

COMMONWEALTH OF KENTUCKY  
SUPREME COURT  
NO. 2018-SC-000138-D

NISHA WEST, AS ADMINISTRATRIX  
OF THE ESTATE OF RANDALL  
BRIDGEMAN AND BEULAH  
BRIDGEMAN

APPELLANT

v. On Discretionary Review from the Ky Court of Appeals  
Case No. 15-CA-000720

WOODMEN OF THE WORLD LIFE  
INSURANCE SOCIETY

APPELLEE

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BRIEF ON BEHALF OF *AMICUS CURIAE*  
UNITED POLICYHOLDERS IN SUPPORT OF APPELLANT


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**CERTIFICATE OF SERVICE**

I hereby certify that on February 13, 2019 ten (10) copies of this motion, brief, and \$150 filing fee were served via UPS Overnight upon Susan Stokley Clary, Clerk of the Supreme Court, State Capitol, Room 235, 700 Capitol Ave., Frankfort, KY 40601, with one (1) copy served by USPS 1<sup>st</sup> Class mail upon: Sam Givens, Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Vernon Miniard, Wayne Circuit Court, 100 W. Columbia Avenue, Monticello, KY 42633; R. Craig Reinhardt, 449 Lewis Hargett Circle, Suite 210, Lexington, KY 40503; Lance W. Turner & Yassmin B. King, 56 Court Street, Monticello, KY 42633.

  
Michael D. Grabhorn

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[www.unitedpolicyholders.org](http://www.unitedpolicyholders.org) .....1

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**PURPOSE AND INTEREST OF  
*AMICUS CURIAE* UNITED POLICYHOLDERS**

United Policyholders was founded in 1991 and is a non-profit organization dedicated to educating the public on insurance issues and consumer rights. It advocates for consumer-friendly insurance rights and regularly supports policyholders by participating as *amicus curiae* in state and federal courts throughout the country. The organization is tax-exempt under Internal Revenue Code § 501(c)(3) and is funded by donations and grants from individuals, businesses and foundations.

United Policyholders is an information resource on sales, coverage, claims and litigation-related issues pertaining to the full range of insurance products. An average of 20,000 monthly visitors read articles and tips at [www.unitedpolicyholders.org](http://www.unitedpolicyholders.org). The organization participates in proceedings of the National Association of Insurance Commissioners and receives frequent invitations to testify at legislative and other public hearings, and to participate in regulatory proceedings on rate and policy issues.

A diverse range of policyholders and policyholder advocates communicate on a regular basis with United Policyholders. By processing these communications and monitoring the insurance marketplace and the industry in general, United Policyholders is able to submit pertinent and accurate information to courts throughout the country via *amicus* briefs. United Policyholders has participated as *amicus curiae* in approximately 400 cases across the country involving significant insurance issues. The organization's reputation as a reliable friend of the court was enhanced when its *amicus curiae* brief was cited in the United States Supreme Court's opinion in *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999), and its arguments were adopted by the California Supreme Court in *Vandenberg v. Superior Court*, 982 P.2d 229 (Cal. 1999) and in *TRB Invs., Inc. v.*

*Fireman's Fund Ins. Co.*, 145 P.3d 472 (Cal. 2006). United Policyholders has appeared in many cases in the Sixth Circuit Court of Appeals, including: *Russell v. Catholic Healthcare Partners*, 614 Fed.Appx. 271 (6th Cir. 2015); *Rochow v. Life Insurance Co. of N. America*, 780 F.3d 364 (6th Cir. 2014); *Demolition Contractors, Inc. v. Westchester Surplus Lines Ins. Co.*, 381 Fed.Appx. 526 (6th Cir. 2010); *GenCorp Inc. v. AIU Insurance Co.*, 138 Fed.Appx. 732 (6th Cir. 2005); and *Advance Watch Co. v. Kemper Nat'l Insurance Co.*, 99 F.3d 795 (6th Cir. 1996).

