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State Court Attempts to Limit the Applicability of the Federal Arbitration Act in a Post-*Lopez* World

I. INTRODUCTION

Imagine a contract for the construction of a small, single family home. The homebuyers are and always have been Alabama residents. The architect, general contractor, and all other workers are and always have been Alabama residents. All of the building materials are from Alabama. Now, imagine that the construction contract, which was signed by all of the parties, contains an arbitration clause providing that all disputes arising out of the contract are subject to arbitration in accordance with the Federal Arbitration Act (FAA).¹ Then, the inevitable occurs. The homebuyers are dissatisfied with the home and file suit against the general contractor, who moves to stay the proceedings pending arbitration. Will the court apply the FAA?

The answer depends on the jurisdiction in which the case is decided. Here, because the case is in Alabama, the court would probably not force the application of the FAA. Furthermore, the court is unlikely to subject the dispute to arbitration at all because Alabama law,² which would apply in the absence of preempting federal law, does not enforce pre-dispute arbitration agreements.³ This is not necessarily how the case would be resolved if the case were to reach the United States Supreme Court.

Seemingly, lower courts use one of three approaches when discussing the constraints of the Commerce Clause on the applicability of the FAA: (1) the "Affects Approach"; (2) the "Substantially Affects Approach;" or (3) the "Three Categories of Commerce Approach."⁴ The second and third categories are where it appears that certain state courts, typically hostile to arbitration, use *United States v. Lopez*⁵ as a tactic to circumvent the FAA. Although many state courts correctly realize that *Lopez* applies to all cases involving the federal government's regulation of an interstate activity that affects commerce, most opinions citing

1. 9 U.S.C §§ 1-14 (2002).

2. See ALA. CODE § 8-1-41(3) (1993).

3. Old Republic Ins. Co. v. Lanier, 644 So. 2d 1258,1260 (Ala. 1994).

4. Compare L & L Kampwood Assoc. v. Omega Builders, Inc., 9 S.W.3d 125, 126 (Tex. 1999), with Am. Gen. Fin. v. Branch, 793 So. 2d 738 (Ala. 2000), and Sisters of the Visitation v. Cochran Plastering Co., 775 So. 2d (Ala. 2000).

5. 514 U.S. 549 (1995).

Lopez tend to overestimate the Supreme Court's intent to place limits on the Commerce Clause. That overestimation results in a tactic used by state courts to circumvent arbitration agreements.

This Comment seeks first to suggest that there are three approaches employed by state courts in determining the effect of the Commerce Clause on the FAA. Further, this Comment seeks to illuminate the ways in which various state courts use *Lopez* to circumvent the FAA. In addition, the Comment predicts the outcome of such cases if the Supreme Court were to decide them.

II. THE LIMITS IMPOSED BY *LOPEZ*

a. *United States v. Lopez*

In *Lopez*, the Supreme Court struck down the Gun-Free School Zones Act of 1990,⁶ holding, for the first time in half a century,⁷ that Congress exceeded its Commerce Clause authority.⁸ The law made it a federal offense for "any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."⁹ The Court began its analysis with a discussion of federalism, noting that "the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."¹⁰ This strong statement foreshadowed the Justices' conclusion in the case, as such strong rhetoric is generally reserved to cases that are clearly out of Congress's reach.

The Court then addressed the definition of "commerce."¹¹ The Constitution states that Congress has the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."¹² In *Gibbons v. Ogden*,¹³ the Court first defined "commerce," stating, "[c]ommerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing

6. 18 U.S.C. § 922(q)(1)(A) (1990).

7. The last time the Supreme Court invalidated a law based on Congress exceeding its Commerce Clause authority was in 1936. See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

8. *Lopez*, 514 U.S. at 549. *Lopez*, a twelfth grade student, was charged with violating the federal law for carrying a concealed .38-caliber handgun into Edison High School in San Antonio, Texas. *Id.* at 551.

9. 18 U.S.C. § 922(q)(1)(A) (1990).

10. *United States v. Lopez*, 514 U.S. 529, 552 (1995) (quoting *THE FEDERALIST* No. 45, at 292-93 (James Madison) (Clinton Rossiter ed. 1961)).

11. *Id.* at 553.

12. U.S. CONST. art. I, § 8, cl. 3.

13. 22 U.S. (9 Wheat.) 1, 189-90 (1824).

rules for carrying on that intercourse.”¹⁴ Moreover, the commerce power “is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution.”¹⁵

The constitutional limitations placed on the Commerce Clause are the very limitations that the *Lopez* Court tried to define. The Court stated that the Commerce Clause power extends to three categories of commerce.¹⁶ If a law does not fall into one of the three categories, then Congress has exceeded its Commerce Clause power. The three categories are: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) those activities having a substantial relation to interstate commerce.¹⁷ In examining the third category, the Court clarified its position by stating that a “substantial” effect on interstate commerce is required.¹⁸

Looking at the law struck down in *Lopez*, it is clear that guns on school property do not substantially affect interstate commerce.¹⁹ However, the inquiry is not so simple for cases involving arbitration agreements. Because the law struck down in *Lopez* was so clearly not a regulation of interstate commerce, some commentators felt that the *Lopez* decision was the equivalent of a warning shot to the legislature.²⁰ Subsequent decisions demonstrate the Court’s intention to limit Commerce Clause powers. One such decision is *United States v. Morrison*.²¹

b. *United States v. Morrison*

In *Morrison*, the Court declared unconstitutional the Violence Against Women Act of 1994 (VAWA).²² That Act, passed under Con-

14. *Lopez*, 514 U.S. at 533 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-90 (1824)).

15. *Id.* at 558-59.

16. *Id.*

17. *Id.*

18. *Id.* at 559.

19. *But see Lopez*, 514 U.S. at 602-03 (Stevens, J., dissenting).

20. See generally Barry C. Toone & Bradley J. Wiskirchen, *Great Expectations: The Illusion of Federalism After United States v. Lopez*, 22 J. LEGIS. 241 (1996).

21. 529 U.S. 598 (2000).

22. *Id.* at 605. In *Morrison*, Christy Brzonkala, a Virginia Polytechnic Institute and State University (Virginia Tech) student, alleged that Antonio Morrison and James Crawford assaulted and repeatedly raped her. *Id.* at 602. She also claimed that she subsequently became severely emotionally disturbed and depressed. *Id.* at 602-03. After a series of poorly handled University hearings which ultimately resulted in Morrison’s punishment being set aside by the senior vice president and provost of the University, Brzonkala dropped out of the University. *Id.* at 604. She later sued Morrison, Crawford, and Virginia Tech alleging that the attack violated the Violence

gress's Commerce Clause power, states that "persons within the United States shall have the right to be free from crimes of violence motivated by gender."²³ The Act also provides victims with a choice of forum and broad civil remedies.²⁴

In *Lopez*, the Supreme Court discussed Congress's failure to insert a jurisdictional element that would make it clear that Congress intended to pass the Gun-Free School Zones Act under its Commerce Clause authority.²⁵ VAWA, however, did contain a jurisdictional element.²⁶ Although the Supreme Court found the statute's jurisdictional element insufficient to satisfy the requirements of the Commerce Clause, the Court noted Congress's lip service to the Commerce Clause.²⁷ Nevertheless, the FAA does contain a specific jurisdictional hook linking the law to the Commerce Clause. The law states that it applies to maritime contracts or contracts "evidencing a transaction involving commerce."²⁸ The question then becomes whether each of the cases in which the FAA is involved evidences "a transaction involving commerce." Most likely, the Supreme Court would answer "yes."

