IN THE SUPREME COURT OF FLORIDA

JOHN S. ROE,

Petitioner,

vs. CASE NO. 71,682

AMICA MUTUAL INSURANCE CO.,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

	PAGE(S)
TABLE OF CITATIONS.....	ii
PRELIMINARY STATEMENT.....	1
STATEMENT OF THE CASE AND FACTS.....	3
SUMMARY OF ARGUMENT.....	8

ARGUMENT:

POINT I

THE CONTRACT PROVISION AUTHORIZING EITHER PARTY TO REJECT ANY UNDERINSURED MOTORIST ARBITRATION AWARD EXCEEDING $10,000.00 DOES NOT VIOLATE THE FLORIDA ARBITRATION CODE OR PUBLIC POLICY AND IS, THEREFORE, VALID AND BINDING.

POINT II

THE CONTRACT PROVISION AUTHORIZING EITHER PARTY TO REJECT AN UNINSURED ARBITRATION AWARD EXCEEDING $10,000.00 SHOULD BE FOUND TO PROPERLY AUTHORIZE THE PARTY MAKING THE REJECTION TO DEMAND A JURY TRIAL BY ITS OWN TERMS AS THE PARTIES STIPULATED THAT THE ARBITRATION CODE WOULD NOT BE APPLICABLE TO AWARDS IN EXCESS OF $10,000.00.

CONCLUSION.....

CERTIFICATE OF SERVICE.....

CITATION OF AUTHORITIES

CASES **PAGE**

Allstate Insurance Co. v. Duffy, 237 So.2d 225 (Fla 3d DCA 1970) 18

Amica Mutual Insurance Company v. John S. Roe, et ux., 12 F.L.W. 2772 (Fla. 2d DCA December 2, 1987) 1, 4, 7

Beach Resorts Intern. v. Clarmac Marine Construction Co., 339 So.2d 689 (Fla. 2d DCA 1976) 11

Berger v. Fireman's Fund Insurance Company, 515 So.2d 997 (Fla. 3d DCA 1987) 1, 5, 9, 13, 15, 17, 22

Excelsior Ins. Co. v. Pomona Park Bar & Package Store, 369 So.2d 938 (Fla. 1979) 21

Fisk v. Shelton, 469 So.2d 248 (Fla 2d DCA 1985) 16

Frank J. Rooney, Inc. v. Charles W. Ackerman of Florida. 219 So.2d 110, 112 (Fla 3d DCA), cert dism. 230 So.2d 13 (Fla, 1969) 12

Hodkin v. Perry, 88 So.2d 139 (Fla. 1956) 16

Knight v. A. S. Equities, Inc., 280 So.2d 456, 459 (Fla. 4th DCA 1973) 18

Pacemaker Corp. v. Euster, 357 So.2d 208 (Fla 3d DCA 1978) . . 11

Paine, Webber, Jackson & Curtis, Inc. v. Lucas, 411 So.2d 1369 (Fla 5th DCA 1982) 12

Reichel v. Government Employees Insurance Co., 487 N.Y.S.2d 99 (Ad2 Dept. 1985) 16

State v. British Leyland Motors, Inc., 1090 So.2d 576 (1st DCA 1974) 13

Taylor v. Kenco Cehmical & Mfg. Corp., 465 So.2d 581 (Fla. 1st DCA 1985) 16

Thomas v. Ratiner, 462 So.2d 1157, 1159 (Fla. 3d DCA 1984) . 18

Title & Trust Co. of Florida v. Parker, 468 So.2d 520, 524 (Fla. 1st DCA 1985) 18

Wood - Hopkins Contracting Co. v. C. H. Barco Contracting Co., 301 So.2d 479, 480 (Fla. 1st DCA 1974) 18

Wooten V. Rhodus, 470 So.2d 844 (Fla 5th DCA 1985) 16

FLORIDA STATUES

Florida Statues, Section 682 (Florida Arbitration Code)

PRELIMINARY STATEMENT

These proceedings are before this Court based on the conflict between the Second District Court of Appeal decision in Amica Mutual Insurance Company v. John S. Roe, et ux., 12 F.L.W. 2772 (Fla. 2d DCA December 2, 1987) and the Third District Court of Appeal decision in Berger v. Fireman's Fund Insurance Company, 515 So.2d 997 (Fla. 3d DCA 1987). This court has accepted jurisdiction.