United Policyholders has also appeared in cases involving both Kentucky insurance issues and policyholder interests, including: *Hicks v. State Farm Fire and Cas. Co.*, 2018 U.S.App. LEXIS 28894, \_\_\_ Fed.App'x \_\_\_ (6th Cir. Oct. 15, 2018); *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512 (Ky. 2006); and *Ky. Farm Bureau Mut. Ins. Co. v. Rodgers*, 179 S.W.3d 815 (Ky. 2005). A complete listing of the cases in which United Policyholders has appeared as *amicus curiae* can be found at its online Amicus Project library: [www.uphelp.org/amicus](http://www.uphelp.org/amicus).

Again, United Policyholders regularly appears before the courts as *amicus curiae* in appellate proceedings throughout the United States, providing the courts with its broad experience with insurance principles likely to impact a large segment of the consuming public. United Policyholders' interest in this case is similarly based on its experience and advocacy on behalf of Kentucky policyholders, specifically the interaction between mandatory arbitration clauses and insurance. Its *amicus curiae* should prove helpful to the Court in understanding and resolving this case.<sup>1</sup>

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<sup>1</sup> Please note this brief was not authored in whole or part by counsel for either party. Further, no monetary contribution was made by counsel for either party to fund the preparation or submission of this brief.

## ARGUMENT

The right to trial by jury is a fundamental right throughout the United States. Kentucky is no exception. Since 1891, Kentucky has provided a constitutional “right of trial by jury” with the proviso that the right be “held sacred.”<sup>2</sup> Against this significant constitutional protection is the right to contract – specifically, in this case, to waive the right of trial by jury in favor of mandatory arbitration. Where this right is to be replaced by private mechanisms, such as mandatory arbitration, specific requirements must be satisfied. *Amicus curiae* United Policyholders submits Woodmen’s unilateral arbitration language failed to satisfy each of Kentucky’s applicable statutory requirements and, therefore, the Court should find the language unenforceable.

**A. There is a threshold issue that precludes the enforcement of Woodmen’s unilateral arbitration language – whether there is an enforceable contract.**

It may be wholly unnecessary for this Court to address the interaction between Kentucky’s insurance statutes and Woodmen’s unilateral arbitration provision. Regardless of whether the arbitration provision is subject to Kentucky’s insurance code, it still must comply with KRS 417.050.<sup>3</sup>

*A written agreement* to submit any existing controversy to arbitration or a provision in written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law for the *revocation of any contract*. (emph. added).

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<sup>2</sup> “The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution.” Ky. Const. § 7.

<sup>3</sup> Woodmen’s argument – that because KRS 417.050(2) excludes insurance, and KRS 314.29-231 potentially exempts it from the exclusion, KRS 417.050 is therefore inapplicable – is flawed. Satisfying the “written agreement” requirement is a condition precedent to KRS 417.050 being applicable. Absent a “written agreement,” there cannot be an applicable exclusion for insurance.



By its express terms, the statute requires a written agreement between the parties. Therefore, the “first task of a court asked to compel arbitration is to determine whether the parties agreed to arbitrate that dispute.” *Oakwood Mobile Homes v. Sprowls*, 82 S.W.3d 193, 195 (Ky. 2002). Absent the requisite agreement, the arbitration provision is unenforceable. This is not inconsistent with the public policy favoring arbitration agreements. *See Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850, 854 (Ky. 2004). To the contrary, it enforces the free-market concept that parties can agree to arbitrate and where they have done so the agreement is enforceable. However, where the parties have not agreed, public policy does not support unilateral efforts at mandatory arbitration. Kentucky’s legislature codified this “meeting of the minds” contractual prerequisite in KRS 417.050.

We do not ... signify any retreat from our recognition of the prevalent public policy favoring enforcement of agreements to arbitrate.... However, that policy is extended to contracts for arbitration which satisfy the requirement of KRS 417.050. The ***document involved here is not such a contract.***

*See Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451, 457 (Ky. 2009) (emph. added).

