NOT DESIGNATED FOR PUBLICATION

No. 125,673

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

JENNIFER SUCHAN,
*Appellee*,

v.

BRENT DOME, et al.,
*Appellants*.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; ERIC A. COMMER, judge. Opinion filed September 8, 2023. Reversed and remanded with directions.

*Eric D. Martin*, of Bryan Cave Leighton Paisner LLP, of St. Louis, Missouri, and *William J. Easley*, of the same firm, of Kansas City, Missouri, for appellants.

*Gary K. Albin, Sean C. Brennan*, *and Drew J. Steadman*, of King, Brennan & Albin, LLC, of Wichita, for appellee.

Before MALONE, P.J., GREEN and ISHERWOOD, JJ.

PER CURIAM: Brent Dome and Waddell & Reed Financial Services, Inc. (Waddell & Reed), appeal the denial of their motion to compel arbitration in a negligence suit filed against them by Jennifer Suchan. They claim the district court erred in denying their motion because Suchan and her late husband, Matthew, previously signed valid agreements which contained an arbitration clause and Suchan readily acknowledges doing so. Dome and Waddell & Reed contend an additional error occurred when the district court declined to allow an arbitrator to decide the scope and intent of that

undisputed arbitration clause. Following a thorough review of the record and the claims raised, with the controlling legal framework as a backdrop, we conclude the district court's ruling against Dome and Waddell & Reed must be overturned. That outcome is driven by our determination that the district court turned a blind eye to undisputed evidence when it concluded that the arbitration clause set out in the Agreements the couple individually signed was unenforceable in this situation. Our decision also arises out of a finding that the district court erred in refusing to allow an arbitrator to decide whether the dispute between the parties fell within the scope of the arbitration provision. Accordingly, this case is reversed and remanded.

## FACTUAL AND PROCEDURAL BACKGROUND

### *The Genworth Policy*

Jennifer Suchan's late husband, Matthew, was previously married to Dorothy Gillett-Payne. During that relationship, Matthew purchased a life insurance policy through Genworth Life and Annuity Insurance Company (Genworth Policy) and designated Gillett-Payne as the beneficiary. The Genworth Policy was later brokered and sold to Brent Dome, a registered financial advisor with Waddell & Reed.

The union between Matthew and Gillett-Payne eventually dissolved and several years later Matthew and Jennifer married. The new couple met with Dome for the express purpose of taking the steps required to change the beneficiary designation from Gillett-Payne to Jennifer (Suchan) on all products Matthew purchased through Dome and Waddell & Reed. At the conclusion of their meeting, Dome assured the couple that all necessary measures were completed to name Suchan the beneficiary.

*The IRAs and MAP Agreements*

The following year, the Suchans again reached out to Dome, but this time it was to obtain assistance with rolling over Individual Retirement Accounts (IRAs). In connection with those transactions, they individually executed Agreement and Acknowledgement documents for Managed Allocation Portfolios (MAP Agreements). Both MAP Agreements contained identical pre-dispute arbitration clauses, which applied to:

> "Any controversy or dispute arising out of or relating to the Services provided pursuant to this Agreement, any transaction involving insurance or securities products effected by your Financial Advisor acting as either a registered representative or investment adviser representative of Waddell & Reed or the construction, performance, or breach of this Agreement including disputes as to the scope and meaning of this arbitration provision be settled in arbitration in accordance with the rules, then in effect, of the Financial Industry Regulatory Authority ('FINRA') or, if FINRA refuses to exercise jurisdiction over the controversy or dispute, the American Arbitration Association."

*The Negligence Lawsuit*

Roughly two years after the MAP Agreements were executed, Matthew passed away due to complications from COVID-19. Shortly after his passing, Suchan learned that Gillett-Payne remained listed as the beneficiary on Matthew's life insurance policy, despite Dome's assurances two years earlier that the couple had completed all requirements to ensure Suchan's name replaced Gillett-Payne's in that regard. Suchan later alleged that, because of Dome's failure to change the named beneficiary she was unable to recover the full amount due to her under the policy.

