Approved: August 3, 2005
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:30 A.M. on March 7, 2005, in Room 123-S of the Capitol.

All members were present except:
Barbara Allen- excused

Committee staff present:
Mike Heim, Kansas Legislative Research Department
Jill Wolters, Office of Revisor of Statutes
Helen Pedigo, Office of Revisor of Statutes
Nancy Lister, Committee Secretary

Conferees appearing before the committee:
Representative Eric Carter
Will Larson, Legal Counsel, Kansas Association of Insurance Agents
Jim Clark, Kansas Bar Association
Toni Wellshear, AARP of Kansas
Ruth Benien, Attorney
Representative Bob Bethell
Cindy D'Ercole, Kansas Action for Children

Others attending:
See attached list.

Chairman Vratil opened the meeting and the hearing on **HB 2109**.

HB 2109 Child passenger safety, seat belts, manufactured after 1968

Proponents:
Representative Bob Bethell stated he has an interest in antique vehicles, and the bill clarifies Kansas law. The clarification will allow owners of vintage vehicles to operate them on the highways of Kansas with out fear of being cited for not having seatbelts in the vehicle. (Attachment 1)

Senator Donovan questioned what the law would be for vehicles that were manufactured with seatbelts prior to 1968, such as the 1966 Ford Mustang. Representative Bethell stated his understanding was that the passengers would be required to use them. However, Representative Bethell agreed that may be something that requires further clarification in the bill.

Chairman Vratil requested that revisors review the law. Jill Wolters suggested adding, "unless such motor vehicle was assembled or manufactured with seatbelts". Chairman Vratil requested that Ms. Wolters take a look at the law, answer Senator Donovan's question, and, if necessary, include vehicles prior to 1968 that were manufactured with seatbelts and prepare an appropriate balloon.

Cindy D'Ercole, Senior Policy Analyst for Kansas Action for Children, testified that the organization supported the bill. Ms. D'Ercole stated that motor vehicle crashes remain the leading cause of unintentional injury-related death among children 17 and under in Kansas. Ms. D'Ercole stated there are three specific amendments to the child passenger safety law that will immediately save lives of Kansas children: extend primary enforcement of seat belt usage to children ages 14-18; require mandatory use of booster seats for children until they are age 8 or taller than 57 inches; increase the fine to bring it in line with other traffic fines in the state. Ms. D'Ercole requested that the Committee amend the bill to include these changes, and stated she included in her written testimony suggested language, which was mostly the same language as in **SB 329** which passed out of the Senate last year. (Attachment 2)

Senator Donovan stated that he strongly in favored this amendment. He had carried **SB 329** on the Senate floor last year and it passed 29-11. It went to the House and got within eight votes of passing. Senator Donovan stated **HB 2109** was moved into this Committee on purpose, for this amendment. Senator Donovan

stated he would be glad to speak to Representative Bethell and let him know that his language could be put into another transportation bill and be supported.

Chairman Vratil closed the hearing on **HB 2109** and opened the hearing on **HB 2016**.

HB 2016 Arbitration; validity of agreement; can apply to employer employee contracts and a tort claim

Proponents:
Representative Eric Carter testified that Kansas adopted the Uniform Arbitration Act in 1973 which included a prohibition on the use of arbitration agreements in tort claims and employment agreements. However, in 1987, the law was amended to clarify that arbitration was permitted for existing tort claims. In 1995 the law was amended to allow arbitration agreements between insurance companies. Representative Carter stated since that time, federal legislation has become involved in arbitration. The Kansas courts have held that, to the extent that interstate commerce is implicated, the Federal Arbitration Act preempts contrary state law.

Representative Carter briefly stated the history of **HB 2016**, following its passage through the house, and requested the Committee favorably pass the bill. (Attachment 3)

Will Larson, legal counsel for the Kansas Association of Insurance Agents, stated his written testimony in support of the bill would provide adequate information to the Committee. (Attachment 4)

Written testimony was submitted by: Wes Ashton, Overland Park Chamber of Commerce; Leslie Kaufman, Kansas Cooperative Council; Marlee Carpenter, The Kansas Chamber (Attachments 5-7)

Opponents:
Jim Clark, Kansas Bar Association (KBA) Legislative Counsel, testified that the KBA is opposed to the bill because it seeks to eliminate the exceptions to written arbitration agreements now contained in the Kansas version of the Uniform Arbitration Act. If one is required to buy insurance, standard insurance companies contain arbitration agreements, and an individual is not able to bargain to strike that agreement. (Attachment 8)

Toni Wellshear, AARP of Kansas, stated that AARP is opposed to the bill because it would limit consumers' rights through the Kansas court system. (Attachment 9)

Chairman Vratil stated to the Committee members that it was important to know that the Kansas rules of civil procedure and the Kansas rules of evidence do not apply in arbitration actions. Whether or not discovery is even permitted is largely at the discretion of arbitrators. Arbitrators are not required to follow the law in making their decision, and the reason they can do this is because, in most cases, there is no appeal on an arbitrator's decision. Only in the event of fraud and certain other specified reasons can there be an appeal to a court.

Ruth Benien, Attorney, appeared on behalf of the National Employment Lawyers Association (NELA), in opposition to the bill. On behalf of the organization, Ms. Benien asked the Committee to not take away the rights which have been given by K.S.A. 5-401 and individuals are entitled to by the Constitution of the State of Kansas, including the right to a jury trial. Ms. Benien provided an example of an employee who signed a Master Employee Agreement and described the series of events and costs that occurred to try and obtain the employee's rights. Ms. Benien also provided the basic commercial Arbitration Rules and Mediation Procedures to the Committee. (Attachments 10-12)

Written testimony was provided by Callie Denton, Kansas Trial Lawyers Association. (Attachment 13)

Chairman Vratil closed the hearing on **HB 2016**.

Chairman Vratil handed out a revised bed space impact on **SB 179**, which deals with enhancing penalties for offenses against children. The Chairman asked the Committee to review before the bill is worked for final action. (Attachment 14)

MINUTES OF THE Senate Judiciary Committee at 9:30 A.M. on March 7, 2005, in Room 123-S of the Capitol.

Chairman Vratil announced that regarding **SB 38**, which deals with public records made subject to subpoena, discovery or other process, the original sponsor has worked with the Board of Healing Arts and come up with a proposal that drastically changes the bill. Everything has been stripped out of the bill except one provision for discovery and subpoena of records pertaining to the Board of Healing Arts. Chairman Vratil stated that copies of the new balloon would be made available for anyone that would like to have one. The Chairman encouraged all interested parties to look at the proposed substitute bill, stating that it would most likely change their testimony. (Attachment 15)

Chairman Vratil adjourned the meeting at 10:30 A.M. The next meeting is scheduled for March 8, 2005.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 3/7/05

NAME	REPRESENTING
A.J. Kotch	AOL-KS
Kevin Graham	A.G.
Callie Hill Denton	KS Trial Lawyers Assoc.
Margaret Farley	~~KS~~ KTLA
Derek Casey	KTLA
Mark BeamWood	KTLA
Will [illegible]	KAIA
[illegible]	KGC
[illegible]	OJA
[illegible] Shaverdi	PMCA
Duane Simpson	KGFH - KARH
Diane Albert	KDOR
[illegible]	[illegible]
Greg Skinner	KDHE
Ken Sieber	Heinlaw Firm
John Peterson	Ks Govt Consulting
JIM CLARK	KBA
Jeff Rottenberg	State Farm

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 3/7/05

NAME	REPRESENTING
Ami Hyten	TILRC
Dan Murray	Federico Consulting
Eric Carter	
STEVE KEARNEY	KAC
Cindy D'Errole	KAC

BOB BETHELL
STATE REPRESENTATIVE, 113TH DISTRICT
104 E. THIRD, P.O. BOX 186
ALDEN, KS 67512
(620) 534-3085
FAX 620-534-3086
bethell@ink.org
www.bobbethell.com

STATE OF KANSAS

TOPEKA

COMMITTEE ASSIGNMENTS
MEMBER: APPROPRIATIONS
HEALTH & HUMAN SERVICES
SOCIAL SERVICES BUDGET
STATE CAPITOL—ROOM 175-W
TOPEKA, KS 66612-1504
785-296-7616

Testimony for HB 2109

Good afternoon Chairman Vratil and members of Senate Judiciary, I am Representative Bob Bethell.

I am here today to show support for HB 2109 as a collector of antique vehicles and one who enjoys the authenticity of the older vehicle I am requesting that the law of Kansas be clarified with the specific language of HB 2109 concerning the use of seat belts in vehicles older than 1968.

In 1968 on January 1, federal law was enacted to require all vehicles assembled from that time on be equipped with seat belts.

HB 2109 simply states that condition. This clarification will allow owners of vintage vehicles to operate them on the highways of Kansas with out fear of being cited for not having seatbelts in the vehicle. The addition of seatbelts to some of these vehicles would not only be difficult but would reduce the value of the vehicle due to the modification.

Thank you Mr. Chairman I will stand for questions.

Senate Judiciary
3-7-05
Attachment 1

KANSAS ACTION FOR CHILDREN
Making a difference for Kansas children.

Kansas Action for Children, Inc.
3360 SW Harrison | Topeka, KS 66611
P 785-232-0550 F 785-232-0699
kac@kac.org | www.kac.org

Celebrating 25 years
of child advocacy

March 7, 2005

To: Senate Judiciary Committee
From: Cindy D'Ercole, Sr. Policy Analyst
Re: House Bill 2109

Kansas Action for Children supports efforts to improve child passenger safety in our state.

We support these efforts because failure to use proper restraints contributes to more fatalities and injuries than any other single traffic-related behavior. We know that laws work; states with the strongest laws also have the highest teen safety belt use. And we know that using proper restraints works; children are safer and lives are saved.

Quite simply, motor vehicle crashes remain the leading cause of unintentional injury-related death among children 17 and under in Kansas. **Increasing seat belt use is the single most effective and immediate way to save lives and reduce the number of injuries on Kansas roadways.**

We became interested in child passenger safety because of the grades for the teen years in our *Kansas Children's Report Card.* Those grades have been the lowest or have tied for the lowest grade in five of the six years of the *Report Card*. When we looked for an explanation it quickly became evident that the high number of teen deaths from automobile crashes was a leading cause for the low grades.

Data from the national *2003 KIDS COUNT Data Book* also showed us that Kansas needed to address this issue. The two indicators most affected by passenger safety laws were significantly worse than the rankings for the other eight indicators. Kansas was ranked 33 in the nation for our child death rate and 37 for our teen death rate. As in the case of the *Report Card* grade, the number of deaths from auto crashes plays a significant role in those low national rankings.

Fortunately this is a case where a clear problem has a very clear solution. There are three specific amendments to the child passenger safety law that will immediately save the lives of Kansas children:

- Extend primary enforcement of seat belt usage to children ages 14-18.
- Require mandatory use of booster seats for children until they are age 8 or taller than 57 inches.
- Increase the fine to bring it in line with other traffic fines in the state.

A M for

Senate Judiciary
3-7-05
Attachment 2

Child Passenger Safety

Motor vehicle crashes remain the leading cause of unintentional injury-related death among children 17 and under in Kansas. Increasing seat belt use is the single most effective and immediate way to save lives and reduce the number of injuries on Kansas roadways.

There are three specific amendments to the child passenger safety law that will immediately save the lives of Kansas children:

- **Extend primary enforcement of seat belt usage to children ages 14-18.**
- **Require mandatory use of booster seats for children until they are age 8 or taller than 57 inches.**
- **Increase the fine to bring it in line with other traffic fines in the state.**

Seat Belts and Child Restraints Work:

- In 2001, 85% of the Kansas children 0-14 killed in motor vehicle crashes were not wearing seat-belts or otherwise restrained.

- Failure to use seat belts contributes to more fatalities and injuries than any other single traffic-related behavior.

Laws Work:

- A 2001 national study found that nine out of ten parents believe that they are taking adequate steps to protect their children if they adhere to their state's child passenger safety laws.

- Research shows that primary safety belt laws are much more effective in increasing safety belt use. In fact, the states that currently have the highest teenage safety belt use have strong primary safety belt laws.

- Kansas has primary enforcement of infant safety seats. Since the early 1980's there has been an impressive 53% decrease in death rates among the 0-4 age group. Kansas does not require booster seats for children over the age 4; there has only been a 4% reduction in death rates in that age category.

Background

Current Kansas Law:
Children under 14 are required wear seat belts. The enforcement is primary and the fine is $20. Children 14 and older are only required to wear seatbelts if they are riding in the front seat. The enforcement is secondary, meaning the driver must be stopped and ticketed for another violation, and the fine is only $10.

This means under Kansas Law:

- A 16 year-old in the back seat is not required to wear a seat belt.
- A 5 year-old is required to wear a seat belt, but standard medical practice dictates that seat belts are designed for only for adults.

K.S.A. 8-1344 is hereby amended to read as follows: 8-1344.
(a) Every driver as defined in K.S.A. 8-1416, and amendments thereto, who transports a child under the age of 14 *18* years in a passenger car as defined in K.S.A. 8-1343a, and amendments thereto, on a highway as defined in K.S.A. 8-1424, and amendments thereto, shall provide for the protection of such child by properly using:
(a) *(1)* For a child under the age of four years a child passenger safety restraining system that meets or exceeds the standards and specifications contained in federal motor vehicle safety standard no. 213 in effect on July 1, 1997; or
(2) for a child four years of age, but under the age of eight years and who weighs less than 80 pounds or is less than 4 feet 9 inches in height, a child passenger safety restraining system that meets or exceeds the standards and specifications contained in federal motor vehicle safety standard no. 203 ***213****; or*
(3) for a child four *eight* years of age but under the age of 14 *18 years or who weighs more than 80 pounds or is more than 4 feet 9 inches in height*, a safety belt manufactured in compliance with federal motor vehicle safety standard no. 208, except that if the number of children subject to this requirement exceeds the number of passenger securing locations available for use by children affected by this requirement, and all of those securing locations are in use by children, then there is not a violation of this section.
(b) If the number of children subject to the requirements of subsection (a) exceeds the number of passenger securing locations available for use by children affected by such requirements, and all of these securing locations are in use by children, then there is not a violation of this section.
(c) The provisions of paragraph (2) of subsection (a) shall not apply in any seating position where there is only a lap belt available.
Sec. 3. K.S.A. 8-1345 is hereby amended to read as follows: 8-1345.
(a) It shall be unlawful for any driver to violate the provisions of K.S.A. 8-1344, and amendments thereto, and upon conviction such driver shall be punished by a fine of $20 *$60*. The failure to provide a child safety restraining system or safety belt for more than one child in the same passenger car at the same time shall be treated as a single violation. Any conviction under the provisions of this subsection shall not be construed as a moving traffic violation for the purpose of K.S.A. 8-255, and amendments thereto.
(b) Ten dollars of The *$60* fine provided for in subsection (a) and court costs assessed under K.S.A. 28-172a, and amendments thereto, shall be waived if the driver convicted of violating **paragraph (1) or (2) of** subsection (a) *or (b)* of K.S.A. 8-1344, and amendments thereto, provides proof to the court that such driver has purchased or acquired an approved child passenger safety restraining system.
(c) No driver charged with violating the provisions of this act shall be convicted if such driver produces in the office of the arresting officer or

in court proof that the child was 14 *18* years of age or older at the time the violation was alleged to have occurred.

(d) Evidence of failure to secure a child in a child passenger safety restraining system or a safety belt under the provisions of K.S.A. 8-1344, and amendments thereto, shall not be admissible in any action for the purpose of determining any aspect of comparative negligence or mitigation of damages.

(e) From and after the effective date of this act, and prior to July 1, 2006, a law enforcement officer shall issue a warning citation to anyone violating paragraph (2) of subsection (a) of K.S.A. 8-1344, and amendments thereto.

