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IN THE SUPREME COURT OF FLORIDA

JOHN S. ROE,

Petitioner,

vs. CASE NO. 71,682

AMICA MUTUAL INSURANCE CO.,

Respondent.

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

These proceedings are before this Court on conflict with Berger v. Fireman's Fund Insurance Company, 515 So.2d 997 (Fla. 3d DCA 1987). By Order of April 8, 1988, this Court accepted jurisdiction for review on the merits.

Though jurisdictionally unnecessary, the case is also of great public importance, for it presents for review the validity, construction and means of application of a common automobile insurance policy clause whereby the insurer is authorized to unilaterally require arbitration of all uninsured or underinsured claims by the insured, and then unilaterally reject any arbitration award to the insured exceeding $10,000, and demand trial as to damages.

Petitioner urges that the provision authorizing the insurer to unilaterally reject such an arbitration award and demand trial on amount of damages is contrary to Florida

law and public policy, and is, therefore, invalid. Alternatively, petitioner urges that in the instant case the arbitration rejection privilege was erroneously construed and was not timely invoked by the insurer in the manner required by Florida law.

Petitioner urges that, on either ground, the arbitration award of $225,735 on his behalf should have been confirmed, and the trial court and district court erred in holding to the contrary. That error should be reversed and corrected by this Court.

STATEMENT OF THE CASE AND FACTS

These proceedings involve the validity of the following insurance policy provision regarding resolution by arbitration of any dispute between the insured and insurer concerning underinsured motorist benefits:

> Arbitration: If we and a covered person do not agree: 1. Whether that person is legally entitled to recover damages under this Part; or 2. As to the amount of damages; either party may make a written demand for arbitration. In this event, each party will select an arbitrator. The two arbitrators will select a third. If they cannot agree within 30 days, either may request that selection be made by a judge of a court having jurisdiction. Each party will: 1. Pay the expenses it incurs; and 2. Bear the expenses of the third arbitrator equally. Unless both parties agree otherwise, arbitration will take place in the county in which the covered person lives. Local rules of law as to procedure and evidence will apply. 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 60 days of the arbitrators' decision. If this demand is not made, the amount of damages agreed to by the arbitrators will be binding. (Emphasis supplied.)

At issue is the validity, construction and manner of application of the above-emphasized provision which authorizes the insurer to unilaterally reject any arbitration award exceeding $10,000 and demand trial.

On September 24, 1984, petitioner, John S. Roe, was involved in an automobile/bicycle collision in which

he sustained personal injuries. After resolving a claim with the third party tortfeasor, Mr. Roe made a claim for underinsured motorist benefits pursuant to his policy of insurance with respondent, Amica Mutual Insurance Company (hereinafter "Amica" or respondent).

The parties agreed to submit the claim of petitioner (as well as that of Mrs. Roe, which is not at issue herein) to arbitration. Arbitration hearing was held on June 23, 1986, after which an arbitration award was entered wherein petitioner was awarded $225,735 for personal injuries sustained in the accident, and petitioner's wife on her claim was awarded $40,000 (R 3). A copy of the arbitration award entered June 27, 1986, is included in the appendix to this brief (A 1).

By letter of July 25, 1986, from respondent's counsel to petitioner's counsel, respondent Amica purported to unilaterally reject the arbitration award to petitioner, John S. Roe, and demand trial as to the issue of petitioner's damages (R 89). A copy of said letter is included in the appendix to this brief (A 2). No pertinent action was taken by respondent within 90 days of the arbitration award, other than forwarding of the referenced letter to counsel for petitioner, John S. Roe.