Although the Court did strike down VAWA based on a violation of the Commerce Clause, this case, like *Lopez*, was an extreme situation where interstate commerce was not involved. The Court has never struck down a law that appeared to address even the least form of commerce. In fact, the opposite is true. Where an activity affects interstate commerce, even in the aggregate, the Court has not denied Congress the power to regulate that activity.²⁹

c. *Wickard v. Filburn*

Wickard v. Filburn is an example of the Supreme Court evaluating the aggregate effects of an activity.³⁰ There, the Supreme Court held

Against Women Act, 42 U.S.C. § 13981 (1999), and that Virginia Tech's actions violated Title IX of the Education Amendments of 1972. *Id.* (citing 20 U.S.C. §§ 1681-1688).

23. *Id.* at 605.

24. *Id.*

25. *United States v. Lopez*, 514 U.S. 549, 561-62 (1995).

26. *Morrison*, 529 U.S. at 613 (2000).

27. *Id.* In a separate section of the act, the legislature stated that the law "creates a federal criminal remedy to punish interstate crimes of abuse[,] including crimes committed by spouses or intimate partners during interstate travel and crimes committed by spouses or intimate partners who cross State lines to continue the abuse." *Id.*

28. 9 U.S.C. § 2 (2002).

29. *See Wickard v. Filburn*, 317 U.S. 111 (1942).

30. *See id.* In *Wickard*, a farmer who had for many years grown wheat for sale and for his own use, was fined because he exceeded the number of acres that could be farmed under the Agricultural Adjustment Act of 1938. *Id.* at 114. The farmer disputed the fine, arguing that because the wheat was grown for his private consumption, it did not affect interstate commerce and, therefore, Congress did not have the power to regulate it. *Id.* at 118.

that even though the activity in question was purely local in character, the aggregate effects of the activity affected interstate commerce.³¹ The Court used the term “substantial” fifty-three years before the *Lopez* decision, stating, “even if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce”³²

III. *ALLIED-BRUCE* AND THE “FULLEST EXTENT” OF COMMERCE

a. *History of “Commerce” in Supreme Court FAA Cases*

In *Bernhardt v. Polygraphic Co.*,³³ the Supreme Court faced the question of whether the FAA applied in state courts. The Court circumvented the issue, holding that it need not decide that point because the contract in question did not “evidence commerce,” and thus was not subject to the FAA.³⁴ Hence, long before *Lopez*, *Bernhardt* held that the FAA cannot rightly be enforced unless the Commerce Clause is satisfied. Therefore, the *Lopez* requirements ought to apply to all FAA cases.

In *Prima Paint v. Flood & Conklin Manufacturing Co.*,³⁵ the Supreme Court addressed how federal courts were to “conduct themselves with respect to subject matter over which Congress plainly has power to legislate,” i.e., interstate commerce.³⁶ The Court stated, “it is clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable federal foundations of ‘control over inter-

31. *Id.* at 119-20.

32. *Id.* at 125.

33. 350 U.S. 198 (1956). *Bernhardt* involved a dispute between a former New York resident and his New York employer with whom he had an employment contract containing an arbitration clause. *Id.* at 199. The case was removed from a Vermont court to a federal court on diversity grounds. *Id.*

34. *Id.* at 201.

35. 388 U.S. 395 (1967). There *Prima Paint* bought Flood & Conklin Manufacturing Co. *Id.* at 397. The sales agreement stated that the parties agreed to arbitrate “[a]ny controversy or claim arising out of or relating to this Agreement, or the breach thereof.” *Id.* at 397-98. The parties also agreed that Flood & Conklin would advise *Prima Paint* as to “formulae, manufacturing operations, sales, and servicing of *Prima Trade Sales* accounts.” *Id.*

Soon after the first payment was due, *Prima Paint* accused Flood & Conklin of breaching both the consulting agreement and the earlier purchase agreement. *Id.* at 398. In response, *Prima Paint* argued that Flood & Conklin had fraudulently represented its solvency and ability to perform its contractual obligations. *Id.* *Prima Paint* filed a complaint with the federal district court and contemporaneously moved to stay any arbitration. *Id.* Thereafter, Flood & Conklin moved to stay the proceedings pending arbitration. *Id.* at 398-99. The district court granted Flood & Conklin’s motion to stay the action and the Second Circuit dismissed *Prima Paint*’s appeal, holding that the contract in question did evidence a transaction involving interstate commerce. *Id.* at 399.

36. *See id.* at 405.

state commerce and over admiralty.”³⁷ In determining that Congress passed the act under its Commerce Clause power, the Court relied on both House and Senate reports. In particular, the Court relied on the statement that the proposed law “only affects contracts relating to interstate subjects and contracts in admiralty.”³⁸ The Court also relied on the Senate report, which stated that the bill “relates to maritime transactions and to contracts in interstate and foreign commerce.”³⁹ Therefore, after *Prima Paint*, it was clear that Congress enacted the FAA pursuant to its constitutional authority to regulate commerce. Accordingly, under the Supremacy Clause, states are bound to enforce the FAA where it is in conflict with a state’s own arbitration laws.⁴⁰

In addition, the Court noted that Congress passed the FAA in response to the states’ unwillingness to enforce arbitration agreements. The Court also spoke about the old common law hostility to arbitration and the fact that many state arbitration laws failed to make arbitration agreements enforceable.⁴¹ Clearly, the Court wanted to force the states to recognize the FAA.⁴²

b. *Allied-Bruce Terminix v. Dobson*

In *Allied-Bruce Terminix Cos. v. Dobson*, the Supreme Court addressed what Congress meant by the phrase “involving commerce,” when it stated that the FAA applied to contracts “evidencing a transaction involving commerce.”⁴³ The facts in *Allied-Bruce* revolve around a termite control contract that contained an arbitration clause.⁴⁴ The Dobsons were homeowners who had a contract with the Terminix Company for pest control in their home.⁴⁵ When the Dobsons discovered exten-

37. *Id.*

38. 65 CONG. REC. 1931 (1924) (citing Congressman Graham, the bill’s sponsor).

