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issue of whether D&S' breach of the vacancy condition contributed to the loss.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

ROBERT KREMER, APPELLANT, V. RURAL COMMUNITY INSURANCE COMPANY, A CORPORATION, APPELLEE.

GARY MOODY, APPELLANT, V. RURAL COMMUNITY INSURANCE COMPANY, A CORPORATION, APPELLEE.

788 N.W.2d 538

Filed September 17, 2010. Nos. S-09-900, S-09-901.

1. **Arbitration and Award.** Arbitrability presents a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.
3. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), an appellate court may review three types of final orders: (1) an order affecting a substantial right in an action that, in effect, determines the action and prevents a judgment; (2) an order affecting a substantial right made during a special proceeding; and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
4. **Final Orders: Arbitration and Award.** Motions to compel arbitration invoke a specific statutory remedy that is neither an action nor a step in an action. As such, the statutory remedy is a special proceeding under Neb. Rev. Stat. § 25-1902(2) (Reissue 2008).
5. **Actions: Statutes.** Special proceedings include civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes that are not actions.
6. ____: ____. Regardless of a statutory remedy's location within Nebraska's statutes, actions and special proceedings are mutually exclusive.
7. **Federal Acts: Arbitration and Award: States: Appeal and Error.** The Federal Arbitration Act's preemptive effect does not extend to state procedural rules for appeals that do not defeat the act's objectives.
8. **Arbitration and Award: Appeal and Error.** The list of appealable arbitration orders under Neb. Rev. Stat. § 25-2620 (Reissue 2008) is not exclusive.
9. **Judgments: Arbitration and Award.** An order compelling arbitration and staying judicial proceedings is a final determination of arbitrability.
10. **Final Orders: Appeal and Error.** An order affects a substantial right if the order affects the subject matter of the litigation, such as diminishing a claim or defense that the appellant had before the court entered the order.

11. **Final Orders: Arbitration and Award.** An order compelling arbitration or staying judicial proceedings pending arbitration is a final order under the second category of Neb. Rev. Stat. § 25-1902 (Reissue 2008): It affects a substantial right in a special proceeding.
12. **Insurance: Contracts: Arbitration and Award.** With certain exceptions, under Neb. Rev. Stat. § 25-2602.01(f)(4) (Reissue 2008), agreements to arbitrate future controversies concerning an insurance policy are invalid.
13. **Federal Acts: Contracts: Arbitration and Award: States.** The Federal Arbitration Act, 9 U.S.C. § 2 (2006), preempts inconsistent state laws that apply solely to the enforceability of arbitration provisions in contracts evidencing a transaction involving commerce.
14. **Federal Acts: Insurance: States.** Under the federal McCarran-Ferguson Act, state law regulating the business of insurance preempts federal law that does not specifically govern insurance.
15. ____: ____: ____. Under the McCarran-Ferguson Act, there are three elements for determining whether a state law controls over (reverse preempts) a federal statute: (1) The federal statute does not specifically relate to the business of insurance; (2) the state law was enacted for regulating the business of insurance; and (3) the federal statute operates to invalidate, impair, or supersede the state law.
16. ____: ____: ____. The primary concern for disputes under the first clause of 15 U.S.C. § 1012(b) (2006) is whether the state law regulates the core components of the business of insurance: the contractual relationship between the insurer and insured; the type of policy that can be issued; and its reliability, interpretation, and enforcement.
17. **Statutes: Insurance: Contracts: Arbitration and Award.** A statute precluding the parties to an insurance contract from including an arbitration agreement for future controversies regulates the insurer-insured contractual relationship. Thus, it regulates the business of insurance.
18. **Federal Acts: Insurance: Contracts: Arbitration and Award.** The Federal Arbitration Act does not preempt Neb. Rev. Stat. § 25-2602.01(f)(4) (Reissue 2008).
19. **Insurance: Agriculture: Corporations.** The Federal Crop Insurance Corporation is a wholly owned government corporation within the U.S. Department of Agriculture, established to regulate the crop insurance industry.
20. ____: ____: ____. The Federal Crop Insurance Corporation's regulations require applicants to apply on one of the corporation's prescribed policy forms, which contain arbitration provisions for all policies reinsured by the corporation.
21. **Constitutional Law: Federal Acts: States.** Under the Supremacy Clause of the U.S. Constitution, state law that conflicts with federal law is invalid.
22. **Federal Acts: States: Intent.** Federal law preempts state law when it conflicts with a federal statute or when the U.S. Congress, or an agency acting within the scope of its powers conferred by Congress, explicitly declares an intent to preempt state law. Preemption can also impliedly occur when Congress has occupied the entire field to the exclusion of state law claims.
23. **Federal Acts: Insurance: Agriculture: Corporations: States.** The Federal Crop Insurance Act and the Federal Crop Insurance Corporation's regulations express an intent to preempt state law that conflicts with the corporation's regulations.