Respondent, Amica Mutual Insurance Company, was the Appellant/Cross-Appellee in the court below, and will be referred to "Amica". Petitioner, John S. Roe, was the Appellee/Cross-Appellant in the court below, and will be referred to as "Roe" or as "Petitioner". Citations to the record on Appeal shall be designated using the symbol "R". Citations to the Appendix submitted by Petitioner will be made using the symbol "A". For the purpose of clarity and to avoid oversight, Respondent has submitted a Supplemental Appendix which is attached hereto. Citations to the Supplemental Appendix will be made using the symbol "SA".

The decision of the Second District Court of Appeal, is eminently correct in both reasoning and result and accurately sets forth the law on the issues sought to be reviewed. The contract provision in dispute provides that either party may make a written demand for arbitration to resolve any dispute concerning underinsured motorist benefits. It further provides

that if an arbitration award exceeds $10,000.00 ("the minimum bodily injury liability limits of the Florida Financial Responsibility Law"), either party would be entitled to a jury trial if demand is made within sixty (60) days of the award. This clause is not unilateral on the part of the insurer.

It is clear that neither party intended arbitration proceedings pursuant to this clause to be governed by the Florida Arbitration Code, Section 682, Florida Statutes. As such, the provisions of the Arbitration Code concerning vacating, modifying or correcting an arbitration award are not applicable. Amica contends that the contract provision is not contrary to Florida law and public policy and, therefore, is valid and binding on the parties.

STATEMENT OF THE CASE AND FACTS

Amica generally accepts the Statement of the Case and Facts as set forth in the Petitioner's Initial Brief. Petitioner, however, misconstrues the language and effect of the arbitration clause which is contained within the policy of insurance between Petitioner and Amica. That provision does not authorize the insurer to unilaterally reject anything. Rather, it provides that either party may demand arbitration to resolve underinsured motorist disputes. It also provides that either party may demand the right to a trial if the amount of the arbitration award exceeds the minimum limit for bodily injury liability specified by the Financial Responsibility Law. Therefore, by agreement of the parties, the Florida Arbitration Code does not apply to arbitration proceedings brought pursuant to the contract clause.

The arbitration clause provides that "either party may make a written demand for arbitration". The Petitioner himself demanded arbitration by letter of January 21, 1986. A copy of said letter is included in the Supplemental Appendix attached to this brief. (SA1) In that letter, Petitioner's counsel, not only invoked arbitration under the disputed clause, but made no objection to the limitations contained therein. By letter of February 3, 1986, Amica acquiesced in Roe's arbitration demand. A copy of Amica's letter is included in the Supplemental Appendix attached to this brief. (SA2) At no time prior to the

arbitration hearing did Roe object to the limitations imposed on arbitration by the insurance contract.

The arbitration hearing was held on June 23, 1986 and arbitration awards were entered on behalf of Roe and his wife. (A1) Again, at no time during the hearing did Roe object to the arbitration provision or its limitations. Subsequent to the award, on July 25, 1986, Amica's counsel wrote a letter demanding jury trial on Petitioner's claim (R89). This demand for jury trial was made pursuant to the terms of the arbitration clause (i.e., within sixty days from the date of the arbitration award).

On October 3, 1986, Petitioner filed a Motion to Confirm Arbitration Award (R1-3). The Circuit Court refused to confirm the arbitration award to Mr. Roe, on the ground that counsel for Amica had complied with the requirements of the arbitration clause and had timely demanded a jury trial. A copy of this judgment is included in the Supplemental Appendix to this brief. (SA3-4)

The District Court of Appeal affirmed the trial court's decision in its opinion rendered December 2, 1987. Amica Mutual Insurance Company v. John S. Roe, et ux., 12 F.L.W. 2772 (Fla. 2d DCA - December 2, 1987). The District Court of Appeal, Second District, held that the arbitration clause did not unilaterally allow Amica to reject an arbitration award in excess of $10,000.00. Rather, it found that the Roes, too, could have requested a jury trial had they found an award slightly over $10,000.00 unsatisfactory.

