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NOTES

ARBITRATION? SURE, BUT ONLY ON *OUR* TERMS: ESCAPE CLAUSES IN UNINSURED MOTORIST POLICIES

*Schaefer v. Allstate Ins. Co.*¹

I. INTRODUCTION

Historically, the insurance industry has widely used arbitration to resolve disputes.² Insurance companies have increasingly included "escape clauses" in their policies.³ These clauses allow an insurance company to ignore an arbitrator's award and have a claim directly heard in a trial court if the award exceeds a pre-determined amount.⁴ The Ohio Supreme Court in *Schaefer v. Allstate Insurance Co.* addressed this issue and decided that the escape clause was unenforceable due to public policy.⁵

II. FACTS AND HOLDING

On November 8, 1985, an automobile occupied by David and Jeanette Schaefer was involved in an accident with a car negligently driven by an uninsured motorist.⁶ At the time of the accident, the Schaeferes had an insurance policy with appellant Allstate Insurance Company that provided uninsured motorist coverage with limits at \$100,000 per person and \$300,000 per occurrence.⁷

1. 590 N.E.2d 1242 (Ohio 1992).

2. Stephen Lamson, *The Impact of the Federal Arbitration Act and the McCarran-Ferguson Act on Uninsured Motorist Arbitration*, 19 CONN. L. REV. 241, 242-46 (1987).

3. *Schaefer*, 590 N.E.2d at 1248.

4. *Id.* at 1243-44.

5. *Id.* at 1249.

6. *Id.* at 1243.

7. *Id.*

After the accident, a dispute arose between the Schaefers and Allstate over the amount of uninsured motorist benefits, if any, due to the Schaefers.⁸ Pursuant to an arbitration clause in the Allstate policy,⁹ the parties brought the dispute over benefits before a panel of three arbitrators for determination.¹⁰ At this hearing, there was no dispute that the uninsured motorist coverage provision applied to this accident or that Jeanette Schaefer suffered from a serious and perhaps permanent disability resulting from a head injury sustained in the accident.¹¹ Rather, the dispute concerned the cause of Jeanette Schaefer's head injury: the car accident or a 1984 fall down a flight of stairs.¹² After a full hearing, the panel decided that the Schaefers had not met their burden of proof that the 1985 car accident was the proximate cause of the injury or that the accident aggravated the 1984 injury.¹³ The panel did, however, decide that the Schaefers had suffered some physical injury from the accident and thereby awarded \$500 to David and \$1500 to Jeanette.¹⁴

After the parties entered into the insurance contract, but prior to the accident, Allstate had issued an amendment to the contract designed to replace the original clause requiring arbitration.¹⁵ The amendment was the applicable clause in the event that a dispute arose between Allstate and the insured parties.¹⁶ The amendment clause stated that any arbitration award not exceeding the limits imposed by the Ohio Financial Responsibility Law¹⁷ would bind both parties and could be entered as a judgment in a proper court, but any award exceeding such

8. *Id.*

9. The original Allstate insurance policy issued to the Schaefers contained the following arbitration clause:

If any person making claim hereunder and Allstate do not agree that such person is legally entitled to recover damages from the owner or operator of an uninsured automobile because of bodily injury to the insured, or do not agree as to the amount of payment which may be owing under this coverage, then, upon written demand of either, the matter or matters upon which such person and Allstate do not agree shall be settled by arbitration in accordance with the rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Such person and Allstate agree to consider itself bound and to be bound by any award made by the arbitrators pursuant to this coverage.

Id. at 1247.

10. *Id.* at 1243.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 1247-48. Such amendments are known as "endorsements." *See id.* at 1247.

16. *Id.* at 1248.

