OA 8-30-88

IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

JOHN S. ROE,

Petitioner,

v.

AMICA MUTUAL INSURANCE COMPANY,

Respondent.

Case No. 71,682

Second District
Case No. 87-345

FILED
SID J. WHITE
JUN 8 1988
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AMICUS CURIAE BRIEF ON BEHALF OF NATIONAL ASSOCIATION OF INDEPENDENT INSURERS

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STATEMENT OF THE CASE AND FACTS

The NATIONAL ASSOCIATION OF INDEPENDENT INSURERS[1] is not a party to this cause and assumes that the parties have accurately set forth its procedural and factual history. This history is also set forth at pp. 1-4 of the Court of Appeals' opinion ("Op.").

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[1]The National Association of Independent Insurers will hereafter be referred to as NAII.

SUMMARY OF THE ARGUMENT

Both the trial court and the Second District court correctly rejected the attempts to confirm and enforce John Roe's arbitration award against Amica Mutual Insurance Company[2] for Two Hundred Twenty Five Thousand Seven Hundred Thirty Five Dollars ($225,735.00). Pursuant to the terms and provisions of its policy with the Roes, Amica properly invoked its right to a de novo jury trial on John Roe's claim for underinsured motorist coverage benefits. Amica's policy provides that if the arbitration award exceed Ten Thousand Dollars ($10,000.00) (the minimum bodily injury liability limits of Florida's Financial Responsibility Law) either party may reject the award within sixty (60) days of its entry, and request a trial on the claim.

In addition to those reasons expoused by the courts below, this holding is mandated by the Federal Arbitration Act (9 U.S.C. §1, et seq.) (1976) which specifically provides that an arbitration award may be confirmed and enforced only "(i)f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award ...." (9 U.S.C. §9). The parties have not agreed to the entry of judgment in this case. The Federal Arbitrations Act controls and supersedes any inconsistent provisions of Florida law, including the Florida Arbitration Code.

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[2]Amica Mutual Insurance Company will hereinafter be referred to as Amica.

ARGUMENT

I

THE FEDERAL ARBITRATION ACT CONTROLS THIS CASE AND VALIDATES AMICA'S ARBITRATION CLAUSE.

The Federal Arbitration Act (9 U.S.C. §1, et seq. (1976)) declares, in part, that:

> A written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable. 9 U.S.C. §2. (Emphasis added)

Amica's policy expressly provides hat it has been "signed ... by Amica's President and Secretary at Providence, Rhode Island ...." (Policy p. 11). Aside from the formation of the policy contract itself, Amica's policy contains the following general coverage provision:

> POLICY PERIOD AND TERRITORY
>
> This policy applies only to accident and losses which occur:
>
> 1. During the policy period as shown in the Declarations; and
>
> 2. Within the policy territory.
>
> The policy territory is:
>
> 1. The United States of America, its territories or possessions;

2. Puerto Rico; or

3. Canada

This policy also applies to loss to, or accidents involving, your covered auto while being transported between their ports.

Since Amica's policy "concerns more states that one" Gibbons v. Ogden, 9 Wheat 1,6, L. Ed. 23 (1824), it qualifies as a transaction involving commerce. See, Unites States v. South-Eastern Underwriters Association, 322 U.S. 533, 550-51, 64 S. Ct. 1162, 1172-73, 8 L. Ed. 1440 (1944), and falls within the scope of the Federal Act. The issue is not whether, in carrying out the terms of the contract, one of the parties did cross state line. As long as the terms of the contract on their face evidence interstate traffic the contract comes within the scope of Section 2. See Acton Catr., Inc. v. Wildwood Partners, Ltd., 508 So. 2d 1274,1276 (Fla. 5th DCA 1987).

Furthermore, the United States Supreme Court has made very clear that the Federal Arbitration Act applies to state court proceedings:

> 'Section 2 (of the Federal Arbitration Act) is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.' Moses H. Cone Memorial Hospital v. Mercury Construction Corporation, 460 U.S. 1, 24 (1983). Enacted pursuant to the Commerce Clause, U.S. Const., Art. I, § 8, Cl.3, this body of substantive law is enforceable in

> both state and federal courts. Southland Corporation v. Keating, 465 U.S. 1, 11-12 (1984) (Emphasis added).

Perry v. Thomas, 482 U.S. ____, _____, 107 S. Ct. 2520,2525, 96 L.Ed.2d 426,437 (1987).

The Federal Act contemplates and validates the precise type of arbitration provision set forth in Amica's policy. Section 9 of the Federal Arbitration Act specifically provides that an arbitration award may be confirmed and enforced only "(i)f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award ...." In this case the parties have not agreed to the entry of judgment, when the arbitration award exceeds Ten Thousand Dollars ($10,000.00), but have expressly reserved to themselves the right to a trial de novo on the underinsured motorist claim.

There is no conflict, in this regard, between the Federal Arbitration Act and the Florida Arbitration Code. As the Second District correctly recognized, Florida' Arbitration Act "permits nonbinding arbitration" clauses such as that used in Amica's policy. (Op., pp. 4-5.) Furthermore, the Florida Arbitration Code specifically provides that it:

> shall not apply to any ... agreement or provision to arbitrate in which it is stipulated that this law shall not apply ... Section 682.02

By agreeing to the specific arbitration clause in Amica's policy, the parties in this case have obviously stipulated that the Florida Arbitration Code should not apply, to the extent inconsistent.

