Approved: 2-1-050
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Mike O'Neal at 3:30 P.M. on January 26, 2005 in Room 313-S of the Capitol.

All members were present except:
Michael Peterson- excused

Committee staff present:
Jerry Ann Donaldson, Kansas Legislative Research
Jill Wolters, Office of Revisor of Statutes
Cindy O'Neal, Committee Secretary

Conferees appearing before the committee:
Representative Eric Carter
Jerry Slaughter, Kansas Medical Society
Kevin Fowler, Kansas Health Care Association
Will Larson, General Counsel for Kansas Association of Insurance Agents
Marlee Carpenter, Kansas Chamber of Commerce & Industry
Jim Clark, Kansas Bar Association
LJ Leatherman, Kansas Trial Lawyers Association
Wil Leiker, AFL- CIO

The hearing on **HB 2016 - arbitrations; validity of agreement; can apply to employer employee contracts and tort claims**, was opened.

Representative Eric Carter, explained that **HB 2016** addresses the issue of arbitration agreements. When Kansas adopted the Uniform Arbitration Act they departed from the Act by adding three prohibitions on the use of arbitration agreements, tort claims, insurance and employment agreements. Since that time the Legislature has clarified that arbitration is permitted for existing tort claims and to allow arbitration agreements between insurance companies are permissible. (Attachment 1)

The Federal Arbitration Act has been held to preempt state statutes that are inconsistent with the purpose of the Federal Act. Representative Carter sited the following U.S. Supreme Court cases:
Southland Corp. v. Keating
Allied-Bruce Terminix Cos v. Dobson

The Kansas appellate courts have followed the U.S. Supreme Court lead by holding that the Federal Arbitration Act preempts Kansas statutes prohibiting arbitration of certain claims. The following cases were sited:
Circuit City Stores, Inc. v. Adam
Biomat, Inc. v. Sampson
Durkin v. Cigna Property & Casualty Corp.

Jerry Slaughter, Kansas Medical Society, appeared as a proponent of the proposed bill because it would be an alternative that could be more efficient and less costly than using the current court system. (Attachment 2)

Kevin Fowler, Kansas Health Care Association, appeared in support of the proposed bill for practical reasons stating that nursing companies in Kansas that are involved interstate commerce can lawfully enter into written agreements that require arbitration while intrastate companies are not allowed to do so. The proposed bill would level the playing field for businesses operating in Kansas. He informed the committee that Oklahoma, Colorado and Missouri all have arbitration statutes which exempt tort claims. (Attachment 3)

Will Larson, General Counsel for Kansas Association of Insurance Agents, commented that the Insurance Agents in general support eliminating the exclusion of arbitration in tort actions. He believes that the majority of cases would not be affected by the change because there is not a contractual relationship. If the bill was passed into law he believes that insurance companies would be more willing to write nursing home liability. (Attachment 4)

MINUTES OF THE House Judiciary Committee at 3:30 P.M. on January 26, 2005 in Room 313-S of the Capitol.

Marlee Carpenter, Kansas Chamber of Commerce & Industry, stated that 60% of their respondents stated that the current lawsuit system is a deterrent to business growth and 83% stated that frivolous lawsuits increase the cost of doing business in the state. (Attachment 5)

The following conferees did not appear before the committee but requested that their written testimony in support of the bill be distributed and placed in the committee minutes:

Kansas Grain & Feed/Kansas Agribusiness Retailers (Attachment 6)
Kansas Cooperative Council (Attachment 7)
Kansas Association of Homes & Services for the Aging (Attachment 8)

Jim Clark, Kansas Bar Association, appeared as an opponent of the proposed bill because it curtails access to the court system and mandates arbitration. With the passage of the bill it would cause the playing fields to not be level. (Attachment 9)

LJ Leatherman, Kansas Trial Lawyers Association, agreed that arbitration is an area of law that the Federal Government has spoken in favor of it. If states try to regulate arbitration through statute, they get in trouble. An easier way to deal with the issue is by public policy, by taking it outside of arbitration, so no one can waive a constitutional right in a contract. This would take the State outside the preemption. (Attachment 10) There is a big push to cut back on jury trials because of the expense. However, we continue to use jury trials because every citizen deserves the right to have a jury trial and use the court system.

Mr. Leatherman commented that the current cap system states that any action brought, then it gives a statutory site to a reference of negligence. He questioned that if these are subject to arbitration then does the cap go away, because cases that are not tied to negligence are not limited under the cap.

Wil Leiker, AFL- CIO, appeared as an opponent of the bill. He agreed with the concept of arbitration, but believes that the bill would be unfair to the average individual and supported the adoption of the Kansas Trial Lawyers Amendment. (Attachment 11)

Committee discussion followed. Representative Carter once again reiterated that the arbitration language was clean up language and that Federal Law preempts states. While Mr. Fowler believed the bill to be addressing public policy.

Chairman O'Neal believed that arbitration would be mandated because if one wants to be admitted to a specific facility they would have to sign the arbitration papers, otherwise they would not be admitted. Mr. Fowler responded that he didn't believe that it would be mandatory but only a option.

The Chairman left the hearing on **HB 2016** opened.

The committee meeting adjourned at 5:00 p.m. The next meeting was scheduled for Monday, January 31, 2005 at 3:30 p.m. in room 313-S.

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HEARING ON H.B. 2016
ERIC CARTER
January 26, 2005

History of KSA 5-401

The 1973 Kansas version of the Uniform Arbitration Act, which was promulgated by the National Conference of Commissioners on Uniform State Laws, deviates from the model act by adding a prohibition on the use of arbitration agreements, tort claims, and employment agreements. In 1987, the Legislature amended K.S.A. 5-401 to clarify that arbitration is permitted for *existing* tort claims. KSA 5-401 was again amended, this time in 1995, to allow arbitration agreements between insurance companies was permissible.

Preemption of States' Anti-Arbitration Laws

The doctrine of preemption is derived from the Supremacy Clause of the United States Constitution, art. VI, cl. 2, which makes federal law the "supreme Law of the Land." Whether a particular federal statute preempts a particular state law, thus rendering the state law unenforceable, depends on congressional intent. Twenty years ago, the Supreme Court held in *Southland Corp. v. Keating* that the Federal Arbitration Act applies in state court and preempts conflicting state laws.

In *Southland Corp. v. Keating*,[1] Southland Corporation, the franchisor of 7-Eleven convenience stores, was sued by a class of its franchisees in California state court. The franchisees argued that Southland had violated the disclosure requirements of the California Franchise Investment Law ("FIL"). Southland moved to compel arbitration of all the claims based on an arbitration clause in the franchise agreement. The trial court refused to grant the motion to compel regarding the FIL claim. The court of appeal reversed and ordered it to arbitration. The California Supreme Court reversed the court of appeal, holding that (1) the FIL claim was not subject to arbitration because the arbitration clause was an invalid "condition, stipulation or provision purporting . . . to waive compliance with any provision of this law"; and (2) the FAA did not preempt the California antiwaiver provision.

The United States Supreme Court reversed the California Supreme Court, holding that the FAA applied in state court and preempted the California anti-waiver provision as applied to arbitration clauses. The Court began by identifying a "national policy favoring arbitration" in the FAA. It found "nothing in the Act indicating that the broad principle of enforceability [in

[1] 465 U.S. 1 (1984).

House Judiciary
1-26-05
Attachment 1

section 2 of the Act] is subject to any additional limitations under state law." Ultimately, the majority concluded: "In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." Accordingly, the FAA preempted the California antiwaiver provision as applied to arbitration clauses and the franchisee had to arbitrate its FIL claim.

The Supreme Court next addressed preemption of state anti-arbitration law by the FAA in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995). There, the Court noted:

- First, "the basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate."
- Second, in enacting the FAA, Congress relied at least in part on its power to regulate interstate commerce.
- Third, the Court had held in Southland that the FAA applies in state court and, thus, "state courts cannot apply state statutes that invalidate arbitration agreements."

The Court then held that the FAA applied and preempted an Alabama law that precluded specific enforcement of pre-dispute arbitration agreements.

In the last two decades, the Supreme Court has consistently thwarted challenges to arbitration that were previously entertained and has thereby federalized the law of arbitration. The Kansas appellate courts have followed this lead by holding that the FAA pre-empts Kansas statutes prohibiting arbitration of certain claims.

Employment Agreements

In the 2001 case of *Circuit City Stores, Inc. v. Adams*, the United States Supreme Court reviewed a case where the plaintiff had signed an employment application containing an agreement to arbitrate all employment disputes, including any ADEA claims. After two years of employment Adams was discharged and filed an age discrimination lawsuit in state court. In response, Circuit City filed a motion in federal court to "enjoin the state court action and compel arbitration" based upon the arbitration agreement. The district court ordered arbitration. The 9th Circuit reversed, and then the Supreme Court, in turn, reversed the 9th Circuit, specifically holding that "Congress intended the FAA ... to pre-empt state anti-arbitration laws".

Following the United States Supreme Court's lead, the Kansas Court of Appeals in *Biomat, Inc. v. Sampson*[2] held that an arbitration clause in an employment agreement was valid, irrevocable, and enforceable because the Federal Arbitration Act preempted Kansas' arbitration law, KSA 5-401, which is the now subject of this HB 2016.