On October 3, 1986, petitioner filed his Motion to Confirm Arbitration Award, which motion also sought confirmation of the arbitration award to Mrs. Roe (R 1-3). The

circuit court entered judgment on December 31, 1986 (filed January 5, 1987) wherein the arbitration award to petitioner, John S. Roe, was not confirmed on the ground that counsel for respondent wrote counsel for petitioner within 60 days of the arbitration award and demanded trial as to petitioner's claim (R 29-30). A copy of the judgment is included in the appendix to this brief (A 3-4). The judgment confirmed the arbitration award as to Patricia Roe, there having been no timely letter of rejection or motion to vacate, correct or modify as to said award (A 3-4).

After denial of motions for rehearing (R 31-76; 77-78; 84), appeal and cross appeal were taken to the District Court of Appeal, Second District of Florida (R 85; R 87).

By Opinion of December 2, 1987, the district court affirmed. Amica Mutual Insurance Company v. John S. Roe, et ux., 12 F.L.W. 2772 (Fla. 2d DCA - December 2, 1987). The district court held, in pertinent part, that the policy provision at issue contractually authorized respondent to unilaterally reject any arbitration award to petitioner in excess of $10,000, and did not contravene either Chapter 682, Florida Statutes (Florida Arbitration Code) or Florida public policy in so providing. The district court held that the letter to petitioner's counsel, without more, was sufficient to effectively reject the arbitration award to petitioner and entitle respondent to trial. A copy of the

decision of the district court is included in the appendix to this brief (A 5-10).

The provisions of Chapter 682, Fla. Stat., pertinent to these proceedings are set forth in the appendix to this brief (A 11-12). These include §§682.02, 682.12, 682.13, 682.14 and 682.15, Fla. Stat. In summary, §682.02, Fla. Stat., provides that parties may agree, or contract, to submit existing or future controversies between them to arbitration, and further provides in pertinent part:

> Such agreement or provision shall be valid, enforceable and irrevocable without regard to the justiciable character of the controversy; provided that this law shall not apply to any such agreement or provision to arbitrate in which it is stipulated that this law shall not apply or to any arbitration or award thereunder.

Section 682.12, Fla. Stat., provides for judicial confirmation of arbitration awards and commands that:

> Upon application of a party to the arbitration, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in §§ 682.13 and 682.14.

Section 682.13, Fla. Stat., sets forth specific, limited grounds for "vacating" an arbitration award, and §682.14, Fla. Stat., sets forth separate, limited grounds for "modification or correction" of an award. Both require an "application" of the party seeking such relief to be submitted within 90 days of receipt of a copy of the arbitration award by the applicant.

It is undisputed that no "application" urging "grounds" as required and limited by §§628.12-14, Fla. Stat., was timely, or ever, submitted in these proceedings (see A 3, Judgment, para. 1) on behalf of respondent. Only respondent's letter to petitioner's counsel was offered, and accepted by the courts below, as the basis of denial of confirmation of the arbitration award to petitioner.

The district court, in its decision below, acknowledged conflict with a decision of the District Court of Appeal, Third District of Florida. In Berger v. Fireman's Fund Insurance Company, 515 So.2d 997 (Fla. 3d DCA 1987), the Third District held that an identical policy provision contravened both the Florida Arbitration Code and Florida public policy and was, therefore, invalid. In the instant case the Second District held that such a provision contravened neither. The direct conflict, as acknowledged, is clear.

Upon proper invocation of jurisdiction by petitioner, this Court entered its Order of April 8, 1988, accepting jurisdiction.

SUMMARY OF ARGUMENT

The instant decision should be reversed. The contract provision in question is contrary to Florida public policy and the Florida Arbitration Code in its attempt to render arbitration awards exceeding $10,000 non-binding at the unilateral, groundless election of the insurer.

Florida public policy recognizes that the very essence of arbitration is an agreement to be bound by the factual determination of the arbitrators and thus end the factual controversy. Bankers & Shippers Insurance Company v. Gonzalez, 234 So.2d 693 (Fla. 3d DCA 1970). This public policy is reflected in the Florida Arbitration Code, which authorizes such agreements for arbitration and renders such agreements, and arbitration awards, irrevocable and enforceable except upon "application" and showing of carefully limited grounds. §§682.02, 682.12-14, Fla. Stat.