Several months later, Suchan filed a negligence suit against both Dome and Waddell & Reed. Later that year, and prior to discovery, Dome and Waddell & Reed filed a motion to compel arbitration, claiming the arbitration clause set out in the MAP Agreements Matthew and Suchan signed extended to the Genworth Policy. Dome and

Waddell & Reed also claimed that any questions concerning the scope of arbitrability were within the bailiwick of the arbitrator.

Suchan disputed those contentions and argued there was no evidence to support their claim concerning the reach of the arbitration provision. She further asserted that, even if the clause could be interpreted to apply to Waddell & Reed, it did not compel arbitration with Dome. Finally, Suchan took the position that the issue of whether a contract to arbitrate existed could not be determined without the benefit of additional discovery.

The district court denied Dome's and Waddell & Reed's motion to compel arbitration. As support for its conclusion, it noted:

> "[T]he arbitration language of the MAP Agreements is boilerplate and should not and cannot be construed to cover a dispute over an insurance transaction that occurred in 2011 and a change of beneficiary designation that was allegedly ordered to take place in 2017, as the MAP Agreement[s] make no other reference to insurance and lack consideration with regard to insurance policies."

Dome and Waddell & Reed timely bring the matter to this court for a determination of whether the district court's analysis was flawed and gave rise to an erroneous conclusion.

## LEGAL ANALYSIS

*The district court erred in denying the motion to compel arbitration.*

Dome and Waddell & Reed bring this appeal to challenge the district court's findings that denial of its motion to compel arbitration was appropriate because the provision used "boilerplate" language that was insufficient to cover any malfeasance

related to the Genworth Policy and because there was no consideration tied specifically to that policy. It is their position that for the district court to arrive at those conclusions, it necessarily and erroneously ignored undisputed evidence that Matthew and Suchan willingly entered into valid MAP Agreements which contained a binding arbitration clause and erroneously applied the law governing resolution of arbitration matters.

When an arbitration agreement is challenged, the district court exercises its authority to determine whether such an agreement exists and if it encompasses the issue in dispute. *MBNA America Bank v. Credit*, 281 Kan. 655, 658, 132 P.3d 898 (2006). The question of who has the power to decide arbitrability depends upon what the parties have agreed. See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943-45, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995). The Supreme Court has held that when parties agree that an arbitrator should decide arbitrability, they delegate to an arbitrator all threshold questions concerning arbitrability. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68-79, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010). Arbitrability disputes "include questions such as 'whether the parties are bound by a given arbitration clause . . . .'" *BG Group PLC v. Republic of Argentina*, 572 U.S. 25, 34, 134 S. Ct. 1198, 188 L. Ed. 2d 220 (2014) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84, 123 S. Ct. 588, 154 L. Ed. 2d 491 [2002]). If a court finds evidence of clear and unmistakable intent to arbitrate arbitrability, it must allow an arbitrator to decide those issues. See *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1292 (10th Cir. 2017).

Once the district court arrives at a conclusion with respect to those matters, its decision constitutes a final and appealable order. K.S.A. 5-450(a)(1); *Anderson v. Dillard's Inc.*, 283 Kan. 432, 435, 153 P.3d 550 (2007). An appellate court reviews the contents of an alleged arbitration agreement like any other contract, applying a de novo standard of review. 283 Kan. at 436. As such, this court is not bound by a district court's interpretation of a written instrument. *Trear v. Chamberlain*, 308 Kan. 932, 936, 425 P.3d 297 (2018).

Whether the parties agreed to arbitrate is determined by contract law principles. See *First Options of Chicago, Inc.,* 514 U.S. at 943-45; *Heartland Premier, LTD v. Group B & B, L.L.C.*, 29 Kan. App. 2d 777, Syl. ¶ 3, 31 P.3d 978 (2001). "The primary rule for interpreting written contracts is to ascertain the parties' intent. If the terms of the contract are clear, the intent of the parties is to be determined from the language of the contract without applying rules of construction." *Anderson*, 283 Kan. at 436. And under Kansas law, whether the actions of the parties reflect an intention to establish a binding contract is a question of fact. *Reimer v. Waldinger Corp.*, 265 Kan. 212, 214, 959 P.2d 914 (1998). An appellate court generally reviews a district court's finding as to the existence of a contract for substantial competent evidence. *Source Direct, Inc. v. Mantell*, 19 Kan. App. 2d 399, 407, 870 P.2d 686 (1994).