39. S. REP. NO. 68-536, at 3 (1924).

40. See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1, 9 (1984). *Southland Corp. v. Keating* is a perfect example of this principle. In that case, convenience store franchisees brought suit against the franchisor alleging fraud, breach of contract, and violation of disclosure requirements of the California Franchise Investment Law. *Id.* at 3-4. The California Court of Appeal reversed the lower court’s refusal to compel arbitration of the appellees’ claims under California’s Franchise Investment Law. *Id.* at 5. The court of appeals held that if the Franchise Investment Law rendered arbitration agreements involving commerce unenforceable, it would conflict with the FAA and would therefore be invalid under the Supremacy Clause. *Id.* The California Supreme Court, however, held that the California statute required judicial consideration of claims brought under the state statute and refused to enforce the parties’ arbitration contract. *Id.* The United States Supreme Court reversed. *Id.* at 6.

41. See *id.* at 13-14.

42. *Id.* at 10.

43. 513 U.S. 265, 273 (1995).

44. *Id.* at 268.

45. *Id.*

sive termite infestation and damage, they brought suit.⁴⁶ Terminix moved to stay the case pending arbitration.⁴⁷ Its motion was denied.⁴⁸ The Supreme Court of Alabama affirmed based on an Alabama statute, ALA. CODE § 8-1-41(3) (1993), that made written, predispute arbitration agreements unenforceable.⁴⁹ In doing so, it was necessary for the Alabama Supreme Court to find that the FAA did not apply to the state contract.⁵⁰ The court accomplished this by finding that the connection between the termite contract and interstate commerce was too slight.⁵¹

The Supreme Court clarified the phrase “involving commerce,” stating that the words are “broader than the often-found words of art ‘in commerce.’”⁵² “Involving commerce” “therefore cover[s] more than ‘only persons or activities within the flow of interstate commerce.’”⁵³ The Court concluded that “involving” is broad and is the functional equivalent of “affecting.” This is significant because the phrase “affecting commerce” usually signals Congress’s intent to exercise its Commerce Clause powers to its fullest extent.⁵⁴ The Supreme Court, therefore, held that the FAA applied and reversed the holding of the Alabama Supreme Court.⁵⁵ The effects of this seemingly local contract were substantial enough for the Supreme Court to apply federal law under the Commerce Clause.

IV. THREE APPROACHES TO THE FAA AFTER *LOPEZ*

Since the *Allied-Bruce* and *Lopez* cases, it appears that lower courts use essentially three different approaches in analyzing the FAA’s “involving commerce” language. One approach, the “Affects Approach,” does not consider the *Lopez* case relevant to the FAA’s commerce language. Another approach, the “Substantially Affects Approach,” correctly incorporates *Lopez*’s requirement that any law passed by Congress under its commerce power must regulate an activity that substantially affects interstate commerce. The third approach, the “Three Categories of Commerce Approach,” encompasses the “Substantially Affects Approach” and recognizes it as one of three areas in which Congress may legislate under its commerce power. Those three catego-

46. *Id.* at 269.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* (citing 9 U.S.C. § 2).

53. *Id.* (citing *United States v. Bldg. Maint. Indus.*, 422 U.S. 271, 276 (1975)).

54. 513 U.S. at 273.

55. *Id.*

ries are: (1) instrumentalities of interstate commerce or persons or things in interstate commerce; (2) use of channels of interstate commerce; or (3) conduct that substantially affects interstate commerce.⁵⁶

a. *The Affects Approach*

Some state courts require only that an effect on interstate commerce occur to apply for the FAA. The error in this approach is not the outcome, but the method. Without the satisfaction of one of the other two categories discussed in *Lopez*, Congress may not regulate where there is only an effect on commerce;⁵⁷ instead, there must be a substantial effect on commerce.

The majority of cases decided under the Affects Approach make no mention whatsoever of *Lopez*. Most merely require “an effect on” or “nexus with” interstate commerce. The Affects Approach is the favored approach in South Carolina,⁵⁸ Maine,⁵⁹

56. United States v. *Lopez*, 514 U.S. 549, 558-59 (1995).

57. See generally *Lopez*, 514 U.S. 549 (1995).

58. See *Zabinski v. Bright Acres Assocs.* 553 S.E.2d 110 (S.C. 2001). The South Carolina Supreme Court employed the “Affects Approach” as late as 2001. In *Zabinski*, the court examined the facts and determined that interstate commerce was involved. *Id.* at 117. The court did not analyze or even mention the *Lopez* standard. See generally *Zabinski*, 553 S.E.2d 110.

Bright Acres Association was a partnership consisting of four equal partners. *Id.* at 112. The partners created the association to buy, renovate, and sell thirty apartments and approximately twenty-six acres of land. *Id.* The partnership agreement provided for arbitration in the case of claims or controversies arising out of the agreement. *Id.* at 112-13. After one of the partners died, another partner bought the deceased’s twenty-five percent share. *Id.* at 113. A controversy arose out of the purchase and the two other partners filed an action seeking arbitration, which the fifty percent partner opposed. *Id.*

The South Carolina Supreme Court required arbitration after finding that the partnership was engaged in interstate commerce. *Id.* at 117. The court stated that in order for them to “ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint and the surrounding facts.” *Id.* The court emphasized that: (1) the partners purchased the land from an out of state owner; (2) Bright Acres financed the purchase through an out-of-state Bank; (3) Bright Acres used several out-of-state subcontractors; and (4) the partners advertised their development across state lines. *Id.* at 117-18.

59. See *Saga Communs. of New England, Inc. v. Voornas*, 756 A.2d 954 (Me. 2000). In *Saga*, the Supreme Judicial Court of Maine faced the choice of “interstate commerce” applications and chose the Affects Approach. *Id.* at 958-59.

Lori Voornas signed an employment agreement to work for *Saga* as an on-air radio announcer and co-host of a morning radio show. *Id.* at 956. The employment contract contained an arbitration clause and a non-compete clause by which Voornas was precluded from performing on-air services for any competing radio station within a seventy-five-mile radius. *Id.* Voornas left *Saga* and soon after began working for Citadel Communications Corporation, a company that owned several radio stations that competed with *Saga*. *Id.* at 956-57. Even though Voornas did not immediately return to the air, *Saga* filed suit to invoke the arbitration clause soon after learning of Voornas’s new employment. *Id.* at 957.