STATE OF KANSAS

EVERETT JOHNSON
STATE REPRESENTATIVE, DISTRICT 77
1142 HENRY
AUGUSTA, KS 67010
(316) 775-7186

STATE CAPITOL—110-S
TOPEKA, KANSAS 66612-1504
(785) 296-7612 OR (785) 296-7699
1-800-432-3924

TOPEKA
HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
VICE-CHAIR: HIGHER EDUCATION
MEMBER: EDUCATION
FEDERAL AND STATE AFFAIRS

REP. ERIC CARTER
TESTIMONY IN SUPPORT OF H.B. 2016
Monday, March 7, 2005

Thank you Mr. Chairman and members of the Committee for giving your consideration to H.B. 2016. I ask you to support H.B. 2016.

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.

Amendments to H.B. 2016 in the House

While HB 2016 was not amended on the House floor, it was amended substantially by the House Committee on Judiciary. HB 2016 originally struck the prohibition on the use of arbitration agreements in disputes involving torts, but this deletion was removed much to the disappointment of myself and others.[1] Additionally, the Committee inserted a new section (1)(d) requiring employers to pay the filing fee in arbitrations with their employees. Tenth Circuit case law already requires that employers pay the filing fee,[2] so this amendment essentially codifies judge-made law on this subject.

[1] Representatives of the Kansas Medical Society, the Kansas Health Care Association, Inc., the Kansas Association of Insurance Agents, and the Kansas Chamber of Commerce testified at the hearing in support of HB 2016, particularly with regard to the removal of the prohibition on arbitration of tort claims. Additionally, written comments of support were received on behalf of the Kansas Association of Homes and Services for the Aging, the Kansas Cooperative Council, the Kansas Grain and Feed Association, and the Kansas Agribusiness Retailers Association.

[2] *See*, e.g., *Shankle v. B-G Maint. Mgmt of Colo. Inc.*, 163 F.3d 1230 (10th Cir. 1999) (arbitration provision imposing cost of arbitration estimated to be between $1,875 and $5,000 on employee required denial of enforcement of entire arbitration agreement).

Senate Judiciary
3-7-05
Attachment 3

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*,[3] 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 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 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.

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[3] 465 U.S. 1 (1984).

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*[4] *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.*,[5] 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 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

[4] 28 Kan.App.2d 242, 15 P.3d 846.
[5] 942 F.Supp. 481 (D. Kan. 1996).

arbitration clauses in its agreements with employees who are members of certain "employee organizations".

Thank you for your consideration of H.B. 2016.

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).

- **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.

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

The Kansas Association of Insurance Agents (KAIA) supported HB 2016 in its original version. The association does not support the amendments to HB 2016 that would return 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 allowing agreements to arbitrate Tort actions would be extremely useful.

In particular in the area of nursing home litigation we believe the removal of the prohibition against arbitrating tort actions 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 help 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 allowing the arbitration of tort actions under 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.

If the committee would consider changing HB 2016 to allow agreements to

arbitrate tort actions as it did in its original form the KAIA would support amending the Bill to include the following safeguards:

1. A 30 day rescission period for the consumer.

2. A requirement that the provision of medical services including admission to an adult care facility could not be contingent on signing an arbitration agreement.

3. That any agreement requiring arbitration of a tort action be a separate and distinct contract.

Legislative Testimony

Date: Monday, March 7, 2005

To: Kansas Senate Judiciary Committee

From: Wes Ashton, Director of Government Relations for the Overland Park Chamber of Commerce

Re: Testimony in Support of HB 2016

Chairman Vratil and members of the Committee:

The Overland Park Chamber appreciates the opportunity to appear here today on behalf of the approximately 1000 member-businesses we represent to present testimony in support of HB 2016.

The Chamber has followed the progress of HB 2016 throughout the first half of the 2005 Legislative session, and our State/Federal Affairs Task Force has endorsed this bill as a positive step for the business community across the state. If HB 2016 is enacted, businesses across the state will lower their cost of doing business and reduce the number of lawsuits. This fall, the Chamber surveyed our membership and found the need for changes in our tort reform system was a common response. The Chamber has identified tort reform a top prioirty for this session.

HB 2016 would eliminate the prohibtion found in the Kansas Uniform Arbitration Act against agreements to arbitrate employment disputes. Arbitration, in most instances, saves time and is cheaper for all parties involved. Further, it would place Kansas in line with the Federal Arbitration Act. This bill is good policy becuase arbitration is fair and expedious for all parties.

The proposed legislation would permit employers and employees to voluntarily enter into aribitration if a dispute were to occur. Our traditional legal system would still be available for those parties that do not wish to arbitrate. Kansas would be more in line with the rest of the country, and would likely resolve disputes in a more cost-effective and less adversarial manner. Arbitration should be promoted during disputes in the regular course of business dealings.

Thank you for your time and I will be happy to answer any questions.

Senate Judiciary
3-7-05
Attachment 5

KANSAS
Cooperative Council

816 SW Tyler St. Ste. 300
Topeka, Kansas 66612
Phone: 785-233-4085
Fax: 785-233-1038
www.kansasco-op.coop

Senate Judiciary Committee

March 7, 2005
Topeka, Kansas

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

Chairman Vratil and members of the Senate 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 Government 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 prohibiting arbitration clauses in employment contracts. The Council supports allowing employers and employees to include an arbitration clause in such 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.

Senate Judiciary
3-7-05
Attachment 6

Legislative Testimony

HB 2016

Monday, March 7, 2005

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

THE KANSAS CHAMBER

The Force for Business

835 SW Topeka Blvd.
Topeka, KS 66612-1671
785-357-6321
Fax: 785-357-4732
E-mail: info@kansaschamber.org
www.kansaschamber.org

Chairman Vratil and members of the Committee;

The Kansas Chamber and its over 10,000 members support HB 2016. This bill will allow binding arbitration as part of an employment contract. As originally drafted this bill also allowed binding arbitration for contracts that may anticipate future torts. We believe that this is an important provision and urge the committee to consider putting this provision back into the bill. Allowing a binding arbitration clause for future torts ensures the injured party is taken care of without the time and expense of litigating a matter and going to trial.

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 the time and expense of the court system, reduce frivolous lawsuits and additionally help many companies obtain more favorable insurance.

We urge this committee to advance HB 2016 with the addition of a clause for future torts. Thank you for your time and I will be happy to answer any questions.

The Kansas Chamber, with headquarters in Topeka, is the statewide business advocacy group moving Kansas towards becoming the best state in America to do business. The Kansas Chamber and its affiliate organizatio[n] The Kansas Chamber Federation, have more than 10,000 member businesses, including local and regional chamb[ers] and trade organizations. The Chamber represents small, medium and large employers all across Kan[sas]

Senate Judiciary
3-7-05
Attachment 9

KANSAS BAR ASSOCIATION

Submitted by Jim Clark

Testimony in Opposition to

HOUSE BILL NO. 2016

Presented to the
Senate Judiciary Committee, March 8, 2005

The Kansas Bar Association appears in opposition to HB 2016 because the bill seeks to eliminate the exceptions to written arbitration agreements now contained in the Kansas version of the Uniform Arbitration Act, K.S.A. 5-401, *et seq*. 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. The inequality of bargaining position recognized by this body in forging the exceptions is a policy decision, and there is little prospect that such instances would rise to the level of an adhesion contract.

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 federal 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.

James W. Clark
KBA Legislative Counsel

Senate Judiciary
3-7-05
Attachment 8

AARP Kansas

Submitted by Toni Wellshear

March 7, 2005
Senator Vratil, Chair
Senate Judiciary Committee
House Bill 2016 As Amended by House Committee

Good morning Chairman Vratil and Members of the House Judiciary Committee. My name is Toni Wellshear and I am a member of the AARP Kansas Topeka Advocacy Team. AARP Kansas represents the views of our more than 350,000 members in the state of Kansas. Thank you for this opportunity to express opposition to HB 2016 as amended that would limit consumer's rights through the Kansas court system.

My father, Tony Schwartz, served as a State Representative from Barton County from 1957 until his death in 1969, so I am aware of the endless problems you address each day.

AARP believes that binding mandatory arbitration should be prohibited. We oppose any legislation such as HB 2016 that restricts individuals' access to the court system.

Of AARP's 35 million members nationwide, more than 44 percent work full or part time. Dennis Kelly, Kansas Department of Labor, reported that there are now 383,000 workers age 55 to 70 years of age in the Kansas labor pool. The number of older workers will grow.

AARP supports laws that protect older workers from all forms of employment discrimination. We support prohibiting the use of mandatory and binding arbitration of claims filed under federal fair employment laws, including the ADEA, Title VII of the Civil Rights Act of 1964, and the Americans with Disabilities Act, as introduced in the Civil Rights Act of 2004.

Binding arbitration also is not in the individual's interest. Under binding arbitration the parties agree to comply with the arbitrator's determination, thereby waiving the right to have a judge or jury ever hear the complaint.

The arbitration process itself has many disadvantages for consumers, including:

- expensive filing fees
- limited access to documents and other information,
- limited knowledge on which to base the choice of an arbitrator,
- the absence of a requirement that arbitrators follow the law or issue written decisions, and
- the extremely limited grounds for appealing an arbitrator's decision.

We thank the House Judiciary Committees for adding back in the current law's prohibition on predispute arbitration clauses in contracts for tort claims which will protect the elderly and disabled who could have been asked to sign arbitration contracts when they enter a nursing home. We respectfully request that this committee not support amendments to delete that provision and to oppose HB 2016 as amended. Thank you.

555 S. Kansas Avenue, Suite 201 | Topeka, KS 66603 | 785-232-4070 | 785-232-8259 fax
Marie Smith, President | William D. Novelli, Executive Director and CEO | www.aarp.org

Senate Judiciary
3-7-05
Attachment 9

TESTIMONY IN OPPOSITION TO HB2016

Presented by:

Ruth M. Benien
Benien Law Offices, Chtd.
Security Bank Bldg., Ste. 603
707 Minnesota Ave.
Kansas City, KS 66101
(913) 621-7100

Presented on behalf of the National Employment Lawyers Association-Kansas Chapter

TESTIMONY

I appear on behalf of the National Employment Lawyers Association (NELA) through its member attorneys in the State of Kansas, and also as an individual attorney who has spent the majority of her practice in the last seventeen years representing individual employees in the preservation and pursuit of their legal rights against their current or former employers. I appear before the Kansas Senate Judiciary Committee and its members, in that capacity, to ask that you reject HB2016 and its proposed changes to K.S.A. 5-401.

Since 1985, the National Employment Lawyers Association (NELA) has provided assistance and support to lawyers protecting the rights of employees. NELA is the country's only national bar association exclusively comprised of lawyers who represent employees in cases involving employment discrimination, illegal workplace harassment, wrongful termination, denial of employee benefits, and other employment related matters. NELA has a membership of more than 3,000 lawyers and legal professionals in all fifty states and the District of Columbia, as well as more than sixty state and local affiliates around the country.

On February 24, 2005, NELA along with the nation's leading consumer, public interest, civil rights and other employment groups held a press conference in Washington, D.C. to announce the formulation of the national "Give Me Back My Rights Coalition, a Coalition whose purpose is not just to raise awareness about the dangers of binding mandatory arbitration, but to advocate for remedial legislation at both the state and federal levels to stop the assault on such rights. I appear on behalf of NELA in the State of Kansas to ask this Committee not to give back the right of the employees in this state to be free from binding mandatory arbitration clauses, but to not take away that right which they have been given by K.S.A. 5-401 and are

entitled to by the Constitution of the State of Kansas, the right to jury trial.

A. Mandatory Binding Arbitration Agreements in Employment Contracts Will Deprive Individual Employees in the State of Kansas of Their Rights to Seek Accessible and Adequate Redress Over Issues Related to One of Their Most Important Assets, Their Jobs:

The Kansas Uniform Arbitration Act specifically protects Kansans from being forced to sign binding, pre-dispute arbitration agreements in situations where they have the most to lose--disputes with their employer over their livelihoods. K.S.A. 5-401(c)(2)(Supp. 1995). The statute, as enacted, after full opportunity for debate, codified a long-standing policy to protect Kansans from such one-sided, unbargained for agreements.
There is no justification for amending or repealing those provisions.

As proposed, the amendments to K.S.A. 5-401, would grant lesser rights to and discriminate against non-union employees and employees holding jobs that do not affect interstate commerce such that they would not be governed by the Federal Arbitration Act (FAA).

Mandatory binding arbitration agreements in individual employee contracts are presented on a "take-it or leave it basis." There is no union to negotiate the terms of the arbitration agreement. Thus, employers are free to structure arbitration in ways that systematically disadvantage the worker. Union employees, although subject to arbitration over collective bargaining issues, internal grievances and the like, are still able to go to court and receive a jury trial on federal and state civil rights and other statutory claims.

As now proposed, K.S.A. 5-401 would give individual employees in Kansas with claims such as worker's compensation wrongful discharge, public policy wrongful discharge, defamation claims, state civil rights claims, implied contract claims and all other employment claims with respect to their jobs even less rights than the Federal Arbitration Act (FAA) provides. Given that Kansas is already an "at will" state wherein the right of an employee to sue an employer is already substantially limited, further erosion of those rights is unwarranted.

Neither the United States Supreme Court or federal courts following its decisions have held that "any" sort of arbitration procedure before "any" manner of arbitrator would be satisfactory in the adjudication of public rights.

Gilmer v. Interstate/Johnson Lane, Corp., 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed. 2d 26 (1991); Cole v. Burns International Security Services, 105 F.3d 1465 (D.C. Cir. 1997). This Committee should not allow that to happen.

In determining whether arbitration is allowable there are two factors that must be considered: 1) adequacy of the arbitration to allow the employee to obtain redress; and 2) accessibility. The allowance of arbitration versus right to jury trial is based on the premise that the employee is not waiving any substantive rights but simply subjecting his or her claims to a different forum.

The majority of federal courts, based on Supreme Court rulings hold that arbitration of claims can be required if the agreement to arbitrate includes at least the following factors:

1) provides for neutral arbitrators
2) provides for more than minimal discovery
3) provides for a written award
4) provides for all of the types of relief that would otherwise be available in court
5) does not require employees to pay either unreasonable costs or any arbitrator's fees or expenses as a condition of access to the arbitration forum (a later Supreme Court case has held the issue of costs is for a case by case determination). See, Gilmer, Id., Emeronye v. Caci International, Inc., 141 F. Supp. 2d. 82 (D.C. D.C. 2001).

The proposed amendment and repeal of existing K.S.A. 5-401 does not mandate any such protections for the employee. In fact, given the rules of statutory construction, it could be argued that by specifically mandating only one condition on a mandatory binding arbitration agreement in the employment setting, i.e. that the employer pay the filing fee, the agreement would be deemed enforceable, no matter how unconscionable its other terms, so long as it contained that provision.

Use of the word "irrevocable" in the statute, if employment issues are no longer exempted, is also troubling as it again implies, if signed, the agreement may not be subject to judicial review.

Another problem with the proposed amendments and repeal of HB2016 is that it doesn't limit what claims relating to employment can be forced to arbitration. Presumably worker's compensation claims, wage and hour and unemployment claims would be included.

Arbitration should not be required in employment relationships unless the ADR (alternative dispute resolution) process is: 1) contractually mandated with non-binding results; 2) optional with binding results; or 3)

optional with non-binding results. This limitation has in the past been supported by the American Arbitration Association and the American Bar Association.

The EEOC experience with voluntary mediation and the federal court's experience with court ordered mediation with non-binding outcomes support the efficacy of these types of procedures. Well over one-half of such claims get resolved, according to mediators handling employment claims. The EEOC takes the position that binding mandatory arbitration agreements should be unenforceable.

B. Allowance of Mandatory Binding Arbitration Agreements in Employment Contracts Will Actually Increase the Costs of Litigation For Employers and Cause Greater Delay In Resolution of Claims:

If mandatory binding arbitration agreements are allowed in Kansas, the cost of the process of adjudicating employment claims will be increased for not only the employee, who will be priced out of the system, but for the employer as well.

Since no prior Kansas legislature has acted to deprive its citizens of the right to use of the judicial system to settle employment disputes, Kansas has no substantial body of law with respect to the interpretation of such agreements in that context. As a result, employers who attempt to enforce such agreements, particularly the most one-sided which will be sure to occur under the proposed amendment, will first have to litigate the legality of the agreement in the state courts. Courts interpreting the FAA look at each case on a case by case basis and are not consistent in what will or will not pass muster. Kansas courts would have to do the same.