The court held that both Amica and the Roes had competent counsel prior to arbitration proceeding and both parties agreed, without objection, that arbitration would be subject to the limitations expressed in the contract. The Court found that the arbitration clause allowed claims of less than $10,000.00 to be resolved by arbitration, and that the contract clearly stated that any award in excess of $10,000.00 would not be binding if either party demanded a trial. The Court further recognized that the parties' agreement did not contravene the Florida Arbitration Code (Chapter 682, Florida Statutes), because the Code allows parties to stipulate to non-binding arbitration. For this same reason, and because Florida law grants parties freedom to contract, the agreement did not violate Florida public policy.

As to the sufficiency of the demand for jury trial, the lower Court found that the letter to Roe's counsel complied with the valid requirements of the arbitration provision, by its service within sixty days of the date of the arbitration award. As the contract of insurance entered between the parties contemplated that the arbitration proceedings would not be governed by the Florida Arbitration Code, this demand for jury trial was sufficient to effectively entitle Amica to a trial on Roe's claim.

The District Court of Appeal, Second District, acknowledged a conflict between its decision and the decision of the Third District Court of Appeal in Berger v. Fireman's Fund Insurance Company, 515 So.2d 996 (Fla. 3d DCA 1987). The Berger court

erroneously held that in all situations the arbitration code contemplated that arbitration would be final and binding. The Third District apparently ignored Section 682.02, Florida Statutes (1985) which provides:

> [A] Two or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof. Such agreement or provision shall be valid, enforceable and irrevocable without regard to the justiciable character of the controversy; provided that this act shall not apply to any agreement or provision to arbitration in which it is stipulated that this law shall not apply or to any arbitration or award thereunder. [emphasis added]

The Berger court did recognize that either party may repudiate the agreement if dissatisfied with an arbitration award in excess of $10,000.00. However, due to its strict interpretation of the arbitration code, and its finding that an agreement to arbitrate will result in a finding that the arbitration is final and binding, the District Court of Appeal, Third District, found that the arbitration clause contravened the arbitration code and public policy.

In the instant case, the District Court of Appeal, Second District, correctly held that the arbitration clause in dispute contravenes neither the Florida Arbitration Code nor public policy. The decision of the Berger court, is incorrect in both reasoning and result, and fails to accurately set forth the law

on the issues sought to be reviewed. The Court's decision in Amica Mutual Insurance Co. v. John S. Roe, et ux., 12 F.L.W. 2722 (Fla. 2d DCA - December 2, 1987) should be affirmed and adopted by this court.

SUMMARY OF ARGUMENT

The underlying decision of the Second District Court of Appeal in the instant case should be affirmed and adopted by this Court. The contract provision in question is neither contrary to Florida public policy or the Florida Arbitration Code. The arbitration clause agreed to by the parties allows either party to request arbitration, and provides that arbitration awards less than $10,000.00 will be binding. The Arbitration Code would not be applicable where, as in this case, the parties stipulated to its inapplicability. In such case, the dispute could be tried if either party's demand was made within sixty days of the arbitrators' award. Such a demand was timely made in this case.

Section 682.02, Florida Statutes, (1985), provides that arbitration agreements may stipulate the Florida Arbitration Code shall not apply. The arbitration clause in dispute does contain such a stipulation. It provides that arbitration awards in excess of $10,000.00 will not be binding. This does not create a unilateral right on the part of an insurer to reject an arbitration award exceeding $10,000.00. Rather, it allows either party to request arbitration and either party to seek a jury trial as to damages should the arbitration award exceed $10,000.00. This benefits the insured at least as much as the insurer in that should the insured be dissatisfied with an arbitration award slightly over $10,000.00, the insured may also request a jury trial as to the amount of damages.

In the instant case, counsel for Roe was fully aware of the policy language and the terms and conditions upon which arbitration would be held. Nevertheless, he demanded arbitration in his letter of January 21, 1986. (SA1) Amica then complied with the demand, and proceeded with arbitration under the terms of the arbitration clause.

Petitioner could have brought a declaratory action, and moved for summary judgment seeking a determination that the arbitration provision was invalid and unenforceable, as was done in the case of Berger v. Fireman's Fund Insurance Company, 515 So.2d 997 (Fla. 3d DCA 1987). Instead, counsel for Petitioner demanded arbitration and proceeded to arbitration without protest. The arbitration clause was clear and evident upon the reading of the policy. Petitioner should now be estopped from arguing that the arbitration clause is invalid and that the arbitration clause, and its limitations should not be binding.