The Supreme Judicial Court held that the arbitration clause should be upheld because the employment contract affected interstate commerce. *Id.* at 959. Similar to the South Carolina court in *Zabinski*, the *Voornas* court looked at the facts to determine that there was an effect on

Missouri,⁶⁰ Louisiana,⁶¹ Colorado,⁶² and Oklahoma.⁶³

interstate commerce. The court relied heavily on the fact that Voornas was a radio announcer. *Id.* The court does not explain why being a radio announcer affects interstate commerce, rather, the court simply states that it does. *Id.*

60. *See Duggan v. Zip Mail Servs., Inc.*, 920 S.W.2d 200 (Mo. Ct. App. 1996). Soon after the *Lopez* decision, the Missouri Court of Appeals for the Eastern District of Missouri decided *Duggan*. There, Dennis Duggan entered into an employment contract with Zip Mail, a mail presort service, to be a sales representative in its St. Louis office. *Id.* at 201. The employment agreement contained an arbitration clause. *Id.* at 201-02. Zip Mail fired Duggan, who subsequently filed suit against Zip Mail, alleging civil conspiracy arising out of his termination, intentional interference with a contract, misrepresentation, defamation, and breach of contract. *Id.* at 202. Zip Mail moved to compel arbitration. *Id.*

The court cited *Allied-Bruce Terminix Cos. v. Dobson* for the proposition that the FAA should reach the full extent of Congress's Commerce Clause power and that "involving commerce" is the functional equivalent of "affecting commerce." *Id.* The court did not, however, examine what "affecting commerce" means in light of *Lopez*. After stating the *Allied-Bruce* holding, the court looked back at federal cases that were decided before *Allied-Bruce* or *Lopez*. *See generally Duggan*, 920 S.W.2d 200. The court then stated that the contract involved interstate commerce "in that the mail which Zip Mail sorted crossed state lines, the U.S. Postal System was the final destination of mail presorted by Zip Mail, and plaintiff's position involved dealing with customers in Illinois, as well as Missouri." *Id.* at 202.

61. *See Alford v. Johnson Rice & Co.*, 773 So. 2d 255, 258 (La. App. 4th Cir. 2000). The *Alford* reasoning is similar to the reasoning used in *Zip Mail*. The court began its Commerce Clause analysis by stating the holding in *Allied-Bruce*, and then relied on cases decided before *Allied-Bruce*, and *Lopez*. *See generally Alford*, 773 So. 2d 255.

The Alford's opened an account with the stock brokerage firm of Johnson and Rice and its employee-broker. *Id.* at 257. The employee-broker requested that the Alford's execute two documents that the company required to complete the transaction. *Id.* One of the documents contained an arbitration agreement. *Id.* at 3. After a dispute arose and the Alford's filed suit, Johnson and Rice moved to compel arbitration. *Id.* at 4. Upon deciding that interstate commerce was involved, the court simply enforced the arbitration agreement. *Id.* at 259.

62. *Grohn v. Sisters of Charity Health Servs.*, 960 P.2d 722, 724 (Colo. Ct. App. 1998). In *Grohn*, Carol Grohn a clinical coordinator, filed a wrongful termination of employment action against Sisters of Charity Health Services of Colorado. *Id.* at 724. Her employment contract contained an arbitration clause and Grohn's former employer moved to compel arbitration. *Id.* The trial court held that the arbitration clause could not be enforced. *Id.* In finding that the arbitration agreement should be enforced, the Colorado Court of Appeals committed the same mistake as the courts in Louisiana, Missouri, and Maine. The court listed some of the language from *Allied-Bruce* and then referred to cases that were decided before both *Allied-Bruce* and *Lopez*. *See generally Grohn*, 960 P.2d 722. In one such case, the Colorado court cited a pre-*Lopez* New Jersey case for the idea that the "involving commerce" requirement is not "a rigorous inquiry." *Id.* at 725. The court further cited the New Jersey case for the proposition that "the contract need have only the slightest nexus with interstate commerce." *Id.* The court then dismissed the fact that the business at issue here involved out-of-state advertising, treating out-of-state patients, receiving payments for out-of-state insurers, and receiving goods from vendors located outside the state. *Id.* at 726. Based on these facts, the court decided to enforce the FAA. *Id.*

63. *See Towe, Hester & Erwin v. Kansas City Fire & Marine Ins. Co.*, 947 P.2d 594, 596 (Okla. Ct. App. 1997).

In *Towe*, an insurance agency sued a group of affiliated non-resident insurance companies alleging that the companies forced the business owners to sign a "Rehabilitation Program" agreement under threat of immediate termination of the agency agreement. *Id.* Additionally, the agency argued that the program was not part of nor subject to the arbitration clause in the original

Some states blatantly defy the *Lopez* decision. In *L & L Kempwood Associates, L.P. v. Omega Builders, Inc.*, the Texas Supreme Court specifically addressed the *Lopez* decision.⁶⁴ There, the court of appeals denied mandamus relief, holding that the FAA was inapplicable because there was no substantial effect on interstate commerce involved, as required by *Lopez*.⁶⁵ Before the Supreme Court of Texas, Kempwood, the appellant, argued that *Lopez* did not restrict the *Allied-Bruce* case.⁶⁶ The court agreed, resting its decision on the fact that *Lopez* did not refer to *Allied-Bruce* or in any way suggest that the United States Supreme Court had changed its view of "Congress's commerce power over economic activities."⁶⁷

Many Texas cases facially rely on *Kempwood*,⁶⁸ while other cases use similar reasoning without citing the *Kempwood* decision.⁶⁹ Many lower courts in Texas require only that a transaction involve interstate commerce for the FAA to apply.⁷⁰ Surprisingly, many of the courts that did not rely on *Kempwood* did not find that the transaction in their respective case *involved* interstate commerce.⁷¹ Moreover, the courts did so without requiring a substantial effect, a much higher hurdle.⁷²

b. *The Substantially Affects Approach*

Many state courts correctly require a substantial effect on interstate commerce to enforce arbitration clauses under the FAA;⁷³ however, these courts often require that the effect on commerce be more "substan-

Agency Agreement. *Id.* The non-resident insurance company filed two applications to stay the proceedings and compel arbitration, one of which was filed pursuant to the FAA. *Id.* at 596.

The Oklahoma court did not even consider what "affects interstate commerce." It simply stated that the business relationship between the parties was interstate in character and therefore affected interstate commerce. *Id.* at 597. The business in *Towe* was an insurance agency. *Id.* at 595.

64. 9 S.W.3d 125, 126 (Tex. 1999).

65. *Id.*

66. *See id.* at 127.

67. *Id.*

68. *See, e.g., In re Educ. Mgmt. Corp. v. The Art Inst. of Houston*, 14 S.W.3d 418 (Tex. Ct. App. 2000); *In re Conesco Fin. Servicing Corp.*, 19 S.W.3d 562 (Tex. Ct. App. 2000); *In re John Profanchik*, 31 S.W.3d 381 (Tex. Ct. App. 2000); *In re Valle Redondo*, 47 S.W.3d 65 (Tex. Ct. App. 2001).

69. *See, e.g., Associated Air Freight v. Meek*, 67 S.W.3d 249 (Tex. App. Mar. 8, 2001), *Shelter Props. v. STTI Const. & Stabilizing Tech. of Texas, Inc.*, No. 04-00-00839-DV, 2001 WL 224988 (Tex. App. Mar. 7, 2001), and *In re Southwest Lodging*, No. 08-01-00072-CV, 2001 WL 636930 (Tex. App. June 7, 2001).

70. *See id.*

71. *See id.* But *see Palm Harbor Homes, Inc. v. McCoy*, 944 S.W.2d 716, 720 (Tex. Ct. App. 1997).