Section 682.02, Fla. Stat., does provide for arbitration agreements which "stipulate" that the Florida Arbitration Code "shall not apply." The instant agreement does not so provide or stipulate. Instead, it purports to modify or circumvent the requirements of §§682.12-14, Fla. Stat., by granting to the insurer an unauthorized right to unilaterally and at will reject and avoid confirmation of any arbitration award exceeding $10,000.

The provision purporting to authorize respondent to reject an arbitration award exceeding $10,000 unilaterally

and at will is contrary to Florida law and public policy, and invalid. Berger v. Fireman's Fund Insurance Company, 515 So.2d 997 (Fla. 3d DCA 1987). The provision should be stricken, with instruction that upon remand the arbitration award to petitioner be confirmed and reduced to judgment. §§682.12, 682.15, Fla. Stat.

The decision below, and denial of confirmation, should alternatively be reversed on the facts of this case. Respondent did not merely enter into the contract in question, but also agreed after the controversy arose that the dispute and damages be submitted to arbitration. Arbitration was actually conducted and completed. Thereafter, respondent did not within 90 days as required by law [§§682.12-14, Fla. Stat.] submit any "application" to any court seeking to modify or vacate the arbitration award on either statutory or contractual grounds. Rather, respondent merely forwarded petitioner's attorney a letter (A 2).

The subject arbitration "escape" clause, if not declared invalid and stricken, must be construed as incorporating existing Florida law. Department of Insurance v. Teachers Ins. Co., 404 So.2d 735, 741 (Fla. 1981). Proper construction of the contract incorporates the requirements and limits of §§682.12-14, Fla. Stat., as the means and grounds for post-arbitration demand for trial. Respondent wholly failed to meet these requirements.

Where respondent agreed to arbitration and thereafter failed to file any court "application" to vacate or modify as required by law within 90 days, it could not thereafter challenge the arbitrators' award. See Burt v. Duval County School Board, 481 So.2d 55 (Fla. 1st DCA 1985); Dairyland Insurance Company v. Hudnall, 279 So.2d 905 (Fla. 3d DCA 1973). The decision below holding to the contrary should be reversed with instruction that upon remand the arbitration award be confirmed and reduced to judgment.

ARGUMENT

POINT I

THE CONTRACT PROVISION AUTHORIZING THE INSURER TO UNILATERALLY REJECT AT WILL ANY ARBITRATION AWARD EXCEEDING $10,000 IS CONTRARY TO THE FLORIDA ARBITRATION CODE AND PUBLIC POLICY AND IS, THEREFORE, INVALID AND INOPERATIVE.

This point involves the validity of an insurance contract clause which provides for arbitration of insurer-insured disputes as to underinsured motorist benefits, and then purports to authorize the insurer to unilaterally reject any arbitration award which exceeds the statutory minimum limit for bodily injury liability, or $10,000.

In the instant case petitioner was injured in an automobile/bicycle collision. Thereafter, petitioner made a claim for underinsured motorist benefits against his insurer, respondent Amica Mutual Insurance Company. The parties agreed to submit the dispute to arbitration. Arbitration proceedings were thereafter conducted. In those proceedings there were no disputed issues as to coverage or liability.

The appointed arbitrators, on June 27, 1986, returned an arbitration award of $225,735 in favor of petitioner (A 1). Respondent did not pay said award but instead, on July 25, 1986, delivered to petitioner's attorney a letter which stated in pertinent part:

> Amica's policy applicable to the above loss gives it the right to demand a trial where the amount of damages awarded by the arbitrators under the UM coverage exceeds the minimum limit of liability specified by the financial responsibility law. In the event that you were not aware of this provision, I am enclosing a sample copy of Amica's policy, including its Florida UM endorsement. Please take a look at the arbitration provision of the Florida UM endorsement that is on the third from the last page of the policy.
>
> Amica has instructed me to invoke that provision, and on its behalf, we demand a trial with reference to Mr. Roe's damages, pursuant to the policy provision.
>
> (A 2)

Respondent did not, however, file or submit any judicial application seeking to have the subject arbitration award modified or vacated as required by §§682.12-14, Fla. Stat. Respondent's failure to submit a judicial application as required by law will be treated in Point II of this brief.