17. OHIO REV. CODE ANN. §§ 4509.01-.99 (Anderson 1988 & Supp. 1991). The Ohio Financial Responsibility Law requires that every person be insured to a minimum of \$12,500 per person or \$25,000 per occurrence. *Id.* §§ 4509.01(K), .20(A).

limits could be taken by either party to a trial court of competent jurisdiction regarding any issue.¹⁸

On August 11, 1989, the Schaeferes filed a motion to vacate the panel's award in the Court of Common Pleas of Franklin County, claiming that the terms of the amendment were unconscionable and against public policy.¹⁹ They advanced an alternative request that they be allowed to have their claims heard before an appropriate trial court.²⁰ The court denied the motion and confirmed the panel's award.²¹

On appeal, the Ohio Court of Appeals for the Tenth District concluded that the provision allowing a party a trial *de novo* if the amount exceeded the financial responsibility law was "so fundamentally unfair as to be unconscionable."²² The court, in an attempt to remedy the unfairness, refused to recognize that portion of the provision making an award binding so that all awards were appealable *de novo*.²³ In so doing, the appeals court reversed the trial court and remanded the case for further proceedings.²⁴

Finding that its decision conflicted with other Ohio courts of appeals, the appellate court certified the case to the Supreme Court of Ohio for review and final determination.²⁵ The Ohio Supreme Court affirmed the appellate court, holding that when an insurance contract contains a provision for arbitration to be binding only if it is within certain limits and otherwise to be reviewable *de novo*, whether or not knowingly bargained for, the policy interest of the state favoring arbitration (1) requires that such a clause be unenforceable and (2) allows that either party may seek *de novo* review from a proper trial court.²⁶

18. *Schaefer*, 590 N.E.2d at 1243-44. While Allstate and the Schaeferes interpreted the amendment differently, both parties agreed that the relevant provision was as follows:

Regardless of the method of arbitration, any award not exceeding the limit of the Financial Responsibility law of Ohio will be binding and may be entered as a judgment in a proper court. Regardless of the method of arbitration when any arbitration award exceeds the Financial Responsibility limits of the State of Ohio either party has a right to a trial on all issues in a court of competent jurisdiction. This right must be exercised within 60 days of the award.

Id. at 1247.

19. *Id.* at 1244.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 1248-50. The *Schaefer* case was in fact consolidated with another case, *Nationwide Mutual Insurance Co. v. Fallon-Murphy*, Case Nos. 91-2105 & 91-2333. The facts of *Fallon-Murphy* were very similar to the facts of *Schaefer*, and the insurance clause at issue was identical. See *Schaefer*, 590 N.E.2d at 1249. In *Fallon-Murphy*, however, the panel of arbitrators awarded the plaintiffs \$1 million, which the insurance company immediately appealed. *Id.* Justice Douglas, in his plurality opinion in *Schaefer*, recognized that the sword cut both ways in holding that the escape clause was unenforceable. See *id.* Since both sides could immediately litigate the issue, the award of the arbitrators would not be binding, and when the trial jury brought in a lower figure for plaintiffs,

III. LEGAL BACKGROUND

The origins of arbitration are ancient. Arbitration has been said to pre-date the legal systems of both the Greeks and the Romans.²⁷ While many realized the benefits of an arbitration system,²⁸ English courts and, later, American courts were generally hostile to enforcing agreements to arbitrate.²⁹ This hostility took the form of the doctrine of revocability, which provided that either party to a disagreement could revoke an agreement to arbitrate future disputes for any reason.³⁰ Judicial hostility to enforcing such agreements has been linked to jealousy over jurisdiction,³¹ to a fear of loss of income,³² and to concerns that parties involved would not receive fair and adequate treatment due to an arbitrator's lesser authority compared to that of a judge.³³ *Scott v. Avery*³⁴ significantly modified the English common law by holding that while persons could not agree to oust the jurisdiction of the courts, they could agree that no cause of action would arise until after the dispute had been submitted to arbitrators.³⁵

In the United States, courts were hesitant to depart from the common law in the absence of statutory guidance.³⁶ To remedy this situation and to pave the way for courts to enforce arbitration agreements, New York in 1920 became the first state to pass an arbitration statute.³⁷ Congress followed New York's lead

they would have to abide by that lower figure. *Id.*

27. Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 132 (1934).

28. *See id.* at 133-35 (discussing guilds and fair courts in England in the Middle Ages).

29. Michael L. Taviss, *Adventures in Arbitration: The Appealability Amendment to the Federal Arbitration Act*, 59 U. CIN. L. REV. 559, 562 (1990).

30. Wolaver, *supra* note 27, at 138-44.

31. This jealousy developed into the doctrine of "ousting," which provided that no agreement between citizens could oust the court's jurisdiction and prohibit that court from hearing the case. *See id.* at 139. This also acted to discourage individuals from seeking forms of settlement outside the official realm. *Id.* The doctrine was first laid down in *Kill v. Hollister*, 1 Wilson 129 (K.B. 1746). *Id.*

32. Taviss, *supra* note 29, at 563 (citing *Kulkundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978 (2d Cir. 1942) (judges prohibiting arbitration as a means to protecting their income)).