Additionally, in *Durkin v. Cigna Prop. & Cas. Corp.*,[3] a federal district court in Kansas dealt with a case in which an employee, who had signed an employment agreement containing an arbitration provision, sued her employer alleging violations of state and federal anti-discrimination laws. The court specifically reviewed Kansas' law and noted that it "specifically excludes employment

[2] 28 Kan.App.2d 242, 15 P.3d 846.
[3] 942 F.Supp. 481 (D. Kan. 1996).

contracts", and then held that our Kansas statute's provision regarding employment agreements was preempted by the Federal Arbitration Act.

> The purpose of the FAA is "to overcome courts' refusals to enforce agreements to arbitrate." ... The FAA was intended to place arbitration agreements on the same footing as other contracts. "Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements...." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983). Accordingly, "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." *Id.* at 24-25, 103 S.Ct. at 941.

In further support of the widely-excepted proposition that Kansas' law prohibiting arbitration agreements in employment agreements, the Fiscal Note you have received for this HB 2016 notes that the Department of Administration – the State of Kansas itself – actually uses arbitration clauses in its agreements with employees who are members of certain "employee organizations".

Additional case excerpts regarding employment agreements:

- Saari v. Smith Barney, Harris Upham & Co., 968 F.2d 877, 881-82 (9th Cir. 1992) (ordering arbitration under the Employee Polygraph Protection Act), cert. denied, 506 U.S. 986 (1992);

- Pritzker v. Merril Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1112 (3rd Cir. 1983) (requiring arbitration in ERISA action for breach of fiduciary obligation);

- Williams v. Katten, Machin & Gavis, 837 F. Supp. 1430, 1437 (N.D. Ill. 1993) (arbitration of Title VII and 1981 race discrimination claims brought by non-equity partner of law firm);

- McNutty v. Prudential-Bache Sec., Inc., 871 F. Supp. 567, 571 (E.D.N.Y. 1994) (arbitration under the Jury Systems Improvement Act); and

- Kinnebrew v. Gulf Ins. Co., 67 Fair Empl. Prac. Cas. (BNA) 189 (N.D. Tex. 1994) (arbitration under Equal Pay Act).

- **BUT, NOTE:**
  - **Fee splitting and attorney's fees**:
    The D.C. Circuit held in Cole v. Burnes Int'l Sec. Servs. that an arbitration agreement could not require an employee to pay any part of the arbitrator's services, including costs and fees. The court based its decision on the rationale that the employee would not otherwise be required to pay for a judge in court. However, the Supreme Court overruled this part of Cole in Green Tree Financial Corp. v. Randolph, holding that an agreement allocating arbitration fees was not per se unenforceable. Rather, the party arguing that the agreement should be invalidated on the grounds that arbitration would be prohibitively expensive must carry the burden of proof to show the likelihood of incurring such prohibitive costs.

  - In *Shankle v. B-G Maintenance Management Inc.*, **the 10th Circuit** determined that an *arbitration agreement is unenforceable if an employee is required to pay*

part of the arbitrator's fees. The Court refused the employer's offer to pay all of the arbitration expenses in order to compel arbitration and refused to strike the fee-splitting provision from the contract.

Tort Actions

Morrison v. Colorado Permanente Medical Group, P.C.
983 F.Supp. 937
D.Colo.,1997

District court lacked subject matter jurisdiction over claims against health plan and physician arising from death of patient; patient had agreed to binding arbitration in enrolling in health plan through her employer, and arbitration clause was enforceable under **Federal Arbitration Act**.

Provisions in Colorado Health Care Availability Act, setting forth specific language that any arbitration clause in a **medical** services agreement is required to contain, are inconsonant with, and therefore **preempted** by, **Federal Arbitration Act (FAA),** under which an arbitration clause in a contract evidencing a transaction involving commerce is revocable only on those grounds applicable to contracts generally.

Toledo v. Kaiser Permanente Medical Group
987 F.Supp. 1174
N.D.Cal.,1997

Service agreement entered into by employer and health maintenance organization (HMO) evidenced transaction involving commerce and, therefore, was subject to **Federal Arbitration Act (FAA),** where agreement provided for general health care and emergency coverage when participant was in another region or another state, many of HMO's physicians were recruited from out of state, and many necessary supplies and medications were shipped from out of state. 9 U.S.C.A. § 2.

So long as contract has any effect on commerce, contract "evidences a transaction involving commerce" within meaning of **Federal Arbitration Act (FAA).** 9 U.S.C.A. § 2.

Claims of health maintenance organization (HMO) members against HMO and its contracting providers for fraud and infliction of emotional distress, arising out of HMO's denial of surgical and **hospital** benefits, fell within scope of arbitration clause contained in HMO's service agreement with member's employer, which provided for arbitration of "any claim aris[ing] from alleged violation of any duty incident to or arising out of [the] agreement, including any claim for **medical** or **hospital** negligence ... irrespective of the legal theories upon which the claim is asserted."

Potts v. Baptist Health System, Inc.
853 So.2d 194
Ala.,2002

Medical center's employment relationship with nurse had a substantial effect upon interstate commerce, and, thus, **Federal Arbitration Act (FAA) preempted** state statute prohibiting enforcement of agreement to submit controversy to arbitration; sizeable amounts of goods used by nurse in treating patients were purchased in interstate commerce, and nurse used many of those goods on a daily and recurring basis throughout course of her employment with **medical** center. 9 U.S.C.A. § 2; Code 1975, § 8-1-41(3).

Mount Diablo Medical Center v. Health Net of California, Inc.
124 Cal.Rptr.2d 607
Cal.App. 1 Dist.,2002

Agreement between **hospital** and health-care service plan involved interstate commerce by requiring **hospital** to provide medications and **hospital** supplies manufactured and distributed nationwide, and, thus, the **Federal Arbitration Act (FAA)** applied. 9 U.S.C.A. § 2.

West Reporter Image (PDF)

250 Kan. 574, 829 P.2d 874

Supreme Court of Kansas.
Blaine SKEWES, Appellee,
v.
SHEARSON LEHMAN BROTHERS, Appellant.
No. 65845.
April 10, 1992.

Stockbroker brought action against his former employer alleging breach of employment contract and retaliatory discharge. The Sedgwick District Court, M. Kay Royse, J., denied former employer's motion to stay proceedings and compel arbitration of retaliatory discharge claim and the Court of Appeals reversed and remanded, 812 P.2d 1240. The Supreme Court granted review and Six, J., held that: (1) Federal Arbitration Act preempted Kansas statute prohibiting arbitration of tort claims, and (2) stockbroker's retaliatory discharge claim was subject to arbitration.
Trial court reversed, Court of Appeals affirmed, and case remanded.
Lockett, J., filed dissenting opinion in which Allegrucci, J., joined.

West Headnotes

[1] KeyCite Notes

⇦160 Exchanges
⇦160k11 Regulation by Exchanges of Members' Dealings with Nonmembers
⇦160k11(11) Arbitration
⇦160k11(12) k. Disputes Involving Members' Employees. Most Cited Cases

Exemption in Federal Arbitration Act for "contracts of employment of * * * workers engaged in foreign or interstate commerce" did not apply to arbitration clause in Form U-4 executed by stockbroker in connection with his employment at brokerage firm. 9 U.S.C.A. § 1.

[2] KeyCite Notes

⇦33 Arbitration
⇦33I Nature and Form of Proceeding
⇦33k2 k. Constitutional and Statutory Provisions; Rules of Court. Most Cited Cases

⇦360 States KeyCite Notes
⇦360I Political Status and Relations
⇦360I(B) Federal Supremacy; Preemption
⇦360k18.15 k. Particular Cases, Preemption or Supersession. Most Cited Cases

Federal Arbitration Act creates body of federal substantive law applicable in state and federal courts, and in creating such substantive rule, Congress intended to foreclose state legislative attempts to undercut enforceability of arbitration agreements. 9 U.S.C.A. § 1 et seq.

[3] KeyCite Notes

⇦33 Arbitration

33II Agreements to Arbitrate
33k6 Requisites and Validity
33k6.2 k. Other Matters. Most Cited Cases
(Formerly 33k6)

Enforceability of Federal Arbitration Act is subject to two limitations only: arbitration act must be contained in written maritime contract or contract evidencing transaction involving commencement, and clause may be invalidated upon such grounds as exist at law or in equity for revocation of any contract; state may not impose additional limitations. 9 U.S.C.A. §§ 1, 2.

[4] KeyCite Notes

33 Arbitration
33I Nature and Form of Proceeding
33k2 k. Constitutional and Statutory Provisions; Rules of Court. Most Cited Cases

360 States KeyCite Notes
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.15 k. Particular Cases, Preemption or Supersession. Most Cited Cases

Federal Arbitration Act preempts conflicting state law which exempts enforcement of arbitration agreements involving interstate commerce. 9 U.S.C.A. § 1 et seq.

[5] KeyCite Notes

160 Exchanges
160k11 Regulation by Exchanges of Members' Dealings with Nonmembers
160k11(11) Arbitration
160k11(12) k. Disputes Involving Members' Employees. Most Cited Cases

Stockbroker's claim of retaliatory discharge against his former employer arose out of or in connection with former employer's business and, thus, was required to be arbitrated pursuant to arbitration clause in Form U-4 that stockbroker had executed in connection with his former employment.

[6] KeyCite Notes

33 Arbitration
33I Nature and Form of Proceeding
33k3 Matters Subject to Arbitration
33k3.1 k. In General. Most Cited Cases
(Formerly 33k3)

Federal Arbitration Act establishes that, as matter of federal law, any doubts concerning scope of arbitrable issues should be resolved in favor of arbitration, whether problem at hand is construction of contract language itself or allegation of waiver, delay or similar defense to arbitrability. 9 U.S.C.A. § 1 et seq.