Dome and Waddell & Reed, as the parties moving to compel arbitration, "had the 'initial summary-judgment-like burden' of presenting enough evidence to show an enforceable agreement to arbitrate. *Duling v. Mid American Credit Union*, 63 Kan. App. 2d 428, 435, 530 P.3d 373 (2022) (quoting *Unified School Dist. #503, Parsons, Kansas v. R.E. Smith Const. Co.*, No. 07-2423-GLR, 2008 WL 2152198, at *2 [D. Kan. 2008]). In ruling as it did, the district court essentially concluded that Dome and Waddell & Reed failed to sustain this burden; such a determination constitutes a negative finding. *Duling*, 63 Kan. App. 2d at 435 (citing *Mohr v. State Bank of Stanley*, 244 Kan. 555, 567, 770 P.2d 466 [1989]; *Short v. Sunflower Plastic Pipe, Inc.*, 210 Kan. 68, 74-75, 500 P.2d 39 [1972]). We are not at liberty to reject that conclusion unless Dome and Waddell & Reed, as the parties challenging the finding, succeed in establishing that it arose out of the district court's arbitrary disregard of undisputed evidence or impermissible reliance upon some other extrinsic consideration such as bias, passion, or prejudice. *State v. Douglas*, 309 Kan. 1000, 1002-03, 441 P.3d 1050 (2019).

A refresher of basic contract principles is helpful. The components of a valid, binding contract typically include an offer of terms, an outward acceptance of its essential

terms, and consideration or a thing of value passing from each party to the other. *M West, Inc. v. Oak Park Mall*, 44 Kan. App. 2d 35, 49, 234 P.3d 833 (2010). Notably, "[t]he parties' mutual promises to arbitrate constitute sufficient consideration under Kansas law." *Clutts v. Dillard's, Inc.*, 484 F. Supp. 2d 1222, 1224 n.1 (D. Kan. 2007).

The assent necessary to form a contract is defined as a "meeting of the minds," or stated another way, "an unconditional and positive acceptance." *U.S.D. No. 446 v. Sandoval*, 295 Kan. 278, 282, 286 P.3d 542 (2012). A legitimate meeting of the minds is present when there is a fair understanding between the parties that comports with mutual consent. It must be reasonably clear from the evidence that the parties contemplated the same conditions when agreeing upon the terms of the contract. *Duling*, 63 Kan. App. 2d at 436. When the contract under scrutiny is too vague to reveal the true intentions of the parties, it is unenforceable. *Mohr*, 244 Kan. at 573.

Kansas law requires only that the terms of the agreement be expressed with reasonable certainty. "A contract will not fail for uncertainty or indefiniteness if the court can determine the terms by which the parties intended to be bound and carry out their intentions." *Duling*, 63 Kan. App. 2d at 437.

Finally, when an arbitration clause contained within a contract is drafted broadly, with its terms stating that any claim which "relates to" the contract is subject to arbitration, then other agreements entered into between the same parties which lack arbitration clauses, may also be subject to arbitration. *Hemphill v. Ford Motor Co.*, 41 Kan. App. 2d 726, 734, 206 P.3d 1 (2009). "'[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.' [Citation omitted.]" *Alliance Platforms, Inc. v. Behrens*, 49 Kan. App. 2d 53, 58, 305 P.3d 30 (2013).

Again, the district court denied the motion to compel arbitration here because it found the language used in the arbitration provision was merely "boilerplate" and lacked

consideration "with regard to insurance policies." Thus, from the court's perspective, the terms of the clause were insufficient to encompass the Genworth Policy and its related beneficiary modification measures, because they were too far removed to fall within the scope of the arbitration provision. We will address each of these justifications in turn.

1. *It is undisputed that the parties entered into valid agreements which contained a binding arbitration clause.*

A valid agreement must be in place before a party is required to submit a particular dispute to arbitration. K.S.A. 5-429(c). Again, whether such an agreement exists presents a question of fact that we review for substantial competent evidence. *Price v. Grimes*, 234 Kan. 898, 904, 677 P.2d 969 (1984). As stated above, absent proof that the district court disregarded undisputed evidence or based its decision on an improper consideration, we will not disturb its holding that Dome and Waddell & Reed failed to satisfy their evidentiary burden. See *J.A. Tobin Construction Co. v. Williams*, 46 Kan. App. 2d 593, 597, 263 P.3d 835 (2011).