33. Zhaodong Jiang, *Federal Arbitration Law and State Court Proceedings*, 23 LOY. L.A. L. REV. 473, 478 n.20 (1990) (citing *Tobey v. County of Bristol*, 23 F. Cas. 1313, 1320-21 (C.C.D. Mass. 1845)).

34. 5 H.L. Cas. 811 (1856).

35. Wolaver, *supra* note 27, at 141-43.

36. Zhaodong Jiang, *supra* note 33, at 479.

37. *See* Tariss, *supra* note 29, at 563; *see also* N.Y. Arbitration Act, ch. 275, 2 N.Y. Laws 803 (1920).

and in 1925 enacted the Federal Arbitration Act,³⁸ which federal courts have interpreted as a legislative mandate favoring arbitration over litigation.³⁹

The FAA is important because it makes any agreement to arbitrate valid and enforceable, limited only by revocation principles in contract law.⁴⁰ The FAA sets guidelines for having a court of competent jurisdiction confirm the award,⁴¹ outlines the procedure and grounds for vacating an award,⁴² and provides a method for appealing an award.⁴³ It must be noted that the grounds for vacating an award are narrow: Arbitration under the act is allowed only for corruption, fraud, or undue means;⁴⁴ partiality or corruption of arbitrators;⁴⁵ and arbitrator misconduct, imperfect execution, or abuse of power.⁴⁶ Motions to vacate must be made and served upon the adverse party within three months of the award.⁴⁷ In addition, the appropriate district court has the power to modify an award where there was a mistake, where a decision was made on matters outside of the arbitration, or where an award was improper in form but in which the merits of the decision were unaffected.⁴⁸ Thus the federal statute, in addition to ensuring the enforceability of an arbitration agreement, makes an arbitration award relatively final and reversible only under certain circumstances.

The common law also was hostile to the enforcement of agreements to arbitrate, but not to the enforcement of arbitration awards.⁴⁹ Both English and American courts held that once an award was made, the reasons for not enforcing an arbitration agreement were less compelling than when the agreement was still executory.⁵⁰ As early as 1854, the United States Supreme Court held that "[a]rbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes, [arbitration] should receive every encouragement from courts of equity."⁵¹

The FAA reflected this federal respect for the awards of arbitration, as did similar state statutes. The practice of codifying such arbitration practices gained popularity, with a great majority of states following the example of the FAA and enacting similar statutes. At the time of this writing, every state in the Union has

38. Federal Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-15 (1988) [hereinafter FAA]); see Taviss, *supra* note 29, at 563.

39. See *Volt Info. Sciences v. Board of Trustees*, 489 U.S. 468, 478 (1988); see also *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985); *Southland Corp. v. Keating*, 465 U.S. 1, 10-11 (1983).

40. 9 U.S.C. § 2.

41. *Id.* § 9.

42. *Id.* § 10.

43. *Id.* § 15.

44. *Id.* § 10(a).

45. *Id.* § 10(b).

46. *Id.* § 10 (c)-(d).

47. *Id.* § 12.

48. *Id.* § 11.

49. *Zhaodong Jiang*, *supra* note 33, at 478 n.21.

50. *Id.*

51. *Burchell v. Marsh*, 58 U.S. 344, 349 (1854).

adopted some type of statute controlling arbitration, while 34 states and the District of Columbia have directly adopted the Uniform Arbitration Act.⁵²

As arbitration gained popularity as a viable and enforceable alternative to litigation, insurance companies increasingly used it to resolve disputes.⁵³ The

52. UNIF. ARBITRATION ACT §§ 1-25, 7 U.L.A. 5 (1985) [hereinafter U.A.A.]. The U.A.A. is one of the most important modern arbitration statutes adopted by states. The current U.A.A. was approved in 1955 by the National Conference of Commissioners on Uniform State Laws and the American Bar Association.