Woodmen has presented no evidence that Bridgeman (the insured) agreed to arbitration. Nor could it. By its own admission, Woodmen previously testified that the agreement was entirely unilateral. The arbitration requirement was “voted on and approved by the Delegates at the National Convention.”<sup>4</sup> Neither Bridgeman, nor any other Kentucky insured, agreed in writing to arbitrate their insurance claims – thereby waiving their constitution rights to a trial by jury. Based on these facts, and consistent

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<sup>4</sup> Appx. Tab 1: Jones Affidavit, ¶ 11.

with both public policy and the legislative mandate in KRS 417.050, Woodmen’s arbitration clause is unenforceable. *See Ally Cat, LLC*, 274 S.W.3d at 457.

**B. An additional issue precludes the enforcement of Woodmen’s unilateral arbitration language – unconscionability.**

As with the discussion of KRS 417.050 and its requirement of a written agreement, the Court need not address Kentucky’s insurance statutes to determine such arbitration language is unconscionable and, as such, unenforceable to Kentucky insureds.

**1. Woodmen’s arbitration language is *procedurally* unconscionable.**

Procedural unconscionability “pertains to the process by which an agreement is reached and the form of an agreement.” *Schnuerle v. Insight Communs., Co. L.P.*, 376 S.W.3d 561, 576 (Ky. 2012). “Factors relevant to the procedural unconscionability inquiry include the bargaining power of the parties, the conspicuousness and comprehensibility of the contract language, the oppressiveness of the terms, and the presence or absence of a meaningful choice.” *Id.* In the context of the foregoing, it would strain public policy to enforce Woodmen’s mandatory arbitration language. This was *not* a contract of adhesion, as in *Schnuerle*, but instead a unilateral proclamation by Woodmen. Bridgeman did *not* have a choice. Notably, the terms of the insurance policy did *not* require Bridgeman, or any other Kentucky insured, to remain a member of the Woodmen.<sup>5</sup> Where the process employed by one party to implement an arbitration agreement unfairly leverages bargaining power and eliminates any real choice, unconscionability has been found. Where, as here, there was no agreement and no

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<sup>5</sup> “RIGHT TO CONTINUE CERTIFICATE IF SEPARATED FROM MEMBERSHIP  
A member who is separated for cause from fraternal membership *can keep this certificate* in force. This can be done by meeting the terms of Part 3 PREMIUMS. *All of the terms of this certificate will still be in force* except that fraternal dues will not be required.” Appx. Tab 2: Policy, p.11.

choice, public policy and Kentucky jurisprudence require Woodmen’s arbitration language be found procedurally unconscionable and unenforceable.<sup>6</sup>

**2. Woodmen’s arbitration language is *substantively* unconscionable.**

Substantive unconscionability “refers to contractual terms that are unreasonably or grossly favorable to one side and to which the disfavored party does not assent.” *Schnuerle*, 376 S.W.3d at 577. Moreover, where arbitration language eliminates or precludes a party from receiving all relief provided by law, it is not enforceable. *Id.* at 573 (“[A]n arbitration clause is not enforceable if it fails to provide plaintiffs with an adequate opportunity to vindicate their claims.”).

Woodmen’s unilateral arbitration language runs afoul of the prohibition on affording Kentucky insureds fewer rights than they are entitled to by Kentucky statute. Woodmen’s arbitration language prohibits “an arbitrator [from] award[ing] punitive damages.”<sup>7</sup> This limitation significantly affects the recovery an insured can recover against Woodmen. To the extent Woodmen were found liable for bad faith, or to have engaged in “unfair or deceptive” practices,<sup>8</sup> a Kentucky insured would be entitled to seek and to recover punitive damages. *See Wittmer v. Jones*, 864 S.W.2d 885, 890 (Ky. 1993)

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<sup>6</sup> Even if Woodmen’s arbitration language was the product of a written agreement, given its placement in the midst of a thirty-three (33) page document, it would also fail to satisfy the “conspicuous” requirement. Aside from the Articles with the added arbitration language, Woodmen did not offer any evidence that it made Bridgeman (or any other Kentucky insured) aware of the material changes – aside from mailing a copy of the document which likely resembled prior mailings without the added language. *See* Ct. Appeals Decision, p.17 (“Based on *the meager record before this Court ...*”) (Hon. Judge Taylor, dissent) (emph. added).

<sup>7</sup> *See* Appx. Tab 3: Const. and Laws, p.16.