24. **Insurance: Agriculture: Corporations: Statutes: Contracts: Arbitration and Award.** The Federal Crop Insurance Corporation's regulations requiring arbitration and the preclusion of arbitration agreements under Neb. Rev. Stat. § 25-2602.01(f)(4) (Reissue 2008) conflict because they cannot both be enforced.
25. **Federal Acts: Insurance: Agriculture: Statutes: Contracts: Arbitration and Award.** Under the McCarran-Ferguson Act, Neb. Rev. Stat. § 25-2602.01(f)(4) (Reissue 2008) does not reverse preempt federal law under the Federal Crop Insurance Act because the Federal Crop Insurance Act specifically relates to the business of insurance.
26. **Federal Acts: Insurance: Agriculture: Corporations: Contracts: Agents.** An agent's or loss adjuster's statement cannot bind the Federal Crop Insurance Corporation when the statement is inconsistent with governing federal law.

Appeals from the District Court for Hamilton County: MICHAEL J. OWENS, Judge. Affirmed.

Kent E. Rauert, of Svehla, Thomas, Rauert & Grafton, P.C., for appellants.

Charles W. Campbell, of Angle, Murphy & Campbell, P.C., L.L.O., and Jeffrey S. Dilley, of Henke-Bufkin, P.A., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

I. SUMMARY

Robert Kremer and Gary Moody, two insureds, appeal from the district court's decisions in their actions to enforce compromise and settlement agreements with their crop insurer, Rural Community Insurance Company (RCIC). In each case, the insured alleged that RCIC's adjuster agreed to pay specified amounts to the insureds. In both cases, RCIC moved to dismiss the action or, alternatively, to compel arbitration and stay the proceedings. In both cases, the court compelled arbitration and stayed judicial proceedings.

We are asked to decide two issues: Whether this court has jurisdiction to review an order that stays judicial proceedings and compels arbitration; and whether federal law preempts Neb. Rev. Stat. § 25-2602.01(f)(4) (Reissue 2008), which precludes arbitration agreements for future controversies relating

to insurance policies. We conclude that the orders are final and that we have jurisdiction. We also conclude that federal regulations under the Federal Crop Insurance Act (FCIA)[1] preempt § 25-2602.01(f)(4). Thus, the district court did not err in compelling the insureds to arbitrate their disputes with RCIC.

II. BACKGROUND

The court found that RCIC issued the "Multiple Peril Crop Insurance" (MPCI) policies under the FCIA and that the Federal Crop Insurance Corporation is the reinsurer for all MPCI policies. The court determined that all MPCI policies contain a dispute resolution provision like the following paragraph from the policies at issue:

> 20. Mediation, Arbitration, Appeal, Reconsideration, and Administrative and Judicial Review.
>
> (a) If you and we fail to agree on any determination made by us except those specified in section 20(d), the disagreement may be resolved through mediation . . . . If resolution cannot be reached through mediation, or you and we do not agree to mediation, the disagreement must be resolved through arbitration in accordance with the rules of the American Arbitration Association (AAA), except as provided in sections 20(c) and (f), and unless rules are established by [the Federal Crop Insurance Corporation] for this purpose.

(Emphasis omitted.)

The court rejected the insureds' argument that they were attempting to enforce their settlement agreement instead of seeking relief under the policy. The court declined to decide whether their alleged agreement with the adjuster was enforceable. It determined that their claim was directly attributable to their policy and therefore within the scope of their arbitration provision. In each case, it sustained RCIC's motion to compel arbitration and issued a stay of judicial proceedings pending arbitration.

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[1] 7 U.S.C. § 1501 et seq. (2006).

III. ASSIGNMENTS OF ERROR

The insureds assign that the court erred in (1) sustaining RCIC's motions to compel arbitration and stay the proceedings because their dispute does not fall within the scope of the arbitration provisions and (2) not deciding whether the parties had reached enforceable compromise and settlement agreements.

IV. STANDARD OF REVIEW

[1,2] Arbitrability presents a question of law.[2] A jurisdictional issue that does not involve a factual dispute presents a question of law.[3] And when reviewing questions of law, we resolve the questions independently of the lower court's conclusions.[4]

V. ANALYSIS

1. Jurisdiction

RCIC contends that an order that compels arbitration and stays judicial proceedings is not a final order. The insureds disagree. They contend that the district court's decision in each case was a final order issued in a special proceeding. Relying on *State ex rel. Bruning v. R.J. Reynolds Tobacco Co.*,[5] they argue that a trial court's ruling on a motion to compel arbitration affects a substantial right whether the court grants or denies the motion.

Neb. Rev. Stat. § 25-2620 (Reissue 2008) explicitly authorizes appeals from judicial orders denying an application to compel arbitration or granting an application to stay arbitration. But § 25-2620 is silent as to whether a party may appeal an order granting an application to compel arbitration or to stay judicial proceedings. In that circumstance, we look to our

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[2] See, *Good Samaritan Coffee Co. v. LaRue Distributing*, 275 Neb. 674, 748 N.W.2d 367 (2008); *Smith Barney, Inc. v. Painters Local Union No. 109*, 254 Neb. 758, 579 N.W.2d 518 (1998).

[3] *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010).

[4] See *Eikmeier v. City of Omaha, ante* p. 173, 783 N.W.2d 795 (2010).