The focus of this point is the invalidity of the contractual clause which purports to authorize respondent, after arbitration, to unilaterally and at will reject any arbitration award exceeding $10,000, even though said award is clearly within coverage of uninsured motorist benefits provided by contract.

Petitioner respectfully urges that the provision is contrary to Florida law and public policy respecting the very nature of arbitration and is, therefore, invalid and unenforceable.

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 Const. Co., 339 So.2d 689 (Fla. 2d DCA 1976).

In Broward County Paraprofessional Association v. McComb, 394 So.2d 471 (Fla. 4th DCA 1981), it was held in pertinent part at page 472 that:

> An arbitrator's award is entitled to a high degree of conclusiveness and should be disturbed only when a clear showing has been made that the arbitrator has exceeded the authority granted to him.

In the instant proceeding no issues of liability or coverage were disputed, and the issue submitted to arbitration was the determination and award of the amount of damages suffered by petitioner. Determination of amount of damages is clearly a matter properly submitted to arbitration, and properly determined by arbitration.

While there are statutorily authorized, and limited, procedures for vacating and modifying arbitrator's awards [§§682.12-14, Fla. Stat.], the law of Florida recognizes that:

> The very essence of an arbitration is an agreement to be bound by the factual determination of the arbitrator and thus end the factual controversy.
>
> Bankers & Shippers Insurance Company v. Gonzalez, 234 So.2d 693 (Fla. 3d DCA 1970)

To the same effect is Travelers Insurance Company v. Luckett, 279 So.2d 885 (Fla. 3d DCA 1973), wherein the court further held at page 886:

> It has long been established in this state that a valid agreement to arbitrate the amount of damages between an insured and insurer, and a subsequent award thereon is binding on the parties . . . Moreover, such an agreement to arbitrate is governed by the provisions of the Florida Arbitration Code and the procedures for challenging the propriety or regularity of the award or proceedings are set out specifically therein. . . . (Citations omitted.)

The instant agreement seeks to pervert the very essence of arbitration by its escape clause which provides:

> This [binding nature] 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. [Florida - $10,000] If the amount exceeds that limit, either party may demand the right to a trial. If this demand is not made, the amount of damages agreed to by the arbitrators will be binding. (Bracketed information supplied.)
>
> (A 6)

Thus, the provision seeks to destroy the very essence of arbitration by making the arbitration award non-binding <u>at will and unilaterally</u> if it exceeds $10,000, even though fully within coverage and contract benefits provided.

Furthermore, the provision is directly contrary to the commands of §§682.12, 682.13 and 682.14, Fla. Stat. Florida law provides in §682.12, Fla. Stat., that arbitration awards <u>shall</u> be judicially confirmed, <u>unless</u> a challenge by application to vacate or modify is timely filed (90 days), urging grounds set forth in either §682.13 or §682.14, Fla. Stat. (A 11).

Section 682.13, Fla. Stat., sets forth five separate defined grounds for vacating an arbitration award (A 11). Those grounds represent the public policy of Florida as enunciated by the legislature. Those grounds do not include, or allow, an arbitration proceeding or award to be vacated or rejected by a party at will if some fixed sum is exceeded.

Section 682.14, Fla. Stat., sets forth three separate grounds for modification or correction of an arbitration award (A 12). Those grounds do not include, or allow, an arbitration proceeding or award to be modified by a party at will if some fixed sum is exceeded.