Amica's demand for jury trial was sufficient. The letter from Amica's counsel to Roes' counsel complied with the valid requirements of the arbitration agreement. It was made, and was received within sixty days of the arbitration award. The contract provision entered between the parties contemplated that awards in excess of $10,000.00 would not be subject to the Florida Arbitration Code. Therefore, the provisions of the code concerning vacating, modifying or correcting an arbitration award are not applicable and the demand for jury trial was timely and properly made.

ARGUMENT

POINT I

THE CONTRACT PROVISION AUTHORIZING EITHER PARTY TO REJECT ANY UNDERINSURED MOTORIST ARBITRATION AWARD EXCEEDING $10,000.00 DOES NOT VIOLATE THE FLORIDA ARBITRATION CODE OR PUBLIC POLICY AND IS, THEREFORE, VALID AND BINDING.

Roe contends that the arbitration clause in question creates a situation whereby the insurer may unilaterally reject any arbitration award which exceeds the statutory minimum limit for bodily injury liability. Petitioner, however, mischaracterizes the arbitration clause involved in this case, and its effect. Petitioner also ignores the effect of his own actions in requesting arbitration and participating in arbitration without objection to the contract provision.

As set out more fully in the Statement of the Case and Facts, counsel for Petitioner demanded arbitration and informed Amica of his choice for arbitrator on January 21, 1986. (SA1) Amica responded by way of letter dated February 3, 1986 and agreed to submit the dispute to arbitration. (SA2) This demand was made without objection and with full awareness of the arbitration clause and the limitations contained therein. Petitioner then proceeded with arbitration, without objection, and subject to the limitations expressed in the contract.

At the conclusion of the arbitration proceeding, an arbitration award was returned in favor of Roe. At that time, Amica acted pursuant to the arbitration clause and demanded the

right to a trial within sixty days of the arbitrators' decision. (A2)

The contract clause which authorizes either party to reject an arbitration award in excess of $10,000.00 is both valid under the Florida Arbitration Code and Florida public policy. It is true that under Florida law, arbitration is clearly favored as a means of dispute resolution, and every reasonable presumption is indulged to uphold proceedings resulting in an award. Beach Resorts Intern. v. Clarmac Marine Construction Co., 339 So.2d 689 (Fla. 2d DCA 1976). However, Section 682.02, Florida Statutes (1985) provides the parties may include in contracts:

> [A] Two or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof. Such agreement or provision shall be valid, enforceable and irrevocable without regard to the judicial character of the controversy; provided that this act shall not apply to any such agreement or provision to arbitrate in which is it stipulated this law shall not apply or to any arbitration or award thereunder. [emphasis added]

Additionally, Florida law supports the proposition that such arbitration agreements are binding only insofar as the parties have agreed to submit certain disputes to binding arbitration. In Pacemaker Corp. v. Euster, 357 So.2d 208 (Fla 3d DCA 1978) the agreement of the parties for binding arbitration was fixed within limits. The court found that such limited arbitration was

valid and it stated:

> Arbitration should be only of those controversies or disputes which the parties have agreed to submit to arbitration.

Id at 210; see also, Frank J. Rooney, Inc. v. Charles W. Ackerman of Florida. 219 So.2d 110, 112 (Fla 3d DCA), cert dism. 230 So.2d 13 (Fla, 1969); Paine, Webber, Jackson & Curtis, Inc. v. Lucas, 411 So.2d 1369 (Fla 5th DCA 1982).

The arbitration provision at issue here complies both with the intent and requirements of Section 682.02, Florida Statutes (1985) and Florida law. In relevant part, the agreement provides:

> A decision agreed to by two of the arbitrators will be binding as to:
> 1. Whether the covered person is legally entitled to recover damages; and
> 2. The amount of damages. This applies only if the amount does not exceed the minimum limit for bodily injury liability specified by the Financial Responsibility Law of the State in which your covered auto is principally garaged. If the amount exceeds that limit, either party may demand the right to a trial. This demand must be made within sixty days of the arbitrators' decision. If this demand is not made, the amount of damages agreed to by the arbitrators will be binding. (emphasis added)

As the District Court of Appeal found in its opinion below, this provision constitutes stipulation that any award in excess of $10,000.00 will not be binding if either party demands a trial. Therefore, the parties did not agree to binding arbitration where, as in this case, the arbitration award exceeded $10,000.00. The provision does not reserve to the insurer the right to unilaterally reject at will a displeasing

arbitration award. Arbitration awards up to and including $10,000.00 will be binding on both parties. Arbitration awards in excess of that amount may be contested in a jury trial by either party. The parties had a right to distinguish by contract those personal injury claims that were under $10,000.00 in value and those exceeding $10,000.00.

