ACT

A. History and Background of the Federal Arbitration Act

In 1925, Congress enacted the Federal Arbitration Act to overcome the overt hostility that state courts had demonstrated towards contractual agreements to arbitrate disputes.[26] Courts throughout the country had continued to deny, and refused to honor, arbitration agreements on the grounds that the removal of courts' jurisdiction violated public policy.[27] Congress attempted to end this hostility by the FAA, United States Code, Title 9, Section 2, which 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 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 grounds as

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such purposes served as the basis for the U.S. Supreme Courts expansion of the FAA in *Southland*, where the Court stated "we cannot believe Congress intended to limit the [FAA] to disputes subject only to federal court jurisdiction." Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 FLA. L. REV. 175, 192 (2002) (quoting Southland Corp. v. Keating, 465 U.S. 1, 15 (1984)). The Court found that "[i]n 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 id.* (citing *Southland*, 465 U.S. at 10).

24. *Keystone*, 1998 MT 326, ¶ 20. *See also supra* text accompanying note 7.

25. *Keystone*, 1998 MT 326, ¶ 29. *See also infra* Part IV.C.

26. *See* Southland Corp. v. Keating, 465 U.S. 1, 10 (1984). Congress enacted the Federal Arbitration Act in 1925, Pub. L. No. 68-401, 43 Stat. 883 (codified at 9 U.S.C. § 2 (2002)).

27. *See* Thomas A. Diamond, *Choice of Law Clauses and Their Pre-emptive Effect upon the Federal Arbitration Act: Reconciling the Supreme Court with Itself*, 39 ARIZ. L. REV. 35, 65 (1997).

exist at law or in equity for the revocation of any contract.[28]

According to the U.S. Supreme Court in *Southland Corporation v. Keating*,[29] the enactment of section 2 declared a national policy favoring arbitration and withdrew the power of the state courts to require judicial forums for resolving claims where the parties had agreed in a contract to resolve future disputes by arbitration.[30]

The FAA reserves power over the states on the authority of Congress to enact rules under the Commerce Clause.[31] The U.S. Supreme Court examined this power and concluded that the statute "is based upon . . . the incontestable federal foundations of control over interstate commerce."[32] Congress enacted the FAA to prevent state and federal courts from reaching different outcomes regarding the validity of arbitration agreements.[33] According to the Court, the FAA will preempt state statutes which intend to make arbitration agreements unenforceable.[34] The Court has stated that there are only two limits to the enforcement of arbitration agreements by the FAA:

> [T]hey must be part of a written maritime contract or a contract 'evidencing a transaction involving commerce' and such clauses 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*.[35]

As early as 1972, the Court held the choice of forum clause made by sophisticated business persons in an arbitration agreement should be honored and enforced "absent some compelling and countervailing reason." [36]

In *Scherk v. Alberto-Culver Co.*,[37] the U.S. Supreme Court held that the FAA preempted a section of the Securities Act, which voided any waiver of judicial forum, because the provisions of the FAA could not be ignored by the courts.[38] The

28. 9 U.S.C. § 2 (2002).

29. 465 U.S. 1 (1984).

30. *See id.* at 9.

31. *Id.* at 11. *See also* U.S. CONST. art. I. § 8, cl. 3.

32. *Southland*, 465 U.S. at 11 (quoting Prima Paint Corp. v. Conklin Manufacturing Corp, 388 U.S. 395 (1967) (citing H.R.Rep. No. 96, 68th Cong., 1st Sess. 1 (1924)).

33. *Southland*, 465 U.S. at 15-16.

34. *See id.* at 10.

35. *Southland*, 465 U.S. at 10-11 (quoting 9 U.S.C. § 2) (emphasis added).

36. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972).

37. 417 U.S. 506 (1974).

38. *See id.*

Court reiterated its rejection of a doctrine which had allowed state courts to ignore the voluntary forum selection clause of a contract, unless the selected state provided a more convenient forum.[39] The Court concluded that a "forum clause should control absent a strong showing that it should be set aside."[40]

The U.S. Supreme Court, in determining the enforcement of the FAA and an arbitration clause in international trade, concluded that the agreement of the parties to eliminate the uncertainty of a forum in advance is an indispensable element in international trade, commerce, and contract.[41] A judicial elimination of an arbitration clause would allow a party to "repudiate its solemn promise."[42]

The Seventh Circuit has reasoned that the FAA mandated courts to order parties to arbitrate "in accordance with the terms of the agreement; one term of the agreement is the parties' forum selection clause."[43] The U.S. Supreme Court reviewed the language "involving commerce" contained in section 2 of the FAA and found such language not to be a limitation, but a qualification, which allowed section 2 to apply to state and federal courts.[44] The Court held that forum shopping between federal and state courts would frustrate the intent of Congress.[45] Therefore, if the arbitration clause were enforceable in federal court it would also be enforceable in state court.[46] The intent of Congress to create a substantive rule was to foreclose state legislatures from undercutting the enforceability of arbitration agreements.[47]

In *Volt Information Sciences, Inc. v. Board of Trustees*,[48] the U.S. Supreme Court noted the lack of procedural rules in the FAA, but found their absence consistent with the main congressional goal to ensure arbitration according to the terms

39. *See* Scherk, 417 U.S. at 518.

40. *Scherk*, 417 U.S. at 518 (quoting *The Bremen*, 407 U.S. at 15 (a case ruling on the enforcement of an international arbitration agreement). *See also supra* text accompanying note 15.

41. *See Scherk*, 417 U.S. at 518-19.

42. *Id.*

43. Snyder v. Smith, 736 F.2d 409, 413 (7th Cir. 1984) *overruled on other grounds by* Felzen v. Andreas, 134 F.3d 873 (7th Cir. 1998).

44. Southland Corp. v. Keating, 465 U.S. 1, 14 (1984).

45. *Id.* at 15.

46. *See id.*

47. *See id.* at 16.

48. 489 U.S. 468 (1989).

of the parties' agreement.[49] However, the Court noted that the FAA does not contain a preemptive provision so as to occupy the entire field of arbitration.[50] The FAA's primary purpose is to enforce private agreements to arbitrate.[51] Thus, when the parties agree to be governed by a state law, then that state's arbitration laws will control over the FAA.[52]

In *Perry v. Thomas*,[53] the U.S. Supreme Court reiterated the power of the FAA by holding that section 2 is a liberal policy favoring arbitration "notwithstanding any state substantive or procedural policies to the contrary."[54] The FAA provides for enforcing arbitration clauses within the full reach of the Commerce Clause. The application of the FAA with the Commerce Clause has resulted in the U.S. Supreme Court's holding "that these agreements are to be *rigorously enforce[d].*"[55] In *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc.*,[56] the Court explained the proper process for a court asked to compel arbitration. The Court stated:

> The first task of a court asked to compel arbitration is to determine whether the parties agreed to arbitrate that dispute. The court is to make this determination by applying the "federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." . . . And that body of law counsels "that questions of arbitrability must be addressed

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49. *Volt*, 489 U.S. at 476.

50. *See id.* at 476-77.