****874 *574** Syllabus by the Court

1. The Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (1988), preempts conflicting state laws which exempt enforcement of arbitration agreements involving interstate commerce. Under the facts of this case, K.S.A. 5-401, which prohibits the arbitration of tort claims, is preempted by the Federal

Arbitration Act.
2. The Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (1988), creates a body of federal substantive law applicable in state and federal courts. In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.
****875** 3. The Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (1988), 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.
4. Under the facts of this case, a stockbroker employee's claim for retaliatory discharge arose out of or in connection with his employer's business. Thus, the claim fell within the arbitration agreement, and the retaliatory discharge action must be stayed and the claim submitted to arbitration.
Daniel M. Dibble, of Lathrop & Norquist, Kansas City, Mo., argued the cause, and W. Joseph Hatley, of the same firm, Overland Park, was with him, on the briefs, for appellant.
Jim Lawing, Wichita, argued the cause and was on the briefs, for appellee.

***575** SIX, Justice.
This is an arbitration case arising from the effect of the Code of Arbitration of the National Association of Securities Dealers, Inc., (NASD) on a tort claim of retaliatory discharge asserted by a stockbroker against his employer.
The two controlling issues are: (1) whether the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.* (1988), preempts K.S.A. 5-401, which prohibits the arbitration of tort claims; and (2) whether plaintiff Blaine Skewes' retaliatory discharge claim arose out of or in connection with his employer's "business" and, consequently, is subject to arbitration under the Uniform Application for Securities Industry Registration form (Form U-4).
Shearson Lehman Brothers, formerly known as Shearson Lehman Hutton, Inc., (Shearson) appealed the trial court's order denying its motion to stay proceedings and compel arbitration of Skewes' retaliatory discharge claim. In an unpublished opinion filed June 28, 1991, 812 P.2d 1240, the Court of Appeals reversed and remanded for an order staying the judicial proceeding and compelling arbitration.
We granted Skewes' petition for review.
We affirm the Court of Appeals, reverse the trial court, and hold that the FAA preempts the Kansas Uniform Arbitration Act. We also hold that under the facts of this case, Skewes' retaliatory discharge claim arose out of or in connection with his employer's "business" and is within the scope of the arbitration provision contained in the Form U-4.

Facts

Skewes was working for Shearson as a stockbroker. Shearson, terminated his employment. Skewes filed suit against Shearson, alleging that Shearson: (1) breached the employment contract; (2) wrongfully refused to allow his pension rights to vest and to pay him under the pension plan; and (3) discharged him in retaliation for filing a wage claim with the Kansas Department of Human Resources.
Shortly after Skewes began his employment, Skewes and Shearson (by its agent, the Wichita office manager) executed a "Form U-4." The Form U-4 contained the following provisions:
"I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to ***576** be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register, as indicated in Question 8."
In Question 8, Skewes indicated that he was to be registered with the NASD.
Section 8(a) of the NASD Code of Arbitration Procedures (NASD Code) states in part:
"Any dispute, claim or controversy eligible for submission under Part I of this Code between or among members and/or associated persons, and/or certain others, arising in connection with the business of such member(s) or in connection with the activities of such associated person(s), shall be arbitrated under this Code, at the instance of:
****876** (1) a member against another member; [and]
(2) a member against a person associated with a member or person associated with a member against a member...."
Section 1, Part I of the NASD Code provides:
"This Code of Arbitration Procedure is prescribed and adopted pursuant to Article VII, Section 1(a)(3) of the By-Laws of the National Association of Securities Dealers, Inc. (The 'Association') for the

arbitration of any dispute, claim or controversy arising out of or in connection with the business of any member of the Association, with the exception of disputes involving the insurance business of any member which is also an insurance company:
(1) between or among members; [and]
(2) between or among members and public customers, or others."
Shearson filed a motion to stay proceedings and to compel arbitration. In support of its motion, Shearson contended that Skewes' claims arose out of his employment as a Shearson stockbroker and that he had agreed to arbitrate such claims under the rules of the New York Stock Exchange (NYSE) and NASD. Shearson asserted that the FAA requires that the action be stayed and Skewes be compelled to arbitrate his claims. Shearson acknowledged that K.S.A. 5-401 excludes from arbitration contracts between employer and employees and tort claims; however, Shearson asserted that the FAA preempts the Kansas statute.
Skewes conceded that his pension benefits and breach of employment contract claims were subject to arbitration under the Form U-4 and that his employment involved interstate commerce.
Skewes contended that his retaliatory discharge claim was not subject to arbitration because K.S.A. 5-401 prohibits arbitration of tort claims. He asserts we have ruled that federal law does not preempt the Kansas arbitration statute.

*577 Rulings of the Trial Court

The trial court granted Shearson's motion to stay and compel arbitration as to all of Skewes' claims except the retaliatory discharge claim. The trial court reasoned: (1) The claim of retaliatory discharge did not arise out of or in connection with Shearson's business of selling securities and is not required to be arbitrated under the NASD Code, and (2) federal law does not preclude a retaliatory discharge state court action because the agreement between Shearson and Skewes is not intrinsically related to the tort. The trial court relied on *Coleman v. Safeway Stores, Inc.*, 242 Kan. 804, 752 P.2d 645 (1988).

The Court of Appeals Opinion

The Kansas Court of Appeals reversed and remanded. It held first that the FAA preempted Kansas law restricting arbitration of tort claims and then reasoned that the retaliatory discharge claim was within the scope of the arbitration agreement, finding that the claim arose out of or in connection with Shearson's business.

FAA Preemption--K.S.A. 5-401--The Arbitration of Tort Claims

K.S.A. 5-401 provides:
"(a) A written agreement to submit any existing controversy to arbitration is valid, enforceable and irrevocable except upon such grounds as exist at law or in equity for the revocation of any contract.
"(b) Except as provided in subsection (c), a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable except upon such grounds as exist at law or in equity for the revocation of any contract.
"(c) The provisions of subsection (b) shall not apply to: (1) Contracts of insurance; (2) contracts between an employer and employees, or their respective representatives; or (3) any provision of a contract providing for arbitration of a claim in tort."
K.S.A. 5-401 invalidates arbitration clauses contained in employment contracts and clauses providing for arbitration of tort claims.

[1] **877 Shearson argues that the FAA preempts Kansas law and mandates that Skewes' retaliatory discharge action be stayed and the claim submitted to arbitration. Thus, Shearson contends the trial court erred in relying on *Coleman.* We agree.
*578 The FAA provides:
"A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exists at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1988).
9 U.S.C. § 1 (1988) defines "commerce," in part, as "commerce among the several States." Section 1 also contains the following exceptions: "[B]ut nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Skewes argues that the arbitration clause in question is contained in a contract

of employment involving interstate commerce, and, therefore, exempt from the FAA.
In *Gilmer v. Interstate/Johnson Lane,* 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991), the Supreme Court considered the argument that 9 U.S.C. § 1 excludes all employment contracts from the FAA in the context of an arbitration agreement contained in a Form U-4.
In affirming the Fourth Circuit, Justice White, speaking for a seven-member majority, stated the issue: "The question presented in this case is whether a claim under the Age Discrimination in Employment Act of 1967 ... can be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application." 500 U.S. at ----, 111 S.Ct. at 1650, 114 L.Ed.2d at 35.
As required by his employment, Gilmer executed a Form U-4 with a clause requiring arbitration of "any dispute, claim or controversy" between him and his employer that is required to be arbitrated under the rules of the organizations with which he registered. 500 U.S. at ----, 111 S.Ct. at 1650, 114 L.Ed.2d at 35. Gilmer registered with the NYSE. The Court noted that the § 1 employment contract exclusion argument was not raised below or presented in the petition for *certiorari.* The Court stated that it would be inappropriate to address the scope of the § 1 exclusion because the arbitration clause was not contained in a contract of employment. ***579** "Rather, the arbitration clause at issue is in Gilmer's securities registration application, which is a contract with the securities exchanges, not with [his employer]." 500 U.S. at ---- n. 2, 111 S.Ct. at 1651 n. 2, 114 L.Ed.2d at 36 n. 2.
In the case at bar, Skewes did not raise the contract of employment argument below. In fact, he assumed a contrary position when he conceded his claims other than retaliatory discharge were required to be arbitrated. *Gilmer* holds that the § 1 exemption of the FAA is not applicable to arbitration clauses in the Form U-4, which contains the arbitration agreement at issue.
Section 3 of the FAA requires that an action brought in any "courts of the United States" upon any issue referrable to arbitration under a written arbitration agreement be stayed until such arbitration has been had. 9 U.S.C. § 3 (1988). Section 4 authorizes a party aggrieved by the failure of another to arbitrate under a written agreement to petition any "United States district court" having jurisdiction for an order compelling arbitration. 9 U.S.C. § 4 (1988).
Acknowledging the references to "courts of the United States" and "United States district court" in §§ 3 and 4 of the FAA, the United States Supreme Court has held that § 2 of the FAA applies in state courts and preempts state law requiring a judicial forum. *Perry v. Thomas,* 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987); ***878** *Southland Corp. v. Keating,* 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984).