The District Court of Appeal, Second District, found that as Chapter 682, Florida Statutes, (1985) permitted non-binding arbitration, the arbitration clause was not invalid under Florida Public Policy. The Petitioner and Amica specifically contracted that any arbitration proceeding for the determination of UM benefits would be binding only to the extent that the award did not exceed $10,000.00. Neither party contemplated that an arbitration award would be binding under all circumstances.

The District Court of Appeal recognized that the parties' right to contract should not be denied unless clearly restricted by valid law. State v. British Leyland Motors, Inc., 1090 So.2d 576 (1st DCA 1974). When the right to contract is taken together with the language of Section 682.02, Florida Statutes (1985), it is clear that public policy does not prevent the parties from entering into a contract provision that provides for non-binding arbitration.

The District Court of Appeal, Third District, erred in its decision of Berger v. Fireman's Fund Insurance Company, 515 So.2d 997 (Fla. 3d DCA 1987). The Berger court based its decision on the premise that the parties therein had agreed to binding

arbitration pursuant to Chapter 682, Florida Statutes (1985). The Berger court specifically found that the Florida Arbitration Code, Section 682.01-.22, Florida Statutes (1985) requires binding arbitration in all circumstances.

In Berger, as in this case, it is obvious that the parties entered into an agreement where non-binding arbitration was contemplated should an award greater than $10,000.00 be made by the arbitration panel. Neither party contemplated the arbitration would be binding under all circumstances and the Arbitration Code clearly does not require all arbitration to be binding or to be governed by Section 682, Florida Statues. In that regard, the Third District erred and the Second District was eminently correct.

In this case, the District Court of Appeal, Second District, noted that the clause was not unfair but, as clearly contracted to between the parties, served a useful purpose. It allows for resolution of minor claims by arbitration while providing both parties an indication of the true value of larger claims through this testing procedure. The clause provides an objective indication of the value of larger claims and encourages settlement of these claims.

Furthermore, the Second District Court of Appeal found the provision does not provide the insurer a unilateral "escape clause" to nullify an arbitration award which was otherwise intended to be binding. Neither party intended an arbitration award in excess of $10,000.00 to be governed by the Florida

Arbitration Code. The parties contemplated such awards would be subject to judicial review at the request of either party. Just as Amica invoked the provision for a jury trial where the arbitrator's award greatly exceeded $10,000.00, the Roes, too, could have requested a jury trial had they found an award of slightly over $10,000.00, but less than anticipated, to be unsatisfactory. Had the arbitrators in this case awarded the Petitioner less than he was satisfied with, Amica could hardly be heard to complain about his invocation of the identical provision.

The District Court in Berger v. Fireman's Fund Insurance Co., 515 So.2d 997 (Fla. 3d DCA 1987) dealt with a similar policy provision but under very different factual circumstances. In Berger, the plaintiff sought declaratory relief and moved for summary judgment seeking a determination that the arbitration provision was invalid and unenforceable. The plaintiff in Berger did not request arbitration and did not enter into or complete arbitration without objection, as has occurred in this case. Also, unlike Berger, counsel for the Petitioner in this case demanded arbitration pursuant to the disputed clause and was aware of the limitations contained therein. (SA1)

Petitioner argues that Amica's agreement to participate in the proceedings, bound Amica to any arbitration award entered thereafter despite the limitations contained in the arbitration provision. Through this argument, Roe attempts to avoid the consequences of his own actions by demanding arbitration and

participating in arbitration without objection. The trial court, and the District Court of Appeal, Second District, determined that both Petitioner and Amica had competent counsel prior to the arbitration proceeding and Petitioner was aware of the limitation clause contained in the arbitration provision.

Having taken advantage of the arbitration proceeding provided for in the policy without objection, Roe should now be estopped from arguing that the arbitration provision allowing either party to obtain a new trial where an award of more than $10,000.00 is made, should not be binding. Taylor v. Kenco Chemical & Mfg. Corp., 465 So.2d 581 (Fla. 1st DCA 1985); Fisk v. Shelton, 469 So.2d 248 (Fla 2d DCA 1985); Hodkin v. Perry, 88 So.2d 139 (Fla. 1956); Wooten V. Rhodus, 470 So.2d 844 (Fla 5th DCA 1985).