51. *See id.* at 479.

52. *See id.* A recent article gives the overall transformation, by the U.S. Supreme Court, of the FAA to the current national policy favoring arbitration.

> Over time the Supreme court has remade the FAA into the cornerstone of a new "arbitration federalism." The remaking of the statute, far from cataclysmic, has proceeded in stages. Drawing from Erie in diversity cases, the Court came to interpret the FAA to supersede state anti-arbitration standards in federal diversity cases. Then, applying a post-New Deal preemption analysis, the Court expanded this "substantive" pro-arbitration policy into a "national policy" applicable in state courts. Finally, on the assumption Congress had acted pursuant to its full commerce clause powers in enacting the FAA, the Court extended this "national policy" to all commercial contracts. Over time, as the Court's attitude toward private arbitral choice shifted, the original FAA's notions of circumscribed federal power succumbed to new jurisdictional understandings.

Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 FLA. L. REV. 175, 182 (2002).

53. 482 U.S. 483 (1987).

54. Perry v. Thomas, 482 U.S. 483, 489 (quoting Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983)).

55. *Perry*, 482 U.S. at 491 (quoting Dean Witter Reynolds Inc., v. Byrd, 470 U.S. 213 (1985) (emphasis added)).

56. 473 U.S. 614 (1985).

> with a healthy regard for the federal policy favoring arbitration .... The [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."[57]

In 1995, in *Allied-Bruce Terminix Companies v. Dobson*,[58] the U.S. Supreme Court was asked by twenty states attorneys general to overrule *Southland*, a landmark case for the FAA .[59] The Alabama Supreme Court had determined, based upon a state statute, that a pre-dispute arbitration agreement was unenforceable "because the connection between the termite contract and interstate was too slight."[60] The Court found that the "Commerce in fact" interpretation was applicable for the FAA, "reading the Act's language as insisting that the 'transaction' in fact 'involve' interstate commerce, even if the parties did not contemplate an interstate commerce connection."[61] The Court reviewed the reach of section 2 of the FAA, in a contract evidencing commerce, and concluded that a broader reading of section 2 was the correct interpretation.[62] The Court reiterated that Congress did not want state and federal courts reaching different outcomes about the validity of arbitration.[63] Hence, state courts were not allowed to apply state statutes invalidating arbitration agreements.[64] The Court stated that no case since *Southland* had eroded the authority of the FAA; in fact Congress had "enacted legislation extending, not retracting, the scope of arbitration."[65]

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57. *Mitsubishi*, 473 U.S. at 626 (quoting Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24-25 (1983)).

The Court has followed this continued line of reasoning to find that federal law, through the Supremacy Clause, will preempt state statutes which interfere with, and are contrary to the intent of Congress. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 108 (1992). In *Gade*, the U.S. Supreme Court found that the Occupational Safety and Health Act (OSHA), 29 U.S.C. § 655, had a preemptive effect over state licensing acts. *Id.* at 108-09 (quoting De Canas v. Bica, 424 U.S. 351, 357 (1976)). The Court has gone as far in this field to say that "even state regulation designed to protect vital state interests must give way to paramount legislation." *Id.* at 108 (citing *De Canas*, 424 U.S. at 357).

58. 513 U.S. 265 (1995).

59. *Id.* at 272.

60. *Allied-Bruce*, 513 U.S. at 269.

61. *Id.* at 281.

62. *See id.* at 273-83.

63. *See id.* at 272.

64. *Id.*

65. *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 272 (1995) (citing to 9

In *Allied-Bruce*, the U.S. Supreme Court determined that the first question regarding section 2 of the FAA concerns the scope of the definition of the term "involving commerce."[66] According to the Court, the term "involving commerce" is the equivalent of "affecting commerce," and gives the FAA the broadest possible reach under the Commerce Clause.[67] Therefore, the FAA and section 2 apply when there is a contract evidencing commerce which contains an arbitration agreement.[68] The Court further held that section 2 does allow states to protect "consumers against unfair pressure to agree to a contract with an unwanted arbitration clause."[69] However, states may regulate section 2 and invalidate arbitration clauses only under general contract principles and "upon such grounds as exist in law or in equity for the revocation of any contract."[70] But, states may not decide that a contract is fair enough to enforce all of the contract's basic terms, and then refuse to enforce the terms of the arbitration clause.[71] Otherwise, to do so would place arbitration clauses on unequal footing with contracts and would run contrary to the FAA and the intent of Congress.[72]

In *Circuit City Stores, Inc. v. Adams*,[73] the Court reviewed the construction of the FAA, the extent of "engaged in commerce," and its reach through the Commerce Clause.[74] The Court reiterated its reasoning in *Allied-Bruce* to overrule the Court of Appeals, reasoning that the "expansive reading of [section] 2, [in *Allied-Bruce*,] gives no reason to abandon the precise reading of a provision that exempts contracts from the FAA's coverage."[75] However, the Court further reasoned that the term "engaged in commerce" in section 1 of the FAA should be viewed "with reference to the statutory context in which it is

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U.S.C. § 15) (noting the elimination of the Act of State Doctrine as a bar to arbitration, and sections 201-208 of Title 9 of the U.S. Code, which expanded the scope of the FAA into international arbitration).

66. *Allied-Bruce*, 513 U.S. at 273.
67. *Id.* at 274.
68. *See id.* at 277.
69. *Id.* at 281.
70. *Id.* (quoting 9 U.S.C. § 2 (2002)).
71. *Id.* at 281.
72. *Id.*
73. 532 U.S.105 (2001).
74. *See id.* at 116-21.
75. *Id.* at 118-19.

found and in a manner consistent with the FAA's purpose."[76] The Court found that the "the text of the FAA forecloses the construction of [section] 1 followed by the Court of Appeals . . . [,] a construction that would exclude all employment contracts from the FAA."[77] The Court found that employment contracts calling for arbitration were not exempted from the FAA under section 1.[78] The Court noted that it would not "chip away at *Southland* by indirection," and that "Congress had not moved to overturn *Southland*, . . . and we now note that it has not done so in response to *Allied-Bruce* itself."[79]

Federal courts have reviewed similar public policy concerns expressed in the opinions of the Montana Supreme Court. A provision of the Michigan Franchise Agreement Law was preempted by the FAA because it had rendered void any provision that called for arbitration outside of Michigan, and thus, the law had imposed limitations on the agreement to arbitrate.[80] A law in Puerto Rico provided that any contract clause that required an automobile dealer to adjust, arbitrate, or litigate outside of Puerto Rico violated public policy and was null and void.[81] The U.S. Supreme Court found that the FAA preempted the statute for invalidating arbitration clauses in dealer's contracts because the public policy concern for forum selection were not among the grounds that existed "in law or equity for the revocation of any contract."[82] The federal courts have found that courts cannot rewrite the parties' arbitration agreements and compel arbitration in a forum not selected and enumerated in the parties' arbitration forum clause.[83]

The courts, overall, have established that when an

76. *Circuit City*, 532 U.S. at 118.

77. *Id.* at 119.