[2] The Court in *Southland Corp.* relied on *Moses H. Cone Hospital v. Mercury Constr. Corp.,* 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983), stating, "[We reaffirm] our view that the Arbitration Act 'creates a body of federal substantive law' and expressly stated what was implicit in *Prima Paint [v. Flood & Conklin,* 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967)], *i.e.,* the substantive law of the Act created was applicable in state and federal courts." *Southland Corp.,* 465 U.S. at 12, 104 S.Ct. at 859. The Court then reasoned: "In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." 465 U.S. at 16, 104 S.Ct. at 861.

[3] The enforceability of the FAA is subject to two limitations only: (1) The arbitration act must be contained in a written maritime ***580** contract or a contract evidencing a transaction involving commerce as defined in § 1; and (2) the clause may be invalidated "upon such grounds as exist at law or in equity for the revocation of any contract" (9 U.S.C. § 2). The state may not impose additional limitations. 465 U.S. at 10-11, 104 S.Ct. at 858-59.
Southland Corp. was applied in *Perry v. Thomas,* which involved facts similar to those in the case at bar. Thomas brought an action alleging breach of contract, conversion, civil conspiracy to commit conversion, and breach of fiduciary duty against his former employer, Kidder, Peabody and Co., and two of its employees, Perry and Johnston. The action arose from a dispute over the commissions on the sale of securities. After Thomas refused to submit the dispute to arbitration, the defendants sought to stay further judicial proceedings and to compel arbitration. The demands for arbitration were based on the arbitration provision found in the Form U-4 that Thomas had signed. The *Thomas* Form U-4 is identical to the Form U-4 signed by Skewes. However, Thomas had registered with the NYSE. Rule 347 of the NYSE was involved in *Thomas* rather than the NASD Code. Rule 347 provided in part: " '[A]ny controversy between a registered representative and any member or member

organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party'...." 482 U.S. at 485, 107 S.Ct. at 2523.

The trial court in *Thomas* denied the defendants' petition to compel arbitration, holding that § 229 of the California Labor Code authorized Thomas to pursue an action to collect wages without regard to private arbitration agreements. 482 U.S. at 486, 107 S.Ct. at 2523. The California Court of Appeals affirmed, and the California Supreme Court denied Thomas' petition for review. 482 U.S. at 488-89, 107 S.Ct. at 2524-25. Relying on *Southland Corp.,* the United States Supreme Court reversed and held that § 2 of the FAA preempts § 229 of the California Labor Code.

The trial court's reliance, in the case at bar, on *Coleman v. Safeway Stores, Inc.,* 242 Kan. 804, 752 P.2d 645, was misplaced. *Coleman* addressed whether the federal Labor Management Relations Act (LMRA) preempted state tort claims. We also referred in *Coleman* ***581** to the inappropriateness of arbitrating tort claims. 242 Kan. at 813-15, 752 P.2d 645.

Coleman is distinguishable from the instant case. The FAA was not involved in *Coleman.* The United States Supreme Court has limited preemption by the LMRA where the state tort law purports to define the meaning of the contract relationship. 242 Kan. at 811-12, 752 P.2d 645 (citing *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 211, 105 S.Ct. 1904, 85 L.Ed.2d 206 [1985]). The United States Supreme Court has not limited the preemption by the FAA. As to our reference in *Coleman* that arbitral procedures are comparatively inappropriate for the resolution of tort claims, we note that *Thomas* and *Southland Corp.* involved tort claims (fraud, breach of fiduciary duty) and that arbitration was required.

****879** Tort claims such as defamation, negligence, fraud, invasion of privacy, and breach of fiduciary duty also have been held arbitrable under the FAA. See *Zolezzi v. Dean Witter Reynolds, Inc.,* 789 F.2d 1447 (9th Cir.1986) (defamation, invasion of privacy); *Morgan v. Smith Barney, Harris Upham & Co.,* 729 F.2d 1163 (8th Cir.1984) (slander); *Block 175 Corp. v. Fairmont Hotel Management Co.,* 648 F.Supp. 450 (D.Colo.1986) (breach of fiduciary duty, intentional or reckless breach of duty); *Merrill Lynch, Pierce, Fenner & Smith v. Thomson,* 574 F.Supp. 1472 (E.D.Mo.1983) (breach of no-compete clause in employment contract); *Merrill Lynch, Pierce, Fenner v. McCollum,* 666 S.W.2d 604 (Tex.App.1984) (tortious interference with contract), *cert. denied* 469 U.S. 1127, 105 S.Ct. 811, 83 L.Ed.2d 804 (1985).

In *R.J. Palmer Constr. Co. v. Wichita Band Instrument Co.,* 7 Kan.App.2d 363, 365, 642 P.2d 127 (1982), decided before *Southland Corp.* or *Thomas,* the Kansas Court of Appeals observed that the FAA applies in state courts as well as federal courts. The FAA requires state courts to enforce an arbitration clause despite contrary state policy.

[4]  *Southland Corp.* and *Thomas* teach that the FAA preempts conflicting state law which exempts enforcement of arbitration agreements involving interstate commerce. Under the facts of the case at bar, K.S.A.1990 Supp. 5-401, which prohibits the arbitration of tort claims, is preempted by the FAA.

*582 Retaliatory Discharge--The Scope of The Arbitration Provision Contained in the Form U-4

[5]  Resolution of the retaliatory discharge/arbitration issue requires interpretation of the arbitration clause contained in the Form U-4 and the NASD code referred to in the Form U-4. The Form U-4 has been adopted by the Kansas Securities Commissioner. K.A.R. 81-2-1(1).

"The construction of a written instrument is a question of law, and the instrument may be construed and its legal effect determined by an appellate court." *Kennedy & Mitchell, Inc. v. Anadarko Prod. Co.,* 243 Kan. 130, 133, 754 P.2d 803 (1988) .

In the Form U-4, Skewes agreed to arbitrate "any dispute, claim or controversy that may arise *between me and my firm* ... that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register, as indicated in Question 8." (Emphasis added.) Skewes indicated in Question 8 that he was to be registered with the NASD. Therefore, we must determine whether the rules, constitutions, or by-laws of the NASD require Skewes' retaliatory discharge claim to be arbitrated.

Section 1 of the NASD Code provides for the arbitration of any "dispute, claim or *controversy arising out of or in connection with the business of any member* ... (1) between or among members; [and] (2) *between or among members* and public customers, or *others.*" (Emphasis added.) Section 8

requires arbitration of disputes defined in section 1 "*between or among members and/or associated persons* ... arising in connection with the business of such member(s) or in connection with the activities of such associated person(s) ... at the instance of: (1) a member against another member; [and] (2) *a member against a person associated with a member* or a person associated with a member against a member." (Emphasis added.)

The trial court held that Skewes' claim for retaliatory discharge did not arise out of or in connection with Shearson's business, which is selling securities. Therefore, the claim was not within the scope of the arbitration agreement.

Shearson argues that Skewes' retaliatory discharge claim arises out of or in connection with Shearson's business. Shearson disagrees with the trial court's narrow interpretation. Shearson asserts ***583** its business is not limited to buying and selling securities but, as with any other employer, includes dealings with employees. We agree.

Skewes contends that the Form U-4 and the NASD Code are ambiguous. He reasons ****880** that any person signing the Form U-4 would understand that only disputes involving securities are required to be arbitrated. Skewes further contends that *Gilmer* suggests that compulsory arbitration should only be permitted in labor disputes where the arbitration clause explicitly applies to disputes arising from the employer/employee relationship. Skewes emphasizes that the NASD rules do not include any provision comparable to Rule 347 of the NYSE, which was dispositive of the *Gilmer* arbitration issue.

[6] In *Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. at 24-25, 103 S.Ct. at 941-42, the Supreme Court stated: "The Arbitration Act 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."

Skewes is correct in asserting that *Gilmer* involved NYSE Rule 347, which is more specific than §§ 1 and 8 of the NASD Code. Rule 347 specifically refers to disputes "arising out of the employment or termination of employment" of a registered representative. However, *Gilmer* does not suggest that a less specific arbitration clause is invalid.

Skewes' argument supporting a narrow interpretation of the NASD Code has been unsuccessfully advanced recently by similarly situated plaintiffs.

In *Singer v. Jefferies & Co., Inc.*, 78 N.Y.2d 76, 571 N.Y.S.2d 680, 575 N.E.2d 98 (1991), New York's highest court, speaking through Chief Judge Wachtler, endorsed a broad interpretation of the NASD Code. Singer, the plaintiff, had worked for the defendant, Jefferies & Co. (the firm). The firm was a member of the NASD. A Form U-4 was involved. The arbitration language interpreted was the same as that before us in the case at bar. Singer, as a senior vice-president and manager of the firm's corporate finance department, at the direction of Jefferies, the CEO, signed a $3 million invoice sent to Ivan F. Boesky for "investment, advisory ***584** and corporate finance services." Boesky pled guilty to illegal stock market activities. The $3 million bill was actually intended to cover an investment loss. Jefferies was charged criminally with aiding and abetting and pled guilty. Singer, who had left the firm, was never charged; however, he did receive a summons from the Securities and Exchange Commission which was investigating Boesky's financial dealings with the firm. Singer sued the firm, alleging that he had been ordered to prepare the fraudulent invoice without knowledge of the true facts. He also asserted that he was made to appear to be a party to the crime and that this caused him to suffer damage to his finances and professional reputation.