The provision at issue falls under the heading "Binding Arbitration" in the MAP Agreements and states, in pertinent part, that the parties agree to arbitrate:

> "Any controversy or dispute arising out of or relating to the Services provided pursuant to this Agreement, any transaction involving insurance or securities products effected by your Financial Advisor acting as either a registered representative or investment adviser representative of Waddell & Reed or the construction, performance, or breach of this Agreement including disputes as to the scope and meaning of this arbitration provision shall be settled in arbitration in accordance with the rules, then in effect, of the Financial Industry Regulatory Authority ('FINRA') or, if FINRA refuses to exercise jurisdiction over the controversy or dispute, the American Arbitration Association."

Following a review of this language, alongside the parties' contentions, the district court declined to find the provision applied to the Genworth Policy. The judge was of the opinion that the use of what it considered to be "boilerplate" terms and an apparent lack of consideration with respect to the Genworth Policy rendered the arbitration clause legally insufficient. That conclusion is factually and legally flawed.

First, we agree with Dome and Waddell & Reed's assertion that in order to reach the result that it did, the district court first had to turn a blind eye to the fact that Suchan never challenged the existence of the MAP Agreement and the arbitration clause contained therein. Rather, in her response to the motion to compel arbitration, Suchan asserted that "a contract indisputably exists" and it cannot be ignored that the contract she embraces contains the arbitration clause we are tasked with analyzing. Suchan's opposition was more focused and rooted in the *scope* of the clause's terms, in that she refuted that it extended to include Dome or the Genworth Policy. As the party moving to compel arbitration, the burden was at the feet of Dome and Waddell & Reed to simply establish the existence of a binding provision. Suchan's acknowledgement that the MAP Agreements she and Matthew entered into contained an arbitration clause plays a critical role in answering that question in the affirmative and demonstrating the district court erred when it failed to afford it the weight it deserved.

Following a review of the document themselves we are satisfied that each of the three requirements necessary to establish a valid contract are fulfilled. Breaking down the MAP Agreement into its individual components we note that Waddell & Reed relies on those documents as a tool to assess the optimal asset mix for an investment based on the answers clients provide to a questionnaire. The "Account Information" portion of the Agreement then memorializes the couples' intent to register their IRAs. The Agreement's "Portfolio Selection" section reflects that Matthew and Suchan sought to pursue aggressive and moderately aggressive portfolios, respectively, while the "Investor Profile" section bears out the individual degree of risk they were each comfortable taking

with regard to those investments. The Agreement also contains a "Service Agreement & Acknowledgements" section which addresses the rights and benefits afforded to each party, including the investment services Dome agreed to provide, and the asset-based advisory fees he and Waddell & Reed would receive from the Suchans in exchange for those services. Finally, the Agreement contained provisions which spoke to "Termination," "Representations and Acknowledgements," "Assignment," "General," and, of course, "Binding Arbitration." Matthew and Suchan executed their respective Agreements by attaching their signatures, as did Dome on the line reserved for the "Financial Advisor."

Suchan encourages us to exempt the Genworth Policy and Dome personally, from the MAP Agreements and, thereby the arbitration clause, because that transaction was allegedly not contemplated by the Agreements and Dome personally was not a party to the provisions of the Agreements. To arrive at either or both conclusions ignores the language, when viewed as a whole, which expresses the plain and unambiguous agreement between the parties. The MAP Agreement expressly states in the "Service Agreement & Acknowledgements" section:

> "This Advisory Services Agreement is entered into by and between the undersigned advisory client(s) ('Client' or 'you') and Waddell & Reed, Inc., a Delaware Corporation ('Waddell & Reed'), to become effective as of the date indicated herein. Whereas, Client is party to a Client Agreement with Waddell & Reed pursuant to which Client maintains a brokerage account through Waddell & Reed ('Client Agreement'); and whereas, in addition to the brokerage services offered to Client pursuant to the Client Agreement, Client desires to engage the services of Waddell & Reed, in its capacity as a registered investment adviser, and its investment adviser representative whose signature appears below ('Financial Advisor') to provide certain advisory services as more fully described herein. . . ."