<sup>8</sup> *See* KRS 304.29-341 (“Every society authorized to do business in this state shall be subject to the provisions of Subtitle 12 of this chapter relating to unfair trade practices.”); KRS 304.12-010 (“No person shall engage in this state in any practice which is prohibited in this subtitle ... or determined pursuant thereto to be, an unfair method of competition or any unfair or deceptive act or practice in the business of insurance.”).

(requiring “evidence of bad faith sufficient to justify punitive damages”); *see also*, KRS 411.186 (providing a statutory right to seek punitive damages); KRS 446.070 (providing the civil enforcement mechanism for a violation of, e.g., Kentucky’s insurance code).<sup>9</sup>

Woodmen’s arbitration language also prohibits the arbitrator from awarding attorney fees “unless otherwise required by applicable law.”<sup>10</sup> Further, in a section entitled “Costs”, Woodmen’s language requires that the insured “shall pay its own attorneys’ fees” – without any consideration of Kentucky’s statutory requirements. KRS 304.12-235(3)<sup>11</sup> allows a Kentucky insured to recover attorneys’ fees for an insurer’s improper denial of a claim. KRS 367.220(3)<sup>12</sup> also allows a Kentucky insured to recover attorneys’ fees where an insured is found to have engaged in “unfair, false, misleading, or deceptive acts.” *See* KRS 367.170. Woodmen’s language strips away a Kentucky insured’s statutory rights to recover attorneys’ fees and related costs.

Woodmen’s arbitration limitations on a Kentucky insured’s statutory rights of recovery run contrary to public policy. Arbitration is intended to provide an alternative mechanism for resolving legal disputes. It is not intended to strip claimants of their statutory rights, otherwise it is unconscionable and unenforceable. *See Schnuerle*, 376 S.W.3d at 573 (“[A]rbitration clauses may continue to be struck down as unconscionable if their terms *strip claimants of a statutory right...*”) (emph. added).

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<sup>9</sup> *See State Farm Mut. Auto. Ins. Co. v. Reeder*, 763 S.W.2d 116, 118 (Ky. 1988).

<sup>10</sup> *Id.*

<sup>11</sup> “If an insurer fails to settle a claim within the time prescribed in subsection (1) of this section and the delay was without reasonable foundation, the insured person or health care provider shall be entitled to be reimbursed for his reasonable attorney's fees incurred.”

<sup>12</sup> “In any action brought by a person under this section, the court may award, to the prevailing party, in addition to the relief provided in this section, reasonable attorney's fees and costs.”

**C. Kentucky prohibits arbitration clauses in insurance contracts pursuant to KRS 417.050(2) an insurance statute.**

Assuming Woodmen’s arbitration language would be otherwise enforceable under KRS 417.050, it is necessary to examine the public policy and Kentucky’s insurance statutes to determine whether additional rationale supports denying enforcement. The analysis begins with KRS 417.050(2) which was “enacted for the purpose of regulating the business of insurance.” *See* Ct. App. Opinion, p.14 (*citing Scott v. Louisville Bedding Co.*, 404 S.W.3d 870, 880 (Ky.App. 2013)). KRS 417.050(2) provides the following prohibition on arbitration agreements in insurance contracts:

This chapter does not apply to: ... (2) Insurance contracts.

This past January the Kentucky Department of Insurance reiterated the prohibition of including arbitration agreements in insurance policies – citing to KRS 417.050(2).

*Consistent with KRS § 417.050* ("Validity of arbitration agreement - Exempt agreements") and controlling court decisions, the Department will reject insurance policy forms that require arbitration of a dispute ("mandatory arbitration") as *void and misleading per se*.<sup>13</sup>

Notably, Woodmen conceded KRS 417.050(2) was a statute related to the business of insurance. In its briefing before the Court of Appeals, Woodmen argued “it is clear KRS § 417.050(2) is an insurance law.”<sup>14</sup> On this issue, United Policyholders agrees with the Court of Appeals, the Kentucky Department of Insurance, and Woodmen.