The law of another progressive jurisdiction may be instructive. The New York courts have addressed the identical policy provision sought to be reviewed by Petitioner here. In the case of Reichel v. Government Employees Insurance Co., 487 N.Y.S.2d 99 (Ad2 Dept. 1985), the question to be resolved was whether an insurer was entitled to re-litigate all of the issues involved in a claim by trial de-novo, where the arbitration clause in a supplemental uninsured motorist insurance policy provided either party could request a trial where an arbitration award exceeded New York's financial responsibility liability limit. The court found that while New York law required arbitration provisions in the statutorily mandated uninsured

motorist coverage to be binding, the supplemental uninsured motorist coverage was not governed by a similar provision under New York law. As such, an insurer was found to have the right to a trial where the arbitrators' award exceeded the minimum bodily injury liability limits.

This holding was affirmed in the case of Reichel v. Government Employees Insurance Co., 499 N.Y.S.2d 385 (CT. APP. 1985). The Court held that either party could seek review of an arbitration award made pursuant to supplementary uninsured motorist coverage which exceeded the minimum liability requirements of the New York law. The court found no public policy or statutory reason to void the trial de novo provision, despite the fact that under the statutorily mandated uninsured motorist coverage, New York law provided for a binding arbitration.

In Florida, of course, there is no statutory provision requiring binding arbitration in disputes involving underinsured motorist coverage. In fact, the Florida Arbitration Code allows non-binding arbitration where the parties have agreed to such. Such an agreement was entered into in this case and allowed either party the right to judicial review by trial.

Should this court find that the arbitration provision is null and void, this court should adopt the result reached in Berger v. Fireman's Fund Insurance Company, 515 So.2d 997 (Fla. 3d DCA 1987). The Court in Berger held that the entire arbitration clause was void and litigation between the parties

was required. Where an agreement or provision of an agreement is null and void under a statute, or public policy, the agreement or the clause is void ab initio. Thomas v. Ratiner, 462 So.2d 1157, 1159 (Fla. 3d DCA 1984); Title & Trust Co. of Florida v. Parker, 468 So.2d 520, 524 (Fla. 1st DCA 1985).

If there is found to be no arbitration provision in the contract because of its invalidity, then there was no right by either party to demand or proceed with arbitration. Parties to a dispute have no right to arbitration unless it is provided for by contract or statute. When there is no statutory or contractual requirement to submit a claim to arbitration, it is error to require arbitration. Allstate Insurance Co. v. Duffy, 237 So.2d 225 (Fla 3d DCA 1970).

Florida law requires that when an arbitration agreement is held invalid, for whatever reason, the parties must resolve their dispute in the courts. Where an agreement is ambiguous to whether disputes are to be resolved by arbitration, such is construed against arbitration. Wood - Hopkins Contracting Co. v. C. H. Barco Contracting Co., 301 So.2d 479, 480 (Fla. 1st DCA 1974). Should this court find that the arbitration agreement failed to comply with the arbitration code, it cannot be binding. Arbitration agreements are non-enforceable when they do not comply with the Florida Arbitration Code. Knight v. A. S. Equities, Inc., 280 So.2d 456, 459 (Fla. 4th DCA 1973)

ARGUMENT

COUNT II

THE CONTRACT PROVISION AUTHORIZING EITHER PARTY TO REJECT AN UNINSURED ARBITRATION AWARD EXCEEDING $10,000.00 SHOULD BE FOUND TO PROPERLY AUTHORIZE THE PARTY MAKING THE REJECTION TO DEMAND A JURY TRIAL BY ITS OWN TERMS AS THE PARTIES STIPULATED THAT THE ARBITRATION CODE WOULD NOT BE APPLICABLE TO AWARDS IN EXCESS OF $10,000.00.

The arbitration clause contained in the policy of insurance issued to Petitioner stipulated that the Florida Arbitration Code would not apply. The contract of insurance further provided that if the amount awarded by arbitration exceeded $10,000.00, either party may demand the right to a trial. This demand must be made within sixty days of the arbitrators' decision. If this demand is not made, the amount of damages agreed to by the arbitrators will be binding.