Fifty jurisdictions have adopted some type of modern arbitration statute with 34 states adopting the U.A.A. See ALASKA STAT. §§ 09.43.010-.180 (1983) (adopting U.A.A.); ARIZ. REV. STAT. ANN. §§ 12-1501 to -1518 (1982) (adopting U.A.A.); ARK. CODE ANN. §§ 16-108-201 to -224 (Michie 1987) (adopting U.A.A.); CAL. CIV. PROC. CODE §§ 1280-1298.8 (West 1980 & Supp. 1989); COLO. REV. STAT. §§ 13-22-201 to -223 (1987) (adopting U.A.A.); CONN. GEN. STAT. ANN. §§ 52-408 to -424 (West 1960); DEL. CODE ANN. tit. 10, §§ 5701-5725 (1975) (adopting U.A.A.); D.C. CODE ANN. §§ 16-4301 to -4314 (1989) (adopting U.A.A.); FLA. STAT. ANN. §§ 682.01-.20 (West Supp. 1989) (adopting U.A.A.); GA. CODE ANN. §§ 9-9-1 to -83 (Supp. 1989); HAW. REV. STAT. §§ 658-1 to -12 (1985); IDAHO CODE §§ 7-901 to -922 (1979) (adopting U.A.A.); ILL. REV. STAT. ch. 10, para. 101-123 (1987) (adopting U.A.A.); IND. CODE §§ 34-4-2-1 to -22 (1986) (adopting U.A.A.); IOWA CODE ANN. §§ 679A.1-.14 (West 1987) (adopting U.A.A.); KAN. STAT. ANN. §§ 5-401 to -422 (1982) (adopting U.A.A.); KY. REV. STAT. ANN. §§ 417.045-.230 (Michie/Bobbs-Merrill Supp. 1988) (adopting U.A.A.); LA. REV. STAT. ANN. §§ 9:4201-4217 (West 1983); ME. REV. STAT. ANN. tit. 14, §§ 5927-5949 (West 1980) (adopting U.A.A.); MD. CODE ANN., CTS. & JUD. PROC. §§ 3-201 to -234 (1984) (adopting U.A.A.); MASS. GEN. LAWS ANN. ch. 251, §§ 1-19 (West 1988) (adopting U.A.A.); MICH. STAT. ANN. §§ 600.5001-.5305 (Callaghan 1988) (adopting U.A.A.); MINN. STAT. ANN. §§ 572.08-.30 (West 1988) (adopting U.A.A.); MISS. CODE ANN. §§ 11-15-101 to -143 (Supp. 1988) (adopting statutory rules for arbitrating future disputes which only apply to construction contracts with some exceptions); MO. REV. STAT. §§ 435.350-.470 (Supp. 1989) (adopting U.A.A.); MONT. CODE ANN. §§ 27-5-111 to -324 (1989) (adopting U.A.A.); NEB. REV. STAT. §§ 25-2601 to -2622 (Supp. 1988) (adopting U.A.A.); NEV. REV. STAT. ANN. §§ 38.015-.205 (Michie 1987) (adopting U.A.A.); N.H. REV. STAT. ANN. §§ 542:1-10 (1974); N.J. STAT. ANN. § 2A:24-1 (West 1987); N.M. STAT. ANN. §§ 44-7-1 to -22 (Michie 1978) (adopting U.A.A.); N.Y. CIV. PRAC. L. & R. 7501-7514 (McKinney 1980); N.C. GEN. STAT. §§ 1-567.1-.20 (1983) (adopting U.A.A.); N.D. CENT. CODE §§ 32-29.2-01 to -20 (Supp. 1989) (adopting U.A.A.); OHIO REV. CODE ANN. §§ 2711.01-.24 (Anderson 1981); OKLA. STAT. ANN. tit. 15, §§ 801-818 (West Supp. 1989) (adopting U.A.A.); OR. REV. STAT. §§ 33.210-.300 (1987); 42 PA. CONS. STAT. ANN. §§ 7301-7320 (1982) (adopting U.A.A.); R.I. GEN. LAWS §§ 10-3-1 to -21 (1985); S.C. CODE ANN. §§ 15-48-10 to -240 (Law. Co-op. Supp. 1988) (adopting U.A.A.); S.D. CODIFIED LAWS ANN. §§ 21-25A-1 to -38 (1987) (adopting U.A.A.); TENN. CODE ANN. §§ 29-5-301 to -320 (Supp. 1988) (adopting U.A.A.); TEX. REV. CIV. STAT. ANN. arts. 224 to 238-6 (West Supp. 1989) (adopting U.A.A.); UTAH CODE ANN. §§ 78-31a-1 to -18 (1987) (adopting U.A.A.); VT. STAT. ANN. tit. 12, §§ 5651-5681 (Supp. 1989) (adopting U.A.A.); VA. CODE ANN. §§ 8.01-581.01 to .016 (Michie Supp. 1989) (adopting U.A.A.); WASH. REV. CODE ANN. §§ 7.04.010-.220 (West 1961); WIS. STAT. ANN. §§ 788.01-.18 (West 1981); WYO. STAT. §§ 1-36-101 to -119 (1988) (adopting U.A.A.); see also *Recent Developments: The Uniform Arbitration Act*, 1992 J. DISP. RESOL. 411, 411. Puerto Rico has also adopted a similar arbitration statute. See P.R. LAWS ANN. tit. 32, §§ 3201-3229 (1990).