The "Scope of Engagement" and "Advisory Fees" provisions that follow outline the services the parties contemplate will be provided by the "Financial Advisor," and

what fees Matthew and Suchan will be responsible for, based on a percentage of a value of the couple's assets, as a result of the services that Dome provides. Aside from Matthew and Suchan, Brent Dome is the only other signatory to those documents and attached his name as the "Financial Advisor."

Returning to the arbitration provision once more, its language likewise evidences an intent that runs contrary to the position advocated for by Suchan. The express terms to which Suchan agreed reflect an awareness that arbitration was the resolution tool the parties would employ for "[a]ny controversy or dispute arising out of or relating to. . . any transaction involving insurance . . . effected by your Financial Advisor acting as either a registered representative or investment adviser representative of Waddell & Reed . . . ."

To find that this language does not encompass the Genworth Policy or contemplate Dome's involvement is to contravene the law. "If the terms of the contract are clear, the intent of the parties is to be determined from the language of the contract without applying rules of construction." *Peterson v. Ferrell*, 302 Kan. 99, 104, 349 P.3d 1269 (2015). Moreover, we must construe the document from the entirety of what is contained within its four corners. "The law favors reasonable interpretations, and results which vitiate the purpose of the terms of the agreement to an absurdity should be avoided." *Waste Connections of Kansas, Inc. v. Ritchie Corp.*, 296 Kan. 943, 963, 298 P.3d 250 (2013). Finally, when the language of arbitration agreements is drafted broadly, the scope of said agreements may reasonably be extended to include disputes that occurred prior to the execution of the agreement in which the clause appears. See *Zink v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 13 F.3d 330, 332 (10th Cir. 1993). When the parties include an arbitration clause in a contract "a presumption of arbitrability arises, particularly if the clause in question contains . . . broad and sweeping language." *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1462 (10th Cir. 1995). This approach comports with the long-standing principle that courts will generally endeavor to uphold arbitration agreements even in those instances where the contract provisions at issue carry

some uncertainty. *City of Lenexa v. C.L. Fairley Constr. Co.*, 245 Kan. 316, 319, 777 P.2d 851 (1989). In summary, we find the district court erred and ignored undisputed facts and plain and unambiguous language in the MAP Agreements when it found that Dome and Waddell & Reed failed to establish the existence of a binding agreement to arbitrate.

a. *The law does not expressly prohibit the use of boilerplate language in arbitration agreements.*

The district court's apparent legal justification is likewise flawed. We begin with its assessment that the provision contained boilerplate language that was insufficient to bind the parties to arbitration for disputes arising out of the Genworth Policy, which preceded the IRAs and MAP Agreements. We conduct this portion of the analysis, again, with the awareness that Kansas courts typically favor arbitration agreements. See *Coulter v. Anadarko Petroleum Corp.*, 296 Kan. 336, 370, 292 P.3d 289 (2013).

According to K.S.A. 5-428(a), an agreement to submit any existing or subsequent controversy that arises between the parties to arbitration "is valid, enforceable, and irrevocable, except upon a ground that exists at law or in equity for the revocation of a contract." The plain language of the arbitration provision reflects that the parties agreed to arbitrate in three separate circumstances, the second of which states that it operates with respect to "*any transaction involving insurance* or securities products effected by your Financial Advisor acting as either a registered representative or investment adviser representative of Waddell & Reed . . . ." There is no question and no dispute that Dome is a Financial Advisor and was acting as a representative of Waddell & Reed when he assisted Matthew with the policy once it was purchased from Genworth. Our role is to attempt to ascertain and give effect to the mutual intentions held by the parties at the time they entered into the contract. *In re Marriage of Knoll*, 52 Kan. App. 2d 930, 940, 381 P.3d 490 (2016) (citing *Hollaway v. Selvidge*, 219 Kan. 345, 349, 548 P.2d 835 [1976]).

To reiterate, when the intent of the parties is ascertainable from the plain language of the agreement, we must enforce the agreement as written. *Knoll*, 52 Kan. App. 2d at 939-40. Adhering to that obligation here leads to the conclusion that from the face of that provision, the Genworth Policy was within the reach of the provision that the parties agreed to.