Such filings will require the employee to pay a filing fee of $111.00 and the employee and employer's attorneys to expend time in briefing the issues.

In a recent case in federal court, in which I participated, this initial stage required the filing of a Complaint, a Motion to Dismiss or to Stay Pending Arbitration, the filing of a Response and a Reply to the same. Supplemental briefing was required by the federal judge. That process took from November, 2003 until mid-August, 2004, nearly nine months.

If the Court does not hold the arbitration agreement unenforceable, the parties must then go to arbitration assuming the employee can afford to pay the costs and is not priced out of the system at that point.

Most national arbitration groups allow as much time for discovery as do the federal or state courts, four or more months. If the employee is able to wait out this process, and come up with the funds ahead of time to pay for the arbitration process, unless the agreement required the employer to pay the arbitrator's fees and the majority of costs, the employee must go back to court to argue that the fees were excessive, or prohibitive. What should have been one procedure has now become three.

The employee's right to appeal any other portion of the arbitration agreement, regardless of how unfair or one-sided the process may have been, is severely limited.

C. Mandatory Binding Arbitration Agreements and Use of Arbitration Is Cost Prohibitive To Employees and Fails to Provide Them Adequate or Accessible Redress:

Under the proposed amendments to K.S.A. 5-401, employees are guaranteed no basic rights to a fair and just adjudication of their claims. All the disadvantages and unfairness of arbitration will be allowed to come into play making it nearly impossible for an employee to obtain full and fair compensation for violated rights.

1. Reasons Mandatory Arbitration Agreements Should Not Be Allowed:

a. Employees Are Not Making a Knowing and Voluntary Waiver of Their Rights:

Mandatory arbitration clauses are often hidden in employee handbooks, placed in small type, buried in written agreements or not highlighted, not pointed out and discussed with employees and/or incorporate rules of a specific entity, such as the American Arbitration Association, etc., which are not provided to the employee, nor is the employee advised how to obtain a copy, or what the terms of such services include. Some courts have even held the employee must demand a copy and be denied to defeat the agreement. The employee is not told what rights are being given up, or more importantly, that what arbitration means is that he or she is giving up the right to a trial by jury, a constitutionally protected right. The employee is not told to consult an attorney. There is no "mutual" bargaining process.

Any implementation of a binding mandatory arbitration clause in an employment contract must require disclosure to the employee of what they are signing up for and what they are giving up in return.

In many cases, the employer also substantially limits the time period for filing from two years to periods as short as thirty days.

b. Employers Are Given The Right to Hand-Pick the Arbitrator ("Judge") and the Employee Has to Pay for the Costs:

Forum shopping has long be denied to plaintiff's in federal or state courts, i.e. picking and choosing the forum in which to file depending on the judge. Arbitration provisions regularly provide that the employer alone can not only select the arbitration service used, but can pick the arbitrator, i.e, the "judge," and/or, to increase the costs, to pick a panel of up to three, hand-picked arbitrators.

There is no requirement that an reputable arbitration service be used. The employer could presumably pick any individual it chose, its former CEO, a friend of management personnel, a disbarred lawyer, or convicted felon. If the employee doesn't have a lawyer or the resources to appeal at the end, he or she is stuck with the result. Cottage industries of arbitration services, without references, will spring up.

Because of the inherent unfairness built into mandatory binding arbitration, few lawyers will be willing to take such cases on a contingency fee basis. The employee, in most cases now without a job, will have no resources to pay an hourly fee, even if it might later be recouped.

A wronged employee should not have to buy justice from the judge, i.e arbitrator. As one court stated, "we are unaware of any situation in American jurisprudence in which a beneficiary of a...statute has been required to pay for the services of the judge assigned to hear her or his case." Cole v. Burns International Security Services, 105 F. 3d 1465, 1483 (3rd Cir. 1997).

Requiring an employer, who has already avoided the risks of a jury trial, to pay the fees of the arbitrator and other costs associated with arbitration is not unfair. Without such a provision, mandatory binding arbitration will require employees of the State of Kansas to pay taxes which support the salaries of district court judges and court personnel, but then deny them the right to the use of the judicial system they have paid for, the most important of rights given to them.

c. Employees Will Be Denied The Right to a Fair, Impartial and Competent Hearing of Their Claims, Full Compensation or the Ability for a Meaningful Appeal:

1) The number of days for hearing, i.e. trial, are often severely curtailed in arbitrations. For example, the American Arbitration Association rules for "commercial" cases (which employer's generally select) generally allow only one day for hearing. Additional time is at the discretion of the arbitrator (at whole or part cost to the employee);

2) The competency of arbitrators to analyze and decide purely legal issues in connection with statutory or common law claims is questionable.

a) Many arbitrators are not even lawyers;
b) Many arbitrators who are lawyers have not traditionally engaged in the same kind of legal analysis performed by judges;
c) Arbitrators often cite to and rely extensively on treatises--few courts of law would do so, even if the treatise was widely respected, as treatises are notoriously out of date with respect to the current state of the law;
d) Arbitrators frequently rely on the leading cases on the subject of employment discrimination, without citing to subsequent lower courts or less publicized opinions interpreting the original decision; this results in decisions based on broad stroke principles to the exclusion of cases more analogous to the claim being decided and the current state of the law;
e) Arbitrators do not always analyze intentional discrimination cases within the proper legal framework because they don't know the law; one analysis of the competency of arbitrators found that at least 16% of arbitrators have never read any judicial opinions involving Title VII; that 40% do not read labor advance sheets to keep abreast of Title VII developments; and of those arbitrators who have never read a judicial opinion or who don't read advance sheets, 50% nonetheless felt professionally competent to decide legal issues in cases involving employment discrimination. See, Harry T. Edwards, Arbitration of Employment Discrimination Cases: An Empirical Study, PROC. OF THE 28TH ANN. MEETING OF THE NATL ACAD. OF ARB. 59, 71-72 (1976);

3) Records of arbitration proceedings are often incomplete; if a party wants a stenographic record of the proceedings the party has to pay for it; court reporter services in the federal courts are without charge; court reporters charge up to $5.00 to $6.00 per page; average employment trials generally take at least 3-5 days, complicated cases up to three weeks; transcripts can easily run in thousands of dollars;

4) Discovery in arbitration proceedings is often limited, often there is no subpoena power for witnesses or

documents; cross examination and testimony under oath may be limited or unavailable; general rules of evidence often do not apply; with some services, a per pleading charge of $100 or more is made for any pleading filed;

5) Arbitrator's are often not required to give reasons for an award or issue a written opinion, or the party requesting a written opinion has to pay for it; the decisions of arbitrators are not published and often secrecy about the proceeding and outcome are required;

6) Because employer's tend to be repeat users of arbitration services studies have shown a tendency for arbitrator's to rule in employer's favor on liability and/or limit damages substantially;

6) Arbitration agreements routinely prohibit an employee from receiving attorney's fees, punitive damages or other damages they would be entitled to recover in a court of law.

d. The Costs Involved In Arbitration Will Deny Employees the Right to an Accessible Forum for Their Claims:

Proponents of mandatory binding arbitration argue that it is a less costly and more efficient and expedited system for the resolution of claims. That is a myth.

The figures cited by proponents generally cite to the filing fees and charges made for "small claims" proceedings, i.e. in most cases less than $10,000.00. Those are the $175.00 filing fees, etc. Fees for normal employee claims for wrongful discharge, employment discrimination will not fall within that bracket. A sliding scale applies to filing fees and almost all other use of the arbitration system has a financial charge.

For example, an employee in Kansas suing for wrongful retaliatory discharge would be entitled to seek full compensatory damages, mental and emotional distress damages up to $250,000.00 and punitive damages of at least an amount equal to the actual damages, i.e. a total claim in excess of $500,000.00, in district court.

Under the American Arbitration Association Rules and Procedures, the filing fee for that action, payable in full at the time of filing, would be $6,000.00 plus a separate case service fee of $2,500.00. See, AAA Rules and Procedures Fee Chart, Commercial Arbitration Rules(2003).

Providing in a statute that the employer must pay the filing fee, but nothing else, still makes the procedure cost prohibitive to almost all employees.

The American Arbitration Association in various literature cites a fee of $700.00 per day as the average arbitrator's fee, presumably including "small claims." References in court cases show under the AAA's Commercial Rules, those generally used in employment claims, a range for arbitrator's fees from $750.00 to $5,000.00 per day with the average $1,800.00 per day in Chicago. See, Phillips v. Associates Home Equity Services, Inc., 179 F. Supp. 2d. 840 (N.D. Ill. 2001).

The Tenth Circuit, which covers the district of Kansas, cited information that the typical employment case in 1999 averaged between 15-40 hours of arbitrator time and a range from $1,875 to $5,000.00 in arbitrator fees. Shankle v. B-G Maintenance Management of Colorado, Inc., 163 F. 3d 1230, FN5 (10th Cir. 1999).

Statistics provided in other court decisions evidence a "mid range arbitrator" charged $250.00 an hour or a minimum per diem rate of $2,000.00 in the region. Alexander v. Anthony International, L.P., 341 F. 3d 256 (3rd. Cir. 2003). Another court referenced arbitrator rates of $800.00 to $1,000.00 per day. Spinetti v. Service Corp., International, 324 F. 3d 212 (3rd Cir. 2003). Another court took notice that arbitrator fees are $500.00 to $1,000.00 or more per day; average fees for other work in the arbitration are $250.00 to $350.00 per hour and that generally 15-40 hours are consumed in arbitrator time in the typical employment case. The same court noted another national arbitration service, JAMS/Endispute arbitrators, charge an average of $300.00 to $400.00 per hour. Fees of $500.00 or $600.00 were not uncommon. That was in 1997. Cole v. Burns International Security Services, 105 F. 3d 1465, 1479-80, FN8 (D.C. Cir. 1997).

Added to these charges are travel expenses and lodging to travel to the hearing, the location for which is often picked by the employer, the cost of a hearing room rental, service of subpoenas if allowed.

An unemployed worker simply can't afford to advance those type of fees and costs.

Unfortunately, in order to avoid arbitration on a "prohibitive" cost basis in the federal courts, the employee now has the burden of demonstrating that the arbitral forum is financially inaccessible by proving, in advance, what the costs will be. The employee of course can't because he or she doesn't know who the arbitrator will be, how long the case will take, or what discovery or pleadings will be necessary. The employer knows what the costs are, however, because it is in most cases a repeat user. The employer generally doesn't have to produce such information in the

initial court determination.

D. SUMMARY OF TESTIMONY:

Any mandatory binding arbitration agreement must be a "reasonable" substitute for a judicial forum and offer an effective means for the vindication of federal or state rights.
Arbitration agreements forced upon employees simply do not provide that assurance. HB 2016 certainly does not. HB2016 should be rejected.

Respectfully Submitted,

s/Ruth M. Benien
Ruth M. Benien

Exhibits Provided at Hearing:

2003 American Arbitration
Association Commercial
Rules & Procedures
Sample Employment Agreement
& Offer

10-10

[redacted]

Submitted by Ruth Benien

February 21, 2000

[redacted]
[redacted]
[redacted]

Dear Mr. [redacted]:

On behalf of [redacted], Inc., I am pleased to offer you the position of Senior Manager, [redacted] Sales of [redacted], Inc. at an initial annualized salary of $115,000. You are also eligible for the sales incentive plan applicable to you, details of which will be provided to you by your manager upon joining. As a full-time salaried employee, upon commencement of your employment, you will be entitled to the Salaried Employee's Benefit Package, a brief summary of which is attached.

You are eligible to participate in the [redacted] Stock Option Program. Under this program, you will receive 8,000 options to purchase [redacted] common stock under the [redacted] Stock Option plan on your date of joining. The exercise price of the Options will be the closing price on your first date of employment with [redacted]. The details of the program will be provided to you upon joining and will be governed by the [redacted] Stock option program and SEC regulations.

Reviews of your performance and compensation package will be performed annually. [redacted], Inc. reserves the right to amend its benefit plans in its discretion upon notice.

We welcome you to [redacted], Inc. and ask that you indicate your acceptance of these terms of your employment by signing and dating the enclosed Master Employment Agreement, and returning the executed Master Employment Agreement to [redacted], Human Resources Specialist, by February 28, 2000.

Please note that you may not alter the attached documents in any way. Any alteration renders the offer of employment, the attached documents, and this letter null and void. Any communication regarding your terms of employment, benefits, or compensation must be in writing and signed by an authorized Human Resources representative of the company. No other communication will be binding or effective.

Sincerely,
[redacted], Inc.

[redacted]
Steven J. Mahlin
Director, Human Resources

enclosures

EMPLOYMENT AGREEMENT

THIS AGREEMENT ("Agreement") is made as of Feb. 22, 2000, 2000 by and between [redacted] ("EMPLOYEE"). In consideration of the mutual promises and covenants herein contained, [redacted] and EMPLOYEE agree as follows:

1. Duties. EMPLOYEE agrees to use EMPLOYEE's best efforts in the performance of employment duties assigned to EMPLOYEE from time to time and to, at all times, act in good faith and in the best interests of [redacted]. EMPLOYEE agrees to comply with all rules, regulations and procedures established by [redacted].

2. Confidential Information. Simultaneous with the execution of this Agreement EMPLOYEE will execute and deliver to [redacted] the confidentiality letter agreement attached hereto as Exhibit A, which confidentiality letter agreement is incorporated herein by reference.

3. Works of Authorship. Any work of authorship created by EMPLOYEE and all improvements, discoveries, or inventions made or conceived by EMPLOYEE, either solely or jointly with others, during employment with [redacted] shall be promptly reported to [redacted] and shall be and remain the sole and exclusive property of [redacted], without further consideration. Upon request by [redacted], all documents and papers shall be executed, and all reasonable assistance shall be furnished (1) to establish in [redacted] title to such work of authorship, improvements, discoveries, and inventions and (2) to enable [redacted] to apply for United States and foreign patents thereon. EMPLOYEE agrees and warrants that any deliverable or service delivered to [redacted] and [redacted]'s use of such deliverable or service will neither infringe any copyrights, nor knowingly infringe any other intellectual property rights of any entity.

4. Effective Date. This Agreement becomes effective upon, if applicable, the approval of your H-1B visa and upon the commencement of your employment at the job site within the United States of America.

5. Compensation/Benefits. [redacted] shall provide compensation/benefits to EMPLOYEE as set forth in the letter accompanying this Agreement.

6. Nondiversion of Employees. During the term of this Agreement and for a period of two (2) years subsequent to the termination of this Agreement, EMPLOYEE shall not, without the prior written consent of [redacted], directly, indirectly, or through any other party solicit, offer to, or accept the employment of, or assist others to solicit, offer to, or accept the employment of, persons who are then, or were during the previous six (6) months, employees of [redacted] or any [redacted] subsidiary.

7. Nonsolicitation/Noncompete. During the term of this Agreement and for a period of two (2) years subsequent to the termination of this Agreement, EMPLOYEE shall not, without the prior written consent of [redacted], directly, indirectly, or through any other party solicit business from or perform services for any direct or indirect [redacted] customer or any prospective [redacted] customer whom EMPLOYEE had any contact with or exposure to at any time during the term of this Agreement.

8. Former Employer. In the event EMPLOYEE becomes a party to any proceeding brought by any former employer of EMPLOYEE at any time during or after EMPLOYEE's employment with [redacted], EMPLOYEE recognizes and agrees that EMPLOYEE shall have full and sole responsibility for responding to such action and that [redacted] has no responsibility to participate in EMPLOYEE's response nor in EMPLOYEE's cost of such response. EMPLOYEE agrees that EMPLOYEE shall not, at any time, disclose to [redacted] or its directors, officers, employees, or agents the trade secrets or any other confidential information of the EMPLOYEE's former employer.