72. *McCoy*, 944 S.W.2d 720.

73. *See, e.g., United States v. Lopez*, 514 U.S. 549 (1995).

tial” than the Supreme Court has required.⁷⁴ These state courts often use the *Lopez* decision as a technique to circumvent the national policy of enforcing arbitration agreements.⁷⁵ Texas⁷⁶ and Alabama⁷⁷ use this technique most frequently, though Tennessee⁷⁸ has employed the approach as well.

Alabama, a state historically hostile to arbitration,⁷⁹ frequently uses this technique, along with the Three Categories of Commerce Approach.⁸⁰ For example, Alabama courts have used this approach in finding no substantial effect on interstate commerce in cases involving construction projects,⁸¹ the purchase and financing of an automo-

74. See, e.g., *Russ Berrie & Co. v. Gantt*, 998 S.W.2d 713 (Tex. App. 1999).

75. See generally 9 U.S.C. § 2.

76. Many Texas Courts of Appeals have found that a substantial effect on interstate commerce is required in order for the FAA to apply. For example, in *Russ Berrie & Co. v. Gantt*, 998 S.W.2d 713 (Tex. App. 1999), an employee, Gantt, sued his former employer for violation of the Texas Labor Code after Russ Berrie fired Gantt. *Id.* at 716. Gantt’s employment contract contained an arbitration agreement that Russ Berrie moved to enforce after Gantt filed the action. *Id.* The court quickly came to the conclusion, without much discussion, that *Lopez* requires that the activity at issue substantially affect interstate commerce. *Id.* at 715. The court held that the FAA did not apply where Gantt’s employment contract was at-will, was not specific as to any out-of-state travel that may be required, and was devoid of information regarding the volume of business conducted by Gantt. *Id.*

In *Ikon Office Solutions v. Eifert*, 2 S.W.3d 688, 691 (Tex. App. 1999), the former owner of a business, Eifert, sued the purchaser of the business, IKON, for breach of contract, fraud, tortious interference, and conspiracy. *Id.* at 690-91. IKON moved to compel arbitration according to the sales contract. *Id.* at 691. The court found that arbitration was inappropriate because the movants failed to present adequate evidence of a substantial effect on interstate commerce. *Id.* at 696.

In re *Turner Bros. Trucking Co.* involved a personal injury suit by an employee against his employer. 8 S.W.3d at 372-73 (Tex. App. 1999). The court used *Lopez* as a natural accompaniment to the *Allied-Bruce* decision. *Id.* at 374-75. It recognized the contradiction in the Texas courts’ holdings and held that the movant had the burden to show that the transaction had a substantial effect on interstate commerce. *Id.* at 375-76.

77. See, e.g., *Rogers Found. Repair, Inc. v. Powell*, 748 So. 2d 869 (Ala. 1989).

78. See *Frizzel Constr. Co. v. Gatlinburg, L.L.C.*, 9 S.W.3d 79, 81-84 (Tenn. 1999). Here, the Supreme Court of Tennessee required that the transaction substantially affect interstate commerce, as described in *Lopez*. *Id.* at 83. The court found that out-of-state contractors participated in the construction of a hotel, nine employees were from another state, at least seven multistate vendors supplied materials for the hotel, and out of state corporations insured and issued payment performance bonds on the project. *Id.* at 83. Based on these facts, the court held that the transaction substantially affected interstate commerce. *Id.* See also *Berkley v. H & R Block E. Tax Servs., Inc.*, 30 S.W.3d 341 (Tenn. Ct. App. 2000).

79. See, e.g., Donald E. Johnson, *Has Allied-Bruce Terminix Cos. v. Dobson Exterminated Alabama’s Anti-Arbitration Rule?*, 47 ALA. L. REV. 577, 581-82 (1996).

80. See, e.g., *Robert Frank McAlpine Architecture, Inc. v. Heilpern*, 712 So. 2d 738 (Ala. 1998).

81. See *Rogers Found. Repair, Inc. v. Powell*, 748 So. 2d 869, 870-72 (Ala. 1999). In *Rogers*, a husband and wife brought a suit against the contractor that they hired to repair their chimney. *Id.* at 870. The contractor moved to compel arbitration per an arbitration clause contained within the work contract. *Id.* The court found that there was no substantial effect on interstate commerce, therefore, the FAA did not apply. *Id.* at 872. This was true despite a clause within the contract that stated that both parties acknowledged that the work performed involved or affected

bile,⁸² the purchase and financing of a home,⁸³ and employment

interstate commerce. *Id.* The court stated that such a recitation did not prove that the involvement of or effect on interstate commerce was substantial. *Id.*

In *Brown v. Dewitt*, Frank Brown, an Alabama resident, sued Dewitt, Inc., an Alabama corporation, for breach of a Preconstruction Purchase and Escrow Agreement for the sale of a condominium. 808 So. 2d 11, 12 (Ala. 2001). That agreement contained an arbitration clause. *Id.* After Brown filed suit, the circuit court granted Dewitt's motion to dismiss. *Id.* at 13. In dismissing the motion, the court stated that a substantial effect on interstate commerce is necessary to compel arbitration. *Id.* at 15.

The Alabama Supreme Court analyzed the case using the five-factor test found in *Sisters of Visitation v. Cochran*. *Id.* The court quickly determined that the only factor at issue was the fifth factor: the degree of separability from other contracts. *Id.* at 14. The degree of interstate commerce involved in a disputed contract does not determine whether the transaction at issue substantially affects interstate commerce. *Id.* at 15. However, if a court finds that the transaction in dispute would disrupt performance of related contracts or activities that would be subject to the FAA, then the interstate commerce involved in the related contracts should be given more weight. *Id.* at 16.

Here, Dewitt argued that a title-insurance policy had been issued by a California corporation for the condominium and that Dewitt marketed the condominiums in interstate commerce. *Id.* at 14-15. Dewitt supported the second argument with evidence that an out-of-state party purchased one of the condominiums. *Id.* at 15. The court determined that the sale of the condominium to an out-of-state party was unrelated and did not create the necessary effect on interstate commerce required to compel arbitration under the FAA. *Id.* at 15. As for the out-of-state title insurance provider, the court held that any effect of such an out of state connection is negligible. *Id.* at 15-16.

82. See *Tefco Fin. v. Green*, 793 So. 2d 755 (Ala. 2001). There, Pamela Green, a car buyer, sued Tefco Finance, her financing company, when Tefco charged Green an additional twenty dollars per month after Green had the car repaired. *Id.* at 756. Green alleged fraud, fraudulent suppression, breach of contract, and negligence. *Id.* at 756-57. Tefco moved to compel arbitration under the retail installment contract and security agreement. *Id.* at 757. The court relied on *Lopez* and *Morrison* and asked whether the aggregate effects of the transaction substantially affected interstate commerce. *Id.* at 759. The court held that the movant did not satisfy its burden because Tefco presented no evidence of how the purchase of a used automobile affects interstate commerce. *Id.* at 759-60. The court did not place much importance on the fact that the car was manufactured out of state and that it inherently is capable of crossing state lines. *Id.* at 760.