[5] *State ex rel. Bruning v. R.J. Reynolds Tobacco Co.*, 275 Neb. 310, 746 N.W.2d 672 (2008).

general final order statute to determine whether the order is final and appealable.[6] Next, we determine whether permitting an appeal under state procedural rules would undermine the goals and policies of the Federal Arbitration Act (FAA).[7]

(a) Arbitrability Hearings Are Special Proceedings

[3,4] Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), an appellate court may review three types of final orders: (1) an order affecting a substantial right in an action that, in effect, determines the action and prevents a judgment; (2) an order affecting a substantial right made during a special proceeding; and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.[8] In *Webb v. American Employers Group*,[9] we held that motions to compel arbitration invoke a specific statutory remedy that is neither an action nor a step in an action. As such, the statutory remedy is a special proceeding under § 25-1902(2).[10]

But RCIC contends that this case is distinguishable from our earlier arbitration cases because here, the district court stayed judicial proceedings instead of dismissing the action. So RCIC argues that each proceeding was merely a step within the overall action under the first category of final orders and not a special proceeding. And because the orders did not have the effect of determining the action and preventing a judgment, RCIC argues that they are not final.

We recognize that *State ex rel. Bruning*[11] provides some support for RCIC's argument. There, we did focus on the relief

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[6] See *id.*

[7] 9 U.S.C. § 1 et seq. (2006). See *State ex rel. Bruning, supra* note 5, citing *Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004).

[8] See *Kilgore v. Nebraska Dept. of Health & Human Servs.*, 277 Neb. 456, 763 N.W.2d 77 (2009).

[9] *Webb, supra* note 7.

[10] See *id.*

[11] *State ex rel. Bruning, supra* note 5.

granted in the proceeding invoked by the defendants' motion to compel arbitration. Because the court granted the motion and dismissed the judicial proceeding, we concluded that the order was final under the first category of § 25-1902: an order affecting a substantial right in an action that, in effect, determines the action and prevents a judgment. On further reflection, however, we conclude that our focus on the remedy was incorrect. By focusing on the relief granted, the order lost its characterization as a special proceeding order and became an order within an action.

[5,6] A proceeding's characterization cannot hinge upon the remedy because it cannot be both a special proceeding and a step within an action. As we have often stated, special proceedings include civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes that are not actions.[12] This statement does not mean that statutory remedies within the civil procedure statutes are never special proceedings because, as *Webb*[13] illustrates, they sometimes are located within those statutes. But regardless of a statutory remedy's location within Nebraska's statutes, actions and special proceedings are mutually exclusive.[14] Thus, we determine whether an order issuing a stay of judicial proceedings in a proceeding to compel arbitration is a final, appealable order under the special proceeding category of final orders.

(b) FAA Rules on Appealable Orders Do Not Preempt State Procedural Rules for Appeals

We recognize that a federal court order compelling arbitration is not appealable under the FAA unless the trial court dismissed the underlying court action. Section 16 of the FAA provides that "(a) [a]n appeal may be taken from . . . (3) a final decision with respect to an arbitration that is subject to this

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[12] See, e.g., *State v. Pratt*, 273 Neb. 817, 733 N.W.2d 868 (2007); *In re Guardianship of Sophia M.*, 271 Neb. 133, 710 N.W.2d 312 (2006).

[13] *Webb, supra* note 7.

[14] See *id.*

title."[15] In *Green Tree Financial Corp.-Ala. v. Randolph*,[16] the U.S. Supreme Court stated that § 16(a)(3) "preserves immediate appeal of any 'final decision with respect to an arbitration,' regardless of whether the decision is favorable or hostile to arbitration." The Court held that under § 16(a)(3), when a federal district court "has ordered the parties to proceed to arbitration, and dismissed all the claims before it, that decision is 'final.'"[17]

Further, this rule applies whether the party seeking arbitration moves to compel arbitration after the opposing party has commenced a court action or initiates an independent proceeding solely to compel a party to arbitrate.[18] The Court concluded that applying different rules of finality based on this distinction was unsupported by the legislation.

It is true that the Court also pointed out that a federal court order entering a stay of judicial proceedings, instead of a dismissal, is not appealable under § 16(b)(1) of the FAA.[19] Since 1988, § 16(b) has precluded an appeal from an interlocutory order granting a stay pending arbitration or compelling arbitration.[20] But the FAA's § 16(b) does not preempt our appellate procedural rules.

[7] In *Webb*, we concluded that the FAA's preemptive effect does not extend to state procedural rules for appeals that do not defeat the FAA's objectives: "'There is no federal policy favoring arbitration under a certain set of procedural rules and the federal policy is simply to ensure the enforceability of private agreements to arbitrate.'"[21] Many other state courts have

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[15] 9 U.S.C. § 16.

[16] *Green Tree Financial Corp.-Ala. v. Randolph*, 531 U.S. 79, 86, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000).

[17] *Id.*, 531 U.S. at 89.

[18] See *id.*

[19] See *id.* See, also, 9 U.S.C. § 16(b).

[20] See 15B Charles Alan Wright et al., Federal Practice and Procedure § 3914.17 (2d ed. 1992).