78. *See id.* at 123.

79. *Id.* at 122. The court noted that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute, it only submits to their resolution in an arbitral, rather than a judicial, forum." *Id.* at 123 (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (citations omitted)). Finally, the Court noted that although *Gilmer* involved a federal statute instead of a state statute, "the argument . . . that a state statute ought not to be denied state judicial enforcement while awaiting the outcome of arbitration. That matter . . . was addressed in *Southland* and *Allied-Bruce*, and we do not revisit the question here." *Id.* at 123-24.

80. Alphagraphics Franchising, Inc. v. Whaler Graphics, Inc., 840 F. Supp. 708, 710 (D. Ariz. 1993).

81. Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc., 723 F.2d 155 (1st Cir. 1983), *aff'd in part, rev'd in part on other grounds*, 473 U.S. 614, 621 (1985).

82. *Id.*

83. *See* Dean Witter Reynolds v. Prouse, 831 F. Supp. 328, 330 (S.D.N.Y. 1993).

agreement to arbitrate future claims is valid, the agreement on the jurisdiction to govern the dispute must also be valid.[84] The U.S. Supreme Court has essentially created a presumption "that arbitration agreements reflect mutual party intent" and are enforceable, and "rebuttable only under traditional contract revocation standards."[85]

B. The Montana Supreme Court versus the Federal Arbitration Act

In 1989, the Montana Supreme Court heard a dispute between two Montana corporations regarding the application of the FAA to an arbitration clause which stated that the American Arbitration Association would resolve any dispute arising out of the partnership agreements.[86] The Montana Supreme Court stated, at that time, that the *"law is clear that if the contract falls within the ambit of the Federal Arbitration Act . . . then an arbitration clause found in that contract must be enforced."*[87] The court determined that since five percent of one business was comprised of out-of-state clients (thus evidencing interstate commerce), the FAA controlled.[88]

However, in 1994, the Montana Supreme Court, in an opinion written by Justice Trieweiler, held that a contract with an arbitration clause was not enforceable, and that the FAA did not preempt state law.[89] The court reasoned that MCA section 27-5-114(4), which called for special notice requirements in order to have a valid arbitration agreement, was enacted for the following reasons: (1) to prevent Montanans from unknowingly waiving their rights to the access to Montana courts; and (2) to prevent Montanans having to arbitrate outside of Montana.[90] The court held that MCA section 27-5-114 established "a fundamental public policy of Montana and the application of

84. *See* R. L. Martyn, Annotation, *Validity and Effect, and Remedy in Respect, of Contractual Stipulation to Submit Disputes to Arbitration in Another Jurisdiction*, 12 A.L.R.3d 892 (1999).

85. Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 FLA. L. REV. 175, 204 (2002) (citing generally Southland Corp. v. Keating, 465 U.S. 1 (1984); Perry v. Thomas, 482 U.S. 483 (1987)).

86. *See* William Gibson, Jr., Inc. v. James Graff Communications, 239 Mont. 335, 336-37, 780 P.2d 1131, 1132 (1989).

87. *Id.* (emphasis added).

88. *Id.*

89. Casarotto v. Lombardi, 268 Mont. 369, 373-77, 886 P.2d 931, 933-34 (1994) *rev'd sub nom.* Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996).

90. *Casarotto*, 268 Mont. at 376, 886 P.2d at 935.

Connecticut law would be contrary to that policy."[91]

The Montana Supreme Court had attempted to rely on some of the language from the U.S. Supreme Court's decision in *Volt Information Sciences, Inc. v. Board of Trustees*,[92] which observed that a California law, which was essentially procedural, did not frustrate the policy of the FAA.[93] Relying on this reasoning, the Montana Supreme Court found that MCA section 27-5-114(4) (notice requirement) would not "undermine the goals and policies of the FAA."[94] However, the court stated that it would not "*decline to enforce arbitration agreements which are entered into knowingly*."[95]

Justice Weber, dissenting, stated that the court misapplied MCA section 27-5-114 because there was no reference to Montana law in the agreement, and the Montana laws on arbitration in contracts were preempted by the coverage of the FAA in the arbitration agreement.[96] Justice Gray, dissenting, found that the court's analysis was incomplete and erroneous.[97] Justice Gray concluded that the notice requirement "totally undermines the purposes of the FAA by rendering the parties' arbitration agreement unenforceable."[98]

The United States Supreme Court, in *Doctor's Associates, Inc v. Casarotto*,[99] held that MCA section 27-5-114(4), and the use of the language "subject to arbitration" conflicted with the FAA, and was thereby preempted by the FAA.[100] The FAA, section 2, provides for the "revocation of arbitration agreements only upon 'grounds as exist at law or in equity for the revocation of any contract.'"[101] The Montana Supreme Court incorrectly read *Volt* as limiting the preemptive force of section 2, and

91. *Casarotto*, 268 Mont. at 376-77, 886 P.2d at 936.

92. 489 U.S. 468

93. *Casarotto*, 268 Mont. at 380, 886 P.2d at 938.

94. *Casarotto*, 268 Mont. at 380-81, 886 P.2d at 938.

95. *Casarotto*, 268 Mont. at 381-82, 886 P.2d at 939 (emphasis added).

96. *Casarotto*, 268 Mont. at 391, 886 P.2d at 945 (Weber, J., dissenting) (Turnage, C.J., joining the foregoing dissent).

97. *See Casarotto*, 268 Mont. at 391, 886 P.2d at 945 (Weber, J., dissenting) (Turnage, C.J., joining the foregoing dissent).

98. *Casarotto*, 268 Mont. at 395, 886 P.2d at 947 (Gray, J., dissenting) (Turnage, C.J., joining the foregoing dissent).

99. 517 U.S. 681 (1996).

100. *Id.* at 688. *See also* MCA § 27-5-114(4) (1995) ("Notice that a contract is subject to arbitration . . . shall be typed in underlined capital letters on the first page of the contract; and unless such notice is displayed thereon, the contract may not be subject to arbitration.")

101. *Doctor's Assocs.*, 517 U.S. at 685 (citing *Southland*, 465 U.S. at 11).

thereby did not ask the proper question from *Volt*: whether MCA section 27-5-114(4) undermined the goals and policies of the FAA.[102] The U.S. Supreme Court remanded the case to the Montana Supreme court in light of *Allied-Bruce v. Dobson*, specifically finding that a state can only regulate arbitration clauses upon the grounds that exist for the revocation of any contract.[103] The U.S. Supreme Court held that a state could not:

> 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's intent.[104]

On remand, the Montana Supreme Court adhered to its original holding in *Casarotto*, and the U.S. Supreme Court was left with no choice but to reverse in *Doctor's Associates* when the Court heard the case a second time.[105] The U.S. Supreme Court again reiterated that the language of the revocation of any contract to be applicable only to general "contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening [section] 2."[106]

In *Doctor's Associates*, the U.S. Supreme Court overruled

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102. *Doctor's Assocs.*, 517 U.S. at 685.

103. *See generally Doctor's Assocs.* 517 U.S. 681.