The firm claimed that the dispute was subject to arbitration. The trial court agreed; the appellate division did not. Singer contended that the dispute was not arbitrable because it arose out of illegal activity and not out of the lawful business of the firm. The appellate division accepted Singer's interpretation, noting that "the business of Jefferies & Company, and of the individual defendant, was stocks, not fraud." 78 N.Y.2d at 82, 571 N.Y.S.2d 680, 575 N.E.2d 98. Upon review, the Court of Appeals rejected the narrow interpretation, noting, "Under prevailing Federal law the wrongful conduct must involve 'significant aspects' of the employment or the employer's business activities [citations omitted]." 78 N.Y.2d at 83, 571 N.Y.S.2d 680, 575 N.E.2d 98.

The *Singer* court, in holding that Singer's claim for injury to reputation resulting from the firm's use of him as an unwitting pawn in a securities fraud was subject to arbitration, stated: "To hold that such a dispute does not arise out of the firm's business is unrealistic and inconsistent with the Federal policy requiring liberal, indeed generous, interpretation of arbitration agreements [citation omitted]." 78 N.Y.2d at 84, 571 N.Y.S.2d 680, 575 N.E.2d 98.

The *Singer* court, in analyzing the NASD Code, noted:
"Congress adopted the [FAA] to insure that the courts would rigorously enforce **881 private agreements to arbitrate (*Dean Witter Reynolds v. Byrd,* 470 U.S. 213, 219, 221 [105 S.Ct. 1238, 1241-42, 84 L.Ed.2d 158]) and it establishes an 'emphatic' national policy favoring arbitration which is binding on all courts, State and Federal [citations omitted]. Pursuant to the Arbitration Act, 'questions of arbitrability must be addressed with a healthy regard for the federal policy * * * [and] any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration' [citations omitted]." 78 N.Y.2d at 81-82, 571 N.Y.S.2d 680, 575 N.E.2d 98.
*585 In *Madden v. Ellspermann,* 813 S.W.2d 51 (Mo.App.1991), the NASD Code received a broad characterization. Madden, the stockbroker plaintiff, sued his former brokerage firm employer, Kidder, Peabody & Co., Inc., and its office manager, Ellspermann, for breach of contract, wrongful termination, and misappropriation of commissions. Madden had been terminated because he failed to notify Kidder, Peabody that he was purchasing an interest in a savings and loan. Again, the NASD Code language we are required to interpret in the case at bar was involved. Madden advanced the narrow interpretation asserted by Skewes. Madden argued that the NASD Code does not cover disputes arising out of private affairs. Madden contended that his purchase of an interest in the savings and loan was personal business not connected with Kidder, Peabody; therefore, the reason for his termination was unconnected with the business of Kidder, Peabody. The Missouri Court of Appeals stated:
"This argument overlooks the fact that the employment of Madden by Kidder, Peabody to conduct its business is a matter arising out of and in the course of business of Kidder, Peabody. In like manner the termination of Madden's employment is a matter arising out of and in connection with the business of Kidder, Peabody. The reason given for the termination, even if related to a non-business subject, is unimportant. The essential ingredient is the termination of employment which is a matter arising out of the business of Kidder, Peabody." 813 S.W.2d at 54.
Francis v. Marshall, 661 F.Supp. 773 (D.Mass.1987), interpreted the scope of §§ 1 and 8 of the NASD Code. The court in *Francis* was urged to interpret the "business of any [NASD] member" narrowly to involve only the purchasing and selling of securities on the over-the-counter markets. The court disagreed, noting that § 1 is broad on its face.
"The arbitration clause does not refer to the 'operation' of a securities business. Rather, it covers 'any dispute' arising 'in connection with' an NASD member's business. For example, the clause is certainly broad enough to cover a dispute between an NASD member and an employee, not stemming from the purchase and sale of securities." 661 F.Supp. at 775.
The *Francis* court held that "the business" of an NASD member securities firm includes the firm's purchase and sale as a corporate entity.
*586 *Nelsen v. Colleary,* 152 Misc.2d 81, 574 N.Y.S.2d 912 (1991), involved a plaintiff stockbroker suing her employer, Chase Securities Inc. The Form U-4, the NASD Code, termination of plaintiff's employment, and a claim of "harassment and humiliation denigrating [plaintiff's] sex and religion" in violation of the New York State Human Rights Law were also involved. The *Nelsen* court emphasized the public policy favoring arbitration in holding that plaintiff's claims were within the intent of the Form U-4 and the NASD arbitration agreement.
Between the dates of our acceptance for review and oral argument, Skewes requested that *Higgins v. Superior Court,* 234 Cal.App.3d 1464, 1 Cal.Rptr.2d 57 (1991), be added to his petition for review. Counsel for Shearson was granted leave to respond to *Higgins.* Skewes followed Shearson's response with a supplemental brief addressing *Higgins.*
The California Supreme Court denied a petition for review and ordered *Higgins* decertified for publication. *Higgins v. Superior* **882 *Court,* B057028 (Cal. S.Ct. January 8, 1992). Therefore, we will not consider *Higgins* in resolving the case at bar.
A.G. Edwards & Sons, Inc. v. Clark, 558 So.2d 358 (Ala.1990), construed §§ 1 and 8 of the NASD Code. Clark, a stockbroker, filed a defamation action against another stockbroker, Thompson, and A.G. Edwards, Thompson's employer, alleging Thompson made defamatory remarks about Clark which were repeated in an A.G. Edwards advertisement. When Clark associated with his employer (Clark was never employed by A.G. Edwards), he had signed a Form U-4 and listed NASD as the organization he would be registered with.
Thompson admitted that he and Clark had never had any business dealings. There had never been any dispute between the two men about any securities transaction or any investment banking transaction. Thompson and A.G. Edwards moved the trial court for an order compelling arbitration. The trial court denied the motion. Both defendants appealed.

The Alabama Supreme Court affirmed, holding that Clark's claim did not arise out of the business of A.G. Edwards. The *Clark* court focused on the title to Part II, where § 8 is found, labeled "Industry and Clearing Controversies," and determined § 8 was intended to apply only to disputes relating to the securities ***587** business. The "business" of the members is the trading of securities. The defamatory remarks had some relation to Clark's business as a stockbroker but did not arise out of or in connection with any business between Clark and A.G. Edwards or Thompson. The Alabama Supreme Court emphasized the nonemployment factual scenario of *Clark* by stating:

"This is not a case like those cited by the defendants wherein the plaintiff was either an employee or a former employee of the defendant or was involved in business transactions with the defendant. Perhaps if these remarks had occurred in the context of business dealings involving the defendants and Clark, the matter might have to be arbitrated under the language of the NASD Code, but that scenario is not the case before us. It is undisputed that Clark and the defendants had had no business dealings with each other." 558 So.2d at 364.

A significant factual distinction exists between *Clark* and the instant action. The facts in *Clark* do not provide the "scenario" that is before us in the case at bar. The tort of defamation in *Clark* occurred in the absence of any business dealings between Clark and Thompson or A.G. Edwards. Skewes was an employee of Shearson; Clark was neither an employee of A.G. Edwards, nor had he had any business dealings with A.G. Edwards or Thompson.

Skewes' termination of employment occurred in the context of business dealings. Skewes alleges in his petition he was given 90 days to raise his projected annual volume. Shearson answered by admitting Skewes was advised to increase his production for the months of July, August, and September and that his failure to improve his production could result in termination. Skewes contends he was terminated not because of low sales production but rather in retaliation for filing a wage claim. Shearson's business is selling securities. Skewes was employed by Shearson to sell securities. Thus, Shearson's employment of Skewes arose out of or in connection with Shearson's business. Likewise, Shearson's termination of Skewes' employment also arose out of or in connection with Shearson's business. Skewes' claim of retaliatory discharge alleges he was terminated for reasons unrelated to the sale of securities; however, we acknowledge the signal from *Moses H. Cone Hospital,* 460 U.S. 1, 103 S.Ct. at 929, to resolve any doubts in favor of arbitration. We hold that Skewes' claim for ***588** retaliatory discharge arose out of or in connection with Shearson's business. Thus, the claim fell within the arbitration agreement. Skewes' retaliatory discharge action must be stayed and the claim submitted to arbitration.

We reverse the trial court and affirm the Court of Appeals. This case is remanded to the trial court for an order staying the judicial proceeding and compelling arbitration.

****883** LOCKETT, Justice, dissenting:

In our system, determining the rights of the parties is based on a maxim, a doctrine, a precedent, a statute, or public policy. In order of importance, the legislature's declaration of public policy is primary. It is the duty of the court, whenever possible, to uphold the public policy of the state.

The Kansas Legislature stated the public policy as to arbitration when it enacted the Kansas Uniform Arbitration Act, K.S.A. 5-401 *et seq.* The Act provides that a written agreement to submit any existing controversy to arbitration is valid, enforceable, and irrevocable except upon such grounds as exist at law or in equity for the revocation of any contract. K.S.A. 5- 401(a). The Act then specifically states it does not apply to (1) contracts of insurance; (2) contracts between an employer and employees, or their respective representatives; or (3) any provision of a contract providing for arbitration of a claim in tort. K.S.A. 5-401(c). By enacting K.S.A. 5- 401(c), our legislature clearly stated the public policy of this state is that parties cannot contract to arbitrate a claim in tort. The majority fails to uphold the legislature's statement of public policy.

The majority correctly states that Skewes, when he began his employment with Shearson, executed a Form U-4, which required him to arbitrate any dispute, claim, or controversy that may arise between him and his firm, a customer, or any other person that is required to be arbitrated under the rules, constitutions, or bylaws of the organization with which he registered. Skewes was registered with the National Association of Securities Dealers, Inc. (NASD).