[21] *Webb, supra* note 7, 268 Neb. at 481, 684 N.W.2d at 40-41. See, also, *Volt Info. Sciences v. Leland Stanford Jr. U.*, 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989).

reached the same conclusion.[22] And the U.S. Supreme Court has never held that §§ 3 and 4[23] of the FAA, which are procedural sections, apply to state courts.[24]

But the law is torn in two directions. A substantial split of authority exists among state courts over whether a party may appeal from an order compelling arbitration.[25] Some state courts have held that under their state procedural rules, orders compelling arbitration and staying judicial proceedings are interlocutory and not appealable. These courts reason that a party adversely affected by an order compelling arbitration can raise the issue in an appeal from an order confirming the arbitrator's award.[26] Other courts have reasoned that their state statute that specifically lists the arbitration orders that a party may appeal is exclusive and does not include an order compelling arbitration.[27]

[8] In contrast, other courts hold that their state legislatures' silence in such statutes does not mean the list of appealable orders is exclusive.[28] We agree. In *State ex rel. Bruning*,[29] we

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[22] See, e.g., *So. Cal. Edison Co. v. Peabody Western Coal*, 194 Ariz. 47, 977 P.2d 769 (1999); *Muao v. Grosvenor Properties Ltd.*, 99 Cal. App. 4th 1085, 122 Cal. Rptr. 2d 131 (2002); *Simmons v. Deutsche Financial Services*, 243 Ga. App. 85, 532 S.E.2d 436 (2000); *Wells v. Chevy Chase Bank*, 363 Md. 232, 768 A.2d 620 (2001); *Clayco Const. Co. v. THF Carondelet Dev.*, 105 S.W.3d 518 (Mo. App. 2003); *Superpumper, Inc. v. Nerland Oil, Inc.*, 582 N.W.2d 647 (N.D. 1998); *Toler's Cove Homeowners v. Trident Construction Co.*, 355 S.C. 605, 586 S.E.2d 581 (2003).

[23] See 9 U.S.C. §§ 3 and 4.

[24] See *Volt Info. Sciences, supra* note 21.

[25] See Annot., 6 A.L.R.4th 652 (1981).

[26] See, *Chem-Ash, Inc. v. Ark. Power & Light Co.*, 296 Ark. 83, 751 S.W.2d 353 (1988); *Muao, supra* note 22; *Lane v. Urgitus*, 145 P.3d 672 (Colo. 2006); *Weston Securities Corp. v. Aykanian*, 46 Mass. App. 72, 703 N.E.2d 1185 (1998); *Toler's Cove Homeowners, supra* note 22.

[27] See, e.g., *So. Cal. Edison Co., supra* note 22; *Muao, supra* note 22; *Weston Securities Corp., supra* note 26; *Toler's Cove Homeowners, supra* note 22.

[28] See, e.g., *Wein v. Morris*, 194 N.J. 364, 944 A.2d 642 (2008); *Gilliland v. Chronic Pain Associates*, 904 P.2d 73 (Okla. 1995).

[29] *State ex rel. Bruning, supra* note 5.

implicitly concluded that the list of appealable arbitration orders under § 25-2620 is not exclusive.

Other state courts also hold that a party resisting arbitration may appeal an order compelling arbitration regardless of whether the trial court's order also dismissed the court action.[30] These courts reason that an order compelling arbitration (1) completely disposes of all the issues before the court in that proceeding, leaving nothing for the parties to litigate; and (2) removes the trial court's jurisdiction over the underlying dispute. They also conclude that permitting appeals from both dismissals and stays creates more certainty and uniformity in their state appellate process.[31]

We recognize that an order issuing a stay within an action or proceeding is usually interlocutory and not appealable absent a statute or court rule permitting an interlocutory appeal.[32] Yet, we have recognized that a stay which is tantamount to a dismissal of an action or has the effect of a permanent denial of the requested relief should be appealable as a final order.[33]

We believe that reasoning applies here. Under Nebraska's Uniform Arbitration Act, whether a court dismisses or stays the court action, the order has the same effect: The parties cannot litigate their dispute in state courts because by enforcing the arbitration agreement, the order divests the court of

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[30] See, *Dewart v. Northeastern Gas Transmission Co.*, 139 Conn. 512, 95 A.2d 381 (1953); *Simmons, supra* note 22; *Evansville-Vanderburgh Sch. v. Teachers Ass'n*, 494 N.E.2d 321 (Ind. App. 1986); *Iowa Mgmt. & Consultants v. Sac & Fox Tribe*, 656 N.W.2d 167 (Iowa 2003); *Wells, supra* note 22; *Sawyers v. Herrin-Gear Chevrolet Co., Inc.*, 26 So. 3d 1026 (Miss. 2010); *Wein, supra* note 28; *Lyman v. Kern*, 128 N.M. 582, 995 P.2d 504 (N.M. App. 1999); *Okla. Oncology & Hematology v. US Oncology*, 160 P.3d 936 (Okla. 2007).

[31] See, e.g., *Sawyers, supra* note 30; *Wein, supra* note 28.

[32] See, e.g., *Department of Children and Families v. L.D.*, 840 So. 2d 432 (Fla. App. 2003); *Cole v. Cole*, 971 So. 2d 1185 (La. App. 2007); *Washington v. FedEx Ground Package System*, 995 A.2d 1271 (Pa. Super. 2010).