104. *Doctor's Assocs.*, 517 U.S. at 686 (quoting *Allied-Bruce*, 513 U.S. at 281).

105. *See id.* at 685. Given the small number of cases that are actually granted certiorari by the U.S. Supreme Court, one must add additional value to a decision, and the direction of the Court, in that it felt strongly enough to address the issue again. Thus, the Court's strong directions in the *Casarotto* opinions should have been followed more closely and carefully by the Montana Supreme Court in the next line of cases that came before the court on the FAA, apparently this was not the case.

Justice Trieweiler and Justice Hunt responded to the U.S. Supreme Court's decision by not signing the remand. *See* Richard C. Rueben, *Western Showdown: Two Montana Judges Buck the U.S. Supreme Court*, A.B.A. J., Oct. 1996, at 16. Justice Trieweiler and Justice Hunt responded that the U.S. Supreme Court was "philosophically misguided" and stated "[w]e cannot in good conscience be an instrument of a policy which is legally unfounded, socially detrimental and philosophically misguided as the United States Supreme Court's decision in this and other cases which interpret and apply the Federal Arbitration Act." *See id.* Trieweiler continued by stating "[w]hat you have here is a bunch of out-of-state corporations imposing arbitration on local residents through clauses buried in contracts of adhesion, and the U.S. Supreme Court saying that's OK." *See id.* Mark R. Kavitz, an attorney representing Doctor's Associates, Inc. in *Casarotto*, raised one of the more concerning issues, brought about by the Justice's refusal to sign the Court's remand, by his response that "the action by the two justices sends the wrong message. 'I don't know how they expect trial court judges to follow their orders if they won't follow the decisions of the U.S. Supreme Court.'" *See id.*

106. *Doctor's Assocs.*, 517 U.S. at 687.

the Montana Supreme Court's holding that MCA section 27-5-114(4) did not conflict with the purpose and policies of the FAA.[107] According to the U.S. Supreme Court, the Montana Supreme Court again misapplied *Volt* as limiting the preemptive force of section 2, and should have focused on whether the goals and policies of the FAA would be undermined by the statute.[108] The U.S. Supreme Court reiterated that a state court cannot "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."[109] The Court found that the Montana Supreme Court misread the holding in *Volt,* because the Court's prior holding had only affected the order of the proceedings, not the enforcement of the arbitration agreement.[110] The purpose of the FAA is to see that arbitration agreements are enforced according to the terms of the agreement; hence, the enforcement of a state law agreed upon in the parties' arbitration agreement would not undermine the purposes of the FAA.[111]

The U.S. Supreme Court has held that if the state law applies only to the "validity, revocability, and enforceability," of any contract, referring to those "contract defenses, such as fraud, duress, or unconscionability," then the state law may invalidate an arbitration agreement without conflicting with section 2 of the FAA.[112] The Court held that a state statute will conflict with the FAA, and should be preempted by the FAA, if the state law puts special notice conditions on arbitration agreements which are not applicable to contracts generally.[113]

IV. PUBLIC POLICY VERSUS THE FAA

The Montana Supreme Court incorrectly held in *Keystone, Inc. v. Triad Systems Corporation* that the FAA preempted neither MCA section 28-2-708 nor MCA section 27-5-323.[114] The court reasoned that the combined effect of the statutes invalidated only the arbitration requirement to the forum outside of Montana, and then found that the remaining

107. *Doctor's Assocs.*, 517 U.S. at 688.
108. *See id.* at 684.
109. *Id.* at 686 (quoting *Allied-Bruce*, 513 U.S. at 281).
110. *Id.* at 687-88.
111. *Id.* at 688.
112. *Id.* at 686-87.
113. *Id.* at 687.
114. 1998 MT 326, ¶ 29, 292 Mont. 229, ¶ 29, 971 P.2d 1240, ¶ 29.

arbitration agreement was valid.[115] However, the court's holding did not conform to the purposes of the FAA, or the U.S. Supreme Court's precedent, or the court's own precedent.[116] The court's holding that the public policies contained within the statutes limited the enforcement of the arbitration agreement to resolve disputes in California directly conflicted with the goals and polices of the FAA.

A. MCA Section 27-5-323 Versus the FAA

The Montana Supreme Court relied, in part, upon MCA section 27-5-323 to invalidate the arbitration agreement in *Keystone*. However, the court failed to analyze separately whether the FAA preempted MCA section 27-5-323 because it undermined the intent of Congress. The court also failed to explain how the requirement of an attorney signature for an arbitration agreement was the same requirement made to all contracts generally under Montana law.

The Montana Supreme Court found that whether or not MCA section 28-2-708 applied to an arbitration agreement was not important, because MCA section 27-5-323 provided public policy protection against forum selection outside of Montana in arbitration agreements.[117] The relevant language of MCA section 27-5-323 states: "No agreement concerning venue involving a resident of this state is valid unless the agreement requires that arbitration occur within the state of Montana. *This requirement may only be waived upon the advice of counsel as evidenced by counsel's signature thereto.*"[118]

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115. *Keystone*, 1998 MT 326, ¶ 29.

116. *See generally Keystone*, 1998 MT 326, 292 Mont. 229, 971 P.2d 1240. In fact, the court only truly addressed MCA § 27-5-323, and in doing so, the court never addressed whether that statute could have been preempted by the FAA, or whether it was contrary to the intent of Congress. *See also infra* text accompanying note 141.

117. *See Keystone*, 1998 MT 326, ¶ 18.

118. MONT. CODE ANN. § 27-5-323 (2001) (emphasis added). In full MCA § 27-5-323 states:

> An initial application must be made to the court of the county in which the agreement provides the arbitration hearing must be held or, if the hearing has been held, in the county in which it was held. Otherwise, the application must be made in the county where the adverse party resides or has a place of business or, if he has no residence or place of business in the state, to the court of any county. All subsequent applications must be made to the court hearing the initial application unless the court otherwise directs. No agreement concerning venue involving a resident of this state is valid unless the agreement requires that arbitration occur within the state of Montana. This requirement may only be waived upon the advice of counsel as evidence by

The court reasoned that since there was no evidence of this right being waived, after the advice of counsel, the statute required arbitration in Montana.[119] The court noted the language from *Doctor's Associates*, preempting state laws that restrict arbitration agreements, but went on to focus on *Volt,* again, stating that when state law does not conflict with the FAA, such law is not pre-empted.[120] The court characterized its understanding from the U.S. Supreme Court's holding in *Doctor's Associates* "to stand for the proposition that a state law may not 'place arbitration clauses on unequal footing' from general contract provisions."[121] However, the question applied by the U.S. Supreme Court in *Volt*, and emphasized in *Doctor's Associates*, was whether the statute would frustrate the intent of Congress and the purpose of the FAA.[122]

The Montana Supreme Court's analysis appears to ignore the U.S. Supreme Court's decision in *Doctor's Associates*, holding that the application of a state statute invalidating arbitration clauses by requiring first page notice of arbitration conflicted with the FAA.[123] The U.S. Supreme Court held that the proper inquiry with a state statute was whether the application of that statute "undermine[s] the goals and policies of the FAA."[124] Yet, nowhere in *Keystone* did the Montana Supreme Court follow this preliminary instruction established by the U.S. Supreme Court in several decisions, including *Doctor's* Associates.[125]

The U.S. Supreme Court held that the language from *Volt* dictated that state law is preempted when it conflicts with federal law and stands as an obstacle to the purposes of

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counsel's signature thereto.