As will be treated more fully in Point II, respondent in these proceedings neither filed any timely application to vacate or modify as required by §682.12, Fla. Stat., nor ever asserted any recognized ground to vacate or modify as required by §§682.13-14, Fla. Stat.

The error of the district court, and of the trial court in denying confirmation, is clear. Those courts effectively held that respondent could enjoy the benefits of arbitration (and unilaterally impose the procedure on petitioner if it so chose) and then remove the very essence or nature of arbitration by reserving the right to unilaterally reject at will a displeasing arbitration award. The courts effectively allowed respondent to amend or modify by contract §682.13, Fla. Stat., and add an additional ground to the effect that:

The insurer may at will have vacated any arbitration award exceeding $10,000.

Neither Florida law nor public policy allows such a provision. The district court erred in holding that this matter was resolved in respondent's favor by mere reference to contract. The right to contract in Florida is not without limits. It has been recognized and held time and again that a contract provision will not be enforced by the courts where to do so will violate the fixed, strong or settled public policy of the state in which enforcement is sought. Title & Trust Co. of Florida v. Parker, 468 So.2d 520 (Fla. 1st DCA 1985); Thomas v. Ratiner, 462 So.2d 1157 (Fla. 3d DCA 1984).

It is equally well established under Florida law that the public policy of a state is the law of the state whether found in its constitution, statutes, judicial records or otherwise. Atlantic Coast Line R. Co. v. Beazley, 54 Fla. 311, 45 So. 761, 785-86 (1907). Thus, both Florida appellate decisions favoring and defining the binding nature of arbitration, and provisions of Chapter 682, Florida Statutes, limiting the grounds for vacating an arbitration award, are part of the public policy of Florida. The district court erred in disregarding this public policy and enforcing an "escape" clause which was directly in violation of such public policy.

This same public policy issue was recently addressed by the District Court of Appeal, Third District, in Berger v. Fireman's Fund Ins. Company, 515 So.2d 997 (Fla. 3d DCA 1987). In that case, under an indistinguishable policy clause, the insured made an uninsured motorist claim and demand for arbitration, which the insurer denied. The insured then (prior to the conduct of any arbitration) brought an action for declaratory judgment challenging the "escape" clause. The trial court held the non-binding arbitration clause to be valid.

On appeal, the district court reversed, holding in pertinent part as to the public policy issues presented:

> An agreement to arbitrate is an agreement to accept the arbitrator's decision as final and binding. Bankers & Shippers Ins. Co. v. Gonzalez, 234 So.2d 693, 695 (Fla. 3d DCA 1970) ('very essence of an arbitration is an agreement to be bound by the factual determination of the arbitrator and thus end the factual controversy'); Travelers Ins. Co. v. Luckett, 279 So.2d 885 (Fla. 3d DCA 1973) (same). The instant arbitration provision which permits either party to repudiate the agreement if dissatisfied with an arbitration award in excess of $10,000, contravenes the Arbitration Code and public policy as expressed in judicial opinions and is therefore null and void.
>
> Berger v. Fireman's Fund Ins. Company, 515 So.2d 997, 998 (Fla. 3d DCA 1987).

Like recognition and application of Florida public policy should be afforded in this case.

While in Berger, supra, the district court held that the entire arbitration clause was inapplicable, and litigation was required, the circumstances of the case sub

judice require different relief. In Berger, supra, the insurer upon demand refused to participate in arbitration, and no arbitration proceedings or award was before the court. In the instant case, however, the respondent insurer did not merely contract, but further agreed to arbitration of the disputed damages and participated in the arbitration proceedings which resulted in an arbitration award to petitioner of $225,735.

Only after the agreed arbitration was completed and award entered did the insurer, by letter (A 2), seek to invoke the "escape" clause and nullify or vacate the award. Under these circumstances, it is enforcement of the "escape" clause which violates public policy and was error below. Proper relief in these proceedings would be to hold the escape clause contrary to public policy and, therefore, invalid and unenforceable, and direct that upon remand the arbitration award be confirmed pursuant to §682.12, Fla. Stat.