[33] *In re Interest of L.W.*, 241 Neb. 84, 486 N.W.2d 486 (1992), quoting *Carpenter v. Carpenter*, 326 Pa. Super. 570, 474 A.2d 1124 (1984).

jurisdiction to hear their dispute.[34] In either case, the only other proceedings authorized by the act are initiated by separate applications to the court: an application to confirm an arbitration award,[35] an application to vacate an award,[36] or an application to modify or correct an award.[37] Our arbitration statutes allow these proceedings even if the parties never disputed arbitrability because they are related to the enforceability of an arbitration award.

[9] As the U.S. Supreme Court recognized in *Green Tree Financial Corp.-Ala.*, while the FAA provides separate proceedings related to enforcing an arbitration award, "the existence of [an enforcement proceeding as a] remedy does not vitiate the finality of" a court's resolution of the parties' preliminary dispute over arbitrability.[38] Obviously, a court would not revisit its decision from an earlier proceeding that the dispute was arbitrable. So we agree with courts that hold that an order compelling arbitration and staying judicial proceedings is a final determination of arbitrability. But our analysis is not complete: Under our final order statute, an order must also affect a substantial right.

[10] We have often stated that an order affects a substantial right if the order affects the subject matter of the litigation, such as diminishing a claim or defense that the appellant had before the court entered the order.[39] Just as an order refusing to compel arbitration diminishes a party's claim that it is entitled to arbitrate,[40] so does an order compelling arbitration diminish

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[34] See *Wein, supra* note 28.

[35] Neb. Rev. Stat. § 25-2612 (Reissue 2008).

[36] Neb. Rev. Stat. § 25-2613 (Reissue 2008).

[37] Neb. Rev. Stat. § 25-2614 (Reissue 2008).

[38] *Green Tree Financial Corp.-Ala., supra* note 16, 531 U.S. at 86. See, also, *Daginella v. Foremost Ins. Co.*, 197 Conn. 26, 495 A.2d 709 (1985); *Matter of Hosiery Mfrs. Corp. v. Goldston*, 238 N.Y. 22, 143 N.E. 779 (1924).

[39] See, e.g., *Miller v. Regional West Med. Ctr.*, 278 Neb. 676, 772 N.W.2d 872 (2009).

[40] See *Webb, supra* note 7.

a party's claim that it is entitled to litigate in court.[41] These claims cannot be effectively vindicated after the party has been compelled to do that which it claims it is not required to do.[42] As the Maryland Court of Appeals stated, "The policy against delay must be weighed against the more fundamental principle that a party who has not agreed to arbitrate a particular dispute cannot be compelled to arbitrate it."[43]

[11] More important, an order that disposes of all the issues presented in an independent special proceeding obviously affects the subject matter of the litigation. By "independent special proceeding," we mean one that is separate from the issues raised in any underlying dispute and is not a phase in a protracted special proceeding with interrelated phases (as in juvenile cases, for example). We conclude that an order compelling arbitration or staying judicial proceedings pending arbitration is a final order under the second category of § 25-1902: It affects a substantial right in a special proceeding.

As noted, after determining whether an arbitration-related order is final under § 25-1902, we determine whether permitting an appeal from the order undermines the FAA's goals and objectives. We determine that it does not. As the U.S. Supreme Court has stated, "The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration."[44] And other courts have concluded that state appellate procedures only affect the timing of an appeal; they neither preclude the enforcement of a valid arbitration agreement nor interfere with the parties' substantive rights.[45] Further, permitting an appeal is consistent with the

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[41] See *Evansville-Vanderburgh Sch., supra* note 30. Compare *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007).

[42] See, e.g., *In re Estate of Rose*, 273 Neb. 490, 730 N.W.2d 391 (2007).

[43] *Wells, supra* note 22, 363 Md. at 249, 768 A.2d at 629, citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995). See, also, *State ex rel. Bruning, supra* note 5.

[44] *Volt Info. Sciences, supra* note 21, 489 U.S. at 477.

[45] See, *Simmons, supra* note 22 (citing cases); *Weston Securities Corp., supra* note 26.

Supreme Court's holding in *Green Tree Financial Corp.-Ala.*[46] that a party may appeal from a final decision on the arbitrability of a dispute. Having determined that an order compelling arbitration and staying judicial proceedings is a final order on arbitrability, we have jurisdiction. Having disposed of the jurisdictional issue, we come at last to the merits of the court's order to arbitrate.

2. The FAA Does Not Preempt Nebraska's Preclusion of Agreements to Arbitrate Future Controversies in Insurance Policies

As noted, the court found that RCIC issued the MPCI policies under the FCIA and that all MPCI policies contain a provision requiring mediation or arbitration. But the parties fail to recognize that the arbitration provision in each policy is invalid under Nebraska law because it required arbitration of future controversies related to an insurance policy.

[12] Section 25-2602.01 addresses two types of arbitration agreements: (1) agreements to arbitrate existing controversies[47] and (2) agreements to arbitrate future controversies.[48] The statute provides that such agreements are valid and enforceable except in specified circumstances. But under § 25-2602.01(f)(4), agreements to arbitrate future controversies concerning an insurance policy are invalid, with certain exceptions that are not applicable here. So unless federal law preempts § 25-2602.01, the arbitration provisions in these insurance policies were invalid.