119. *Keystone*, 1998 MT 326, ¶ 22.

120. *See id.*

121. *Id.* ¶¶ 23-24.

122. *See Doctor's Assocs.*, 517 U.S. at 688.

123. *See id.*

124. *Id.* at 685 (quoting Casarotto v. Lombardi, 268 Mont. 369, 381, 886 P2d 931, 938 (1994)). The U.S. Supreme Court noted that the Montana Supreme Court did use this necessary question in *Casarotto*. *See id.* (citing *Casarotto*, 268 Mont. at 381, 886 P.2d at 938). However, the Court also noted the Montana Supreme Court conclusion was at odds with the Court's precedent. The Court continued by finding that the Montana Supreme Court's decision was in error because it did not enforce the arbitration clause, but invalidated it. *See id.* The Court held that a state law that "places arbitration agreements apart from 'any contract,' and singularly limits their validity . . . is thus inconsonant with, and is therefore preempted by, the federal law." *Id.*

125. *See Keystone*, 1998 MT 326, ¶¶ 16-23. *See also Doctor's Assocs.*, 517 U.S. at 685.

Congress.[126] The policy of the FAA is to rigorously enforce arbitration agreements.[127] As the Montana Supreme Court read *Allied-Bruce* too narrowly in *Casarotto*, the court now appears to have read *Doctor's* Associates too narrowly by ignoring the U.S. Supreme Court precedent that only "general applicable contract defenses *such as fraud, duress or unconscionability*, may be used to invalidate arbitration agreements without contravening [section] 2 [of the FAA]."[128] Thus, the U.S. Supreme Court has extended the FAA by limiting section 2 only to the defenses of basic formation issues of contracting. However, the Montana Supreme Court narrowed the FAA by not addressing the U.S. Supreme Court's reasoning and findings when the court cited to *Doctor's Associates*.

The Montana Supreme Court relied too heavily upon the language of putting arbitration agreements on equal footing with contracts generally.[129] However, given the court's reasoning, the court erred by the using MCA section 27-5-323 as it did because the language of the statute directly conflicts with section 2. This is especially true when MCA section 27-5-323 is reviewed in light of the U.S. Supreme Court's instructions in *Doctor's Associates*: would MCA section 27-5-323 "undermine the goals and policies of the FAA."[130]

MCA section 27-5-323 states that arbitration venue clauses are invalid unless the arbitration is to take place in the state of Montana.[131] There is no Montana statute that applies the same language of MCA section 27-5-323 to contracts generally. In fact, MCA section 25-2-202 allows parties to change venue by agreement, at least within Montana, without a requirement of an attorney's signature.[132] MCA section 27-5-323 states that an effective waiver of Montana as the forum for arbitration requires the advice of counsel and the signature of counsel as proof.[133] Again, such language is not used in a statute to apply to contracts generally. The requirement for a party to have the advice of counsel in an arbitration agreement is not a general

126. Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468, 477 (1989) (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

127. Perry v. Thomas, 482 U.S. 483, 490 (1987).

128. *Doctor's Assocs.*, 517 U.S. at 687 (emphasis added).

129. *Keystone*, 1998 MT 326, ¶ 25.

130. *Doctor's Assocs.*, 517 U.S. 681, 685 (1996) (quoting *Casarotto*, 268 Mont. at 381, 886 P2d at 938).

131. MONT. CODE ANN. § 27-5-323 (2001).

132. MONT. CODE ANN. § 25-2-202 (2001).

133. *Id.*

requirement of "law or in equity for the revocation of any contract."[134]

In *Doctor's Associates*, the U.S. Supreme Court held that the first page requirement in MCA section 27-5-114 "singularly limits" the validity of the parties' arbitration agreement; therefore, the statute was *preempted by the FAA*.[135] The Court held that: "[T]he State's law conditions the enforceability of arbitration agreements on compliance with special notice requirements not applicable to contracts generally. The FAA thus displaces the Montana statute with respect to arbitration agreements covered by the Act."[136]

Similarly, the provisions in MCA section 27-5-323 singularly limits arbitration and will void the enforcement of the parties' arbitration agreements, according to the terms of the contract, based upon a requirement that is not a precondition of an enforceable contract. MCA section 27-5-323 on its face would be inconsistent with the goals and policies of the FAA. Therefore, MCA section 27-5-323 should have been pre-empted by the FAA, just as the U.S. Supreme Court held MCA section 27-5-114 was preempted by the FAA.[137]

B. MCA Section 28-2-708 Versus the FAA

The Montana Supreme Court, in *Keystone*, attempted to square its lack of proper analysis of MCA section 28-2-708 by finding that MCA section 27-5-323 provided public policy protection against forum selection outside of Montana in arbitration agreements.[138] However, the court failed to do a separate analysis of whether MCA section 28-2-708 was preempted by the FAA. Keystone's argument for the court to invalidate the forum clause was based upon the premise that MCA section 28-2-708 rendered void forum selection outside of Montana, due to public policy.[139]

MCA section 28-2-708 states:

> Every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals or which limits time within which he may thus enforce his rights is void. This

134. *Doctor's Assocs.*, 517 U.S. at 687 (quoting 9 U.S.C. § 2 (2002)).
135. *Id.* at 688.
136. *Id.* at 687.
137. *See id.*
138. *Keystone*, 1998 MT 326, ¶ 18.
139. *Id.* ¶ 19.

section does not affect the validity of an agreement enforceable under Title 27, section 5.[140]

The Montana Supreme Court reviewed the use of MCA section 28-2-708 in two prior contract cases in an effort to show that forum restrictions applied to contracts generally.[141] However, the court found that MCA section 28-2-708 had two historical purposes: "(1) to protect Montana residents from having to litigate outside of Montana; and (2) *to invalidate pre-dispute arbitration agreements*."[142]

While the Montana Supreme Court's initial reasoning appeared valid, the court's reasoning fell flat for numerous reasons. First, the court never addressed Triad's argument: (a) that arbitration does not apply to MCA section 28-2-708 because the terms "usual proceeding"' in "ordinary tribunals" did not apply, yet the court had relied upon these terms in prior decisions; and (b) that the section states the validity of an enforceable agreement under Title 27, Section 5, the Montana Uniform Arbitration Act, is not affected.[143] Instead of addressing Triad's arguments, the court quickly attempted to apply two prior cases without first reviewing the statute.[144]

Second, the Montana Supreme Court misapplied the two prior cases, *Polaris* and *Rindal*, in this context, in an effort to establish the policy reasons against forums outside of Montana.[145] The analysis (a) in *Polaris* relies upon the phrases "usual proceedings" in the "ordinary tribunals" to determine the court's holding,[146] which the *Triad* court never addressed, and

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140. MONT. CODE ANN. § 28-2-708 (2001).