Section 1, Part I of the NASD Code requires arbitration of any dispute, claim, or controversy arising out of or in connection with the business of any member of NASD, with the exception of disputes involving the insurance business of any member which ***589** is also an insurance company: (1) between or among members; and (2) between or among members and public customers, or others.

Section 8(1) of the NASD Code states in part:
"Any dispute, claim or controversy eligible for submission under Part I of this Code between or among members and/or associated persons, and/or certain others, arising in connection with the business of such member(s) or in connection with the activities of such associated person(s), shall be arbitrated under this Code...."
By contrast, Rule 347 of the New York Stock Exchange provides in part: "Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party." Unlike the NASD Code, the rules of the New York Stock Exchange clearly require arbitration of controversies arising out of employment or termination of employment. NASD does not require that the parties arbitrate termination of employment.
In *A.G. Edwards & Sons, Inc. v. Clark,* 558 So.2d 358 (Ala.1990), Clark, a stockbroker, sued Thompson, another stockbroker, and A.G. Edwards & Sons, Inc., Thompson's employer, alleging defamation based upon comments made by Thompson and then repeated by A.G. Edwards in a newspaper advertisement. As a stockbroker, Clark had signed an agreement to arbitrate any dispute between him and another broker or firm. The defendants moved the trial court for a stay and for an order compelling Clark to submit to arbitration; the trial court denied the motion. Thompson had never had any business transactions with Clark or any dispute about any securities transaction or any investment banking transaction. Both defendants sought review.
The Alabama Supreme Court noted two general principles governing the determination of arbitrability: First, the duty to arbitrate is a contractual obligation; only those disputes which a party has agreed to submit to arbitration must be so resolved. Arbitrability ****884*** is thus a matter of contract interpretation. It must be ascertained whether the parties intended the particular dispute to be arbitrated as evidenced by the language contained in the agreement. Second, when contract language is ambiguous or unclear, ***590*** a "healthy regard" for the federal policy favoring arbitration requires that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." 558 So.2d at 361. The court noted the NASD Code does not define "business," but it does define "[i]nvestment banking or securities business" as "the business, carried on by a broker or dealer, of underwriting or distributing issues of securities, or of purchasing securities and offering the same for sale as a dealer therein, or of purchasing and selling securities upon the order and for the account of others." "Member" is defined as "either any broker or dealer admitted to membership in the [National Securities Clearing] Corporation or any officer or partner of such a member." 558 So.2d at 363.
The Alabama court stated that although the arbitration clauses in the NASD Code talk of "business," it is clear that all the persons that must abide by the arbitration clauses are defined in terms of participants in the "securities business." By its very nature, the "business" of the members of NASD is the trading of securities and, while arbitration clauses are to be interpreted broadly, they are not limitless and cannot be interpreted to include matters that clearly fall outside the scope of the contract or agreement. The court determined that despite the facts the allegedly defamatory remarks had some connection with Clark's business as a stockbroker and the remarks had an adverse effect on Clark's business, it remained that this alleged defamation did not arise in connection with any business between Clark and the defendants. 558 So.2d at 363-64.
The majority chose not to follow the rationale of the Alabama Supreme Court that NASD does not require torts to be arbitrated. By doing so, the majority departs from the stated public policy of our legislature and adopts the rationale of cases contrary to that public policy.
Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute the party has not agreed to submit. See *City of Beverly v. White, Hamele & Hunsley,* 224 Kan. 386, 580 P.2d 1321 (1978). The district court correctly determined that under the NASD Code, Skewes contracted only to arbitrate disputes with his employers or others that arise out of the sale of stock, and not tort claims.
591 I would affirm the district court.

ALLEGRUCCI, J., joins the foregoing dissenting opinion.
Kan.,1992.
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"Any dispute, claim or controversy eligible for submission under Part I of this Code between or among members and/or associated persons, and/or certain others, arising in connection with the business of such member(s) or in connection with the activities of such associated person(s), shall be arbitrated under this Code...."
By contrast, Rule 347 of the New York Stock Exchange provides in part: "Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party." Unlike the NASD Code, the rules of the New York Stock Exchange clearly require arbitration of controversies arising out of employment or termination of employment. NASD does not require that the parties arbitrate termination of employment.
In *A.G. Edwards & Sons, Inc. v. Clark,* 558 So.2d 358 (Ala.1990), Clark, a stockbroker, sued Thompson, another stockbroker, and A.G. Edwards & Sons, Inc., Thompson's employer, alleging defamation based upon comments made by Thompson and then repeated by A.G. Edwards in a newspaper advertisement. As a stockbroker, Clark had signed an agreement to arbitrate any dispute between him and another broker or firm. The defendants moved the trial court for a stay and for an order compelling Clark to submit to arbitration; the trial court denied the motion. Thompson had never had any business transactions with Clark or any dispute about any securities transaction or any investment banking transaction. Both defendants sought review.
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The Alabama court stated that although the arbitration clauses in the NASD Code talk of "business," it is clear that all the persons that must abide by the arbitration clauses are defined in terms of participants in the "securities business." By its very nature, the "business" of the members of NASD is the trading of securities and, while arbitration clauses are to be interpreted broadly, they are not limitless and cannot be interpreted to include matters that clearly fall outside the scope of the contract or agreement. The court determined that despite the facts the allegedly defamatory remarks had some connection with Clark's business as a stockbroker and the remarks had an adverse effect on Clark's business, it remained that this alleged defamation did not arise in connection with any business between Clark and the defendants. 558 So.2d at 363-64.
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***591** I would affirm the district court.

ALLEGRUCCI, J., joins the foregoing dissenting opinion.
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To: House Judiciary Committee

From: Jerry Slaughter
Executive Director

Subject: HB 2016; concerning arbitration

Date: January 26, 2005

The Kansas Medical Society appreciates the opportunity to appear today in support of HB 2016, which amends KSA 5-401 to allow parties to agree, in advance, to arbitrate employment disputes and claims involving torts, such as medical malpractice claims.

One of the main cost drivers of medical malpractice liability insurance premiums is transaction costs – legal fees, expert witness fees, and related expenses associated with handling complex personal injury claims. As insurance premiums have continued to soar around the country, physicians and other health care providers are looking for more efficient, less costly, ways of resolving such disputes. Arbitration is one alternative that could prove in time to be more efficient, timely and cost-effective than the tort system.

This legislation would permit physicians and patients to enter into agreements to arbitrate future disputes the parties may have regarding the patient care rendered. Arbitration of such claims would be purely voluntary, requiring the agreement of both parties to submit such matters to arbitration. The conventional court system would still be available for those cases the parties did not want to agree to arbitrate. This change will bring Kansas more in line other states across the nation and make Kansas law consistent with the federal arbitration act. By making arbitration available as an alternative, it gives physicians and patients the opportunity to pursue an alternative method of dispute resolution that may prove to be less adversarial and more cost-effective. We urge you to report HB 2016 favorably.

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Testimony Before the House Committee on Judiciary Supporting House Bill No. 2016

Kevin M. Fowler of Frieden, Haynes & Forbes on Behalf of the Kansas Health Care Association, Inc.

January 26, 2005

Chairperson O'Neal and members of the Committee, my name is Kevin Fowler. I am a partner in the Topeka law firm of Frieden, Haynes & Forbes and I have been licensed to practice law in Kansas for nearly 23 years. During the past 12 years, a significant amount of my professional time and attention has been devoted to legal matters affecting the interests of Kansas adult care homes and their residents. I am appearing before the Committee on behalf of the Kansas Health Care Association, Inc. to request your favorable consideration of House Bill No. 2016.

This bill amends the Kansas Uniform Arbitration Act to provide that, except for certain contracts of insurance, "a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable except upon such grounds as exist at law or in equity for the revocation of any contract." By eliminating the current exemptions for employment contracts and tort claims in K.S.A. 5-401(c), House Bill No. 2016 promotes conformity with the Federal Arbitration Act (9

U.S.C. § 1 *et seq.*), the Uniform Arbitration Act and the Revised Uniform Arbitration Act.[1] The bill would also make the Kansas Uniform Arbitration Act more consistent with the arbitration statutes of our neighboring states of Missouri and Colorado, neither of which provide exemptions for tort claims or employment contracts. By promoting conformity with the Federal Arbitration Act, House Bill No. 2016 would provide a level playing field for all Kansas businesses, regardless of whether they engage in activities involving interstate commerce or competition with businesses located across the state line.

Under the Federal Arbitration Act, tort claims and employment contracts for non-transportation workers may be properly included in a valid and enforceable arbitration provision as long as: (1) the written agreement involves a transaction that, in fact, affects interstate commerce; and (2) the written agreement is not avoidable on established grounds

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[1] The Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), was enacted by Congress in 1925 and re-codified in 1947 as Title 9 of the United States Code. In relevant part, Section 2 of the FAA provides: "A written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

The Uniform Arbitration Act ("UAA") was originally promulgated by the National Conference of Commissioners on Uniform State Laws in 1955. In relevant part, Section 1 of the UAA provides: "A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. This act also applies to arbitration agreements between employers and employees or between their respective representatives [unless otherwise provided in the agreement]."