9. Compliance with Laws/Hold Harmless. EMPLOYEE agrees to comply with all provisions of this Agreement and with all laws and to indemnify, defend and hold harmless [redacted], its employees, agents, officers, and directors, from and against any and all claims, liabilities, damages, costs, and/or expenses of whatever kind or nature, including without limit court costs and attorney fees, arising out of or related to the failure to so comply other than those claims, liabilities, damages, costs, and/or expenses arising solely from the gross negligence or willful misconduct of [redacted].

10. Remedies. Notwithstanding paragraph 11 below, EMPLOYEE agrees that EMPLOYEE's failure or neglect to perform, keep, or observe any term, provision, condition, covenant, warranty, or representation contained in this Agreement, the confidentiality letter agreement, or any other agreement between EMPLOYEE and [redacted] will cause [redacted] immediate and irreparable harm and that [redacted] is, in addition to all other remedies available to it, entitled to immediate injunctive and equitable relief from a court having jurisdiction to prevent any breach and to secure the enforcement of its rights hereunder.

11. Arbitration. Any dispute, controversy, or claim arising out of or related to this Agreement which has not been mutually resolved by the parties shall be determined and settled according to the Commercial Arbitration Rules of the American Arbitration Association except as expressly set forth herein. EMPLOYEE may demand arbitration by giving written notice to [redacted] stating the nature of the controversy. [redacted] may demand arbitration at any time. An arbitration panel or an individual arbitrator shall

...selected by [redacted] and the arbitration shall be held in Troy, Michigan or such other place as chosen by [redacted]. The arbitration panel or individual arbitrator shall allow such discovery as is appropriate for the purposes of the arbitration in accomplishing fair, speedy, and cost-effective resolution of disputes. Any award rendered by the arbitration panel or individual arbitrator shall be final, conclusive, and binding upon the parties and a judgment may be enforced in any court having jurisdiction.

12. Reimbursement Obligation. In the event EMPLOYEE resigns employment with or is terminated for Cause by [redacted] within twelve (12) months of the later of relocating to or starting work at a new job site for which [redacted] provided any relocation expense reimbursement to EMPLOYEE or paid any relocation expense on behalf of EMPLOYEE, EMPLOYEE recognizes and agrees that EMPLOYEE shall pay to [redacted] the amount of any such relocation expense reimbursement and/or any relocation expense paid by [redacted] on behalf of EMPLOYEE. Cause includes, but is not limited to, breach of this Agreement, neglect of duties, failure to act in the best interests of [redacted], and violation of rules, regulations, and procedures established by [redacted].

13. Miscellaneous. This Agreement contains the entire agreement of the parties and [redacted] shall not be bound by any other different, additional, or further agreements or understandings except as consented to in writing by the Chief Administrative Officer or Director, Human Resources of [redacted]. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns. No amendment hereof shall be effective unless contained in a written instrument signed by the parties hereto. No delay or omission by either party to exercise any right or power under this Agreement shall impair such right or power or be construed to be a waiver thereof. A waiver by either party of any of the covenants to be performed by the other party or of any breach shall not be construed to be a waiver of any succeeding breach or of any other covenant. If any provision of the Agreement is declared invalid, such provision shall be deemed severable from the remaining provisions of the Agreement which shall remain in full force and effect. EMPLOYEE shall not assign or transfer this Agreement without the prior written consent of [redacted]. EMPLOYEE's employment with [redacted] is at will and may be terminated by [redacted] at any time with or without cause, and with or without notice. All rights and remedies provided for in this Agreement shall be cumulative and in addition to and not in lieu of any other rights or remedies available to either party at law, in equity, or otherwise. Paragraphs 2, 3, 6, 7, 8, 9, 10, 11, 12, and 13 of this Agreement shall survive termination of this Agreement and EMPLOYEE's employment with [redacted]. The parties submit to the jurisdiction and venue of the circuit court for the County of Oakland, State of Michigan or, if original jurisdiction can be established, the United States District Court for the Eastern District of Michigan with respect to any action arising, directly or indirectly, out of this Agreement or the performance or breach of this Agreement. The parties stipulate that the venues referenced in this Agreement are convenient. This Agreement shall be construed under and in accordance with the laws of the State of Michigan.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the day and year first written above.

[redacted]

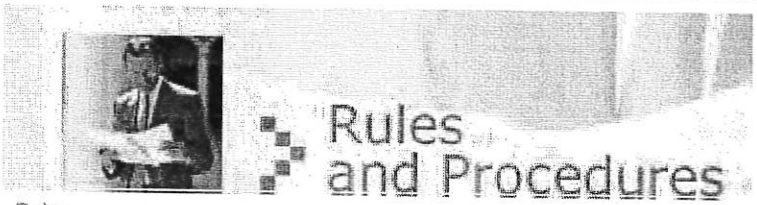
BY: _____
Steven D. Mislin
Director, Human Resources

February 21, 2000

BY: _____
[redacted]

DATE: Feb. 21, 2000

Submitted by Ruth Benien



Rules

Prin

Commercial Arbitration Rules and Mediation Procedures
(Including Procedures for Large, Complex Commercial Disputes)
Amended and Effective July 1, 2003 – click here to view a summary of the most changes

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Senate Judiciary
3-7-05
Attachment 12

IMPORTANT NOTICE

These rules and any amendment of them shall apply in the form in effect at the t administrative filing requirements are met for a demand for arbitration or submis agreement received by the AAA. To ensure that you have the most current info see our Web Site at www.adr.org.

INTRODUCTION

Each year, many millions of business transactions take place. Occasionally, disagreements develop over these business transactions. Many of these disput resolved by arbitration, the voluntary submission of a dispute to an impartial per persons for final and binding determination. Arbitration has proven to be an effe way to resolve these disputes privately, promptly, and economically.

The American Arbitration Association (AAA), a not-for-profit, public service orga offers a broad range of dispute resolution services to business executives, attor individuals, trade associations, unions, management, consumers, families, communities, and all levels of government. Services are available through AAA headquarters in New York and through offices located in major cities throughout United States. Hearings may be held at locations convenient for the parties and limited to cities with AAA offices. In addition, the AAA serves as a center for ed and training, issues specialized publications, and conducts research on all form of-court dispute settlement.

Standard Arbitration Clause

The parties can provide for arbitration of future disputes by inserting the followin into their contracts:

> *Any controversy or claim arising out of or relating to this contract, or the thereof, shall be settled by arbitration administered by the American Arb Association under its Commercial Arbitration Rules, and judgment on th rendered by the arbitrator(s) may be entered in any court having jurisdic thereof.*

Arbitration of existing disputes may be accomplished by use of the following:

We, the undersigned parties, hereby agree to submit to arbitration admi by the American Arbitration Association under its Commercial Arbitratio the following controversy: (describe briefly) We further agree that the ab controversy be submitted to (one) (three) arbitrator(s). We further agre will faithfully observe this agreement and the rules, that we will abide by perform any award rendered by the arbitrator(s), and that a judgment of court having jurisdiction may be entered on the award.

In transactions likely to require emergency interim relief, the parties may wish to their clause the following language:

The parties also agree that the AAA Optional Rules for Emergency Mea Protection shall apply to the proceedings.

These Optional Rules may be found below.

The services of the AAA are generally concluded with the transmittal of the awa Although there is voluntary compliance with the majority of awards, judgment on award can be entered in a court having appropriate jurisdiction if necessary.

Administrative Fees

The AAA charges a filing fee based on the amount of the claim or counterclaim. fee information, which is included with these rules, allows the parties to exercise over their administrative fees.

The fees cover AAA administrative services; they do not cover arbitrator compe or expenses, if any, reporting services, or any post-award charges incurred by t parties in enforcing the award.

Mediation

The parties might wish to submit their dispute to mediation prior to arbitration. I mediation, the neutral mediator assists the parties in reaching a settlement but have the authority to make a binding decision or award. Mediation is administer the AAA in accordance with its Commercial Mediation Procedures. There is no additional administrative fee where parties to a pending arbitration attempt to m their dispute under the AAA's auspices.

If the parties want to adopt mediation as a part of their contractual dispute settle procedure, they can insert the following mediation clause into their contract in conjunction with a standard arbitration provision:

If a dispute arises out of or relates to this contract, or the breach thereof the dispute cannot be settled through negotiation, the parties agree first good faith to settle the dispute by mediation administered by the Americ Arbitration Association under its Commercial Mediation Procedures bef resorting to arbitration, litigation, or some other dispute resolution proce

If the parties want to use a mediator to resolve an existing dispute, they can ent the following submission:

The parties hereby submit the following dispute to mediation administer the American Arbitration Association under its Commercial Mediation Procedures. (The clause may also provide for the qualifications of the (s), method of payment, locale of meetings, and any other item of conce parties.)

Large, Complex Cases

Unless the parties agree otherwise, the procedures for Large, Complex Comme Disputes, which appear in this pamphlet, will be applied to all cases administere AAA under the Commercial Arbitration Rules in which the disclosed claim or counterclaim of any party is at least $500,000 exclusive of claimed interest, arbi fees and costs.

The key features of these procedures include:

- a highly qualified, trained Roster of Neutrals;
- a mandatory preliminary hearing with the arbitrators, which may be conducted by teleconference;
- broad arbitrator authority to order and control discovery, including depositions;
- presumption that hearings will proceed on a consecutive or block b

COMMERCIAL MEDIATION PROCEDURES

M-1. Agreement of Parties

Whenever, by stipulation or in their contract, the parties have provided for medi conciliation of existing or future disputes under the auspices of the American Ar Association (AAA) or under these procedures, they shall be deemed to have ma these procedures, as amended and in effect as of the date of the submission of dispute, a part of their agreement.

M-2. Initiation of Mediation

Any party or parties to a dispute may initiate mediation by filing with the AAA a submission to mediation or a written request for mediation pursuant to these procedures, together with the $325 nonrefundable case set-up fee. Where ther submission to mediation or contract providing for mediation, a party may reques AAA to invite another party to join in a submission to mediation. Upon receipt of request, the AAA will contact the other parties involved in the dispute and attem obtain a submission to mediation.

M-3. Requests for Mediation

A request for mediation shall contain a brief statement of the nature of the dispu the names, addresses, and telephone numbers of all parties to the dispute and t who will represent them, if any, in the mediation. The initiating party shall simultaneously file two copies of the request with the AAA and one copy with ev other party to the dispute.

M-4. Appointment of the Mediator

Upon receipt of a request for mediation, the AAA will appoint a qualified mediat serve. Normally, a single mediator will be appointed unless the parties agree ot or the AAA determines otherwise. If the agreement of the parties names a medi specifies a method of appointing a mediator, that designation or method shall b followed.

M-5. Qualifications of the Mediator

No person shall serve as a mediator in any dispute in which that person has any financial or personal interest in the result of the mediation, except by the written of all parties. Prior to accepting an appointment, the prospective mediator shall any circumstance likely to create a presumption of bias or prevent a prompt me with the parties. Upon receipt of such information, the AAA shall either replace mediator or immediately communicate the information to the parties for their comments. In the event that the parties disagree as to whether the mediator sh serve, the AAA will appoint another mediator. The AAA is authorized to appoint mediator if the appointed mediator is unable to serve promptly.

M-6. Vacancies

If any mediator shall become unwilling or unable to serve, the AAA will appoint mediator, unless the parties agree otherwise.

M-7. Representation

Any party may be represented by persons of the party's choice. The names and addresses of such persons shall be communicated in writing to all parties and t AAA.

M-8. Date, Time, and Place of Mediation

The mediator shall fix the date and the time of each mediation session. The me shall be held at the appropriate regional office of the AAA, or at any other conve location agreeable to the mediator and the parties, as the mediator shall determi

M-9. Identification of Matters in Dispute

At least ten days prior to the first scheduled mediation session, each party shall the mediator with a brief memorandum setting forth its position with regard to th that need to be resolved. At the discretion of the mediator, such memoranda m mutually exchanged by the parties.

At the first session, the parties will be expected to produce all information reaso required for the mediator to understand the issues presented.

The mediator may require any party to supplement such information.

M-10. Authority of the Mediator

The mediator does not have the authority to impose a settlement on the parties attempt to help them reach a satisfactory resolution of their dispute. The mediat authorized to conduct joint and separate meetings with the parties and to make written recommendations for settlement.

Whenever necessary, the mediator may also obtain expert advice concerning te aspects of the dispute, provided that the parties agree and assume the expense obtaining such advice.

Arrangements for obtaining such advice shall be made by the mediator or the p as the mediator shall determine.

The mediator is authorized to end the mediation whenever, in the judgment of t

mediator, further efforts at mediation would not contribute to a resolution of the between the parties.

M-11. Privacy

Mediation sessions are private. The parties and their representatives may atten mediation sessions. Other persons may attend only with the permission of the and with the consent of the mediator.

M-12. Confidentiality

Confidential information disclosed to a mediator by the parties or by witnesses i course of the mediation shall not be divulged by the mediator. All records, repo other documents received by a mediator while serving in that capacity shall be confidential.

The mediator shall not be compelled to divulge such records or to testify in rega mediation in any adversary proceeding or judicial forum.

The parties shall maintain the confidentiality of the mediation and shall not rely introduce as evidence in any arbitral, judicial, or other proceeding:

(a) views expressed or suggestions made by another party with respect to possible settlement of the dispute;

(b) admissions made by another party in the course of the mediation proce

(c) proposals made or views expressed by the mediator; or

(d) the fact that another party had or had not indicated willingness to acce proposal for settlement made by the mediator.

M-13. No Stenographic Record

There shall be no stenographic record of the mediation process.

M-14. Termination of Mediation

The mediation shall be terminated:

(a) by the execution of a settlement agreement by the parties;

(b) by a written declaration of the mediator to the effect that further efforts mediation are no longer worthwhile; or

(c) by a written declaration of a party or parties to the effect that the media proceedings are terminated.

M-15. Exclusion of Liability

Neither the AAA nor any mediator is a necessary party in judicial proceedings re the mediation. Neither the AAA nor any mediator shall be liable to any party for or omission in connection with any mediation conducted under these procedure

M-16. Interpretation and Application of Procedures

12-7

The mediator shall interpret and apply these procedures insofar as they relate t mediator's duties and responsibilities. All other procedures shall be interpreted applied by the AAA.

M-17. Expenses

The expenses of witnesses for either side shall be paid by the party producing s witnesses. All other expenses of the mediation, including required traveling and expenses of the mediator and representatives of the AAA, and the expenses of witness and the cost of any proofs or expert advice produced at the direct reque mediator, shall be borne equally by the parties unless they agree otherwise.

ADMINISTRATIVE FEES

The nonrefundable case set-up fee is $325 per party. In addition, the parties ar responsible for compensating the mediator at his or her published rate, for conf and study time (hourly or per diem).

All expenses are generally borne equally by the parties. The parties may adjust arrangement by agreement.

Before the commencement of the mediation, the AAA shall estimate anticipated expenses. Each party shall pay its portion of that amount as per the agreed up arrangement. When the mediation has terminated, the AAA shall render an acc and return any unexpended balance to the parties.

COMMERCIAL ARBITRATION RULES

R-1. Agreement of Parties*+

(a) The parties shall be deemed to have made these rules a part of their arbitr agreement whenever they have provided for arbitration by the American Ar Association (hereinafter AAA) under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules. These rules and any amendment of them shall apply in the effect at the time the administrative requirements are met for a demand for arbitration or submission agreement received by the AAA. The parties, by agreement, may vary the procedures set forth in these rules. After appoint the arbitrator, such modifications may be made only with the consent of the arbitrator.

(b) Unless the parties or the AAA determines otherwise, the Expedited Proced shall apply in any case in which no disclosed claim or counterclaim exceeds $75,000, exclusive of interest and arbitration fees and costs. Parties may al agree to use these procedures in larger cases. Unless the parties agree oth these procedures will not apply in cases involving more than two parties. T Expedited Procedures shall be applied as described in Sections E-1 throug of these rules, in addition to any other portion of these rules that is not in co with the Expedited Procedures.