141. *Keystone*, 1998 MT 326, ¶ 18 (citing Rindal v. Seckler Co., 786 F. Supp. 890, 894 (D. Mont. 1992); State ex rel. Polaris Indus., Inc. v. Dist. Ct., 215 Mont. 110, 111, 695 P.2d 471, 472 (1985)).

But see Electrical Products Consolidated v. Bodell, 132 Mont. 243, 247-48, 316 P.2d 788, 790 (1957). The Montana Supreme Court upheld a forum selection clause in a contract finding "*the parties have a right to stipulate in advance where any action arising under a contract may be tried.*" In addition, the court found the stipulation in no way restricted the defendant from enforcing her rights by the usual proceedings in the ordinary tribunals. *Id.* (emphasis added).

142. *Keystone*, 1998 MT 326, ¶ 18 (emphasis added).

143. *See id.* ¶ 16. This raises another question of whether the FAA would then apply or Title 27, Section 5 of the MCA, which essentially would mean MCA § 27-5-323. However, for reasons discussed earlier, MCA § 27-5-323 could never stand up to the scrutiny of whether it frustrated the intent of Congress and the FAA. Therefore, the FAA, again, would preempt MCA § 27-5-323, leaving the original arbitration agreement of the parties fully enforceable.

144. *See Keystone*, 1998 MT 326, ¶ 17.

145. *See id.* ¶¶ 18-19.

146. *See Polaris Indus.*, 215 Mont. at 111, 695 P.2d at 472.

(b) *Rindal* relies on an analysis of *Erie Railroad v. Tompkins*,[147] and the *Erie* doctrine, for a due process analysis to create the public policy.[148] The court's analysis in *Rindal* cites to *Polaris* only for its holding and the analysis on public policy against forums outside of Montana.[149] The reliance *Polaris* and *Rindal* still did not determine the applicability of the language in MCA section 28-2-708 to an arbitration agreement. The court did not follow the analysis that the U.S. Supreme Court advised in *Doctor's Associates*. Most importantly, the Montana Supreme Court failed to address prior precedent which stated that the FAA created procedural and substantive law under the Commerce Clause, "*notwithstanding the Erie doctrine.*"[150]

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147. 304 U.S. 64 (1938).

148. *See Rindal*, 786 F. Supp. at 892 (citing Erie R.R. v. Tompkins, 304 U.S. 64 (1938)).

But see Young Lee, *Forum Selection Clauses: Problems of Enforcement in Diversity Cases and State Courts*, 35 COLUM. J. TRANSNAT'L L. 663, 674-79 (1997). The article points out:

> [T]he outcome of an Erie analysis regarding forum selection clauses in diversity cases remains far from predictable, as evidenced by a circuit split concerning the issue of whether state or federal law applies to the enforceability of forum selection clauses. While the Second, *Ninth*, and Eleventh Circuits follow the federal policy of holding forum clauses prima facie valid, the Third and Eighth Circuits diverge from this trend.

Id. at 676 (emphasis added) (citing Manetti-Farrow, Inc. v. Gucci America, Inc., 858 F.2d 509, 512 (9th Cir. 1988) (holding federal law applies to interpret a forum selection clause because "forum selection is primarily a venue mater") (additional citations omitted)). *See e.g.* Spradlin v. Lear Siegler Mgmt. Servs. Co., 926 F.2d 865 (9th Cir. 1991) (finding that The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, mandated enforcement of forum selection clauses absent a showing of fraud).

See also Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991). The U.S. Supreme Court noted that an analysis regarding the enforceability of a forum clause, which was a vital part of the agreement, must begin with *The Bremen* holding that "although not 'historically . . . favored,' [forum selection clauses,] are 'prima facie valid." *Id.* at 589 (citing *The Bremen*, 407 U.S. at 9-10). The Court went on to refine this analysis in cases with a purely routine contract, "nearly identical to every commercial passage contract." *Id.* at 593. The Court reasoned that a non-negotiated contract forum clause was still valid because: "[f]irst, a cruise line has a special interest in limiting the flora in which it potentially could be subject to suit;" second, a cruise line carries passengers from many locales, and the cruise line could find itself in several different flora; third, a clause dispels confusion over "where suits arising from the contract must be brought and defended," saving litigation time and expense over pretrial forum motions; finally, a passenger who purchases a ticket containing a forum selection clause benefits from the reduced fares, enjoyed by the companies savings by limiting the numerous potential judicial forums. *Id.* at 594-595. The Court found that, absent bad faith, such clauses are enforceable. *Id.* at 595.

149. *Rindal*, 786 F.Supp. at 891-92 (citing *Polaris*, 215 Mont.110, 695 P.2d 471).

150. William G. Phelps, Annotation, *Pre-Emption by Federal Arbitration Act (9 U.S.C. §§ 1 et seq.) of State Laws Prohibiting or Restricting Formation or Enforcement of Arbitration Agreements*, 108 A.L.R. FED.179 § 2 (2000) (citing Prima Paint Corp. v. Flood

Third, the Montana Supreme Court ignored precedent of the U.S. Supreme Court, when the court relied upon a state statute, MCA section 28-2-708, with the historical purpose "to invalidate pre-dispute arbitration agreements."[151] Contrary to the court's reasoning, the intent of Congress enacting section 2 was to create a national policy favoring arbitration by foreclosing state legislative attempts to undermine the enforceability of arbitration claims.[152] The language used by the court showed that MCA section 28-2-708 was intended to undermine the intent of Congress by undermining the goals and policies of the FAA.[153]

The U.S. Supreme Court has continued to rule that section 2 is a liberal policy favoring arbitration *"notwithstanding any state substantive or procedural policies to the contrary."*[154] The FAA provides for the enforcement of arbitration clauses within the full reach of the Commerce Clause and "these agreements are to be rigorously enforce[d]."[155] The FAA will preempt any state law which interferes with, or is contrary to, the FAA, and such law must yield to federal law.[156] MCA section 28-2-708, historically, was to invalidate arbitration agreements, and is therefore contrary to the intent of Congress. Thus, MCA section 28-2-708 must yield to the preemptive power of the FAA.

C. Partial Enforcement of an Arbitration Agreement

In *Keystone*, the Montana Supreme Court held: "[T]hat the combined effect of these statutes, as applied to the arbitration provision in this case, invalidates only that portion of the provision in this case which requires Keystone to arbitrate the dispute outside of Montana."[157] However, the U.S. Supreme Court held that states were not allowed to enforce the basic principles of a contract but not enforce the arbitration

& Conklin Mfg. Co., 388 U.S. 395 (1967)).

151. *Keystone*, 1998 MT 326, ¶ 17.

152. *See Southland*, 465 U.S. at 9.

153. *See Perry*, 482 U.S. at 489.

154. *Id.* (emphasis added). Clearly, by the court's findings, MONT. CODE ANN. § 28-2-708, with the purpose to undermined arbitration agreements, was the type of statutes Congress had intended to preempt through the FAA. *See also Keystone*, 1998 MT 326, ¶ 17.