Petitioner's contention appears to be that the parties could not stipulate to non-binding arbitration and, therefore, chapter 682, Florida Statutes is controlling. As a result, the only grounds for setting aside the arbitration award are contained in Sections 682.12, 682.13 and 682.14, Florida Statutes (1985). Those sections provide limited grounds for relief where an arbitration award has been made, and require that an objecting party submit "application" within ninety days.

Amica's argument, as set forth previously in this brief, is that the parties did not agree to binding arbitration. In such cases, the arbitration code and the requirements of Section 682,

Florida Statutes, would not apply if either party made a demand for jury trial within sixty days of the date of the arbitration award. Such a demand was timely made by Amica in the letter dated July 25, 1986. (R89,A2) Therefore, Amica complied with the contract provision and properly demanded a jury trial.

Roe contends that the contractual language can only be construed in two ways. However, a third plain and unambiguous construction is obvious; the provisions of Chapter 682, Florida Statutes, are not applicable in this case, due to the parties stipulation. Furthermore, if the provisions of Section 682, Florida Statutes, were applicable, none of the grounds for an "application" specified in Sections 682.12-14, Florida Statutes, are available in this case. Amica is not attempting to vacate the award in this case. The arbitration agreement contemplates, instead, that should either party demand the right to a jury trial, then the insured would initiate an action against the insurer for damages.

The fact that the contract clause does not specify the manner in which the demand must be made is not fatal to the validity of the arbitration clause. Contrary to the Petitioner's contention, the contract is not silent as to the grounds for the rejection of the arbitration award. If the award exceeds $10,000.00, then either party may reject the award in sixty days. It is then incumbent upon the insured to bring an action against the carrier once the demand for jury trial has been made by either the insured or the carrier notwithstanding the

arbitration award of greater than $10,000.00. The parties agreed to non binding arbitration. Therefore, Section 682, Florida Statues, would not apply in this case. At the point the arbitration award exceeded the $10,000.00 limit, the arbitrators' award became advisory in nature and had no binding effect on either party, as long as a demand for trial was made within the sixty day time limit provided for in the contract.

The insured cites Excelsior Ins. Co. v. Pomona Park Bar & Package Store, 369 So.2d 938 (Fla. 1979) as providing guidance in this case. A reading of that case, and the rules of law set forth therein, shows that this court "prefers that contracts be construed as valid". Such a constriction should be made here, where the parties stipulated to non-binding arbitration pursuant to Section 682, Florida Statutes.

There is no silence in the contract between the parties which requires the Florida Arbitration Code to be incorporated into the contract, so as to establish the intention of the parties. Amica made its demand for a jury trial within the sixty days from the arbitration award and complied with the contract provision concerning such a demand. Petitioner did not object to the demand but thereafter filed his motion to confirm arbitration award. (R1-3)

CONCLUSION

The District Court of Appeal, Second District, did not misconstrue the contract or Florida law when it upheld the trial court's decision in refusing to confirm the arbitration award. The requirements of Section 682, Florida Statutes (1985) were not applicable where the parties so stipulated. As a result, the requirements under Section 682, Florida Statutes requiring an "application" within ninety days to vacate on the statutory grounds set forth therein were not applicable. Rather, the contract provision which required a demand for jury trial be made to the opposing party, was controlling and was complied with. Where Petitioner demanded and participated in the arbitration proceeding, pursuant to the arbitration clause herein disputed, and an arbitration award was made pursuant to that proceeding which exceeded $10,000.00, Petitioner should be estopped from challenging the arbitration clause by his failure to object thereto.

The District Court of Appeal, Third District, committed error in its decision in the case of Berger v. Fireman's Fund Insurance Company, supra. Where the parties have stipulated that an arbitration award will not be binding, such a stipulation is valid pursuant to Florida Statute 682.02 and does not violate Florida Public Policy. The decision of the District Court of Appeal, Second District, should be affirmed and adopted by this court. The parties should proceed to trial for the resolution of

the dispute in this matter.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U. S. Mail to W. James Kelly, Esquire, P. O. Box 2177, Lakeland, Florida 33806-2177, C. Kenneth Stuart, Esquire, P. O. Box 2177, Lakeland, Florida 33806-2177, Thomas Ervin, Esquire, P. O. Box 1170, Tallahassee, Florida 32302, and E. C. Deeno Kitchens, Esquire, P. O. Box 1170, Tallahassee, Florida 32302 this 2nd day of June, 1988.

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