The Revised Uniform Arbitration Act ("RUAA") was promulgated by the National Conference of Commissioners on Uniform State Laws in 2000. In relevant part, Section 6 of the RUAA provides: "(a) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract."

for the revocation of any contract. *See, e.g., Allied-Bruce Terminix Companies v. Dobson*, 513 U.S. 265 (1995); *Southland Corporation v. Keating*, 465 U.S. 1 (1984).

Moreover, it is well-settled that "'[t]he Federal Arbitration Act ... preempts conflicting state laws which exempt enforcement of arbitration agreements involving interstate commerce.'" *Biomat, Inc. v. Sampson,* 28 Kan.App.2d 242, 244, 15 P.3d 846 (2000) (quoting *Skewes v. Shearson Lehman Bros.,* 250 Kan. 574, Syl. ¶ 1, 829 P.2d 874 (1992)). As Judge [now Justice] Beier wrote for the court in *Biomat*, the FAA "applies in state courts as well as federal, and 'requires state courts to enforce an applicable arbitration clause despite contrary state law or policy.' *R.J. Palmer Constr. Co. Inc. v. Wichita Band Instrument Co. Inc.,* 7 Kan.App.2d 363, 365, 642 P.2d 127 (1982) (citing *Allison v. Medicab Int'l.,* 92 Wash.2d 199, 597 P.2d 380 [1979]). "'In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.' " Skewes, 250 Kan. at 579, 829 P.2d 874 (quoting *Southland Corp. v. Keating,* 465 U.S. 1, 16, 104 S.Ct. 852, 79 L.Ed.2d 1 [1984])." 28 Kan.App.2d at 244.

The Kansas economy is comprised of businesses that are involved in interstate commerce and businesses that that confine their activities within the State, Currently, interstate firms may lawfully enter into written agreements that require arbitration of tort claims and employment contracts and such agreements are valid and enforceable under the Federal Arbitration Act despite contrary state laws. Intrastate firms, however, are subject to the tort claim and employment contract exemptions of K.S.A 5-401(c) and must, therefore, do business in a much more restrictive environment than their interstate counterparts. House Bill No. 2016 levels the playing field for Kansas businesses that

operate exclusively within this State and ensures that all companies doing business within our borders are subject to the same rules applicable to the arbitration of disputes.

In the interest of fairness and equal treatment, the Kansas Health Care Association supports House Bill No. 2016 and requests that the Committee give this bill favorable consideration.

TESTIMONY OF KANSAS ASSOCIATION OF INSURANCE AGENTS COUNSEL WILL LARSON ON HB 2016 IN FRONT OF THE HOUSE JUDICIARY COMMITTEE

The Kansas Association of Insurance Agents (KAIA) supports HB 2016. As you are undoubtedly aware HB 2016 eliminates the prohibition in the Kansas Uniform Arbitration Act against agreements to arbitrate tort actions. From prior experience the insurance industry as a whole has found that resolving disputes by arbitration is less time consuming, easier and less expensive for all parties. While this change to the Uniform Arbitration Act would not effect the vast majority of tort cases which, of course, occur outside of any contractual relationship of the parties, there are some specific areas of litigation where this amendment would be extremely useful.

In particular in the area of nursing home litigation we believe this amendment would be very beneficial. Over the last decade or so nursing homes have been target defendants in civil litigation. While the plaintiff's bar claims the reason for this is deficiencies in the nursing home care, we would suggest the real reason has to do with the unique vulnerability of nursing homes to litigation. This vulnerability springs from the type of regulation that nursing homes are subjected to, the fact that nursing homes are populated by elderly residents that are subject to injury or illness even with the best of care and, maybe most importantly of all, the fact that nursing homes are, by there very nature, depressing places which most people dislike.

As a result of the industry being a target of litigation nursing home liability insurance has become very expensive and increasing difficult to obtain. Most insurers

simply refuse to write nursing home insurance because of their experience in defending nursing home claims. Because of the difficulty in obtaining insurance many nursing homes go without coverage and figure their option is to simply go out of business if sued. This benefits no one including claimants who may have valid claims against nursing homes.

We believe that allowing nursing homes to enter into enforceable arbitration agreements with residents and being able to arbitrate rather than litigate claims would to alleviate some of the insurability problems that nursing homes face. My experience has been that arbitrations are typically very fair to both sides. The insurance industries support for arbitrating tort claims isn't so much based on the belief that awards would be reduced but that there would be a significant savings in the time and money spent in resolving disputes.

We also believe that this amendment to the Kansas Uniform Arbitration Act would make it consistent with federal law. The Federal Arbitration Act does not prohibit arbitration of tort actions. In fact if a nursing home can demonstrate that it engages in interstate commerce the federal law preempts state law and agreements to arbitrate tort actions are then enforceable under the Federal Arbitration Act. However, because of the current Kansas prohibition against arbitrating tort actions it usually takes a court proceeding to obtain a decision that a specific nursing home engages in interstate commerce in order to enforce an arbitration agreement.

For all the reasons noted above the KAIA asks the committee to take favorable action on HB 2016.

THE KANSAS CHAMBER

The Force for Business

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Legislative Testimony

HB 2016

Wednesday, January 26, 2005

Testimony before the Kansas House Judiciary Committee
By Marlee Carpenter, Vice President of Government Affairs

Chairman O'Neal and members of the Committee;

The Kansas Chamber and its over 10,000 members support HB 2016. If this bill is enacted, those instances in which binding arbitration is part of an employment contract or a contract that many anticipate future torts, it is less likely that a lawsuit will be filed, those cases will go to trial and the expense of hiring an attorney for those matters will be incurred.

In our December 2004 CEO and Business Owner's Poll, 60% of the respondents stated that our current lawsuits system is a deterrent to business growth and 83% state that frivolous lawsuits increase the cost of doing business in the state. The November 2004 Registered Voters Poll reflect a similar sentiment. Sixty-five percent of those that responded stated that our current legal system should be reformed and 61% believe that lawsuit reform equals economic growth.

HB 2016 will help save businesses money, reduce frivolous lawsuits and help many companies obtain more favorable insurance.

We urge this committee to advance HB 2016. Thank you for your time and I will be happy to answer any questions.

STATEMENT OF THE

KANSAS GRAIN & FEED ASSOCIATION

AND THE

KANSAS AGRIBUSINESS RETAILERS ASSOCIATION

SUBMITTED TO THE

HOUSE JUDICIARY COMMITTEE

REP. MIKE O'NEAL, CHAIRMAN

January 26, 2005

KGFA & KARA MEMBERS ADVOCATE PUBLIC POLICIES THAT ADVANCE A SOUND ECONOMIC CLIMATE FOR AGRIBUSINESS TO GROW AND PROSPER SO THEY MAY CONTINUE THEIR INTEGRAL ROLE IN PROVIDING KANSANS AND THE WORLD THE SAFEST, MOST ABUNDANT FOOD SUPPLY.

816 SW Tyler, Topeka KS 66612 – 785-234-0461 - Fax: 785-234-2930

House Judiciary
1-26-05
Attachment 6

Chairman O'Neal and members of the House Judiciary Committee, I am Duane Simpson testifying on behalf of the Kansas Grain and Feed Association (KGFA) and the Kansas Agribusiness Retailers Association (KARA). The KGFA is a voluntary state association with a membership encompassing the entire spectrum of the grain receiving, storage, processing and shipping industry in the state of Kansas. KGFA's membership includes over 950 Kansas business locations and represents 99% of the commercially licensed grain storage in the state. KARA's membership includes over 700 agribusiness firms that are primarily retail facilities that supply fertilizers, crop protection chemicals, seed, petroleum products and agronomic expertise to Kansas farmers. KARA's membership base also includes ag-chemical and equipment manufacturing firms, distribution firms and various other businesses associated with the retail crop production industry. On behalf of these organizations, I am testifying in support of House Bill 2016.

HB 2016 makes contracts between employers and employees that include provisions for arbitration to settle disputes valid, enforceable and irrevocable. We believe that K.S.A. 5-401(c) does not apply to most, if any, of our members due to federal law which preempts state law for any business involved in interstate commerce. Nevertheless, we believe that the Kansas statute is considered by many of our members to apply to them. Because of the conflicting statutes, many businesses in Kansas, including our members, do not include arbitration clauses in their contracts.

Cleaning up our statute to conform to federal law will make it clear to all Kansas businesses that they are able to include arbitration in their contracts if they so choose. Since arbitration is a tool which can be used to reach compromise without the need for costly legal battles, we believe passage of HB 2016 will be good for Kansas business.

We urge the committee to support HB 2016. Thank you for your consideration.

KANSAS COOPERATIVE COUNCIL
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House Judiciary Committee

January 26, 2005
Topeka, Kansas

HB 2016 – removing the state statutory language prohibiting arbitration clauses in employment contracts.

Chairman O'Neal and members of the House Judiciary Committee, thank you for the opportunity to share comments, on behalf of the Kansas Cooperative Council, in support of HB 2016. I am Leslie Kaufman and I serve the Council as Governmental Relations Director. The Council includes more 223 cooperative business members. Together, they have a combined membership of nearly 200,000 Kansans.

As we understand it, the bill before you will remove a provision in Kansas statutes, thus more aligning us with federal law on many employment contracts. The Council supports allowing employers and employees to include an arbitration clause in employment contracts.

Allowing employment matters to be remedied through arbitration provides a meaningful option for employers and employees to attempt a compromise which might prevent costly legal battles. Additionally, it provides a forum for dispute resolution that can be more conciliatory than an adversarial court proceeding. As such, we respectfully request you act favorably on HB 2016.