It is appropriate to observe in closing this point that confirmation of the arbitrator's award in this case is precisely the end favored by public policy. In such a manner, the dispute between the parties, both having agreed to and participated in the arbitration, is resolved without the necessity of re-litigation of the identical damages amount issue in the courts of this state. The very essence of arbitration is recognized and applied, Bankers & Shippers

Insurance Company v. Gonzalez, supra, and additional expense, delay and unnecessary burden on judicial resources are avoided.

Any other holding will essentially render arbitration a meaningless nullity or, worse, an expensive way-station to be disregarded at will by a displeased party deciding, after-the-fact, that chances through litigation may be better.

It is further worthy of note that, in essence, respondent agreed to have the factual issue of its amount of liability determined by arbitrators and now seeks to have that factual determination of damage award wholly disregarded and the identical factual issue re-litigated in court.

In Travelers Insurance Company v. Luckett, 279 So.2d 885 (Fla. 3d DCA 1973), an analogous attempt at a second damages evaluation was rejected. In that case the insured was covered by two separate policies, each of which provided uninsured motorist coverage, and also provided for arbitration in the event of dispute as to damages.

After an accident, the insured entered arbitration with one insurer and his awarded damages were established at $3,750. The insured, feeling that amount insufficient, then invoked his separate insurance contract right, and demanded arbitration and damage determination against the second insurer. In this second proceeding, the district court observed the issue presented to be as follows:

> The issue before us is the effect to be given to the first arbitration's determination of appellee's damages of $3,750.00 and whether appellee can attempt to gain a second, hopefully greater, determination of his damages under the second arbitration.
>
> Travelers Ins. Co. v. Luckett, 279 So.2d 885 (Fla. 3d DCA 1973).

Having so framed the issue, the district court held that such an indirect evasion of the prior factual determination of damages would not be permitted. The court held in pertinent part at page 886:

> In the case sub judice, appellee does not believe that the initial factual determination of his damages was correct or sufficient. He, thus, attempts to acquire a second determination of his damages under the arbitration clause of appellant's policy. The very essence of an arbitration is an agreement to be bound by the factual determination of the arbitrator and thus end the factual controversy. Bankers & Shippers Ins. Co. v. Gonzalez, Fla.App.1970, 234 So.2d 693. Thus, appellee would not have been entitled to challenge the factual nature of the damage award after the first arbitration. He attempts here to indirectly challenge that finding. It is well established that a party may not do indirectly what he is forbidden to do directly. Cf., Bankers & Shippers Ins. Co. v. Gonzalez, supra. We are, therefore, of the opinion that the chancellor erred in finding that the appellee was entitled to a second chance to establish his damages for this accident.

The above-quoted Luckett case, supra, and the case sub judice are not identical but the similarities permit guidance to be drawn from the earlier case. There the insured had a facially clear contractual right to have a second determination of his damages in proceedings with the second insurer. The district court nevertheless held that because of the binding nature of factual determination of damages

in arbitration proceedings, the insured was bound by the amount determined in the first arbitration proceeding, and could not indirectly challenge or re-litigate that factual determination.

A like holding is called for in the instant case. Where respondent has not only contracted for, but also agreed to and participated in arbitration, respondent should not be afforded a second "bite" at the identical damages determination "apple."

Under the dictates of Travelers Ins. Co. v. Luckett, supra, and Florida public policy, even if respondent was, arguendo, entitled to a "trial," respondent would be bound by the prior factual determination of amount of damages. In other words, there would be nothing left to try.

For the foregoing reasons, petitioner respectfully urges that the "escape" clause in question violates Florida law and public policy and is, therefore, invalid and inoperative. The district court erred in holding to the contrary. This Court should reverse and direct that, upon remand, the arbitration award to petitioner in the amount of $225,735 be judicially confirmed.