(c) Unless the parties agree otherwise, the Procedures for Large, Complex Commercial Disputes shall apply to all cases in which the disclosed claim or counterclaim of any party is at least $500,000, exclusive of claimed interest, arbitration fees and costs. Parties may also agree to use the Procedures in involving claims or counterclaims under $500,000, or in nonmonetary cases Procedures for Large, Complex Commercial Disputes shall be applied as d in Sections L-1 through L-4 of these rules, in addition to any other portion of

rules that is not in conflict with the Procedures for Large, Complex Commercial Disputes.

(d) All other cases shall be administered in accordance with Sections R-1 thro 54 of these rules.

* The AAA applies the *Supplementary Procedures for Consumer-Related Disputes* to arbitration cla agreements between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of t purchase of standardized, consumable goods or services are nonnegotiable or primarily nonnegoti most or all of its terms, conditions, features, or choices. The product or service must be for persona household use. The AAA will have the discretion to apply or not to apply the Supplementary Proced the parties will be able to bring any disputes concerning the application or nonapplication to the att the arbitrator. Consumers are not prohibited from seeking relief in a small claims court for disputes within the scope of its jurisdiction, even in consumer arbitration cases filed by the business.

+ A dispute arising out of an employer promulgated plan will be administered under the AAAs Natio for the Resolution of Employment Disputes.

R-2. AAA and Delegation of Duties

When parties agree to arbitrate under these rules, or when they provide for arbit by the AAA and an arbitration is initiated under these rules, they thereby authori AAA to administer the arbitration. The authority and duties of the AAA are presc the agreement of the parties and in these rules, and may be carried out through the AAA's representatives as it may direct. The AAA may, in its discretion, assig administration of an arbitration to any of its offices.

R-3. National Roster of Arbitrators

The AAA shall establish and maintain a National Roster of Commercial Arbitrato ("National Roster") and shall appoint arbitrators as provided in these rules. The "arbitrator" in these rules refers to the arbitration panel, constituted for a particul whether composed of one or more arbitrators, or to an individual arbitrator, as th context requires.

R-4. Initiation under an Arbitration Provision in a Contract

(a) Arbitration under an arbitration provision in a contract shall be initiated in th following manner:

(i) The initiating party (the "claimant") shall, within the time period, if any, in the contract(s), give to the other party (the "respondent") written notic intention to arbitrate (the "demand"), which demand shall contain a stat setting forth the nature of the dispute, the names and addresses of all o parties, the amount involved, if any, the remedy sought, and the hearing requested.

(ii) The claimant shall file at any office of the AAA two copies of the deman two copies of the arbitration provisions of the contract, together with the appropriate filing fee as provided in the schedule included with these rul

(iii) The AAA shall confirm notice of such filing to the parties.

(b) A respondent may file an answering statement in duplicate with the AAA wi days after confirmation of notice of filing of the demand is sent by the AAA. respondent shall, at the time of any such filing, send a copy of the answerin statement to the claimant. If a counterclaim is asserted, it shall contain a st setting forth the nature of the counterclaim, the amount involved, if any, and

remedy sought. If a counterclaim is made, the party making the counterclaim s forward to the AAA with the answering statement the appropriate fee provid schedule included with these rules.

(c) If no answering statement is filed within the stated time, respondent will be to deny the claim. Failure to file an answering statement shall not operate t the arbitration.

(d) When filing any statement pursuant to this section, the parties are encoura provide descriptions of their claims in sufficient detail to make the circumsta the dispute clear to the arbitrator.

R-5. Initiation under a Submission

Parties to any existing dispute may commence an arbitration under these rules at any office of the AAA two copies of a written submission to arbitrate under th rules, signed by the parties. It shall contain a statement of the nature of the disp names and addresses of all parties, any claims and counterclaims, the amount involved, if any, the remedy sought, and the hearing locale requested, together appropriate filing fee as provided in the schedule included with these rules. Unl parties state otherwise in the submission, all claims and counterclaims will be d to be denied by the other party.

R-6. Changes of Claim

After filing of a claim, if either party desires to make any new or different claim o counterclaim, it shall be made in writing and filed with the AAA. The party asser such a claim or counterclaim shall provide a copy to the other party, who shall h days from the date of such transmission within which to file an answering state with the AAA. After the arbitrator is appointed, however, no new or different clai be submitted except with the arbitrator's consent.

R-7. Jurisdiction

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, inc any objections with respect to the existence, scope or validity of the arbitrati agreement.

(b) The arbitrator shall have the power to determine the existence or validity of contract of which an arbitration clause forms a part. Such an arbitration cla be treated as an agreement independent of the other terms of the contract. decision by the arbitrator that the contract is null and void shall not for that r alone render invalid the arbitration clause.

(c) A party must object to the jurisdiction of the arbitrator or to the arbitrability o claim or counterclaim no later than the filing of the answering statement to t or counterclaim that gives rise to the objection. The arbitrator may rule on s objections as a preliminary matter or as part of the final award.

R-8. Mediation

At any stage of the proceedings, the parties may agree to conduct a mediation conference under the Commercial Mediation Procedures in order to facilitate settlement. The mediator shall not be an arbitrator appointed to the case. Whe parties to a pending arbitration agree to mediate under the AAA's rules, no addit administrative fee is required to initiate the mediation.

R-9. Administrative Conference

At the request of any party or upon the AAA's own initiative, the AAA may cond administrative conference, in person or by telephone, with the parties and/or the representatives. The conference may address such issues as arbitrator selectio potential mediation of the dispute, potential exchange of information, a timetabl hearings and any other administrative matters.

R-10. Fixing of Locale

The parties may mutually agree on the locale where the arbitration is to be held. party requests that the hearing be held in a specific locale and the other party fil objection thereto within 15 days after notice of the request has been sent to it by AAA, the locale shall be the one requested. If a party objects to the locale requ the other party, the AAA shall have the power to determine the locale, and its d shall be final and binding.

R-11. Appointment from National Roster

If the parties have not appointed an arbitrator and have not provided any other of appointment, the arbitrator shall be appointed in the following manner:

(a) Immediately after the filing of the submission or the answering stateme expiration of the time within which the answering statement is to be filed AAA shall send simultaneously to each party to the dispute an identical 10 (unless the AAA decides that a different number is appropriate) nam persons chosen from the National Roster. The parties are encouraged to an arbitrator from the submitted list and to advise the AAA of their agreement.

(b) If the parties are unable to agree upon an arbitrator, each party to the d shall have 15 days from the transmittal date in which to strike names ob to, number the remaining names in order of preference, and return the li AAA. If a party does not return the list within the time specified, all pers named therein shall be deemed acceptable. From among the persons have been approved on both lists, and in accordance with the designate of mutual preference, the AAA shall invite the acceptance of an arbitrat serve. If the parties fail to agree on any of the persons named, or if acc arbitrators are unable to act, or if for any other reason the appointment be made from the submitted lists, the AAA shall have the power to mak appointment from among other members of the National Roster without submission of additional lists.

(c) Unless the parties agree otherwise when there are two or more claima two or more respondents, the AAA may appoint all the arbitrators.

R-12. Direct Appointment by a Party

(a) If the agreement of the parties names an arbitrator or specifies a meth appointing an arbitrator, that designation or method shall be followed. notice of appointment, with the name and address of the arbitrator, shall with the AAA by the appointing party. Upon the request of any appointi the AAA shall submit a list of members of the National Roster from whic party may, if it so desires, make the appointment.

(b) Where the parties have agreed that each party is to name one arbitrato arbitrators so named must meet the standards of Section R-17 with res

impartiality and independence unless the parties have specifically agreed p to Section R-17(a) that the party-appointed arbitrators are to be non-ne need not meet those standards.

(c) If the agreement specifies a period of time within which an arbitrator sh appointed and any party fails to make the appointment within that perio AAA shall make the appointment.

(d) If no period of time is specified in the agreement, the AAA shall notify t to make the appointment. If within 15 days after such notice has been s arbitrator has not been appointed by a party, the AAA shall make the appointment.

R-13. Appointment of Chairperson by Party-Appointed Arbitrators or Parti

(a) If, pursuant to Section R-12, either the parties have directly appointed arbitrators, or the arbitrators have been appointed by the AAA, and the have authorized them to appoint a chairperson within a specified time a appointment is made within that time or any agreed extension, the AAA appoint the chairperson.

(b) If no period of time is specified for appointment of the chairperson and party-appointed arbitrators or the parties do not make the appointment days from the date of the appointment of the last party-appointed arbitra AAA may appoint the chairperson.

(c) If the parties have agreed that their party-appointed arbitrators shall ap chairperson from the National Roster, the AAA shall furnish to the party-appointed arbitrators, in the manner provided in Section R-11, a list sele from the National Roster, and the appointment of the chairperson shall as provided in that Section.

R-14. Nationality of Arbitrator

Where the parties are nationals of different countries, the AAA, at the request of party or on its own initiative, may appoint as arbitrator a national of a country ot that of any of the parties. The request must be made before the time set for the appointment of the arbitrator as agreed by the parties or set by these rules.

R-15. Number of Arbitrators

If the arbitration agreement does not specify the number of arbitrators, the dispu be heard and determined by one arbitrator, unless the AAA, in its discretion, dir three arbitrators be appointed. A party may request three arbitrators in the dem answer, which request the AAA will consider in exercising its discretion regardin number of arbitrators appointed to the dispute.

R-16. Disclosure

(a) Any person appointed or to be appointed as an arbitrator shall disclose AAA any circumstance likely to give rise to justifiable doubt as to the ar impartiality or independence, including any bias or any financial or pers interest in the result of the arbitration or any past or present relationship the parties or their representatives. Such obligation shall remain in effe throughout the arbitration.

(b) Upon receipt of such information from the arbitrator or another source,

shall communicate the information to the parties and, if it deems it appropria so, to the arbitrator and others.

(c) In order to encourage disclosure by arbitrators, disclosure of informatio pursuant to this Section R-16 is not to be construed as an indication tha arbitrator considers that the disclosed circumstance is likely to affect im or independence.

R-17. Disqualification of Arbitrator

(a) Any arbitrator shall be impartial and independent and shall perform his or h duties with diligence and in good faith, and shall be subject to disqualificatio

(i) partiality or lack of independence,

(ii) inability or refusal to perform his or her duties with diligence and in goo and

(iii) any grounds for disqualification provided by applicable law. The partie agree in writing, however, that arbitrators directly appointed by a party p to Section R-12 shall be nonneutral, in which case such arbitrators nee impartial or independent and shall not be subject to disqualification for p or lack of independence.

(b) Upon objection of a party to the continued service of an arbitrator, or on its initiative, the AAA shall determine whether the arbitrator should be disqualifi under the grounds set out above, and shall inform the parties of its decision, decision shall be conclusive.

R-18. Communication with Arbitrator

(a) No party and no one acting on behalf of any party shall communicate ex pa an arbitrator or a candidate for arbitrator concerning the arbitration, except t party, or someone acting on behalf of a party, may communicate ex parte w candidate for direct appointment pursuant to Section R-12 in order to advise candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate's qualifications, availability, or independence in relation to the parties or to discuss the suitability of candid selection as a third arbitrator where the parties or party-designated arbitrato participate in that selection.

(b) Section R-18(a) does not apply to arbitrators directly appointed by the parti pursuant to Section R-17(a), the parties have agreed in writing are non-neut Where the parties have so agreed under Section R-17(a), the AAA shall as administrative practice suggest to the parties that they agree further that Se 18(a) should nonetheless apply prospectively.

R-19. Vacancies

(a) If for any reason an arbitrator is unable to perform the duties of the offi AAA may, on proof satisfactory to it, declare the office vacant. Vacancie be filled in accordance with the applicable provisions of these rules.

(b) In the event of a vacancy in a panel of neutral arbitrators after the heari have commenced, the remaining arbitrator or arbitrators may continue hearing and determination of the controversy, unless the parties agree otherwise.

(c) In the event of the appointment of a substitute arbitrator, the panel of arbitrators shall determine in its sole discretion whether it is necessary t all or part of any prior hearings.

R-20. Preliminary Hearing

(a) At the request of any party or at the discretion of the arbitrator or the A arbitrator may schedule as soon as practicable a preliminary hearing wit parties and/or their representatives. The preliminary hearing may be co by telephone at the arbitrator's discretion.

(b) During the preliminary hearing, the parties and the arbitrator should dis future conduct of the case, including clarification of the issues and claim schedule for the hearings and any other preliminary matters.

R-21. Exchange of Information

(a) At the request of any party or at the discretion of the arbitrator, consist the expedited nature of arbitration, the arbitrator may direct

i) the production of documents and other information, and

ii) the identification of any witnesses to be called.

(b) At least five business days prior to the hearing, the parties shall excha copies of all exhibits they intend to submit at the hearing.

(c) The arbitrator is authorized to resolve any disputes concerning the exc information.

R-22. Date, Time, and Place of Hearing

The arbitrator shall set the date, time, and place for each hearing. The parties s respond to requests for hearing dates in a timely manner, be cooperative in sch the earliest practicable date, and adhere to the established hearing schedule. T shall send a notice of hearing to the parties at least 10 days in advance of the h date, unless otherwise agreed by the parties.

R-23. Attendance at Hearings

The arbitrator and the AAA shall maintain the privacy of the hearings unless the provides to the contrary. Any person having a direct interest in the arbitration is to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during th testimony of any other witness. It shall be discretionary with the arbitrator to det the propriety of the attendance of any other person other than a party and its representatives.

R-24. Representation

Any party may be represented by counsel or other authorized representative. A intending to be so represented shall notify the other party and the AAA of the na address of the representative at least three days prior to the date set for the hea which that person is first to appear. When such a representative initiates an arb or responds for a party, notice is deemed to have been given.

R-25. Oaths

Before proceeding with the first hearing, each arbitrator may take an oath of offi if required by law, shall do so. The arbitrator may require witnesses to testify un administered by any duly qualified person and, if it is required by law or request any party, shall do so.

R-26. Stenographic Record

Any party desiring a stenographic record shall make arrangements directly with stenographer and shall notify the other parties of these arrangements at least th days in advance of the hearing. The requesting party or parties shall pay the co record. If the transcript is agreed by the parties, or determined by the arbitrator the official record of the proceeding, it must be provided to the arbitrator and ma available to the other parties for inspection, at a date, time, and place determine arbitrator.

R-27. Interpreters

Any party wishing an interpreter shall make all arrangements directly with the int and shall assume the costs of the service.

R-28. Postponements

The arbitrator may postpone any hearing upon agreement of the parties, upon r of a party for good cause shown, or upon the arbitrator's own initiative.

R-29. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the abse any party or representative who, after due notice, fails to be present or fails to o postponement. An award shall not be made solely on the default of a party. Th arbitrator shall require the party who is present to submit such evidence as the may require for the making of an award.

R-30. Conduct of Proceedings

(a) The claimant shall present evidence to support its claim. The respond then present evidence to support its defense. Witnesses for each party also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure, provided that the par treated with equality and that each party has the right to be heard and is fair opportunity to present its case.

(b) The arbitrator, exercising his or her discretion, shall conduct the procee with a view to expediting the resolution of the dispute and may direct th of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or par case.

(c) The parties may agree to waive oral hearings in any case.

R-31. Evidence

(a) The parties may offer such evidence as is relevant and material to the and shall produce such evidence as the arbitrator may deem necessary

understanding and determination of the dispute. Conformity to legal rules o evidence shall not be necessary. All evidence shall be taken in the pre all of the arbitrators and all of the parties, except where any of the partie absent, in default or has waived the right to be present.

(b) The arbitrator shall determine the admissibility, relevance, and material the evidence offered and may exclude evidence deemed by the arbitrat cumulative or irrelevant.

(c) The arbitrator shall take into account applicable principles of legal privil such as those involving the confidentiality of communications between and client.

(d) An arbitrator or other person authorized by law to subpoena witnesses documents may do so upon the request of any party or independently.

R-32. Evidence by Affidavit and Post-hearing Filing of Documents or Other Evidence

(a) The arbitrator may receive and consider the evidence of witnesses by declaration or affidavit, but shall give it only such weight as the arbitrato it entitled to after consideration of any objection made to its admission.