The remaining issue is whether Woodmen, as a fraternal organization, is subject to KRS 417.050(2) or, stated differently, whether Woodmen is permitted to insert mandatory arbitration language into a Kentucky insurance policy. An

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<sup>13</sup> *See* Appx. Tab 4: Ky Dept Ins. Bulletin (emph. added).

<sup>14</sup> *See* Woodmen Reply Brief, p.4.

examination of Kentucky’s insurance code and public policy supports this Court concluding the arbitration language is prohibited and unenforceable.

**1. KRS 304.29 does *not* permit Woodmen to materially alter a Kentucky insured’s rights and benefits under the policy (certificate).**

While Woodmen is permitted, as a fraternal benefit foreign insurer,<sup>15</sup> to amend the “laws and rules for the government of [its] society, the admission of its members, and the management of its affairs,”<sup>16</sup> these ministerial powers do not extend to altering the terms and conditions of an insurance policy – to materially alter an insured’s claim process and rights to enforce the policy terms. This interpretation is consistent with KRS 304.29, and its subchapters, which only reference ministerial powers. Given an insured is not required to maintain membership, allowing an insurer to unilaterally alter the material terms of an insurance policy at any time would run afoul of Kentucky’s reasonable expectations doctrine.

Even if a unilateral material alteration of policy terms were permitted, Woodmen was required to comply with KRS 304.29-111. This statute, specifically applicable to fraternal benefit foreign insurers, required Woodmen to file with the Kentucky Department of Insurance a “duly certified copy of all amendments... within ninety (90) days after the[ir] enactment.”<sup>17</sup> The record does not indicate Woodmen complied with this statutory requirement – to file its arbitration amendment – at any time, let alone prior to seeking to enforce it against Bridgeman. This lack of evidence provides further support that the arbitration language is unenforceable.

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<sup>15</sup> See KRS 304.1-070 (defining a “foreign insurer [as] one formed under the laws of any state, other than [Kentucky.]”)

<sup>16</sup> See KRS 304.29-051.

<sup>17</sup> See KRS 304.29-111(4).

**2. KRS 304.29 requires Woodmen’s insurance policy to conform to the form requirements for all other insurance policies.**

Pursuant to KRS 304.29-191, each life insurance policy (certificate) “delivered or issued” by Woodmen to a Kentucky insured must conform to the form requirements of all other life insurance policies issued to Kentucky insureds. Specifically, “[e]very life ... insurance certificate ... shall meet the standard contract provision requirements not inconsistent with this subtitle for like policies issued by life insurers in this state, except that a society may provide for a grace period for payment of premiums of one (1) full month in its certificates.” *Id.* This incorporation of Kentucky’s life insurance requirements is pivotal to the determination that Woodmen’s arbitration language is not enforceable.

Section 14 of the Code, entitled “**The Insurance Contract**,” applies to life insurance policies and provides a lengthy list of statutory form requirements. These requirements include: (i) “Ground for disapproval”; (ii) “Contents of policies in general”; (iii) “Additional policy contents”; (iv) “Charter, bylaw provisions”; and (v) “Jurisdiction of courts.” Each of these statutory sections provide grounds for invalidating Woodmen’s arbitration language.

**a. KRS 304.14-130 requires disapproval of the arbitration language.**

KRS 304.14-130 provides that Kentucky’s Insurance Commissioner “shall disapprove any form ... or withdraw any previous approval thereof” if the form contains any terms that are “in violation of, or does not comply with, this code.”<sup>18</sup> This requirement applies to each life insurance policy issued or delivered in Kentucky. By

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<sup>18</sup> See KRS 304.14-130(1)(a).

extension, and pursuant to KRS 304.29-191's incorporating language, it also applies to fraternal life insurance policies. Relevant to Woodmen's arbitration language in its life insurance policy, KRS 417.050(2) prohibits the inclusion of arbitration in all life insurance policies in Kentucky. This prohibition necessarily extends to fraternal insurers, including Woodmen. Further, given the language of the statute is mandatory – "shall" – there is no discretion on the part of the Insurance Commissioner. The arbitration language must be disapproved, and any prior approval withdrawn.