POINT II

THE CONTRACT PROVISION AUTHORIZING THE INSURER TO UNILATERALLY REJECT ANY ARBITRATION AWARD EXCEEDING $10,000 SHOULD BE CONSTRUED TO AUTHORIZE REJECTION ONLY UPON OR BY TIMELY FILING OF COURT APPLICATION SETTING FORTH THEREIN GROUNDS SPECIFIED IN §§682.13 AND 682.14, FLA. STAT.

This point considers the proper construction, in pari materia, of the contract clause, which provides in pertinent part:

> If the amount exceeds that limit [$10,000], either party may demand the right to a trial. (Bracketed information supplied.)
>
> (A 6)

and §682.12, Fla. Stat., which provides:

> 682.12 **Confirmation of an award.**--Upon application of a party to the arbitration, the court shall confirm an award, unless within the time limits hereinafter imposed [90 days] grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in ss. 682.13 and 682.14.
>
> (A 11)

Sections 682.13 and 682.14 each specify limited grounds for relief, and affirmatively require that the objecting party submit such grounds by "application" within 90 days. No such application was submitted by respondent in the instant case.

In Point I of this brief it was urged that the "escape clause" quoted above is invalid. In this point petitioner urges that the district court erred by misconstruction of the clause.

The escape clause is totally silent as to "grounds" for rejection of an arbitration award exceeding $10,000 and as to the means of doing so. It merely states that in such instances "either party may demand the right to a trial." (A 6).

This contractual language may be construed in either of two ways. It may be construed, as by the district court, to grant an unfettered, unilateral right to reject any arbitration award over $10,000, without regard to the grounds and "application" requirements specified in §§682.12-14, Fla. Stat. For the reasons and upon the authorities set forth in Point I, such a construction must result in a further holding of violation of public policy and invalidity. Berger v. Fireman's Fund Ins. Company, 515 So.2d 997 (Fla. 3d DCA 1987).

A different construction is available, however, and is required by Florida law. Though the subject contract is silent, on its face, as to grounds for and means of rejection of an arbitration award, this Court has recognized and held that a contract incorporates within its terms applicable existing Florida law as if set forth fully therein. Department of Insurance v. Teachers Ins. Co., 404 So.2d 735, 741 (Fla. 1981). Thus, it is consistent with established Florida law, indeed required, to hold that the contract in question though silent in its "escape" clause, is supplemented by incorporation of the terms and restrictions of §§682.12-14, Fla. Stat.

In Excelsior Ins. Co. v. Pomona Park Bar & Package Store, 369 So.2d 938 (Fla. 1979), this Court rejected and reversed a district court contractual interpretation which rendered the insurance contract void. In so doing, this Court held at page 941, in pertinent part:

> Other applicable rules of construction also bear against Pomona Park and support our interpretation of the policy. A reasonable interpretation of a contract is preferred to an unreasonable one. James v. Gulf Life Insurance Co., 66 So.2d 62 (Fla. 1953); Travelers Indemnity Co. v. Milgen Development, Inc., 297 So.2d 845 (Fla.3d DCA 1974). And in the belief that the parties intended their agreement to be valid, a contract ought not be readily interpreted as ineffective. Corbin on Contracts, Section 546 (1960); Foster v. Jones, 349 So.2d 795 (Fla.2d DCA 1977). Under the view of paragraph (h) adopted by the District Court of Appeal and Pomona Park, the contract is void as written because the contested exclusion nullifies Excelsior's general obligation to provide coverage to Pomona Park, which is engaged in the alcoholic beverages business. Such an interpretation is unreasonable when compared to the alternative and also affronts the rule which prefers that contracts be construed as valid.

In the instant case the contract does not specify or stipulate that the Florida Arbitration Code shall not apply. See §682.02, Fla. Stat. (A 11) It, instead, provides for arbitration of disputes and then reserves the right to demand trial as to awards over $10,000, without specification of grounds for or means of demand for trial.