83. See *Ex parte Learakos*, No. 1000244, 2001 WL 792787 (Ala. 2002). *Ex parte Learakos* involved a suit by a homebuyer, Learakos, against an internet brokerage company, ERA Class.Com; one of the brokerage company's agents, Connie Olsen; and the seller of the home, Also Bernabo. *Id.* at *1. Learakos alleged breach of fiduciary duty, fraudulent misrepresentation, fraudulent suppression, conspiracy to defraud, and negligence or wantonness. *Id.* The homeowner listed the home for sale in Alabama, the internet selling company is an Alabama franchise of a New Jersey company, and an Alabama bank financed the purchase of the home. *Id.* at **1-2. Learakos paid one thousand dollars in earnest money from a bank account in Illinois. *Id.* at *2. The purchase agreement signed by the buyer contained an arbitration agreement. *Id.* at *1. The selling company moved to compel that agreement after Learakos filed suit. *Id.*

The Alabama Supreme Court held that the New Jersey franchise headquarters were collateral to the contract between Learakos and Class.Com. *Id.* at *3. The court also held that the Illinois withdrawal and payment to an Alabama company did not establish a substantial effect on interstate commerce. *Id.* Here, the court held that because the FAA's substantial effect on interstate commerce requirement was not met, the court could not properly apply the FAA. *Id.* at *4. Rather, Alabama law should apply to prohibit specific enforcement of "an agreement to submit a controversy to arbitration." *Id.* (citing ALA. CODE §8-1-41(3) (1975)). The Supreme Court of Alabama vacated the lower court's order to arbitrate. *Id.*

disputes.⁸⁴

Even though the state usually tries to circumvent the FAA, there is at least one case where the Alabama Supreme Court held that a party met the state's high "substantial" effects requirement. In *American General Finance v. Branch*, the Supreme Court of Alabama decided a case brought by borrowers against a loan company.⁸⁵ The court noted the following pertinent facts: American General Finance was a large, multinational corporation with its headquarters in Indiana; American General was associated with many other out of state corporations; and the loan was inherently mobile, which enabled Branch to purchase goods and services that traveled in interstate commerce.⁸⁶ The court found that a substantial effect on interstate commerce is required to apply the FAA,⁸⁷ and that, under the facts of this case, there was no such effect.

V. THE THREE CATEGORIES OF COMMERCE APPROACH

The Three Categories of Commerce Approach is a variation on the Substantially Affects Approach. Courts using this approach correctly state the rule,⁸⁸ although they very often misapply it. The problem arises when courts apply this test too stringently. For instance, overly stringent application has been used in cases involving construction in

84. See *Ex parte Ephraim*, 806 So. 2d 352 (Ala. 2001). In *Ephraim*, Flora Ephraim sued Tenet Healthcare Corporation ("Tenet"), her former employer, claiming retaliatory discharge. *Id.* at 353. After suffering an on-the-job injury, Ephraim claimed that Tenet refused to reimburse her for medical costs related to her injury, refused to pay her weekly benefits during her recovery, and refused to reinstate her when she was capable of returning to work. *Id.* Ephraim received an employee handbook and signed an Employee Acknowledgement Form, which stated that she voluntarily agreed to submit to "final and binding arbitration" regarding claims and disputes relating in any way to employment or the termination of employment with Tenet. *Id.* at 353-54. The lower court compelled arbitration. *Id.* at 354-55.

On appeal, the Alabama Supreme Court held that Tenet had to prove that the employment contract had a substantial effect on interstate commerce in order to apply the FAA. *Id.* at 356. Regardless of Ephraim's signing of the arbitration agreement, the court held that because Tenet did not present evidence indicating that its employment contract with Ephraim substantially affected interstate commerce, the motion to compel arbitration was improperly granted. *Id.* at 358.

85. 793 So. 2d. 738 (Ala. 2001).

86. See generally *id.*

87. *Id.* at 747.

88. The rule, as previously stated, allows Congress to regulate three categories of commerce: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) those activities having a substantial relation to interstate commerce. See, e.g., *City of Cut Bank v. Tom Patrick Constr., Inc.*, 963 P.2d 1283 (Mont. 1998).

Montana⁸⁹ and Alabama,⁹⁰ the purchase of real estate,⁹¹ and employ-

89. *City of Cut Bank v. Tom Patrick Constr.*, 963 P.2d 1283 (Mont. 1998). There, Cut Bank argued that its arbitration agreement was unenforceable because the contract containing the agreement did not involve interstate commerce. *Id.* at 1284. When Tom Patrick Construction did not complete the construction project in the way that City of Cut Bank wanted, Cut Bank hired another company to finish the job and refused to surrender Tom Patrick Construction's bond and performance bond. *Id.* Tom Patrick began the process of arbitrating the dispute, and Cut Bank objected. *Id.*

The district court held that the matter involved interstate commerce and denied Cut Bank's complaint seeking a stay of arbitration. *Id.* On appeal, Cut Bank argued that the case was purely local and that it did not involve interstate commerce. *Id.* The Supreme Court of Montana held that the district court incorrectly dismissed the complaint because when viewed in the light most favorable to the plaintiff, the undisputed facts showed that the construction project was a local transaction that did not involve interstate commerce. *Id.*

The present court first recited the three categories from *Lopez* in which Congress can regulate commerce. *Id.* at 1286. The court determined that the only category where this transaction had a possibility of falling was the "substantially affects interstate commerce" category. *Id.* at 1286. The court focused on the following facts: (1) Cut bank was a municipal corporation created and existing pursuant to Montana law; (2) Tom Patrick Construction is a corporation chartered in Montana with its principal place of business in that state; and (3) the construction project was to be performed in Montana. *Id.* at 1287.

90. *See Robert Frank McAlpine Architecture, Inc. v. Heilpern*, 712 So. 2d 738 (Ala. 1998). In *Heilpern*, homeowners William and Lauda Heilpern sued Robert Frank McAlpine Architecture, Inc. for breach of contract, fraud, conversion, and conspiracy related to the remodeling of their house. *Id.* at 739. The contract that governed the agreement between the Heilperns and McAlpine contained an arbitration clause. *Id.* The Heilperns specified certain appliances, plumbing fixtures, lighting fixtures, and so forth for use in the remodeling project that McAlpine could only get from out-of-state suppliers. *Id.* McAlpine had the items shipped from various states to Alabama for use in the project. *Id.*

Dissatisfied with the work done on their house, the Heilperns sued both the architectural firm and the contractor's firm. *Id.* The trial court denied the defendants' motion to compel arbitration. *Id.* The Supreme Court of Alabama held that the architectural firm was not engaged in the interstate transport of goods where it purchased out of state materials and shipped them into Alabama for use on the Heilpern's project. *Id.* at 790.