We do not share the district court's view that the contract used "boilerplate" language that was too narrowly drawn to include the Genworth Policy which predated the MAP Agreements by several years. Our research has failed to yield any authority for the proposition that boilerplate language, in and of itself, is problematic and the district court's order did not identify any. Rather, we found the contrary to be true. See *Oesterle v. Atria Mgmt. Co., LLC*, 09–4010–JAR, 2009 WL 2043492, at *4 (D. Kan. 2009) (unpublished opinion) (finding arbitration clause written with boilerplate language not unconscionable). Greater scrutiny of such provisions is warranted, however, when their verbiage arises within the context of unconscionability, such as deceptive practices or when the bargaining power of one is used to disadvantage another. For example, in *Dodson v. U-Needa Self-Storage*, 32 Kan. App. 2d 1213, 96 P.3d 667 (2004), the court found that U-Needa committed an unconscionable act, but it was not merely by virtue of its usage of boilerplate language in its contract. Rather, it was a product of the other facts outlined in the case to support the unconscionable act, such as the fact the consumer was deprived of the opportunity to receive a material benefit from the subject of the transaction. 32 Kan. App. 2d 1213, Syl. ¶ 6. Such unconscionability is not present in this case, nor has it been alleged.

The undercurrent of the district court's ruling appears to simply be a concern that the arbitration provision carried the potential to be stretched beyond what the court perceived to be its permissible reach. But again, Kansas courts strive to keep arbitration agreements intact even when its language carries a measure of uncertainty. *Hemphill v. Ford Motor Co.*, 41 Kan. App. 2d 726, 735, 206 P.3d 1 (2009).

*Hemphill* presented a somewhat similar situation that is useful in informing our analysis of the issue. In that case, the Hemphills filed suit against Ford Motor Company, Fenton Motors (a Ford dealer), and DaimlerChrysler Services North America, LLC (Chrysler Financial, a car-financing entity) for claims arising from the Hemphills' purchase of a Ford Mustang convertible. The purchase was financed through an agreement between the Hemphills, Fenton Motors, and Chrysler Financial, and the finance agreement contained an arbitration clause. When the Hemphills filed suit, all three defendants moved to compel arbitration, and the district court granted that motion. 41 Kan. App. 2d at 727-28.

The arbitrator issued an award granting some of the Hemphills' claims against Fenton Motors but also, in an amended award, granted Chrysler Financial's crossclaim against the Hemphills for a deficiency judgment on amounts still owed on the purchase. After the district court confirmed the arbitration award without objection, the Hemphills appealed, challenging the decision to compel arbitration and the arbitrator's authority to amend the arbitration award. 41 Kan. App. 2d at 728.

Relevant to our analysis here is that portion of the case that analyzed whether Ford could compel arbitration of the Hemphills' claims against it despite the fact it was not a party to the contract the Hemphills entered into which contained the arbitration agreement. A panel of this court found that because the Hemphills' claims against Ford were inextricably intertwined with their substantive claims against Fenton Motors and Chrysler Financial, the identified parties to the arbitration agreement, the Hemphills were estopped from avoiding arbitration with Ford. 41 Kan. App. 2d at 729.

In so finding, the *Hemphill* court highlighted the strong public policy at both the State and Federal levels which favors arbitration. That analysis prompted the court to observe that arbitration agreements will generally be upheld even in the face of some uncertainty—"[thus], it is not surprising that a broadly written arbitration provision

covering any claims 'related to' the underlying contract may bring within its scope disputes that arise out of a separate agreement." 41 Kan. App. 2d at 735 (citing *City of Andover v. Southwestern Bell Telephone*, 37 Kan. App. 2d 358, 361, 153 P.3d 561 [2007]; *Skewes v. Shearson Lehman Bros.*, 250 Kan. 574, Syl. ¶ 3, 829 P.2d 874 [1992] [under Federal Arbitration Act, any doubts about whether arbitration is required should be resolved in favor of arbitration]).

The *Hemphill* court went on to synthesize Federal caselaw with that of Kansas to outline a set of factors it determined were helpful in ascertaining whether to compel arbitration for disputes arising under an agreement that does not contain an arbitration clause but bears relation to a contract which includes a broadly drafted provision to compel arbitration. Those factors include: (1) whether the agreements incorporate or reference one another; (2) whether the agreements are dependent on each other or relate to the same subject matter; (3) whether the arbitration clause excludes certain claims; and (4) whether the agreements are executed closely in time and by the same parties. 41 Kan. App. 2d at 735.