This contractual "silence" is readily remedied where the provisions of existing Florida law are incorporated in the contract, Department of Insurance v. Teachers Ins. Co., supra, and where the established law of Florida is that

the intention of the parties and proper construction of a contract

> must be determined from an examination of the whole contract and not from the separate phases or paragraphs.

Lalow v. Codomo, 101 So.2d 390, 393 (Fla. 1958)

When, consistent with the foregoing, the terms of §§682.12-14, Fla. Stat., are properly incorporated and applied, the contract must be construed to require that a contractually authorized demand for trial:

1. Be made by court application submitted within 90 days, and

2. State and be based upon one of the grounds recognized in §682.13 or §682.14, Fla. Stat.

In the instant case no application was submitted by respondent to any court within 90 days. There was only a letter (A 2). In the instant case even the letter did not state or assert any ground recognized in §682.13 or §682.14, Fla. Stat.

Where no application as affirmatively required by §§682.12-14, Fla. Stat., is filed within the requisite 90-day period, the arbitration award must be confirmed. Burt v. Duval County School Board, 481 So.2d 55 (Fla. 1st DCA 1985); Haskell v. Forest Land and Timber Company, 408 So.2d 811 (Fla. 1st DCA 1982). Where a purported application fails to allege some ground listed in §§682.13-14, Fla. Stat., as the basis for vacating, the arbitration award must be

confirmed. Dairyland Insurance Company v. Hudnall, 279 So.2d 905 (Fla. 3d DCA 1973).

Where, as here, the district court misconstrued the contract and refused to confirm the arbitration award, and where there was presented neither the required "application" to vacate, nor any statutorily recognized ground to vacate, the error is clear.

The intent and import of Florida law, and of the contract when construed in accordance with Florida law, are unmistakable. Where respondent agreed to and participated in the arbitration proceedings, and a proper factual determination of damages was made by arbitration award, respondent's insufficient effort to reject the award on unauthorized grounds should have been denied.

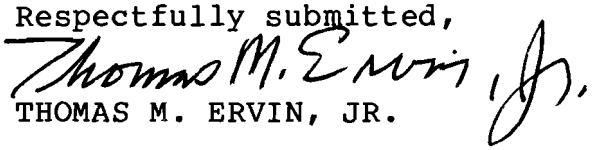
This case and matter should have been over, with only confirmation of the arbitration award pursuant to §682.12, Fla. Stat., and entry of judgment thereon pursuant to §682.15, Fla. Stat., remaining to be accomplished. Such is the relief this Court should direct upon remand after reversal of the erroneous decision of the District Court of Appeal, Second District. Such is the disposition required by the law and public policy of Florida, and by the contract between the parties when properly construed.

CONCLUSION

The decision of the district court is clearly erroneous. If construed to grant the unilateral right to reject an arbitration award at will by letter, then the "escape" clause is contrary to Florida law and public policy and, therefore, invalid. If properly construed to incorporate existing Florida law, then respondent failed to submit any application or authorized ground for denial of confirmation.

On either basis, proper disposition of this case is reversal, with direction that upon remand the arbitration award be confirmed and judgment entered thereon. Petitioner urges this Court to so hold and direct.

Respectfully submitted,



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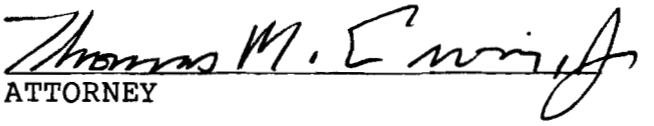
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of Petitioner's Initial Brief on the Merits and Appendix to Initial Brief on the Merits has been furnished by U.S. mail to MANUEL J. ALVAREZ, ESQ., Mitchell, Alley, Rywant & Vessel, P.A., Post Office Box 2003, Tampa, FL 33601, this 12th day of May, 1988.



ATTORNEY