In *Kampis v. Yarbrough*, Kampis, an Alabama resident, sued Yarbrough, an Alabama corporation, after they contracted for the construction of a new house in Alabama. *Kampis v. Yarbrough*, No. 1000099, 2002 WL 228047, at *1 (Ala. Feb. 8, 2002). The contract contained an arbitration agreement. *Id.* After closing on the house, Kampis discovered many defects in the construction of the house for which he brought suit for negligent or wanton construction or design, breach of contract, breach of implied warranty of fitness, workmanship, and habitability, breach of express warranty, fraudulent misrepresentation, and fraudulent suppression. *Id.*

The defendants argued that the contract substantially affected interstate commerce because Yarbrough Construction used national suppliers in the construction of the home. *Id.* The court held that evidence that a party purchased equipment and materials from an in-state supplier, which does business with or receives supplies or equipment from an out-of-state company, does not by itself establish a substantial effect on interstate commerce. *Id.* at 3. In addition, the court held that under the "come-to-rest" doctrine in *Schechter Poultry Corp. v. United States*, the flow in interstate commerce ended when the materials or equipment reached the stores in Alabama patronized by Yarbrough. *Id.* (citing *Schechter*, 295 U.S. 495, 543 (1935)). The reference to the end of the flow of commerce shows that the court recognizes an alternative to the substantially affects test. Had the court found that the flow of commerce had not ended, the court could have found that the FAA applied.

91. *See Am. Gen. Fin. v. Morton*, 812 So. 2d 282 (Ala. 2001). In *Morton*, the court required a substantial effect on interstate commerce after determining that the transaction did not involve the

ment recruiting.⁹² It appears that the Supreme Court of Alabama uses this approach more often than any other state. There is, however, at least one Alabama case in which the court found that the FAA applied under the Three Categories of Commerce Approach.⁹³

flow of interstate commerce. *Id.* at 286. Morton, an Alabama resident, sought compensatory and punitive damages for breach of contract, fraudulent suppression, and fraudulent misrepresentation based on his purchase of Alabama real estate from American General Finance, Inc., an Alabama company. *Id.* at 283.

The court held that the FAA did not apply because the sale of real property in Alabama by an Alabama company to a resident of Alabama is neither a transaction within the flow of interstate commerce nor did the transaction have a substantial effect on interstate commerce under the *Sisters of the Visitation v. Cochran* test. *Id.* at 286. The court analyzed the five factors laid down in *Cochran* and determined that the contract did not have a substantial effect on interstate commerce. *Id.* at 288. Thus, the arbitration clause was unenforceable. The court also noted that the Morton facts are different from the facts in *Thompson v. Skipper Real Estate Co.*, 729 So. 2d 287, 290 (Ala. 1999), where the real estate purchase involved out-of-state financing, out-of-state title insurance, and out-of-state homeowner's insurance. *Id.*

92. See *Selma Med. Center, Inc. v. Fontenot*, No. 1991793, 2001 WL 873615 (Ala. Aug. 3, 2001). In *Fontenot*, the Supreme Court of Alabama reversed the trial court's finding that the defendant had not met its burden of demonstrating that the transactions at issue involved or had any "substantial effect [on] interstate commerce." *Id.* at *1. The defendant, Selma Medical Center, recruited two anesthesiology residents to relocate their medical practices from South Carolina to Alabama. *Id.* The physicians agreed, each signing a "Recruiting Agreement" which contained a provision obligating the hospital to pay the physicians \$500,000 in gross cash receipts. *Id.* However, if the physicians' net collectible revenue exceeded \$500,000, the physicians would repay the hospital the difference. *Id.* The hospital claimed, and the physicians disputed, that the physicians owed it excess revenue. *Id.* The hospital then filed a demand for arbitration with the American Arbitration Association. *Id.* In response, the physicians filed a motion for stay of arbitration, which the trial court granted based on the court's belief that the hospital's agreement with the physicians was only intrastate in nature. *Id.* at *2.

The Supreme Court of Alabama overruled the lower court's decision holding that the recruitment agreement was interstate in nature, satisfying the requirements of the FAA. *Id.* at *7. The physicians argued that under *Cochran*, the agreements presented no "substantial impact" upon interstate commerce that would render the FAA inapplicable. *Id.* at *5. The court held that the physicians entered the flow of interstate commerce when they moved from South Carolina to Alabama and that a substantial effect was not required where one of the other categories of the *Lopez* decision was satisfied. *Id.* at *6. As such, the court stated,

[w]hen a case involves allegation of the use of the instrumentalities of interstate commerce, or persons or things in interstate commerce, a court need not reach the question whether the underlying transaction "substantially affects" interstate commerce, because 'such persons and things, by definition, substantially affect - because they are components of - interstate commerce.'

Id. at *5 (quoting *Ex parte Stewart*, 786 So. 2d 464, 474 (Ala. 2000)).

93. See *Ex parte Stewart*, 786 So. 2d 464, 467-69 (Ala. 2000). In *Stewart*, the Supreme Court of Alabama upheld an order to compel arbitration. *Id.* at 469. Hugh Stewart and Kameron Hyde, plaintiffs, were dealers of the *Birmingham News*, a newspaper published by The Birmingham News Company (The News). *Id.* The News authorized the plaintiffs to act as exclusive distributors of the newspaper in certain areas under a contract titled "Independent News Dealer Agreement." *Id.* That agreement contained an arbitration provision. *Id.* at 466. Plaintiffs brought suit after The News changed its distribution system and customer rating procedures, thereby harming the plaintiffs. *Id.* The News filed a motion to compel arbitration, which the trial court granted. *Id.* at 466-67. The plaintiffs sought a writ of mandamus directing the trial court to vacate its order. *Id.*

The most important case in this category is, predictably, from the Alabama Supreme Court. In *Sisters of the Visitation v. Cochran Plastering Company*, the court discusses the definition of "involving commerce" in great detail.⁹⁴ In *Cochran*, a Catholic religious order, the Sisters of the Visitation, sued a contractor, Cochran, who the Sisters had hired to make repairs on their chapel.⁹⁵ Cochran moved to compel arbitration under the contract for the repairs.⁹⁶

The court began its analysis by recognizing that *Lopez* allows Congress to regulate three categories of commerce: channels of commerce, instrumentalities of commerce, and activities having a substantial effect on interstate commerce.⁹⁷

Then, the court commented on the *Lopez* decision's effect on the *Wickard* case. It stated that an aggregate effects analysis, as used in *Wickard*,⁹⁸ should not be given too elastic an interpretation. Furthermore, the court held that in order for an economic activity to come within the commerce power, the activity must substantially affect interstate commerce.⁹⁹ Because *Wickard* was not overruled by *Lopez*, however, the court analyzed whether the facts of *Cochran* satisfy the *Wickard* standard. The court addressed this question by asking

whether the actions of an individual, which actions standing alone would be considered "local" actions or actions with only an "indirect" influence on interstate commerce, may be considered to have a substantial influence on interstate commerce is to be determined by considering how critical the regulation of all similarly situated persons' activity is to the accomplishment of the primary purpose of a statute drawn to regulate an activity clearly having a substantial effect on interstate commerce.¹⁰⁰

