KANSAS BAR ASSOCIATION

TO: **The Honorable Fred Patton, Chair**
And Members of the House Judiciary Committee

FROM: **Robert B. Sullivan**
On behalf of the Kansas Bar Association

RE: **KBA Support for HB 2072 – Amending the uniform arbitration act of 2000 to address validity of an agreement to arbitrate in a contract for insurance**

DATE: **February 4, 2019**

Chairman Patton and members of the House Judiciary Committee, my name is Robert B. Sullivan. I am an attorney admitted in both Kansas and Missouri and a lifelong resident of Kansas. I am also the Manager and sole member of Sullivan Mediation and Arbitration, LLC. During the last 27 years of my active practice with the law firm of Polsinelli PC, my primary emphasis had been representing members of the insurance industry, insurance companies, insurance agencies and insurance agents. I am licensed as a life and health agent and as a property and casualty in Kansas, which I obtained for educational purposes, as I have never sold an insurance policy.

I am here today to testify in favor of H.B. 2072.

Kansas enacted the Kansas Arbitration Act (K.S.A. 5-401) in 1973. Before its repeal the Kansas Arbitration Act provided that any provision in a written contract to submit to arbitration regarding a controversy between the parties was valid, enforceable and irrevocable, **except for contracts of insurance** (not including reinsurance contracts). When the Kansas Arbitration Act was repealed in 2018 by H.B. 2571 and replaced with the Revised Uniform Arbitration Act of 2000, the exception regarding the prohibition of a binding arbitration clause in an insurance contract was omitted. I believe the amendment as set forth in H.B. 2072 to reinstitute the prohibition is appropriate.

The Kansas Supreme Court in the case of *Tommie L. Friday v. Trinity Universal of Kansas (262 Kan. 347 (1997)* upheld the validity of the prohibition in K.S.A. 5-401,

ruling that a binding appraisal provision in a contract of insurance looked exactly like an arbitration provision and therefore was invalid under K.S.A. 5-401. The court also found that the arbitration provision was not preempted by the *Federal Arbitration Act (9 U.S.C.A section 1)* because the *McCarran-Ferguson Act (15 U.S.C Section 1011 et seq.)* permitted the states the exclusive right to regulate the business of insurance. McCarran-Ferguson is often referred to as a reverse preemption law, allowing states to regulate the business of insurance, rather than federal law.

I would note that Missouri retained it prohibition against arbitration clauses in insurance contracts (R.S.Mo 435.350), which reads "A written agreement to submit any existing controversy to arbitration or a provision in a written contract, **except contracts of insurance and contracts of adhesion**, to submit to arbitration any controversy… between the parties is valid, enforceable and irrevocable…".

If you have any questions, I would be happy to try to answer them.

Note: McCarran-Ferguson provides that "no act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance."

About the Kansas Bar Association:

The Kansas Bar Association (KBA) was founded in 1882 as a voluntary association for dedicated legal professionals. Its more than 7,200 members include lawyers, judges, law students, and paralegals. www.ksbar.org