Even if there were a conflict between the Federal Arbitration Act and Florida law, regarding the enforceability of Amica's arbitration clause, the Federal Act controls and renders the clause valid and enforceable. Perry v. Thomas, supra (Federal Act pre-empts California Labor Code); Southland Corporation v. Keating, supra; (Federal Act pre-empts California Franchise Investment Law). As the Fourth District held in a related context:

> The issue before us is whether the United States Arbitration Act supersedes inconsistent provisions of Florida law and the Florida Arbitration Code. We hold that it does and that state courts are bound to apply the Federal Arbitration Act with it applies.
>
> * * *
>
> The Federal Arbitration Act was enacted pursuant to the Commerce Clause of the United States Constitution and supersedes inconsistent state laws.
>
> * * *
>
> The Supremacy clause requires us to resolve any inconsistency between the two laws in favor of the federally created right, and to subordinate Florida law to the supreme law of the land. We therefore hold that Florida courts must recognize and apply the Federal Arbitration Act and that arbitration agreements which are valid and enforceable under the federal law are also valid and enforceable in Florida courts

Merrill Lynch Pierce Fenner & Smith, Inc. v. Melamed, 405 So. 2d 709,791-2 (Fla. 4th DCA 1981).

II

AMICA'S ARBITRATION CLAUSE IS NOT UNCONSCIONABLE

Petitioner himself, the actual party to the insurance contract, does not content that this arbitration clause is unconscionable. Nevertheless, the Florida Trial Lawyers raised this argument in their amicus brief before the Second District. The Second District, however, correctly rejected that contention (op., pp. 5-6) as have other courts as well. Consider, for example, this statement by an Ohio trial court:

> Lastly, the defendant-claimant asserts that this arbitration provision, as it relates to the right to trial, in unconscionable and therefore, it should not be enforced. Traditionally, an unconscionable contract has been defined to be such as no sensible person not under delusion, duress, or in distress would make, and such as no honest and fair person would accept. R. L. Kimsey Cotton Company v. Ferguson, 233 Ga. 962, 214 S.E. 2d 360 (1975); Stiefler v. McCullough, 94 Ind. App. 123, 174 N.E. 823 (1931). To come within the scope of this definition, the terms of the contract must be monstrously harsh and shocking to the conscience, Domus Realty Corporation v. 3440 Realty Company, Inc., 179 Misc. 749, 40 N.Y.S. 2d 69 (New York County Sup. Ct. 1943), or so totally one-sided as to be oppressive, Stanley A. Klopp, Inc. v. John Deere Company, 510 F. Supp. 807, 810 (E. D. Pa. 1981); In re Marriage of Carlson, 101 Ill. App. 3d 924, 428 N.E. 2d 1005 (1981). Of course, the concept of unconscionability must necessarily be applied in a flexible manner depending upon all the facts and circumstances of the particular case. Friedman v. Egan, 64 A.D. 2d 70, 407 N.Y.S. 2d 999 (1978).
>
> In the present case, the arbitration provision in question requires that , under certain circumstances, the defendant-claimant

> must pursue his claim against the plaintiff-respondent in court, even though he has received an arbitration award. This Court finds that such a provision cannot be considered monstrously harsh and shocking to the conscience or so totally one-sided as to be oppressive. Thus, the challenged provision is found not to be unconscionable. Allstate Insurance Company v. Shinover, No. 82-1722, slip op. at 5 (Ohio Ct. Common Pleas 1982).

In any event, due to the applicability of the Federal Arbitration Act, it is federal law which controls the issue of unconscionability in this particular context, not state law. Thomas v. Perry, 426 Cal. Rptr. 156 (Cal. App. 1988). As demonstrated above (supra, pp. 5-6_, this particular type of arbitration clause is validated by the Federal Arbitration Act itself and that Act supersedes any inconsistent state laws.

Additionally, the United States Supreme Court has specifically admonished that:

> A court (may not) rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot. Perry v. Thomas, supra, 482 U.S. at _____ n. 9, 10, 107 S. Ct. at 2527 n. 9, 96 L. Ed. 2d at 437 n. 9.

CONCLUSION

The trial court and the Second District correctly refused to confirm and enter judgment on John Roe's arbitration award. Pursuant to the terms of the arbitration clause in the applicable policy of insurance, Amica has a right to a trial on John Roe's claim of underinsured motorist coverage benefits. That clause if validated and rendered enforceable by the Federal Arbitration Act. An Act which supersedes any inconsistent state laws including the Florida Arbitration Code.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished to Manuel J. Alvarez, Esquire, P. O. Box 2003, Tampa, Florida 33601, George W. Phillips, Esquire, P. O. Box 270504, Tampa, Florida 32602 Thomas M. Ervin, Jr. Esquire, Post Office Drawer 1170, Tallahassee, FL 32302, and C. Kenneth Stuart, Jr., Esquire, P. O. Box 2177, Lakeland, Florida 33806-2177, this 6th day of June, 1988.

ATTORNEY