**b. KRS 304.14-150 requires the life insurance policy to apprise the insured of the scope of coverage and any limitations.**

KRS 304.14-150 requires an insurer, including a fraternal insurer pursuant to KRS 304.29-191, to provide an insurance policy that specifically identifies "the risks insured against," "the conditions pertaining to the insurance," and the "benefits payable."<sup>19</sup> This obligation to apprise an insured of the extent of the life insurance coverage, including any limitations on the right to obtain benefits (e.g. the claims process) is fundamental. Moreover, it is an enforceable right. A fraternal insurer cannot materially alter the terms of the life insurance policy without ensuring the Kentucky insured is fully apprised. *See e.g. Bidwell v. Shelter Mut. Ins. Co.*, 367 S.W.3d 585, 589 (Ky. 2012) ("[T]he insured is entitled to all the coverage he may reasonably expect to be provided under the policy. Only an unequivocally conspicuous, plain and clear manifestation of the company's intent to exclude coverage will defeat that expectation.").

In this instance, the life insurance policy is completely silent as to any limit on the claims process.<sup>20</sup> As has become customary in recent years, there is not a contractual

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<sup>19</sup> *See* KRS 304.14-150(1)(c), (f), (g).

<sup>20</sup> "SETTLEMENT. Proof of death or application for any other benefit provided by this certificate must be furnished to the Home Office. This certificate must be turned in for



statute of limitations. Similarly, there is not a requirement for an insured to delay filing a lawsuit until 60 days after submission of claim. Instead, the policy claims process only requires a claim be filed by submitting proof of death. The insured, or more likely the beneficiary, is wholly unaware of any other limitations on their respective policy rights. From a public policy standpoint, and given the insurer is in the strongest position as the drafter of this contract of adhesion, the insurer is accountable for its silence. Kentucky's statute requires the same result – any undisclosed, or inconspicuous, limitations are unenforceable. The same should hold true for Woodmen's arbitration language.

**c. KRS 304.14-160 precludes the inclusion of arbitration language in life insurance policies.**

While KRS 304.14-150 provides mandatory contents for life insurance policies, KRS 304.14-160 permits an insurer, as well as a fraternal insurer, to include additional “provisions not inconsistent with the code and which are ... [not] prohibited by law.”<sup>21</sup> As already discussed, and conceded by Woodmen, KRS 417.050(2) prohibits including arbitration language in any insurance policy. Reading this prohibition in concert with KRS 304.14-160 leads to the conclusion that no insurer, fraternal or otherwise, may add an arbitration requirement to a life insurance policy.

**d. KRS 304.14-170 further underscores the requirement for a fraternal life insurer to include the material provisions of its bylaws in the insurance policy.**

KRS 304.14-170, entitled “Charter, bylaw provisions,” further requires that life insurance policies referencing “any portion of the charter, bylaws or other constituent document” specifically “set forth in full in the policy” the material terms impacting the

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any final settlement. All benefits will be payable at the Home Office.” Appx. Tab 2: Policy, p.11.

<sup>21</sup> See KRS 304.14-160(3).

insured's rights and benefits. This statutory requirement is consistent with Kentucky's definition of an insurance policy, which requires the policy attach all papers effecting the coverage.<sup>22</sup> These requirements provide further protections for Kentucky insureds, making sure they – and more likely their beneficiaries – are fully aware of the extent of their life insurance as well as any limitations. Woodmen's failure, whether negligent or intentional, to set forth the material terms of arbitration bylaw precludes its enforcement.

**e. KRS 304.14-370 prohibits a fraternal life insurer from using arbitration agreements to deprive Kentucky Courts of jurisdiction to hear policyholder claims.**

KRS 304.14-370 ostensibly provides the best support for the Court finding KRS 417.050(2) applicable to fraternal insurers. The statute expressly prohibits any “conditions, stipulations or agreements in a contract of insurance” that would “deprive [Kentucky courts] of jurisdiction of actions against foreign insurers.” *Id.* This statutory protection of a Kentucky insured's constitutional right to a jury trial is fundamental and consistent with, albeit more expansive than, KRS 417.050(2). KRS 417.050(2) specifically prohibits arbitration agreements in insurance policies. KRS 304.14-370 is broader. It prohibits any condition, stipulation or agreement – not just arbitration. With respect to fraternal insurers, and Woodmen, KRS 304.14-370 prohibits any effort to divest Kentucky courts from hearing an insured's – or beneficiary's – claims. Such a prohibited effort would necessarily include Woodmen's unilateral arbitration language.