The court also expressed concern that an overly expansive application of the FAA would "defeat the doctrine of federalism."¹⁰¹

The News presented evidence that virtually all of the inserts contained in the newspaper, including advertisements for national retail chains, are prepared, printed, and shipped to The News from out-of-state companies. The News also presented evidence showing that a significant portion of its news content and pictures derived from out-of-state agreements with other news services, including the Associated Press, Universal Press, Knight Ridder Tribune, and King Features. *Id.* at 467-68. The court held that the distribution of the newspapers by Stewart and Hyde was part of the flow of interstate commerce and that the flow of commerce had not ended upon delivery of the inserts, news, and pictures sent to The News by out-of-state companies. *Id.* at 468-69.

94. 775 So. 2d. 759 (Ala. 2000).

95. *Id.* at 760.

96. *Id.*

97. *Id.* at 761.

98. See generally *Wickard v. Filburn*, 317 U.S. 111 (1942).

99. *Id.* at 760-61.

100. *Id.* at 764.

101. *Id.* at 765.

The court found that if the *Cochran* facts fall under any prong of *Lopez*, they fall under the Substantial Affects prong.¹⁰² Then, the court developed five criteria to help determine whether a situation has a substantial effect on interstate commerce. First, the court analyzed the citizenship of the parties and stated that the transaction involved two local parties unaffiliated with interstate commerce.¹⁰³ Second, the court looked at the tools and equipment used and determined that regardless of whether Cochran acquired tools and equipment in interstate commerce, there was no substantial effect based on this prong.¹⁰⁴ Next, the court assessed the cost allocation of services and materials, stating that there was no evidence that the contract affected interstate commerce by way of a "dependence upon materials and services moving in interstate commerce."¹⁰⁵ Then, the court asked whether the actors' subsequent movement across state lines could create a substantial effect on interstate commerce and determined that the restoration project was incapable of subsequent movement across state lines.¹⁰⁶ Lastly, the court looked at the degree of separability from other contracts and found that even though the Sisters' contract with Cochran was connected with many other contracts that may have a substantial effect on interstate commerce, that fact alone is not determinative.¹⁰⁷

VI. THE LOWER FEDERAL COURTS GET IT RIGHT

Generally, the lower federal courts correctly apply the joint rule created by *Lopez* and *Allied-Bruce Terminix* cases.¹⁰⁸ While these courts require that the facts of a case satisfy one of the three categories of commerce created by the *Lopez* Court, they realistically apply the rule to the facts in the case at hand. They recognize that while there are limits on Congress's Commerce Clause power, those limits are reached in only the most extreme situations.

The District of Connecticut correctly applied both rules in *Cosmotek Mumessillik ve Ticaret Ltd. Sirkketi v. Cosmotek USA*.¹⁰⁹ There, the court stated that to determine whether the FAA applies, a three-

102. *Id.* at 764.

103. *Id.* at 765.

104. *Id.* at 766.

105. *Id.*

106. *Id.*

107. *Id.* at 767.

108. *But see* *Knepp v. Credit Acceptance Corp.*, 229 B.R. 821 (Bankr. N.D. Ala. 1999).

109. 942 F. Supp. 757 (D. Conn. 1996). There, Cosmotek USA entered into a contract with Ticaret Limited Sirkketi whereby Sirkketi became Cosmotek's distributor and sales representative for the sale of Fitch Catalyst units. *Id.* at 759. Advance Power Systems (APSI) manufactured the catalyst units. *Id.* While the contract between Cosmotek and Sirkketi contained an agreement by the parties to arbitrate future disputes, APSI was not a party to that contract. *Id.* at 760. When a

prong test must be satisfied: (1) there must be a written arbitration agreement; (2) federal jurisdiction must be proper and independent of the FAA; and (3) the underlying transaction must involve interstate commerce.¹¹⁰ Because the facts of this case did not satisfy the first prong of the test, the court did not examine the commerce requirement beyond stating that interstate commerce must be involved in order for the FAA to apply.¹¹¹

In 2001, the United States Court of Appeals for the Third Circuit faced the task of combining the *Lopez* and *Allied-Bruce* holdings in *Roadway Package Systems, Inc. v. Kayser*.¹¹² In *Kayser*, the circuit court affirmed the lower court, holding that the FAA applied despite the existence of the Pennsylvania Uniform Arbitration Act.¹¹³ The court stated that the FAA should apply in *Kayser* because the contract at issue contained an agreement to arbitrate between citizens of different states and involved the "delivery and pick-up of packages that have been or will be shipped interstate."¹¹⁴ The court stated that in this situation, the agreement was "unquestionably within Congress' power to reach under the Commerce Clause."¹¹⁵ Here, the court recognized that the FAA applies because the law falls within two of the areas where Congress may regulate commerce, namely the channels and instrumentalities of interstate commerce.¹¹⁶

VII. CONCLUSION

Though the Supreme Court began its decision in *Lopez* with a strong quote by James Madison claiming that the federal government's powers are "few and defined," for the Supreme Court to hold that Congress has exceeded its Commerce Clause powers, Congress must enact extreme legislation with no "sort of economic enterprise" or no "essen-

dispute arose, the plaintiff argued that the state law applied, rather than the FAA, because APSI was not a party to the contract. *Id.*

110. *Id.* at 759.

111. *Id.* at 759-60.

112. 257 F.3d 287 (3d Cir. Pa. 2001). There, Roadway Package System, Inc. (RPS), shipped small packages for corporate clients. *Id.* at 288. Independent contractors, such as the defendant, aided in shipping the packages. *Id.* Roadway fired Kayser and alleged that he failed to meet his obligations under the Linehaul Contractor Operating Agreement (LCOA), which governed their business dealings. *Id.* at 289. Kayser demanded arbitration, as was his right under the LCOA, and won an award. *Id.* at 290. RPS then asked the court to vacate the award. *Id.* at 291. The district court complied, applying the vacatur standards set forth in the FAA on the grounds that the arbitrator exceeded the scope of his authority. *Id.*

113. *Id.* at 289.

114. *Id.* at 291.

115. *Id.* at 291-92.

116. *See id.* at 292.

tial part of a larger regulation or economic activity.”¹¹⁷ This is an extremely loose test that can be easily fulfilled. Although courts should require that one of the three categories of commerce be met before applying the FAA, the courts should realize that this is no high hurdle. Where a contract containing an arbitration clause involves any form of interstate commerce, even in the aggregate, the Supreme Court would likely find that the FAA applies.

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117. *United States v. Lopez*, 514 U.S. 549, 561 (1995).

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