[13,14] "Under the FAA, written provisions for arbitration are 'valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'"[49] Section 2[50] of the FAA preempts inconsistent state laws that apply solely to the enforceability of arbitration

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[46] See *Green Tree Financial Corp.-Ala., supra* note 16.

[47] See § 25-2602.01(a).

[48] See § 25-2602.01(b).

[49] *Aramark Uniform & Career Apparel v. Hunan, Inc.*, 276 Neb. 700, 703, 757 N.W.2d 205, 209 (2008), quoting 9 U.S.C. § 2.

[50] 9 U.S.C. § 2.

provisions in contracts "evidencing a transaction involving commerce."[51] Because of the U.S. Supreme Court's expansive interpretation of this phrase, the FAA governs whether an arbitration provision in a contract touching on interstate commerce is enforceable.[52] But under the federal McCarran-Ferguson Act,[53] state law regulating the business of insurance preempts federal law that does not specifically govern insurance.

Subsection (a) of 15 U.S.C. § 1012 provides that "[t]he business of insurance . . . shall be subject to the laws of the several States which relate to the regulation or taxation of such business." Section 1012(b) sets out the state law exemptions:

> 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, or which imposes a fee or tax upon such business, *unless such Act specifically relates to the business of insurance*: *Provided*, That [the federal antitrust statutes] shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

(Emphasis supplied.) (Emphasis in original.)

Congress passed the McCarran-Ferguson Act to overturn a U.S. Supreme Court decision under the Commerce Clause that threatened the continued supremacy of states to regulate "the activities of insurance companies in dealing with their policyholders."[54] The U.S. Supreme Court has interpreted the second clause of § 1012(b) to provide an exemption to an insurer from antitrust scrutiny if its challenged practices constitute the "business of insurance" and are regulated by state law.[55] The first clause, which is at issue here, shields state regulation of the insurance business from federal preemption under

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[51] See *Hunan, Inc., supra* note 49.

[52] See *id.* See, also, *Smith v. Pacificare Behavioral Health of CA*, 93 Cal. App. 4th 139, 113 Cal. Rptr. 2d 140 (2001).

[53] See 15 U.S.C. §§ 1011 through 1015 (2006).

[54] *SEC v. National Securities, Inc.*, 393 U.S. 453, 459, 89 S. Ct. 564, 21 L. Ed. 2d 668 (1969).

[55] See *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 219, 99 S. Ct. 1067, 59 L. Ed. 2d 261 (1979).

Congress' Commerce Clause authority, whether dormant or exercised, unless the federal statute specifically relates to the business of insurance.[56]

[15] Under the McCarran-Ferguson Act, federal courts have set out three elements for determining whether a state law controls over (reverse preempts) a federal statute: (1) The federal statute does not specifically relate to the business of insurance; (2) the state law was enacted for regulating the business of insurance; and (3) the federal statute operates to invalidate, impair, or supersede the state law.[57] Applying this test, the only question for determining whether Nebraska law controls over the FAA is whether Nebraska's restriction of arbitration agreements in insurance policies regulates the business of insurance.

In *SEC v. National Securities, Inc.*,[58] the Court first interpreted the McCarran-Ferguson Act in a dispute under the first clause of § 1012(b). It explained that in enacting the McCarran-Ferguson Act,

> Congress was concerned with the type of state regulation that centers around the contract of insurance . . . . The relationship between insurer and insured, *the type of policy which could be issued*, its reliability, interpretation, *and enforcement*—these were the core of the "business of insurance." . . . But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the "business of insurance."[59]

In examining the act, the Court held that a state law that protected insurance stockholders from inequitable mergers

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[56] *American Ins. Assn. v. Garamendi*, 539 U.S. 396, 123 S. Ct. 2374, 156 L. Ed. 2d 376 (2003).

[57] *American Bankers Ins. Co. of Florida v. Inman*, 436 F.3d 490 (5th Cir. 2006); *Standard Sec. Life Ins. Co. of New York v. West*, 267 F.3d 821 (8th Cir. 2001).

[58] *National Securities, Inc., supra* note 54.

[59] *Id.*, 393 U.S. at 460 (emphasis supplied).

was not a regulation of the insurance business: "The crucial point is that here the State has focused its attention on stockholder protection; *it is not attempting to secure the interests of those purchasing insurance policies*."[60] The Court recognized that the state had approved the merger at issue under a statute that also required it to find that the merger would not reduce the security of or services to policyholders. That part of the statute was a regulation of the insurance business and exempt from preemption by federal law. But to the extent the statute protected shareholders, it did not regulate the insurance relationship.

Later, in *Department of Treasury v. Fabe*,[61] the Court held that a state priority statute for insurer liquidations was not preempted by a federal priority statute for bankruptcy obligations. To the extent that the state statute protected policyholders by giving their claims a higher priority than the federal government's claims, it regulated the business of insurance.