**3. KRS 304.29-341 expressly incorporates Chapter 12 relating to unfair trade practices.**

Even were fraternal insurers not subject to the policy requirements of Chapter 14, KRS 304.29-341 incorporates Chapter 12 “relating to unfair trade practices.” KRS

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<sup>22</sup> See KRS 304.14-020.

304.12-010 provides Kentucky’s statutory prohibition on “unfair” and “deceptive practices.”<sup>23</sup> KRS 304.12-230 provides Kentucky’s statutory prohibition on “unfair claims settlement practices.”<sup>24</sup> As to the issue before the Court, both KRS 304.12-010 and 304.12-230 are insurance statutes subject to KRS 417.050(2). By extension of KRS 304.29-341 through Chapter 12, KRS 417.050(2) would apply to any insured’s claims. Again, and consistent with public policy, the result is the same – the arbitration language is not enforceable.

**4. KRS 417.050(2) is the more specific (and recent) statute and should control over the more general KRS 304.29-231.**

A final issue bears addressing that further supports the Court finding Woodmen’s unilateral arbitration language unenforceable. Kentucky has long recognized that a specific statute controls over a general statute involving the same subject. *See Parts Depot, Inc. v. Beiswenger*, 170 S.W.3d 354, 361 (Ky. 2005) (“The applicable rule of statutory construction where there is both a specific statute and a general statute seemingly applicable to the same subject is that the specific statute controls.”). KRS 304.29-231 generally seeks to exempt fraternal insurers from Kentucky’s insurance laws, except as otherwise provided. This general statute addressed in broad terms the extent to which Kentucky’s insurance code would be applicable to a fraternal insurer. Notably, the exception language – addressed in the context of Chapter 14 – undermines any argument concerning KRS 417.050(2) application to a fraternal life insurance policy. However,

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<sup>23</sup> “No person shall engage in this state in any practice which is prohibited in this subtitle, or which is defined therein as, or determined pursuant thereto to be, an unfair method of competition or any unfair or deceptive act or practice in the business of insurance.”

<sup>24</sup> “It is an unfair claims settlement practice for any person to commit or perform any of the following acts or omissions...”

even were that not the case, given KRS 417.050(2) is limited solely to the exclusion of a specific clause – arbitration – it would take precedence. *See Parts Depot, Inc*, 170 S.W.3d at 361.

Moreover, KRS 417.050(2) is the more recent statute. The legislature is presumed to be aware of existing law when enacting later laws, as well as aware of the court’s interpretation. *See Baker v. White*, 65 S.W.2d 1022, 1024 (Ky. 1933). When the legislature enacted KRS 417.050(2), there was no need to add specific language solely for fraternal insurers. The legislature understandably adopted the specific language approach and directed the arbitration prohibition to each insurance policy issued to a Kentucky resident. Given Kentucky’s long-standing “sacred” constitutional “right of trial by jury,” there is no indication the legislature intended to allow fraternal insurers an exemption from this constitutional mandate.

### CONCLUSION

This case is of substantial interest to the *amicus curiae* United Policyholders, advocating on behalf of the thousands of Kentucky insureds affected, or potentially affected, by this Court’s decision. For any or all of the foregoing rationale, *amicus curiae* respectfully request the Court hold that Woodmen’s unilateral arbitration language is unenforceable, reverse the Court of Appeals’ decision, and remand to Wayne Circuit Court with instructions to allow Appellant West’s claims to proceed on the merits.

Date: February 13, 2019

Respectfully Submitted,



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United Policyholders

## **APPENDIX**

- Tab 1: Jones Affidavit**
- Tab 2: Life Insurance Policy**
- Tab 3: Const. and Laws**
- Tab 4: Ky. Dept. of Insurance Bulletin**