All but the second of these factors is of value here. Turning to the first one, the arbitration clause here states that it applies to "[a]ny controversy or dispute arising out of or relating to the Services provided pursuant to this Agreement, any transaction involving insurance or securities products effected by your Financial Advisor acting as either a registered representative or investment adviser representative of Waddell & Reed . . . ." In our view, this language can arguably be interpreted to incorporate or reference the Genworth policy. As to the third factor, there is no indication from the clause that any claims are excluded. Finally, as to the fourth, formal measures were taken by Matthew and Suchan to ensure the intended beneficiary adjustments were accomplished less than a year before the MAP Agreements were signed and two-thirds of the signatories on the MAP Agreements are the same as the Genworth policy, with the third person associated

with the MAP Agreements, Suchan, being the intended beneficiary of the Genworth policy.

We also find that Federal caselaw offers a measure of guidance. In *Zink*, the question arose as to whether an arbitration clause could reasonably be interpreted to cover a contract executed two years earlier. The agreement subject to scrutiny in that case stated: "[A]ny controversy between [the parties] arising out of [plaintiff's] business or this agreement shall be submitted to arbitration." *Zink*, 13 F.3d at 332. When reviewing the terms of the provision, the *Zink* court paid heed to the principle that arbitration agreements are to be broadly construed with any doubts resolved in favor of inclusion. It specifically held that "the arbitration agreement is clearly broad enough to cover the dispute at issue despite the fact that the dealings giving rise to the dispute occurred prior to the execution of the agreement." *Zink*, 13 F.3d at 332 (citing *Belke v. Merrill Lynch, Pierce, Fenner & Smith*, 693 F.2d 1023, 1028 [11th Cir. 1982]). "'An arbitration clause covering disputes arising out of the contract or business between the parties evinces a clear intent to cover more than just those matters set forth in the contract.'" 13 F.3d at 332 (quoting *Belke*, 693 F.2d at 1028). The court also rejected Zink's contention that an agreement to arbitrate a dispute must pre-date the actions giving rise to the dispute because that position runs contrary to contract principles governing arbitration agreements. 13 F.3d at 332 (citing *Bridgestone/Firestone, Inc. v. Local Union No. 998*, 4 F.3d 918, 921 [10th Cir. 1993]; *Belke*, 693 F.2d at 1028).

The MAP Agreement here expresses the parties' clear intent to arbitrate, identifies the claims or controversies that would be arbitrated, identifies and links to the binding rules for the arbitration, and states that the arbitrator's decision is final and binding. Both parties accepted the MAP Agreement and its essential terms through attachment of their signatures. Accordingly, the district court erred when it concluded the arbitration provision consisted of merely boilerplate language which rendered it unenforceable.

b. *The arbitration agreement was supported by sufficient consideration.*

We also cannot uphold the district court's conclusion that the arbitration clause is undermined by a lack of consideration as again, the plain language of their agreement states otherwise. "'Consideration is defined as some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other.'" *Varney Business Services, Inc. v. Pottroff*, 275 Kan. 20, 32, 59 P.3d 1003 (2002). "A promise is without consideration when the promise is given by one party to another without anything being bargained for and given in exchange for it." 275 Kan. at 32 (quoting 2 Corbin on Contracts § 5.20 [rev. ed. 1995]).

The arbitration clause reflects that the parties agreed to waive any right to a jury trial with respect to disputes that are the subject of the MAP Agreement. Both parties therefore mutually exchanged sought-after promises to arbitrate, rather than litigate, a multitude of potential claims. That reciprocal obligation provides the requisite consideration. Neither party was under a legal duty to agree to those measures, and it has oft been stated that "'[t]he parties' mutual promises to arbitrate constitute sufficient consideration under Kansas law.'" *Duling*, 63 Kan. App. 2d at 436 (quoting Clutts v. Dillard's, Inc., 484 F. Supp. 2d 1222, 1224 n.1 [D. Kan. 2007]); see also Rangel v. Hallmark Cards, Inc., No. 10–4003–SAC, 2010 WL 781722, at *7 (D. Kan. 2010) (unpublished opinion) ("[M]utual promises to arbitrate, binding both parties, serve as sufficient consideration."). Notably, the "Service Agreement and Acknowledgments" section also includes an affirmative statement that the parties acknowledge "the receipt and sufficiency" of the "good and valuable consideration."