(b) If the parties agree or the arbitrator directs that documents or other evi be submitted to the arbitrator after the hearing, the documents or other evidence shall be filed with the AAA for transmission to the arbitrator. A parties shall be afforded an opportunity to examine and respond to such documents or other evidence.

R-33. Inspection or Investigation

An arbitrator finding it necessary to make an inspection or investigation in conn with the arbitration shall direct the AAA to so advise the parties. The arbitrator s the date and time and the AAA shall notify the parties. Any party who so desires present at such an inspection or investigation. In the event that one or all partie present at the inspection or investigation, the arbitrator shall make an oral or wri report to the parties and afford them an opportunity to comment.

R-34. Interim Measures**

(a) The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.

(b) Such interim measures may take the form of an interim award, and the arbitrator may require security for the costs of such measures.

(c) A request for interim measures addressed by a party to a judicial autho not be deemed incompatible with the agreement to arbitrate or a waiver right to arbitrate.

** The Optional Rules may be found below.

R-35. Closing of Hearing

The arbitrator shall specifically inquire of all parties whether they have any furth

proofs to offer or witnesses to be heard. Upon receiving negative replies or if sa that the record is complete, the arbitrator shall declare the hearing closed. If brie to be filed, the hearing shall b e declared closed as of the final date set by the a for the receipt of briefs. If documents are to be filed as provided in Section R-3 the date set for their receipt is later than that set for the receipt of briefs, the late shall be the closing date of the hearing. The time limit within which the arbitrato required to make the award shall commence, in the absence of other agreemen the parties, upon the closing of the hearing.

R-36. Reopening of Hearing

The hearing may be reopened on the arbitrator's initiative, or upon application o party, at any time before the award is made. If reopening the hearing would pre making of the award within the specific time agreed on by the parties in the cont out of which the controversy has arisen, the matter may not be reopened unless parties agree on an extension of time. When no specific date is fixed in the con the arbitrator may reopen the hearing and shall have 30 days from the closing o reopened hearing within which to make an award.

R-37. Waiver of Rules

Any party who proceeds with the arbitration after knowledge that any provision requirement of these rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object.

R-38. Extensions of Time

The parties may modify any period of time by mutual agreement. The AAA or t arbitrator may for good cause extend any period of time established by these rul except the time for making the award. The AAA shall notify the parties of any extension.

R-39. Serving of Notice

(a) Any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules, for any court action in connection therewith, or for the entry of judgment on any award made u these rules may be served on a party by mail addressed to the party, or representative at the last known address or by personal service, in or o the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard to the dispute is or has been grante party.

(b) The AAA, the arbitrator and the parties may also use overnight delivery electronic facsimile transmission (fax), to give the notices required by th rules. Where all parties and the arbitrator agree, notices may be trans electronic mail (E-mail), or other methods of communication.

(c) Unless otherwise instructed by the AAA or by the arbitrator, any docum submitted by any party to the AAA or to the arbitrator shall simultaneou provided to the other party or parties to the arbitration.

R-40. Majority Decision

When the panel consists of more than one arbitrator, unless required by law or arbitration agreement, a majority of the arbitrators must make all decisions.

R-41. Time of Award

The award shall be made promptly by the arbitrator and, unless otherwise agre the parties or specified by law, no later than 30 days from the date of closing th hearing, or, if oral hearings have been waived, from the date of the AAA's trans the final statements and proofs to the arbitrator.

R-42. Form of Award

(a) Any award shall be in writing and signed by a majority of the arbitrators shall be executed in the manner required by law.

(b) The arbitrator need not render a reasoned award unless the parties req such an award in writing prior to appointment of the arbitrator or unless arbitrator determines that a reasoned award is appropriate.

R-43. Scope of Award

(a) The arbitrator may grant any remedy or relief that the arbitrator deems equitable and within the scope of the agreement of the parties, includin not limited to, specific performance of a contract.

(b) In addition to a final award, the arbitrator may make other decisions, in interim, interlocutory, or partial rulings, orders, and awards. In any interi interlocutory, or partial award, the arbitrator may assess and apportion t expenses, and compensation related to such award as the arbitrator determines is appropriate.

(c) In the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-49, R-50, and R-51. The arbitrat apportion such fees, expenses, and compensation among the parties in amounts as the arbitrator determines is appropriate.

(d) The award of the arbitrator(s) may include:

(i) interest at such rate and from such date as the arbitrator(s) may de appropriate; and

(ii) an award of attorneys' fees if all parties have requested such an a is authorized by law or their arbitration agreement.

R-44. Award upon Settlement

If the parties settle their dispute during the course of the arbitration and if the pa request, the arbitrator may set forth the terms of the settlement in a "consent aw consent award must include an allocation of arbitration costs, including administ fees and expenses as well as arbitrator fees and expenses.

R-45. Delivery of Award to Parties

Parties shall accept as notice and delivery of the award the placing of the award true copy thereof in the mail addressed to the parties or their representatives at known addresses, personal or electronic service of the award, or the filing of the in any other manner that is permitted by law.

R-46. Modification of Award

Within 20 days after the transmittal of an award, any party, upon notice to the ot parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empo redetermine the merits of any claim already decided. The other parties shall be 10 days to respond to the request. The arbitrator shall dispose of the request wi days after transmittal by the AAA to the arbitrator of the request and any respon thereto.

R-47. Release of Documents for Judicial Proceedings

The AAA shall, upon the written request of a party, furnish to the party, at the pa expense, certified copies of any papers in the AAA's possession that may be re judicial proceedings relating to the arbitration.

R-48. Applications to Court and Exclusion of Liability

(a) No judicial proceeding by a party relating to the subject matter of the ar shall be deemed a waiver of the party's right to arbitrate.

(b) Neither the AAA nor any arbitrator in a proceeding under these rules is necessary or proper party in judicial proceedings relating to the arbitrati

(c) Parties to an arbitration under these rules shall be deemed to have con that judgment upon the arbitration award may be entered in any federal court having jurisdiction thereof.

(d) Parties to an arbitration under these rules shall be deemed to have con that neither the AAA nor any arbitrator shall be liable to any party in any for damages or injunctive relief for any act or omission in connection wit arbitration under these rules.

R-49. Administrative Fees

As a not-for-profit organization, the AAA shall prescribe an initial filing fee and a service fee to compensate it for the cost of providing administrative services. T in effect when the fee or charge is incurred shall be applicable. The filing fee sh advanced by the party or parties making a claim or counterclaim, subject to final apportionment by the arbitrator in the award. The AAA may, in the event of extr hardship on the part of any party, defer or reduce the administrative fees.

R-50. Expenses

The expenses of witnesses for either side shall be paid by the party producing s witnesses. All other expenses of the arbitration, including required travel and ot expenses of the arbitrator, AAA representatives, and any witness and the cost o proof produced at the direct request of the arbitrator, shall be borne equally by t parties, unless they agree otherwise or unless the arbitrator in the award asses expenses or any part thereof against any specified party or parties.

R-51. Neutral Arbitrator's Compensation

(a) Arbitrators shall be compensated at a rate consistent with the arbitrator stated rate of compensation.

(b) If there is disagreement concerning the terms of compensation, an app rate shall be established with the arbitrator by the AAA and confirmed to

parties.

(c) Any arrangement for the compensation of a neutral arbitrator shall be through the AAA and not directly between the parties and the arbitrator.

R-52. Deposits

The AAA may require the parties to deposit in advance of any hearings such su money as it deems necessary to cover the expense of the arbitration, including t arbitrator's fee, if any, and shall render an accounting to the parties and return a unexpended balance at the conclusion of the case.

R-53. Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a dif arises among them concerning the meaning or application of these rules, it shall decided by a majority vote. If that is not possible, either an arbitrator or a party refer the question to the AAA for final decision. All other rules shall be interpret applied by the AAA.

R-54. Suspension for Nonpayment

If arbitrator compensation or administrative charges have not been paid in full, t may so inform the parties in order that one of them may advance the required p If such payments are not made, the arbitrator may order the suspension or termi of the proceedings. If no arbitrator has yet been appointed, the AAA may suspe proceedings.

EXPEDITED PROCEDURES

E-1. Limitation on Extensions

Except in extraordinary circumstances, the AAA or the arbitrator may grant a pa more than one seven-day extension of time to respond to the demand for arbitr counterclaim as provided in Section R-4.

E-2. Changes of Claim or Counterclaim

A claim or counterclaim may be increased in amount, or a new or different claim counterclaim added, upon the agreement of the other party, or the consent of th arbitrator. After the arbitrator is appointed, however, no new or different claim or counterclaim may be submitted except with the arbitrator's consent. If an increa claim or counterclaim exceeds $75,000, the case will be administered under the procedures unless all parties and the arbitrator agree that the case may continu processed under the Expedited Procedures.

E-3. Serving of Notices

In addition to notice provided by Section R-39(b), the parties shall also accept n telephone. Telephonic notices by the AAA shall subsequently be confirmed in w the parties. Should there be a failure to confirm in writing any such oral notice, t proceeding shall nevertheless be valid if notice has, in fact, been given by telep

E-4. Appointment and Qualifications of Arbitrator

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(a) The AAA shall simultaneously submit to each party an identical list of fi proposed arbitrators drawn from its National Roster from which one arbi shall be appointed.

(b) The parties are encouraged to agree to an arbitrator from this list and t the AAA of their agreement. If the parties are unable to agree upon an arbitrator, each party may strike two names from the list and return it to within seven days from the date of the AAA's mailing to the parties. If f reason the appointment of an arbitrator cannot be made from the list, th may make the appointment from other members of the panel without th submission of additional lists.

(c) The parties will be given notice by the AAA of the appointment of the ar who shall be subject to disqualification for the reasons specified in Secti 17. The parties shall notify the AAA within seven days of any objection arbitrator appointed. Any such objection shall be for cause and shall be confirmed in writing to the AAA with a copy to the other party or parties.

E-5. Exchange of Exhibits

At least two business days prior to the hearing, the parties shall exchange copie exhibits they intend to submit at the hearing. The arbitrator shall resolve dispute concerning the exchange of exhibits.

E-6. Proceedings on Documents

Where no party's claim exceeds $10,000, exclusive of interest and arbitration co other cases in which the parties agree, the dispute shall be resolved by submiss documents, unless any party requests an oral hearing, or the arbitrator determin an oral hearing is necessary. The arbitrator shall establish a fair and equitable procedure for the submission of documents.

E-7. Date, Time, and Place of Hearing

In cases in which a hearing is to be held, the arbitrator shall set the date, time, a place of the hearing, to be scheduled to take place within 30 days of confirmatio arbitrator's appointment. The AAA will notify the parties in advance of the heari

E-8. The Hearing

(a) Generally, the hearing shall not exceed one day. Each party shall hav opportunity to submit its proofs and complete its case. The arbitrator sh determine the order of the hearing, and may require further submission documents within two days after the hearing. For good cause shown, th arbitrator may schedule additional hearings within seven business days the initial day of hearings.

(b) Generally, there will be no stenographic record. Any party desiring a stenographic record may arrange for one pursuant to the provisions of R-26.

E-9. Time of Award

Unless otherwise agreed by the parties, the award shall be rendered not later th days from the date of the closing of the hearing or, if oral hearings have been w from the date of the AAA's transmittal of the final statements and proofs to the arbitrator.

E-10. Arbitrator's Compensation

Arbitrators will receive compensation at a rate to be suggested by the AAA regio office.

PROCEDURES FOR LARGE, COMPLEX COMMERCIAL DISPUTES

L-1. Administrative Conference

Prior to the dissemination of a list of potential arbitrators, the AAA shall, unless t parties agree otherwise, conduct an administrative conference with the parties a their attorneys or other representatives by conference call. The conference will place within 14 days after the commencement of the arbitration. In the event th are unable to agree on a mutually acceptable time for the conference, the AAA contact the parties individually to discuss the issues contemplated herein. Such administrative conference shall be conducted for the following purposes and for additional purposes as the parties or the AAA may deem appropriate:

(a) to obtain additional information about the nature and magnitude of the and the anticipated length of hearing and scheduling;

(b) to discuss the views of the parties about the technical and other qualifi of the arbitrators;

(c) to obtain conflicts statements from the parties; and

(d) to consider, with the parties, whether mediation or other non-adjudicati methods of dispute resolution might be appropriate.

L-2. Arbitrators

(a) Large, Complex Commercial Cases shall be heard and determined by one or three arbitrators, as may be agreed upon by the parties. If the p are unable to agree upon the number of arbitrators and a claim or count involves at least $1,000,000, then three arbitrator(s) shall hear and dete the case. If the parties are unable to agree on the number of arbitrators each claim and counterclaim is less than $1,000,000, then one arbitrato hear and determine the case.

(b) The AAA shall appoint arbitrator(s) as agreed by the parties. If they ar to agree on a method of appointment, the AAA shall appoint arbitrators Large, Complex Commercial Case Panel, in the manner provided in the Regular Commercial Arbitration Rules. Absent agreement of the partie arbitrator(s) shall not have served as the mediator in the mediation pha instant proceeding.

L-3. Preliminary Hearing

As promptly as practicable after the selection of the arbitrator(s), a preliminary h shall be held among the parties and/or their attorneys or other representatives a arbitrator(s). Unless the parties agree otherwise, the preliminary hearing will be conducted by telephone conference call rather than in person. At the preliminar hearing the matters to be considered shall include, without limitation:

(a) service of a detailed statement of claims, damages and defenses, a sta of the issues asserted by each party and positions with respect thereto,

legal authorities the parties may wish to bring to the attention of the arbitrat

(b) stipulations to uncontested facts;

(c) the extent to which discovery shall be conducted;

(d) exchange and premarking of those documents which each party believ be offered at the hearing;

(e) the identification and availability of witnesses, including experts, and su matters with respect to witnesses including their biographies and expect testimony as may be appropriate;

(f) whether, and the extent to which, any sworn statements and/or deposit may be introduced;

(g) the extent to which hearings will proceed on consecutive days;

(h) whether a stenographic or other official record of the proceedings shall maintained;

(i) the possibility of utilizing mediation or other non-adjudicative methods dispute resolution; and

(j) the procedure for the issuance of subpoenas.

By agreement of the parties and/or order of the arbitrator(s), the pre-hearing activities and the hearing procedures that will govern the arbitration will be memorialized in a Scheduling and Procedure Order.

L-4. Management of Proceedings

(a) Arbitrator(s) shall take such steps as they may deem necessary or desi avoid delay and to achieve a just, speedy and cost-effective resolution Complex Commercial Cases.

(b) Parties shall cooperate in the exchange of documents, exhibits and inf within such party's control if the arbitrator(s) consider such production t consistent with the goal of achieving a just, speedy and cost-effective re of a Large, Complex Commercial Case.

(c) The parties may conduct such discovery as may be agreed to by all the provided, however, that the arbitrator(s) may place such limitations on t conduct of such discovery as the arbitrator(s) shall deem appropriate. I parties cannot agree on production of documents and other information, arbitrator(s), consistent with the expedited nature of arbitration, may est the extent of the discovery.

(d) At the discretion of the arbitrator(s), upon good cause shown and consi with the expedited nature of arbitration, the arbitrator(s) may order depo of, or the propounding of interrogatories to, such persons who may pos information determined by the arbitrator(s) to be necessary to determin the matter.

(e) The parties shall exchange copies of all exhibits they intend to submit hearing 10 business days prior to the hearing unless the arbitrator(s) de

otherwise.

(f) The exchange of information pursuant to this rule, as agreed by the pa and/or directed by the arbitrator(s), shall be included within the Scheduli Procedure Order.

(g) The arbitrator is authorized to resolve any disputes concerning the exc information.

(h) Generally hearings will be scheduled on consecutive days or in blocks consecutive days in order to maximize efficiency and minimize costs.

OPTIONAL RULES FOR EMERGENCY MEASURES OF PROTECTION

O-1. Applicability

Where parties by special agreement or in their arbitration clause have adopted t rules for emergency measures of protection, a party in need of emergency relief the constitution of the panel shall notify the AAA and all other parties in writing o nature of the relief sought and the reasons why such relief is required on an em basis. The application shall also set forth the reasons why the party is entitled t relief. Such notice may be given by facsimile transmission, or other reliable me must include a statement certifying that all other parties have been notified or a explanation of the steps taken in good faith to notify other parties.