Zhaodong Jiang in his article indicates that West Virginia and Alabama have adopted no arbitration statutes, when actually both have adopted quite complex statutes controlling arbitration which are similar to both the U.A.A. and the Ohio arbitration statutes at issue here. See Zhaodong Jiang, *supra* note 33, at 475 n.7; ALA. CODE §§ 6-6-1 to -16 (1977); W. VA. CODE § 55-10-1 to -8 (1981).

53. See generally Lamson, *supra* note 2.

most common form of arbitration clause today is that typically found in ordinary uninsured motorist coverage.⁵⁴ The clause usually takes the form of an agreement to arbitrate a dispute arising out of either an entitlement to payment or the amount of payment and includes an agreement to be bound by the results of arbitration.⁵⁵ Again, the result of the arbitration is final and binding.⁵⁶ Once an award is rendered in an uninsured motorist arbitration, there are relatively few grounds for setting it aside; the award is considered inviolable.⁵⁷

In enacting an arbitration statute, the state of Ohio decided not to adopt the FAA wholesale, although the statute Ohio did adopt reflected a majority of the FAA's basic premises.⁵⁸ The Ohio code provides for enforcement of agreements to arbitrate, subject only to the law of contract and excluding most arbitration agreements dealing with real estate.⁵⁹ A party can obtain a court order compelling a reluctant party to proceed with arbitration as agreed upon,⁶⁰ and that party can also apply to the Court of Common Pleas at any time within one year of an arbitration award to have it confirmed.⁶¹ The Ohio code also provides a means to vacate the award under specific circumstances: if the award was procured by corruption, fraud, or undue means; if the arbitrators were corrupt or partial; if the arbitrators were guilty of misconduct or misbehavior which resulted in prejudice to a party; or if the arbitrators exceeded their powers or imperfectly executed them.⁶² Ohio trial courts also have the power to modify

54. *Id.* at 243.

55. *Id.* at 244. The Lamson article includes a sample standard form insurance arbitration clause, which is substantially similar to the original arbitration clause in the Allstate policy at issue in the present case. See *id.* n.14. The standard form reads:

If any person making claim hereunder and the company do not agree that such person is legally entitled to recover damages from the owner or operator of an uninsured highway vehicle because of bodily injury to the insured, or do not agree as to the amount of payment which may be owing under this insurance, then, upon written demand of either, the matter or matters upon which such person and the company do not agree shall be settled by arbitration, which shall be conducted in accordance with the rules of the American Arbitration Association unless other means of conducting the arbitration are agreed to between the insured and the company, and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Such person and the company each agree to consider itself bound and to be bound by any award made by the arbitrators pursuant to this insurance.

Id.

56. *Id.* at 244.

57. Gerald Asken, *Arbitration of Uninsured Motorist Endorsement Claims*, 24 OHIO ST. L.J. 589, 606-07 (1963); see also Alan I. Widiss, *Perspectives on Uninsured Motorist Coverage*, 62 NW. U. L. REV. 497, 544-45 (1967). For the grounds for setting aside an arbitration award, see *supra* notes 44-46 and accompanying text.

58. See OHIO REV. CODE ANN. §§ 2711.01-.36 (Anderson 1988).

59. *Id.* § 2711.01.

60. *Id.* § 2711.03.

61. *Id.* § 2711.09.