The primary objective in construing a contract is not to label it with specific definitions, but to ascertain and enforce the intent of the parties as shown by the contents of the instrument. Performing that task here, we conclude an agreement to arbitrate was

properly formed and the district court erred in reaching a contrary finding on the grounds that consideration was lacking.

1. *Whether the Genworth Policy dispute fell within the scope of the arbitration agreement is a matter properly determined by the arbitrator based on the plain language of the arbitration provision upon which the parties agreed.*

Finally, Dome and Waddell & Reed argue the district court erred by not allowing an arbitrator to analyze and decide whether the arbitration clause extended to include the Genworth Policy and its associated beneficiary concerns.

As stated earlier in this opinion, we review arbitration agreements as we would any other contract and subject it to a de novo standard of review. *Anderson*, 283 Kan. at 436.

> "The Federal Arbitration Act establishes a strong federal policy in favor of arbitrating disputes. Thus, as our court noted in [*Packard v. Credit Solutions of America*, 42 Kan. App. 2d 382, Syl. ¶ 4, 213 P.3d 437 (2009)], all doubts about the scope of what issues are subject to arbitration 'should be resolved in favor of arbitration.' As the United States Supreme Court has directed, ambiguities as to the scope of the arbitration clause itself are resolved in favor of arbitration. Accordingly, when interpreting provisions that determine the scope of the arbitration agreement, normal state-law canons of contract construction—such as construing ambiguous provisions against the party that drafted it—generally are trumped by the Act's policy in favor of arbitration. [Citations omitted.]" *Hague v. Hallmark Cards, Inc.*, 48 Kan. App. 2d 118, 121, 284 P.3d 369 (2012).

Additionally, the Supreme Court has recognized that "parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Center, West, Inc.,* 561 U.S. at 68-69. Again, both Matthew and Suchan individually signed their respective MAP Agreements with Waddell & Reed and the pre-dispute arbitration clauses in those Agreements undeniably provide that the parties agree the clauses are intended to

encompass disputes arising out of "the scope and meaning of this arbitration provision" and such disputes "shall be settled in arbitration in accordance with the rules, then in effect, of the Financial Industry Regulatory Authority ('FINRA') or, if FINRA refuses to exercise jurisdiction over the controversy or dispute, the American Arbitration Association."

The district court declined to find the Genworth Policy was within the reach of the arbitration provision because Matthew secured the policy in 2011, and sought to change the beneficiary in 2017, seven years and one year, respectively, before the MAP Agreements were signed. As further support for its conclusion the court noted that, aside from the arbitration provision, the MAP Agreements did not make any references to insurance matters. The arguments Suchan brings to us in this issue essentially mirror the district court's reasoning.

The district court's conclusions and Suchan's arguments are directly rooted in the scope of the arbitration clause. Yet the plain language of that provision clearly reveals that those were not matters within the district court's purview to decide. To the contrary, it expresses the parties' agreement that issues concerning "the construction, performance, or breach of this Agreement including disputes as to the scope and meaning of this arbitration provision shall be settled in arbitration . . . ."

Given that we have deemed the MAP Agreements to be valid and enforceable contracts, the arbitration provisions in those agreements are likewise valid and enforceable. Thus, that portion of the arbitration clause which plainly states that disputes arising out of the scope and meaning of its terms must be resolved through arbitration should be enforced. The Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq., "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218, 105

S. Ct. 1238, 84 L. Ed. 2d 158 (1985). The FAA creates a body of federal substantive law applicable in state *and* federal courts. *Packard*, 42 Kan. App. 2d at 384 (citing *Skewes v. Shearson Lehman Bros.*, 250 Kan. 574, 579, 829 P.2d 874 [1992]). Thus, this case must be returned to the district court with directions to submit the question of whether the terms of the MAP Agreements encompass the Genworth Policy and its related beneficiary deficiencies to arbitration as agreed upon by the parties.

Reversed and remanded with directions.