O-2. Appointment of Emergency Arbitrator

Within one business day of receipt of notice as provided in Section O-1, the AA appoint a single emergency arbitrator from a special AAA panel of emergency arbitrators designated to rule on emergency applications. The emergency arbitr shall immediately disclose any circumstance likely, on the basis of the facts disc the application, to affect such arbitrator's impartiality or independence. Any cha to the appointment of the emergency arbitrator must be made within one busine of the communication by the AAA to the parties of the appointment of the emerg arbitrator and the circumstances disclosed.

O-3. Schedule

The emergency arbitrator shall as soon as possible, but in any event within two business days of appointment, establish a schedule for consideration of the app for emergency relief. Such schedule shall provide a reasonable opportunity to a parties to be heard, but may provide for proceeding by telephone conference or written submissions as alternatives to a formal hearing.

O-4. Interim Award

If after consideration the emergency arbitrator is satisfied that the party seeking emergency relief has shown that immediate and irreparable loss or damage will the absence of emergency relief, and that such party is entitled to such relief, th emergency arbitrator may enter an interim award granting the relief and stating t reasons therefore.

O-5. Constitution of the Panel

Any application to modify an interim award of emergency relief must be based o changed circumstances and may be made to the emergency arbitrator until the

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constituted; thereafter such a request shall be addressed to the panel. The em arbitrator shall have no further power to act after the panel is constituted unless parties agree that the emergency arbitrator is named as a member of the panel.

O-6. Security

Any interim award of emergency relief may be conditioned on provision by the p seeking such relief of appropriate security.

O-7. Special Master

A request for interim measures addressed by a party to a judicial authority shall deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate. If the AAA is directed by a judicial authority to nominate a special mas consider and report on an application for emergency relief, the AAA shall proce provided in Section O-1 of this article and the references to the emergency arbit shall be read to mean the special master, except that the special master shall is report rather than an interim award.

O-8. Costs

The costs associated with applications for emergency relief shall initially be app by the emergency arbitrator or special master, subject to the power of the panel determine finally the apportionment of such costs.

ADMINISTRATIVE FEES

The administrative fees of the AAA are based on the amount of the claim or counterclaim. Arbitrator compensation is not included in this schedule. Unless t parties agree otherwise, arbitrator compensation and administrative fees are su allocation by the arbitrator in the award.

In an effort to make arbitration costs reasonable for consumers, the AAA has a fee schedule for consumer-related disputes. Please refer to Section C-8 of the *Supplementary Procedures for Consumer-Related Disputes* when filing a consu related claim.

The AAA applies the *Supplementary Procedures for Consumer-Related Dispute* arbitration clauses in agreements between individual consumers and businesse the business has a standardized, systematic application of arbitration clauses wi customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in all of its terms, conditions, features, or choices. The product or service must be personal or household use. The AAA will have the discretion to apply or not to the Supplementary Procedures and the parties will be able to bring any dispute concerning the application or non-application to the attention of the arbitrator. Consumers are not prohibited from seeking relief in a small claims court for disp claims within the scope of its jurisdiction, even in consumer arbitration cases file business.

Fees

An initial filing fee is payable in full by a filing party when a claim, counterclaim o additional claim is filed. A case service fee will be incurred for all cases that pro their first hearing. This fee will be payable in advance at the time that the first h scheduled. This fee will be refunded at the conclusion of the case if no hearing occurred. However, if the Association is not notified at least 24 hours before th

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the scheduled hearing, the case service fee will remain due and will not be refu

These fees will be billed in accordance with the following schedule:

Amount of Claim	Initial Filing Fee	Case Servic
Above $0 to $10,000	$500	$200
Above $10,000 to $75,000	$750	$300
Above $75,000 to $150,000	$1,500	$750
Above $150,000 to $300,000	$2,750	$1,250
Above $300,000 to $500,000	$4,250	$1,750
Above $500,000 to $1,000,000	$6,000	$2,500
Above $1,000,000 to $5,000,000	$8,000	$3,250
Above $5,000,000 to $10,000,000	$10,000	$4,000
Above $10,000,000	*	*
Nonmonetary Claims**	$3,250	$1,250

Fee Schedule for Claims in Excess of $10 Million.

The following is the fee schedule for use in disputes involving claims in excess million. If you have any questions, please consult your local AAA office or case management center.

Claim Size	Fee	Case Servi
$10 million and above	Base fee of $ 12,500 plus .01% of the amount of claim above $ 10 million.	$6,000
	Filing fees capped at $65,000	

** This fee is applicable only when a claim or counterclaim is not for a monetary amount. Where a monetary claim amount is not known, parties will be required a range of claims or be subject to the highest possible filing fee.

Fees are subject to increase if the amount of a claim or counterclaim is modified the initial filing date. Fees are subject to decrease if the amount of a claim or counterclaim is modified before the first hearing.

The minimum fees for any case having three or more arbitrators are $2,750 for t fee, plus a $1,250 case service fee. Expedited Procedures are applied in any c where no disclosed claim or counterclaim exceeds $75,000, exclusive of interes arbitration costs.

Parties on cases held in abeyance for one year by agreement, will be assessed annual abeyance fee of $300. If a party refuses to pay the assessed fee, the ot party or parties may pay the entire fee on behalf of all parties, otherwise the mat be closed.

Refund Schedule

The AAA offers a refund schedule on filing fees. For cases with claims up to $7 minimum filing fee of $300 will not be refunded. For all other cases, a minimum $500 will not be refunded. Subject to the minimum fee requirements, refunds wi calculated as follows:

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- 100% of the filing fee, above the minimum fee, will be refunded if the cas settled or withdrawn within five calendar days of filing.
- 50% of the filing fee, in any case with filing fees in excess of $500, will be refunded if the case is settled or withdrawn between six and 30 calendar filing. Where the filing fee is $500, the refund will be $200.
- 25% of the filing fee will be refunded if the case is settled or withdrawn b 31 and 60 calendar days of filing.

No refund will be made once an arbitrator has been appointed (this includes on arbitrator on a three-arbitrator panel). No refunds will be granted on awarded ca

Note: the date of receipt of the demand for arbitration with the AAA will be used calculate refunds of filing fees for both claims and counterclaims.

Hearing Room Rental

The fees described above do not cover the rental of hearing rooms, which are a on a rental basis. Check with the AAA for availability and rates.

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KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

To: Chairman Vratil and Members of the Senate Committee on Judiciary

From: Callie Jill Denton for the Kansas Trial Lawyers Association

Date: March 7, 2005

Re: **HB 2016**

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 testimony in opposition to 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 as amended by the House eliminates one 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.

Current Kansas law permits arbitration of any dispute when the parties agree to arbitration *after* a dispute arises. HB 2016 deals with arbitration agreements that are signed by the parties *prior to* the dispute. The distinction is significant: Kansas citizens may not have anticipated a dispute and doesn't fully understand they may have limited their procedural and constitutional rights by agreeing to arbitration. Even more problematic is the situation where the parties to the dispute are of unequal bargaining power—for example, employer and employee, doctor and patient, elderly resident and nursing home—and the stronger party drafts the pre-dispute arbitration contract. In such situations, arbitration is not appropriate for the following reasons:

1. Consumers and/or employees may not know that they are 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.

2. Arbitration provisions may limit the selection of an arbitrator to a service selected by the employer/company. The service provider may be dependent on the employer/company for repeat business, raising questions of impartiality.

Terry Humphrey, Executive Director

Fire Station No. 2 • 719 SW Van Buren Street, Suite 100 • Topeka, Ks 66603-3715 • 785.232.7756

E-Mail: triallaw @ ink.org

3. The party that drafts the arbitration agreement—the employer/company--can specify the arbitration rules and require complete secrecy of the proceedings and outcome, limit what evidence can be presented, and limit discovery. There is no subpoena power in arbitration so a claimant cannot compel third parties to produce relevant evidence.

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

5. The arbitration proceeding does not necessarily take place in a location convenient to the claimant. Arbitration clauses usually require that any arbitration take place in a specified location, often a place convenient to the drafter such as where the company or employer 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.

KTLA believes that current Kansas law provides appropriate protections for situations in which pre-dispute arbitration contracts are unfair—when the parties are not on equal footing and don't understand how arbitration works. Prohibiting pre-dispute arbitration contracts in situations where citizens are more likely to be at a disadvantage—contracts of insurance, employer-employee contracts, and contracts for the resolution of torts—is a correct public policy goal. At the same time, current Kansas law that permits parties to agree to arbitrate any dispute, post-dispute, encourages citizens to choose arbitration if and when it makes sense for both parties.

KTLA believes the current law provides an appropriate balance, and respectfully requests your opposition to HB 2016.

WSJ.com THE WALL STREET JOURNAL. ONLINE

October 1, 2003

PERSONAL JOURNAL

Signing Away Your Right to Sue

In Significant Legal Shift, Doctors, Gyms, Cable Services Start to Require Arbitration

By JANE SPENCER
Staff Reporter of THE WALL STREET JOURNAL

It is a tough choice: Give up your legal rights -- or forget about joining a gym, getting a cellphone or even seeing your doctor.

In an effort to fend off lawsuits, a growing number of companies, including Comcast Corp. and Amazon.com Inc., are asking consumers to agree to "mandatory arbitration" and waive their right to sue the company if a dispute arises.

These binding arbitration clauses have been standard in credit-card and stock brokerage contracts for years, but they are now migrating into the fine print of everyday consumer services, including cable TV, cellphones, online retailers, gyms, auto financing firms, travel agencies and summer camps.

Even more jarring to some consumers: While health-maintenance organizations have long required arbitration, some private doctors -- in an effort to rein in medical-malpractice claims -- are making patients agree to arbitration before they receive medical care.

Companies say mandatory binding arbitration offers both parties a cheaper and quicker alternative to drawn-out court battles and prevents trial lawyers from reaping the benefits of massive class-action settlements. "You still get to have your rights heard, it's just more efficient," says Silvia Kleer, a lawyer for Ford Motor Credit Co., which is in the midst of introducing an arbitration provision to its auto-financing agreements nationwide.

The downside is that arbitration sharply limits consumers' ability to battle companies through the court system. Some even prohibit suits in small-claims court. Many consumers don't realize they have agreed to arbitration until they have a problem, since the clauses are typically tucked into contracts or described in "bill stuffers" that accompany monthly statements.

OPTING OUT

How consumers can avoid mandatory arbitration clauses:

• Credit-card issuers Discover, Chase and Fleet give cardholders a 30-day window to reject the arbitration terms.

Critics say these agreements force consumers into a second-rate justice system with no jury and few opportunities to appeal. The proceedings are usually private, which means companies are spared bad publicity, and there often is no public record. "The corporate world understands this as a way to subvert the jury system and

- Some organizations like AARP don't allow arbitration clauses on affinity credit cards. Some credit unions also offer clause-free cards.
- While doctors and hospitals may pressure you to sign an agreement, many will still treat you even if you don't.

get tort reform in a way they have not been able to do through state legislatures," says Joanne Doroshow, executive director of the Center for Justice & Democracy in New York.

The agreements are showing up in an increasing variety of places. Cable provider Comcast Corp. recently added arbitration provisions to both its high-speed Internet and cable-television contracts. All of AOL Time Warner Inc.'s high-speed Internet companies -- including AOL for Broadband, Road Runner and EarthLink -- require arbitration, and the company says it is considering adding arbitration to its cable-TV contracts. Dozens of heavily trafficked Web sites, including eBay Inc., Amazon and Hotels.com include an arbitration provision to the terms & conditions section.

Movie-rental companies like Hollywood Entertainment Corp.'s Hollywood Video and Blockbuster Inc. require arbitration, and the clauses continue to proliferate in the financial-services industry: Capital One Financial Corp. added a clause to its credit-card agreement last year, and Sallie Mae, a student-loan finance company, now requires it with some services.

The trend is also taking hold in the health-care field, as doctors seek ways to limit skyrocketing liability-insurance premiums. The American Medical Association has come out in favor of arbitration, and some states are actively taking steps to encourage doctors to use it. In March, the Utah state Legislature passed a law that allows doctors to turn away patients who refuse to sign arbitration clauses.

Signing at the Doctor's Office

Heidi Olsen of Payson, Utah, experienced the state's new law first hand in April, when she was three weeks away from delivering her fourth child. Her obstetrician's staff handed her a document, and told her to sign. "I didn't want to sign my rights away, just because their insurance rates are going up," says Ms. Olsen. But Ms. Olsen, who says she likes her doctor and didn't want to make a last-minute switch, eventually relented and signed the agreement.

Consumer groups say arbitration gives companies the upper hand in disputes. Companies don't directly dictate the outcome of the hearings, and consumers often have a say in which individual arbitrator hears the case. Still, in consumer contracts, companies often name the arbitration firm that will handle all of their disputes: Sprint Corp.'s new consumer contracts require that all arbitrations be heard by the CPR Institute for Dispute Resolution.

Arbitration firms say the financial arrangements don't influence rulings, and arbitrators are trained to be highly independent. For instance, the American Arbitration Association, used by Verizon Wireless, says that consumers win at least some financial damages in 57% of cases it hears. Richard Naimark, senior vice president at the association, says the speed of arbitration proceedings, which are completed in just four months, on average, is ultimately far more consumer-friendly than the court system. "Companies can outlast you; they can outspend you in court," says Mr. Naimark.

But arbitration can also be costly for consumers. A simple hearing may cost consumers only $100 or so, and sometimes companies will pick that up. But consumers seeking large damages can spend far more, and probably need to hire a lawyer. Thomas Campbell, a trial lawyer in Birmingham, Ala., who has filed two arbitration claims for clients over termite-control contracts, says the total filing costs in the cases came to $12,000 and $16,000, respectively, not including his

lawyer fees.

While state and federal courts generally have upheld arbitration agreements, they have thrown out some clauses that were deemed too restrictive. The result: Companies are rapidly rewriting their agreements, to make the arbitration clauses impervious to legal challenges down the road. In the past year, companies including Morgan Stanley's Discover unit, eBay and Sprint have all revised the terms of their arbitration clauses.

The revisions, which companies commonly mail along with their monthly bill, often give savvy consumers a way to back out of the clauses. But you need to act quickly. Credit cards issued through Fleet, Discover and Capital One all have offered consumers a 30-day window to opt-out when the arbitration contract is revised. But once you miss the window, you're locked in.

Shopping Around

Customers can also shop around for companies that don't require arbitration. Many small credit unions, like Tower Federal Credit Union of Laurel, Md., will issue credit cards without contracts. Nextel, for example, is one of the only wireless providers that doesn't include arbitration provision in its contracts.

Consumers can also avoid arbitration provisions when they get a credit card through organizations that have negotiating power with credit-card issuers. All credit cards issued by AARP, for example, don't contain arbitration provisions since the organization refuses to accept them.

One customer turned the tables on her termite-control company. Margo Rebar of Vestavia Hills, Ala., was required to sign an arbitration contract when she signed up for termite-control insurance. So when she paid her monthly bill, she included a note stating that by cashing the check, the company was agreeing to let her out of the arbitration clause. The check was cashed -- and last fall the Alabama Supreme Court ruled that it was an enforceable contract. Now, Ms. Rebar is free to sue the company. "We're thrilled," she says.

Write to Jane Spencer at jane.spencer@wsj.com[1]

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Hyperlinks in this Article:
(1) mailto:jane.spencer@wsj.com

Updated October 1, 2003

From: "brendah" <brendah@kssentcomm.org>
To: <vratil@senate.state.ks.us>, <goodwin@senate.state.ks.us>, "Nancy Lister" <nancyl@senate.state.ks.us>, "Helen Abramson" <helena@senate.state.ks.us>
Date: 3/3/2005 5:03:17 PM
Subject: SB 179 agg indecent libs with balloon -Impact Statement

Submitted by Chairman Vratil

Attached you will find the impact statement for SB 179 with the balloon amendment discussed in Committee today.