[16] In *Fabe*, the Court reemphasized its holding in *National Securities, Inc.* that the primary concern for disputes under the first clause of § 1012(b) is whether the state law regulates the core components of the business of insurance: the contractual relationship between the insurer and insured; the type of policy that can be issued; and its reliability, interpretation, and enforcement. It determined that the phrase "business of insurance" has a broader meaning under the first clause of § 1012(b) than under the second clause: "The broad category of laws enacted 'for the purpose of regulating the business of insurance' consists of laws that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance."[62]

Every federal appellate court to address this issue has held that state laws restricting arbitration provisions in insurance contracts regulate the business of insurance and are not

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[60] *Id.* (emphasis supplied).

[61] *Department of Treasury v. Fabe*, 508 U.S. 491, 113 S. Ct. 2202, 124 L. Ed. 2d 449 (1993).

[62] *Id.*, 508 U.S. at 505.

preempted by the FAA.[63] These courts have reasoned that such state laws regulate core components of the insurance business by legislating how disputed claims can be resolved.[64] Applying factors that the Supreme Court set out under the second clause of § 1012(b),[65] these courts have also asked whether the law has the effect of transferring or spreading a policyholder's risk. They have reasoned that a state's restriction of arbitration clauses affects the transfer of risk by (1) placing limits on the parties' agreement to spread risk[66] or (2) introducing the possibility of a jury verdict into the process for resolving disputed claims.[67] Alternatively, they have simply stated that any contract of insurance is an agreement to spread risk.[68]

Reasonable people might disagree whether statutes restricting arbitration agreements in insurance policies affect the transfer of risk. But we do not consider this issue dispositive. First, even for disputes under the second clause of § 1012(b), no factor is dispositive in itself whether an insurer's practice constitutes the "business of insurance."[69] More important, the Court in *Fabe* explained that these factors were intended to define

> the scope of the antitrust immunity located in the second clause of § [101]2(b). We deal here with the first clause, which is not so narrowly circumscribed. . . . To equate laws "enacted . . . for the purpose of regulating the business of insurance" with the "business of insurance" itself

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[63] See, *Inman, supra* note 57; *McKnight v. Chicago Title Ins. Co., Inc.*, 358 F.3d 854 (11th Cir. 2004); *West, supra* note 57; *Stephens v. American Intern. Ins. Co.*, 66 F.3d 41 (2d Cir. 1995); *Mutual Reinsurance Bureau v. Great Plains Mut.*, 969 F.2d 931 (10th Cir. 1992). See, also, *Smith, supra* note 52.

[64] See *West, supra* note 57; *Mutual Reinsurance Bureau, supra* note 63.

[65] See *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 102 S. Ct. 3002, 73 L. Ed. 2d 647 (1982).

[66] See *Mutual Reinsurance Bureau, supra* note 63.

[67] *Inman, supra* note 57; *West, supra* note 57.

[68] See, *Stephens, supra* note 63; *Mutual Reinsurance Bureau, supra* note 63.

[69] See *Pireno, supra* note 65.

> . . . would be to read words out of the statute. This we refuse to do.[70]

[17,18] We conclude that under *Fabe*, the *National Securities* test[71] is the more relevant test for disputes under the first clause of § 1012(b). Applying that test, we conclude that a statute precluding the parties to an insurance contract from including an arbitration agreement for future controversies regulates the insurer-insured contractual relationship. Thus, it regulates the business of insurance. So we agree with federal courts that the FAA does not preempt such statutes. Specifically, we hold that the FAA does not preempt Nebraska's § 25-2602.01(f)(4). But we are not done. The FAA is not the only federal law that we consider in determining whether § 25-2602.01(f)(4)'s preclusion of agreements to arbitrate future controversies in crop insurance policies is preempted.

3. Federal Regulations Under the FCIA Preempt Nebraska's Prohibition Against Agreements to Arbitrate Future Controversies in a Crop Insurance Policy Reinsured by the Federal Crop Insurance Corporation

As noted, the district court found that RCIC issued this crop insurance policy under the FCIA and that the Federal Crop Insurance Corporation (the Corporation) is the reinsurer for all MPCI policies. The court further determined that all MPCI policies contain the same alternative dispute resolution provision.

[19] The Corporation is a wholly owned government corporation within the U.S. Department of Agriculture, established to regulate the crop insurance industry.[72] "Private insurance companies offer crop insurance and are then reinsured (and regulated) by the [Corporation]."[73] Subsections (e) and (l) of 7 U.S.C. § 1506 authorize the Corporation to adopt rules and regulations necessary to conduct its business. Subsection (a)(1)

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[70] *Fabe, supra* note 61, 508 U.S. at 504 (emphasis omitted).

[71] See *National Securities, Inc., supra* note 54.

[72] *Acceptance Ins. Companies, Inc. v. U.S.*, 583 F.3d 849 (Fed. Cir. 2009).

[73] *Id.* at 851.

of 7 U.S.C. § 1508 authorizes the Corporation to "insure, or provide reinsurance for insurers of, producers of agricultural commodities . . . under 1 or more plans of insurance determined by the Corporation to be adapted to the agricultural commodity concerned."