155. *Perry*, 482 U.S. at 491.

156. *See* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 108 (1992).

157. *Keystone*, 1998 MT 326, ¶29.

agreement.[158] The Montana Supreme Court appeared to ignore this simple precedent by holding that all aspects of the contract were enforceable, including the agreement to arbitrate, and finding the forum clause unenforceable.[159]

The Montana Supreme Court also appeared to ignore its own precedent in *Casarotto* where the court had stated it *would not* decline to enforce an arbitration agreement when the parties entered into the arbitration clause knowingly.[160] Yet in *Keystone*, the parties entered into the contract after many months of negotiations in California and Montana.[161] The parties in *Keystone* were both successful business entities, which would have made it very difficult for the court to find that they did not enter into the arbitration agreement knowingly. And yet, in *Keystone*, the court never addressed its prior language from *Casarotto*, or the precedent from the U.S. Supreme Court on the partial enforcement of an arbitration agreement.

D. The National Policy Favors Arbitration.

The Montana Supreme Court appears to have misunderstood, or ignored, all of the prior holdings of the U.S. Supreme Court which have been strongly reiterated by the Court since *Southland*.[162] Section 2 declared a national policy favoring arbitration, and withdrew the power of the state courts to require judicial forums for resolving claims when the parties had agreed otherwise in a contract for arbitration.[163] In fact, the U.S. Supreme Court has reviewed the reach of section 2 of the FAA in a contract evidencing commerce and concluded that the broader reading and purpose of section 2 was the correct interpretation.[164]

158. *Allied-Bruce*, 513 U.S. at 281.

159. *See Keystone*, 1998 MT 326, ¶ 29.

160. *See Casarotto,* 268 Mont. at 381-82, 886 P.2d at 939. The court made no finding in *Keystone* that the contract was one of adhesion, or distress, or fraud, in fact the court notes the parties entered into the agreement after months of negotiations. *See Keystone*, 1998 MT 326, ¶ 12.

161. *See Keystone*, 1998 MT 326, ¶ 12.

162. *See Southland*, 465 U.S. at 9.

163. *See id.*

164. *Allied-Bruce*, 513 U.S. at 268. *See also infra* 22.

V. PERSONAL OPINIONS GETTING IN THE WAY OF APPLYING THE FEDERAL ARBITRATION ACT

A. Justice Trieweiler's Specially Concurring Opinion in Casarotto is Philosophically Misguided

Justice Trieweiler, who has written several decisions for the Montana Supreme Court in cases involving an arbitration issue, also wrote a specially concurring opinion in *Casarotto* to discuss the enforcement of the FAA in state courts.[165] In his specially concurring opinion, Justice Trieweiler expressed his view that federal judges only used the FAA as a way to control heavy case loads and looked on the "reluctance of state courts to apply the FAA as a sign of intellectual inadequacy."[166]

In *Casarotto,* Justice Trieweiler openly discussed his beliefs in the enforcement and preemption of the FAA on states. Justice Trieweiler stated that federal judges force the FAA upon state courts "as the panacea for their [(federal judges)] 'heavy case loads' and who consider the reluctance of state courts to buy into the arbitration program as a sign of intellectual inadequacy."[167] Justice Trieweiler continued by stating that there are rules of law for venue and jurisdiction based upon the idea that it is "unfair to force people to travel long distances" and Montana courts are accessible in fairness, regardless of wealth or political power.[168] Justice Trieweiler continued to address the federal bench, stating:

> What I would like the people in the federal judiciary, especially at the appellate level, to understand is that due to their misinterpretation of congressional intent when it enacted the Federal Arbitration Act, and due to their naive assumption that arbitration provisions and choice of law provisions are knowingly bargained for, all of these procedural safeguards and substantive laws are easily avoided by any party with enough leverage to stick a choice of law and an arbitration provision in its pre-printed contract and require the party with inferior bargaining power to sign it.[169]

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165. *Casarotto*, 268 Mont. at 382, 886 P.2d at 939.

166. *Casarotto*, 268 Mont. at 382, 886 P.2d at 939 (Trieweiler, J., specially concurring).

167. *Id.* (Trieweiler, J., specially concurring).

168. *Casarotto*, 268 Mont. at 382-83, 886 P.2d 939 (Trieweiler, J., specially concurring).

169. *Casarotto*, 268 Mont. at 383, 886 P.2d at 940 (Trieweiler, J., specially concurring).

Justice Trieweiler added that he was "offended by the attitudes of federal judges, typified by the remarks of Judge Selya in the First Circuit," who support arbitration as a contractual device because they help to ease the overcrowded federal courts.[170] Justice Trieweiler stated that nowhere in Judge Selya's opinions did Judge Selya acknowledge a court who resists arbitration, like Montana, who has "a case load typically three times as great as Justice Selya's case load."[171] Justice Trieweiler continued by stating that the federal courts have made the FAA a perversion and an "open hostility to any legislative effort to assure that unsophisticated parties to contracts of adhesion at least understand the rights they are giving up."[172] Justice Trieweiler added:

> It seems to me that judges who have let their concern for their own crowded docket overcome their concern for the rights they are entrusted with should step aside and let someone else assume their burdens. The last I checked, there were plenty of capable people willing to do so.[173]

B. ANALYSIS OF JUSTICE TRIEWEILER'S PERSONAL ATTACK ON THE FAA

By verbally attacking the federal bench, and specific members of the bench, Justice Trieweiler clearly mixes his role as a Justice of the court with his own personal beliefs. Justice Trieweiler ignored the direct precedent laid out by the U.S. Supreme Court, in which the Court stated that the FAA created procedural and substantive law under the Commerce Clause, notwithstanding the Erie doctrine.[174] Thus, Justice Trieweiler's

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170. *Casarotto*, 268 Mont. at 383, 886 P.2d at 940 (Trieweiler, J., specially concurring). Justice Trieweiler cites to Judge Selya's comments from Securities Industry Ass'n v. Conolly, 883 F.2d 114 (1st Cir.1989), where arbitration is called:

> [an] "increased resort to the courts' as the cause for "tumefaction of already-swollen court calendars" [and] as "a contractual device that relieves some of the organic pressure by operating as a shunt, allowing parties to resolve disputes outside of the legal system" [and] that "the hope has long been that the Act could serve as a therapy for the ailment of the crowded docket."

Id. (quoting Connolly, 883 F.2d at 1116).

171. *Casarotto*, 268 Mont. at 384, 886 P.2d at 940 (Trieweiler, J., specially concurring).

172. *Casarotto*, 268 Mont. at 385, 886 P.2d at 941 (Trieweiler, J., specially concurring).

173. *Id.* (Trieweiler, J., specially concurring).