Thank you.

House Judiciary
1-26-05
Attachment 7

KAHSA
Kansas Association of
Homes & Services for the Aging

To: Rep. Mike O'Neal, Chair, and Members,
House Judiciary Committee
From: Debra H. Zehr, Executive Vice President
Date: Wednesday, January 26, 2005

Testimony in Support of House Bill 2016

Thank you for this opportunity to offer support for House Bill 2016.

The Kansas Association of Homes and Services for the Aging represents 160 not-for-profit long term care and aging service providers throughout the state. Our members include church, fraternal organization and government-sponsored retirement communities, nursing homes, assisted living residences, hospital long term care units, low income housing and community-based service providers.

House Bill 2016 is good public policy because:

- Arbitration is a fair, effective, economical, expeditious way to resolve healthcare-related disputes…for claimants as well as defendants.
- It brings Kansas law into compliance with the Federal Arbitration Act.
- It permits the option to shift formal dispute resolution from an overburdened court system.
- It will help stem a driver of escalating liability insurance premiums in the long term care arena.

(Note: In the case of long term care facilities, the Centers for Medicare and Medicaid Services mandates that a current resident cannot be obligated to sign an agreement which calls for arbitration should a claim of tort arise, and cannot be discharged because they decline to sign such an agreement.)

Thank you for your favorable consideration of House Bill 2016. Please feel free to contact me, John Peterson or Bill Brady if you have questions about our position on this, or other issues related to aging services.

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A state affiliate of the American Association of Homes & Services for the Aging

KANSAS BAR ASSOCIATION

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Testimony in Opposition to

HOUSE BILL NO. 2016

Presented by Jim Clark, Legislative Counsel, Kansas Bar Association
to the
House Judiciary Committee, January 26, 2005

The Kansas Bar Association appears in opposition to **HB 2016** because the bill eliminates two of the three exceptions to a written arbitration agreement now contained in the Kansas version of the Uniform Arbitration Act, K.S.A. 5-401, *et seq*. (**House Bill 2036** would eliminate the third exception, and our opposition is to both bills.) The KBA opposes any legislation that would limit access to the courts by Kansas citizens, and enforcing mandatory arbitration clauses has that effect.

The Kansas act was enacted in 1974, nearly 50 years after the enactment of the Federal Arbitration Act, and contained three exceptions to a written agreement: contracts of insurance, contracts of employment, and tort claims. From a public policy perspective these three exceptions cover situations where there is a strong possibility that the written agreement was not made on a level playing field.

It is true that in many instances, the operation of the federal act preempts the Kansas statute. However, in those cases, no legislative action is required to negate the effect of the statutory exceptions: it is an operation of law. There are other situations where the federal act is not operative. For example, in the case of Friday v. Trinity Universal of Kansas, 262 Kan. 347 (1997) the Kansas Supreme Court held that the Federal Arbitration Act was precluded by the McCarren Ferguson Act, hence the Kansas statutory exceptions to enforcement of a written arbitration agreement were not preempted.

While arbitration is to be encouraged, especially in the normal course of business dealings, where litigation is both costly and time-consuming, public policy considerations for the exceptions found in K.S.A. 5-401(c) do not cover the ordinary course of commerce, hence should be retained. For these reasons, the Kansas Bar Association opposes this legislation, and would urge members of the Committee to do so as well.

KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

To: Chairman O'Neal and Members of the House Committee on Judiciary

From: L J Leatherman on behalf of the Kansas Trial Lawyers Association

Date: January 26, 2005

Re: **HB 2016**

Chairman O'Neal and members of the House Committee on Judiciary, I appear before you today on behalf of the Kansas Trial Lawyers Association. I am a Kansas attorney and member of KTLA. KTLA is a statewide, nonprofit organization of lawyers who represent consumers and advocate for the safety of families and the preservation of the civil justice system. We appreciate the opportunity to present written and oral testimony on HB 2016.

The Kansas Uniform Arbitration Act (K.S.A. 5-401 *et seq.*) specifically protects Kansans by prohibiting arbitration clauses in insurance contracts, employment contracts and provisions of a contract providing for arbitration of tort claims. House Bill 2016 eliminates two of the three protections by removing the prohibition of pre-dispute mandatory arbitration provisions in employment contracts and any provision of a contract requiring arbitration of a claim in tort.

Arbitration can be a positive and productive dispute resolution experience under certain circumstances: where both parties are equal, when the agreement to arbitrate is made after a dispute rises, and where both parties knowingly understand the pros and cons of choosing arbitration, including that they may be waiving their right to access the courts. Mandatory, pre-dispute arbitration provisions raise concerns because there is often an unequal balance of power between the parties—for example, employer and employee, elderly resident and nursing home—or the parties don't fully understand when they sign the agreement that they have limited their constitutional right to seek resolution of disputes in court. The following are a few of the pitfalls of contractual clauses that require arbitration:

1. Consumers and/or employees often are not put on notice that they entering into an arbitration agreement. Arbitration clauses are normally buried in written agreements and are generally not pointed out and/or discussed with the consumer/employee. Consumers/employees do not bargain for arbitration clauses.

Terry Humphrey, Executive Director

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2. Arbitration provisions regularly provide that the employer/company alone select the arbitration service – often one dependent on them for repeat business.

3. The employer/company writes the arbitration rules, and the rules often demand complete secrecy of the proceedings and the outcome while limiting what evidence employees/consumers can present. Discovery is limited and expedited. There is no subpoena power so a claimant cannot compel third parties to produce relevant evidence.

4. The claimant (employee or consumer) may be required to pay some or all of the costs of the arbitration. There is an administration fee paid to the arbitration service as well as the hourly fees for the arbitrator. All costs are required to be paid in advance. The up front costs are often in excess of $1,000 and increase in relation to the amount of the underlying claim. Where a consumer bears the costs, they may be forced to forego their claim because they cannot afford it.

5. Arbitration clauses usually require that any arbitration take place in a specified location, often where the company is located. A Goodland resident may be required to travel to Overland Park to dispute a $500 claim.

6. Appeal rights are extremely limited. This means that legal errors in an arbitrator's decision are frequently beyond remedy.

Despite the concerns raised by mandatory arbitration clauses, such clauses are on the increase and can be found in all manner of contracts: credit card agreements, employee handbooks, software agreements, and agreements to provide care for our loved ones in nursing homes are just a few examples. The reason for the increase is because of a broad interpretation that the Federal Arbitration Act (FAA) preempts the protections provided in state laws like Kansas', and because the FAA does not provide protections for consumers in the same way that the Kansas law does.

KTLA members are very concerned that if the protections in Kansas law are preempted by the federal law, and if HB 2016 passes as written, the result will be that Kansans will sign contracts with arbitration clauses without appreciating that they've given up their constitutional right to a jury trial. For this reason, we support an amendment to HB 2016 that would prohibit clauses in any contract where the waiver of a constitutional right (such as a jury trial) is not knowingly and voluntarily made. We believe the proposed amendment will help Kansans to better understand the contracts they are signing, and that the contracts may include arbitration clauses which would force them to give up their constitutional rights. Without the amendment, KTLA will be unable to support HB 2016.

If HB 2016 advances, I respectfully request that you support the amendment.

HOUSE BILL No. 2016

AN ACT concerning arbitration; relating to the validity of an agreement; amending K.S.A. 5-401 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:
Section 1. K.S.A. 5-401 is hereby amended to read as follows: 5-401.
(a) A written agreement to submit any existing controversy to arbitration is valid, enforceable and irrevocable except upon such grounds as exist at law or in equity for the revocation of any contract.
(b) Except as provided in subsection (c), a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable except upon such grounds as exist at law or in equity for the revocation of any contract.
(c) The provisions of subsection (b) shall not apply to: (1) contracts of insurance, except for those contracts between insurance companies, including reinsurance contracts; ~~(2) contracts between an employer and employees, or their respective representatives; or (3) any provision of a contract providing for arbitration of a claim in tort.~~
(d) No contractual provision that waives a constitutional right is enforceable absent a showing that the waiver was knowingly and voluntarily made.
Sec. 2. K.S.A. 5-401 is hereby repealed.
Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.

Amendment requested by the Kansas Trial Lawyers Association
House Judiciary
1/26/05

Kansas AFL-CIO

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UNION YES

TESTIMONY ON H.B. 2016
to the Judiciary Committee

by Wil Leiker, Executive Vice President
Kansas AFL-CIO
January 26, 2005

Thank you Mr. Chairman and members of the committee for this opportunity to speak in opposition to HB 2016 in its present form. My name is Wil Leiker, Executive Vice President, Kansas AFL-CIO.

As you might imagine, the Kansas AFL-CIO is intimately familiar with arbitration. Needless to say, the Kansas AFL-CIO supports arbitration **so long as the parties are on equal footing when they initially agree to arbitrate.**

The Kansas Legislature when it originally enacted K.S.A. 5-401 clearly recognized that employers and employees are not always on equal footing. The employer generally has the upper hand when offering employment to the average worker.

Although the bill will not impact unions and their collective bargaining agreements, on behalf of workers in general, we do oppose the bill.

If the amendment proposed by the Kansas Trial Lawyers Association is adopted, we would support the bill. It seems that it would be fair and appropriate to simply insure that when parties entered into an arbitration agreement, it was done knowingly and voluntarily.

Thank you for your courtesies.

KANSAS AFL-CIO SOLIDARITY

House Judiciary
1-26-05
Attachment 11