[20] Under this authority, the Corporation has promulgated regulations prescribing the terms for common crop insurance policies.[74] The Corporation's regulations specifically require applicants to apply on one of the Corporation's prescribed policy forms.[75] Those forms contain arbitration provisions for all policies reinsured by the Corporation.[76]

Also, 7 U.S.C. § 1506(l) provides in part:

> State and local laws or rules shall not apply to contracts, agreements, or regulations of the Corporation or the parties thereto to the extent that such contracts, agreements, or regulations provide that such laws or rules shall not apply, or to the extent that such laws or rules are inconsistent with such contracts, agreements, or regulations.

Under its statutory authority to regulate private crop insurance contracts, the Corporation has also promulgated regulations providing that state and local governments cannot pass laws or promulgate rules that affect or govern its agreements or contracts.[77] And the regulations specifically preclude state and local governments from exercising approval authority over the policies it issues.[78]

[21,22] Under the Supremacy Clause of the U.S. Constitution, state law that conflicts with federal law is invalid.[79] Federal law preempts state law when it conflicts with a federal statute or when the U.S. Congress, or an agency acting within the scope of its powers conferred by Congress, explicitly declares an

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[74] See 7 C.F.R. part 457 (2010).

[75] See § 457.8(a).

[76] See § 457.8(b).

[77] See 7 C.F.R. § 400.352(a) (2010).

[78] See § 400.352(b)(3).

[79] *Zannini v. Ameritrade Holding Corp.*, 266 Neb. 492, 667 N.W.2d 222 (2003).

intent to preempt state law.[80] Preemption can also impliedly occur when Congress has occupied the entire field to the exclusion of state law claims.[81]

[23-25] We conclude that the FCIA and the Corporation's regulations express an intent to preempt state law that conflicts with the Corporation's regulations. Further, the Corporation's regulations requiring arbitration and the preclusion of the arbitration agreement under § 25-2602.01(f)(4) conflict because they cannot both be enforced. And because the FCIA and the Corporation's regulations specifically deal with insurance, they invoke the exception under the McCarran-Ferguson Act's § 1012(b). That is, under the McCarran-Ferguson Act, Nebraska's § 25-2602.01(f)(4) does not reverse preempt federal law under the FCIA because the FCIA specifically relates to the business of insurance.[82] Because the McCarran-Ferguson Act does not apply, the Corporation's regulations requiring arbitration preempt state law and are enforceable.

[26] Moreover, the insureds cannot evade the arbitration requirement by claiming that they are enforcing their settlement agreement with the adjuster. An agent's or loss adjuster's statement cannot bind the Corporation when the statement is inconsistent with governing federal law.[83] And each crop insurance policy's arbitration provision is clearly broad enough to cover disputes over adjustment actions: "If you and we fail to agree on any determination *made by us*," the disagreement must be resolved through mediation or arbitration. (Emphasis supplied.) We conclude that the district court did not err in determining that the insureds' dispute is subject to arbitration.

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[80] See, *In re Interest of Elias L.*, 277 Neb. 1023, 767 N.W.2d 98 (2009); *Zannini, supra* note 79. See, also, *Fidelity Federal Sav. & Loan Assn. v. De La Cuesta*, 458 U.S. 141, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982).

[81] See *Zannini, supra* note 79.

[82] See, *In re 2000 Sugar Beet Crop Ins. Litigation*, 228 F. Supp. 2d 992 (D. Minn. 2002); *IGF Ins. Co. v. Hat Creek Partnership*, 349 Ark. 133, 76 S.W.3d 859 (2002).

[83] See, *OPM v. Richmond*, 496 U.S. 414, 110 S. Ct. 2465, 110 L. Ed. 2d 387 (1990); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 68 S. Ct. 1, 92 L. Ed. 10 (1947).

VI. CONCLUSION

We determine that an arbitration order which directs the parties to arbitrate their dispute and stays the underlying judicial action is a final, appealable order in a special proceeding under the second category of § 25-1902. We determine that § 25-2602.01(f)(4), which precludes provisions to arbitrate future controversies in insurance contracts, is not preempted by the FAA. Under the McCarran-Ferguson Act, § 25-2602.01(f)(4) regulates the business of insurance and reverse preempts the FAA. But § 25-2602.01(f)(4) is preempted by the FCIA and its implementing regulations, which require arbitration. The McCarran-Ferguson Act does not apply because the FCIA specifically relates to the business of insurance. Finally, we conclude that the arbitration provision in each crop insurance policy requires the parties to arbitrate disputes over adjustment actions. The district court did not err in ordering arbitration.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LAMONT RUFFIN, ALSO KNOWN AS LAMONT ROLAND, APPELLANT.

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Filed September 17, 2010. No. S-09-972.

1. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
2. **Jurisdiction: Affidavits: Fees: Appeal and Error.** A poverty affidavit serves as a substitute for the docket fee otherwise required upon appeal, and an in forma pauperis appeal is perfected when the appellant timely files a notice of appeal and a proper affidavit of poverty.
3. **Affidavits: Good Cause: Appeal and Error.** Generally, in the absence of good cause evident in the record, it is necessary for a party appealing to personally sign the affidavit in support of her or his motion to proceed in forma pauperis.

Petition for further review from the Court of Appeals, IRWIN, SIEVERS, and MOORE, Judges, on appeal thereto from the District Court for Buffalo County, JOHN P. ICENOGLE, Judge. Judgment of Court of Appeals affirmed.