174. William G. Phelps, Annotation, *Pre-Emption by Federal Arbitration Act (9 U.S.C. §§ 1 et seq.) of State Laws Prohibiting or Restricting Formation or Enforcement of Arbitration Agreements*, 108 A.L.R. FED. 179 (2000) (citing Prima Paint Corp. v. Flood &

arguments for state controlled venue had already been quashed by the U.S. Supreme Court's application of the FAA.[175]

Justice Trieweiler stated that the federal courts had misinterpreted the congressional intent of the FAA by naively assuming that parties knowingly bargain for arbitration provisions and choice of law provisions.[176] However, Justice Trieweiler is not in the position to re-analyze Congressional intent for a federal statute, especially when the U.S. Supreme Court had previously ruled the opposite in numerous cases, including in a case reversing the Montana Supreme Court in *Doctor's Associates*.[177] Justice Trieweiler's statement that he was offended by the attitudes of federal judges like Judge Selya in the First Circuit, who, according to Justice Trieweiler, only supports arbitration clauses because they help to ease the overcrowded federal courts, was improper and not judicious.

Justice Trieweiler's claim that nowhere in Judge Selya's prior opinions does he acknowledge courts who resist arbitration, like Montana, having "a case load typically three times as great as Justice Selya's case load" not only reflects Justice Trieweiler's dislike of the FAA, but misses the issue of Congressional intent and the Supremacy Clause.[178] Justice Trieweiler's statement that the federal courts have made the FAA a perversion and an "open hostility to any legislative effort to assure unsophisticated parties in contracts of adhesion at least understand the rights they are giving up" shows another example of hostility and bias towards the true policy of the FAA.[179] Justice Trieweiler only continued to prove his personal bias against the FAA by stating that federal judges who have let their concern for their own crowded docket overcome their concern "should step aside and let someone else assume their burdens."[180]

Conklin Mfg. Co., 388 U.S. 395 (1967)).

175. *See generally* Prima Paint Corp. v. Flood & Conklin Mfg Co., 388 U.S. 395 (1967); Southland Corp. v. Keating, 465 U.S. 1 (1984); Perry v. Thomas, 482 U.S. 483 (1987); Volt Info. Sys., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468 (1989); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995).

176. *Casarotto*, 268 Mont. at 383, 886 P.2d at 940.

177. *See Doctor's Assocs.*, 517 U.S. 681 (1996). *See also supra* text accompanying note 158.

178. *See Doctor's Assocs.*, 517 U.S. 681. Justice Trieweiler's comment also appears to be in the tone of a self-congratulating complement that not only serves to show his bias, but that the FAA is being undermined by the Montana Supreme Court.

179. *Casarotto*, 268 Mont. at 385, 886 P.2d at 941.

180. *Id.*

C. The Precedent of the U.S. Supreme Court Versus Justice Trieweiler's Opinion.

The U.S. Supreme Court has continued to reiterate the power of the FAA over conflicting state laws by holding that section 2 embodies a liberal policy favoring arbitration "notwithstanding any state substantive or procedural policies to the contrary."[181] The FAA provides for the enforcement of arbitration clauses within the full reach of the Commerce Clause. The application of the FAA with the Commerce Clause has resulted in the Supreme Court's holdings "that these agreements are to be 'rigorously enforce[d].'"[182] The Court has held that the FAA preempted a state statute which made arbitration agreements in wage collection claims unenforceable.[183] Any state law which interferes with or is contrary to the FAA must yield to federal law.[184] The FAA was not set up for a set of procedural rules, but to ensure arbitration according to the terms of the parties' agreement.[185] The FAA's primary purpose is to enforce the private agreements of parties to arbitrate.[186]

Justice Trieweiler erred in challenging federal judges for their willingness to enforce the national policy of a broad interpretation of the FAA.[187] Justice Trieweiler's opinion of the FAA, as an excuse to lighten the dockets of courts, in combination with his view that the FAA is unfair in enforcing arbitration agreements for forums outside of Montana, runs contrary to the policy of the FAA to enforce arbitration agreements as agreed to by the parties.[188] Unfortunately, there is no way to avoid Justice Trieweiler's biases when reviewing his opinions for the Montana Supreme Court involving the FAA or in any future arbitration agreement dispute before the court.

VI. CONCLUSION

The Montana Supreme Court in *Keystone* would have been

181. Perry v. Thomas, 482 U.S. 483, 489 (1987).

182. *Id.* at 490 (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985)).

183. *See Perry*, 482 U.S. at 490.

184. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 108 (1992).

185. Volt Info. Sys., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468, 476 (1989).

186. *See id.*

187. *See id.*

188. *See* Southland Corp. v. Keating, 465 U.S. 1, 9 (1984).

overruled if it had been reviewed by the U.S. Supreme Court, as will, and rightfully so, all future cases by the court which apply such a narrow reading of the policy and intent of the FAA. In *Doctor's Associates*, the U.S. Supreme Court explicitly instructed Montana Supreme Court that it had misread and misapplied prior cases, specifically *Volt*, by narrowly interpreting the policy and preemptive power of the FAA.[189] The Montana Supreme Court has continued to misapply prior cases and to narrow the FAA by holding that state statutes, which run contrary to the purposes of Congress, are not preempted by the FAA because those statutes established public policy.

The U.S. Supreme Court appears to be frustrated with the continued need to re-apply *Southland* and by the need to reiterate the history and purpose of the FAA.[190] The frustration of Court, combined with the continued excuses of state courts to comply with the purposes of the FAA, could ultimately result in the Congressional enactment of new federal substantive law over all interstate arbitration agreements. At the very least, the U.S. Supreme Court will again overrule the Montana Supreme Court for its circumvention of the FAA. The Montana Supreme Court will continue to be overruled, at great financial cost to the parties, until the court complies with the polices of the FAA to "enforce privately negotiated agreements to arbitrate . . . in accordance with their terms."[191]

The likely outcome, and the most unfortunate, is the result the court's decisions could have on the much needed growth of outside business into the state of Montana. The companies, especially small businesses, that would be looking to do business in Montana, or with Montana companies, will be far more careful before they enter into contracts that will leave them at the mercy of the Montana Supreme Court for the enforcement of bargained for arbitration agreements. As companies attempt to lower the risks of high cost litigation, and look to alternative dispute resolution as a means of keeping business ventures working despite disagreements, they have no choice but to be overly cautious as a result of the protectionist attitude of the Montana Supreme Court.

The Montana Supreme Court's analysis in *Keystone*, while not surprising, is disappointing. The court's failure to realize

189. *See* Doctor's Assocs. v. Casarotto, 517 U.S. 681, 688 (1996).
190. *Southland*, 465 U.S. at 10.
191. *Volt*, 489 U.S. at 478.

the importance of the FAA policy to enforce a party to arbitrate according to that party's promises is frustrating. Apparently the court's promise not to "decline to enforce arbitration agreements which are entered into knowingly"[192] cannot be relied on by companies seeking to do business in Montana. The purpose of the FAA, since its Congressional enactment in 1925, to overcome the overt hostility of state courts towards contractual agreements to arbitrate disputes, has still not been realized in Montana.[193]

192. *Casarotto v. Lombardi*, 268 Mont. 369, 381-82, 886 P.2d 931, 939.
193. *See Southland*, 465 U.S. at 10.