If you have any questions or need additional information, please do not hesitate to contact me.

--Patti

Patricia Biggs, Executive Director

Kansas Sentencing Commission

700 SW Jackson St. Suite # 501

Topeka KS 66603

785-296-0923 (voice) 785-296-0927 (fax)

<mailto:patriciab@kssentcomm.org> patriciab@kssentcomm.org

Senate Judiciary
3-7-06
Attachment 14

KANSAS

MEMORANDUM

To: Chairman Vratil

From: Patricia Biggs, Executive Director

Date: March 3, 2005

RE: Fiscal Note on amended SB 179

SUMMARY OF BILL:
AN ACT concerning offenses against children; relating to enhancing penalties; amending K.S.A. 21-3510 and 21-3511 and K.S.A. 2004 Supp. 21-3516 and repealing the existing sections.

This bill will likely have an impact upon the Kansas Sentencing Guidelines Act. Specifically, this bill will:

- raise the severity level for aggravated indecent solicitation of child from a severity level 6 person felony ***to*** a severity level 5 person felony.
- change the definition of sexual exploitation of a child in subsection (a)(2) to allow the defendant to be charged with multiple counts of sexual exploitation of a child for each visual depiction of child pornography. Sexual exploitation of a child is a severity level 5 person felony.

Section 1 amends K.S.A. 21-3511 (b) to raise the severity level for aggravated indecent solicitation of a child from a severity level 6 person felony ***to*** a severity level 5 person felony.

Section 2 amends K.S.A. 2004 Supp. 21-3516 (a)(2) to define sexual exploitation of a child is: possessing any visual depiction, including any photograph, film, video picture, digital or computer generated image or picture, whether made or produced by electronic, mechanical or other means, where such visual depiction is of a child under 18 years of age is shown or heard engaging in sexually explicit conduct with intent to arouse or satisfy the sexual desires or appeal to the prurient interest of the offender, the child or another. Sexual exploitation of a child is a severity level 5 person felony.

Section 3 repeals K.S.A. 21-3510 and 21-3511 and K.S.A. 2004 Supp. 21-3516.

Section 4 sets the effective date as publication in the statute book.

700 SW Jackson Street, Suite 501, Topeka, KS 66603 -3714
Voice 785-296-0923 Fax 785-296-0927 http://www.accesskansas.org/ksc/SiteMap.htm

IMPACT ON KANSAS SENTENCING COMMISSION:
Based on the current duties of the Kansas Sentencing Commission, the change(s) proposed in this bill will affect the following:

- ☐ The current operation or responsibilities of the Commission
- ☐ The current budget of the Commission.
- ☐ The current staffing and operating expenditure levels of the Commission.
- ☐ The long-range fiscal estimates of the Commission.
- ☐ The change(s) proposed in this bill will not likely affect the duties of the Kansas Sentencing Commission.

ANALYTIC RESULT SUMMARY:

IMPACT ON PRISON ADMISSIONS:
- ☐ Increase by an estimated: 18 additional admissions in FY 2006; 20 additional admissions in FY 2015
- ☐ Potential to increase but cannot quantify
- ☐ Decrease by an estimated:
- ☐ Potential to decrease but cannot quantify
- ☐ Remain the same

IMPACT ON OFFENDER POPULATION LEVELS:
- ☐ Impact offender population as noted below **: 18 additional prison beds needed in FY 2006; 113 additional prison admissions in FY 2015**
- ☐ Potentially impact offender population as noted below.
- ☐ Minimal or no impact on offender population.
- ☐ May impact offender population but cannot quantify with data available.

ASSUMPTIONS
- Population:
  - Target: The target population of this assessment is any offender convicted of the crimes of:
    - ~~Indecent solicitation of a child (K.S.A. 21-3510)~~
    - Aggravated indecent solicitation of a child (K.S.A. 21-3511)
    - Sexual exploitation of a child (K.S.A. 21-3516)
  - Growth Rate: Projected admissions to KDOC correctional facilities are assumed to increase by an annual average of one and one-half percent which is consistent with the underlying growth assumption used in the baseline forecast.
  - Impact Relation: Bed space impacts are in relation to the baseline forecast produced in September 2004 by the Kansas Sentencing Commission.
- This bill, with balloon amendments:
  - ~~raises the severity level of indecent solicitation of a child from a severity level 7 person felony to a severity level 6 person felony~~
  - raises the severity level of aggravated indecent solicitation of a child from a severity level 6 person felony to a severity level 5 person felony
    - average length of sentence for severity level 5 is assumed to be 30 months.

- changes the definition of sexual exploitation of a child

- Percentage of target inmate sentence served in prison is assumed to be 85% -- consistent with projections produced September 2004.

- Data Source: This impact projection is based on
  - FY 2004 Prison Admissions
  - FY 2004 felony sentencing journal entries

- Effective Date: This policy is assumed effective July 1, 2005.

PRESENTATION OF ANALYSIS AND RESULTS:

Prison Admissions:

- During FY 2004, 30 offenders convicted of the above offenses were admitted to prison. Of this number,
  - 26 (86.7%) offenders convicted of the offense of aggravated indecent solicitation of a child
    - The average length of sentence for this group is 25.3 months
  - 4 (13.3%) offenders convicted of the offense of sexual exploitation of a child
    - The average length of sentence for this group is 48.3 months
- Of the 30 offenders,
  - 13 (43.3%) were new court commitments
  - 17 (56.7%) were probation violators

Probation Sentences:

- During FY 2004, 38 offenders convicted of the above offenses were sentenced to probation. Of this number,
  - 29 (76.3%) offenders convicted of the offense of aggravated indecent solicitation of a child
  - 9 (23.7%) offenders convicted of the offense of sexual exploitation of a child

Current Policy:

If current policy remains unchanged, by the year 2006, 26 prison beds will be needed and by the year 2015,
56 prison beds will be needed.

Impact Projection:

If the severity level of aggravated indecent solicitation of a child is raised from a severity level 6 person felony to a severity level 5 person felony,

- By the year 2006,
  - There will be 44 prison admissions of target offenders
    - This is an increase of 19 prison admissions
  - There will be 26 prison beds needed for target offenders
    - This is an increase of 18 beds over current policy-based projections
- By the year 2015,
  - There will be 50 prison admissions of target offenders
    - This is an increase of 20 prison admissions
  - There will be 169 prison beds needed for target offenders

- This is an increase of 113 beds over current policy-based projections.

There is no impact from the definitional change of sexual exploitation of a child.
Changes resulting from the change in the method of counting offenses (Section 3 change to "visual depiction") cannot be estimated with available data.

Prison Admission Impact Assessment

Fiscal Year	Current Policy Unchanged Prison Admission	If Severity Level Raised From 6 to 5 Prison Admission	Additional Prison Admission
2006	26	44	18
2007	27	44	17
2008	27	45	18
2009	28	46	18
2010	28	46	18
2011	28	47	19
2012	29	48	19
2013	29	48	19
2014	30	49	19
2015	30	50	20

Prison Bed Space Impact Assessment

Fiscal Year	Current Policy Unchanged Beds Needed	If Severity Level Raised From 6 to 5 Beds Needed	Additional Beds Needed
2006	26	44	18
2007	36	88	52
2008	42	133	91
2009	44	156	112
2010	45	156	111
2011	53	161	108
2012	53	164	111
2013	57	165	108
2014	53	167	114
2015	56	169	113

CONCLUSION: IMPACT OF SB 179 with Balloon Amendment:
Admissions: The impact of this bill will result in 18 additional prison admissions in FY 2006 and 20 additional prison admissions in FY 2015.

Prison Beds: The impact of this bill will result in the need for 18 additional prison beds by FY 2006 and 113 additional prison beds by FY 2015.

FEB 16 RECD 2/16/05

Jim O'Connor -

Here is a draft substitute for SB 38.

Larry Swenson
296-3680

Submitted by Chairman Vratil.

Senate Judiciary
3-7-05
Attachment 15

Substitute for Senate Bill No. 38

AN ACT concerning records of the state board of healing arts not subject to discovery or release; amending K.S.A. 65-3836 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. A licensee's license may be revoked, suspended or limited, or the licensee may be publicly or privately censured, or an application for a license or for reinstatement of a license may be denied upon a finding of the existence of any of the following grounds:

(a) The licensee has committed fraud or misrepresentation in applying for or securing an original, renewal or reinstated license.

(b) The licensee has committed an act of unprofessional or dishonorable conduct or professional incompetency.

(c) The licensee has been convicted of a felony or class A misdemeanor, whether or not related to the practice of the healing arts. The board shall revoke a licensee's license following conviction of a felony occurring after July 1, 2000, unless a 2/3 majority of the board members present and voting determine.by clear and convincing evidence that such licensee will not pose a threat to the public in such person's capacity as a licensee and that such person has been sufficiently rehabilitated to warrant the public trust. In the case of a person who has been convicted of a felony and who applies for an original license or to reinstate a canceled license, the application for a license shall be denied unless a 2/3 majority of the board members present and voting on such application determine by clear and convincing evidence that such person will not pose a threat to the public in such person's capacity as a licensee and that such person has been sufficiently rehabilitated to warrant the public trust.

(d) The licensee has used fraudulent or false advertisements.

(e) The licensee is addicted to or has distributed intoxicating liquors or drugs for any other than lawful purposes.

(f) The licensee has willfully or repeatedly violated this act, the pharmacy act of the state of Kansas or the uniform controlled substances act, or any rules and regulations adopted pursuant thereto, or any rules and regulations of the secretary of health and environment which are relevant to the practice of the healing arts.

(g) The licensee has unlawfully invaded the field of practice of any branch of the healing arts in which the licensee is not licensed to practice.

(h) The licensee has engaged in the practice of the healing arts under a false or assumed name, or the impersonation of another practitioner. The provisions of this subsection relating to an assumed name shall not apply to licensees practicing under a professional corporation or other legal entity duly authorized to provide such professional services in the state of Kansas.

(i) The licensee has the inability to practice the healing arts with reasonable skill and safety to patients by reason of physical or mental illness, or condition or use of alcohol, drugs or controlled substances. In determining whether or not such inability exists, the board, upon reasonable suspicion of such inability, shall have authority to compel a licensee to submit to mental or physical examination or drug screen, or any combination thereof, by such persons as the board may designate either in the course of an investigation or a disciplinary proceeding. To determine whether reasonable suspicion of such inability exists, the investigative information shall be presented to the board as a whole, to a review committee of professional peers of the licensee established pursuant to K.S.A.

65-2840c and amendments thereto or to a committee consisting of the officers of the board elected pursuant to K.S.A. 65-2818 and amendments thereto and the executive director appointed pursuant to K.S.A. 65-2878 and amendments thereto or to a presiding officer authorized pursuant to K.S.A. 77-514 and amendments thereto. The determination shall be made by a majority vote of the entity which reviewed the investigative information. Information submitted to the board as a whole or a review committee of peers or a committee of the officers and executive director of the board and all reports, findings and other records shall be confidential and not subject to discovery by or release to any person or entity except for those ordered by a court to be disclosed following an in camera review. The licensee shall submit to the board a release of information authorizing the board to obtain a report of such examination or drug screen, or both. A person affected by this subsection shall be offered, at reasonable intervals, an opportunity to demonstrate that such person can resume the competent practice of the healing arts with reasonable skill and safety to patients. For the purpose of this subsection, every person licensed to practice the healing arts and who shall accept the privilege to practice the healing arts in this state by so practicing or by the making and filing of a renewal to practice the healing arts in this state shall be deemed to have consented to submit to a mental or physical examination or a drug screen, or any combination thereof, when directed in writing by the board and further to have waived all objections to the admissibility of the testimony, drug screen or examination report of the person conducting such examination or drug screen, or both, at any proceeding or hearing before the board on the ground that such testimony or examination or drug screen report constitutes a privileged communication. In any proceeding by the board pursuant to the provisions of this subsection, the record of such board proceedings involving the mental and physical examination or drug screen, or any combination thereof, shall not be used in any other administrative or judicial proceeding.

(j) The licensee has had a license to practice the healing arts revoked, suspended or limited, has been censured or has had other disciplinary action taken, or an application for a license denied, by the proper licensing authority of another state, territory, District of Columbia, or other country, a certified copy of the record of the action of the other jurisdiction being conclusive evidence thereof.

(k) The licensee has violated any lawful rule and regulation promulgated by the board or violated any lawful order or directive of the board previously entered by the board.

(l) The licensee has failed to report or reveal the knowledge required to be reported or revealed under K.S.A. 65-28,122 and amendments thereto.

(m) The licensee, if licensed to practice medicine and surgery, has failed to inform in writing a patient suffering from any form of abnormality of the breast tissue for which surgery is a recommended form of treatment, of alternative methods of treatment recognized by licensees of the same profession in the same or similar communities as being acceptable under like conditions and circumstances.

(n) The licensee has cheated on or attempted to subvert the validity of the examination for a license.

(o) The licensee has been found to be mentally ill, disabled, not guilty by reason of insanity, not guilty because the licensee suffers from a mental disease or defect or incompetent to stand trial by a court of competent jurisdiction.

(p) The licensee has prescribed, sold, administered, distributed or given a controlled substance to any person for other than medically accepted or lawful purposes.

(q) The licensee has violated a federal law or regulation relating to controlled substances.

(r) The licensee has failed to furnish the board, or its investigators or representatives, any information legally requested by the board.

(s) Sanctions or disciplinary actions have been taken against the licensee by a peer review committee, health care facility, a governmental agency or department or a professional association or society for acts or conduct similar to acts or conduct which would constitute grounds for disciplinary action under this section.

(t) The licensee has failed to report to the board any adverse action taken against the licensee by another state or licensing jurisdiction, a peer review body, a health care facility, a professional association or society, a governmental agency, by a law enforcement agency or a court for acts or conduct similar to acts or conduct which would constitute grounds for disciplinary action under this section.

(u) The licensee has surrendered a license or authorization to practice the healing arts in another state or jurisdiction, has surrendered the authority to utilize controlled substances issued by any state or federal agency, has agreed to a limitation to or restriction of privileges at any medical care facility or has surrendered the licensee's membership on any professional staff or in any professional association or society while under investigation for acts or conduct similar to acts or conduct which would constitute grounds for disciplinary action under this section.

(v) The licensee has failed to report to the board surrender of the licensee's license or authorization to practice the healing arts in another state or jurisdiction or surrender of the licensee's membership on any professional staff or in any professional association or society while under investigation for acts or conduct similar to acts or conduct which would constitute grounds for disciplinary action under this section.

(w) The licensee has an adverse judgment, award or settlement against the licensee resulting from a medical liability claim related to acts or conduct similar to acts or conduct which would constitute grounds for disciplinary action under this section.

(x) The licensee has failed to report to the board any adverse judgment, settlement or award against the licensee resulting from a medical malpractice liability claim related to acts or conduct similar to acts or conduct which would constitute grounds for disciplinary action under this section.

(y) The licensee has failed to maintain a policy of professional liability insurance as required by K.S.A. 40-3402 or 40-3403a and amendments thereto.

(z) The licensee has failed to pay the premium surcharges as required by K.S.A. 40-3404 and amendments thereto.

(aa) The licensee has knowingly submitted any misleading, deceptive, untrue or fraudulent representation on a claim form, bill or statement.

(bb) The licensee as the responsible physician for a physician assistant has failed to adequately direct and supervise the physician assistant in accordance with the physician assistant licensure act or rules and regulations adopted under such act.

(cc) The licensee has assisted suicide in violation of K.S.A. 21-3406 as established by any of the following:

(A) A copy of the record of criminal conviction or plea of guilty for a felony in violation of K.S.A. 21-3406 and amendments thereto.

(B) A copy of the record of a judgment of contempt of court for violating an injunction issued under K.S.A. 2002 Supp. 60-4404 and amendments thereto.

(C) A copy of the record of a judgment assessing damages under K.S.A. 2002 Supp. 60-4405 and amendments thereto.

Sec. 2. K.S.A. 65-2836 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.