62. *Id.* § 2711.10. These provisions are substantially similar to those of the federal legislation. See *supra* notes 40-48 and accompanying text.

an award on narrow grounds,⁶³ and the court must enter judgment in conformity with an award once an order confirming, modifying, or correcting the award has been made.⁶⁴ This judgment is then appealable.⁶⁵ Thus, under the Ohio statute, arbitration agreements are enforceable, and final awards reversible, only in specific instances and for limited reasons.

Recently it has become commonplace for insurance companies to issue policies or to amend existing policies to include terms that arbitration will be binding *only* when the award amount is less than a proscribed limit (in many cases this limit coincides with the minimum amount of accident insurance required to be carried by the state's financial responsibility statute).⁶⁶ Either party may appeal to a court for a trial *de novo* of an arbitration award greater than that proscribed amount.⁶⁷ Such clauses have naturally caused dispute and have been the subject of litigation within Ohio.⁶⁸ Interestingly, the various Ohio courts that have heard these cases have developed differing approaches and results.

It is universally accepted that Ohio policy favors arbitration as an expedient and inexpensive alternative to civil litigation.⁶⁹ In *Motorists Mutual Insurance Co. v. Said*,⁷⁰ the Eighth District Court of Appeals held that a clause similar to that in dispute in *Schaefer* was not void and was therefore enforceable⁷¹ even though arbitration normally contemplates a final, binding decision.⁷² The court stated that the express agreement of the parties controlled, whatever the result.⁷³ Moreover, the court held that the clause was not unconscionable because either party — including a dissatisfied but victorious insured party — could avoid the award, so that it was not unduly one-sided.⁷⁴

63. OHIO REV. CODE ANN. § 2711.11. The grounds listed here for modifying an award are:

1. there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award;
2. the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matters submitted;
3. the award is imperfect in matter of form not affecting the merits of the controversy.

Id.

64. *Id.* § 2711.12.

65. *Id.* § 2711.15.

66. *See, e.g.,* *Roe v. Amica Mut. Ins. Co.*, 533 So. 2d 279, 280 (Fla. 1988).

67. *Schaefer*, 590 N.E.2d at 1248.

68. *Id.*

69. *Lightning Rod Mut. Ins. Co. v. Saffle*, No. 15134, 1991 WL 231359, at *2 (Ohio Ct. App. Nov. 6, 1991) (unpublished decision) (citing *Menardi v. Petrigalla*, 462 N.E.2d 1246, 1248-49 (Ohio Ct. App. 1983)).

70. No. 084-119, 1987 WL 16532 (Ohio Ct. App. Sept. 3, 1987) (unpublished decision), *overruled by* *Cincinnati Ins. Co. v. Apisdorf*, No. CP-185814, 1992 WL 333131, at *4 (Ohio Ct. App. Nov. 12 1992) (unpublished decision).

71. *Said*, 1987 WL 16532, at *3.

72. *Id.* at *2.

73. *Id.*

74. *Id.* at *3.

In 1989, the Ohio Court of Appeals for the Eleventh District followed *Said* in *Roen v. State Farm Mutual Insurance Co.*⁷⁵ The *Roen* court held that a decision to arbitrate should not be less valid because it was conditional and that the clause was not against public policy according to *Said*.⁷⁶ Finally, in *Lightning Rod Mutual Insurance Co. v. Saffle*,⁷⁷ the Ninth District Court of Appeals held that a substantially similar clause was not unconscionable because, at the time of entering into the contract, it was not one-sided and applied equally to both parties; hence, it was not "facially unequal."⁷⁸ Further, the *Saffle* court held that not allowing such limited agreements might actually violate the state's interest in arbitration by dissuading persons from voluntarily engaging in arbitration if they could not do it on their own terms.⁷⁹

The Ohio Second District Court of Appeals decided differently in *Trupp v. State Farm Mutual Automobile Insurance Co.*⁸⁰ In this case, the clause involved allowed for appeal *de novo* by either party.⁸¹ The court held that the clause was both unconscionable and unenforceable, stating that "[t]here is something terribly unfair about the proposition: 'Heads, I win. Tails, we go two out of three.'"⁸² The *Trupp* court agreed with Justice Sweeney's concurring opinion in *Nationwide Mutual Insurance Co. v. Marsh*,⁸³ which stated that the clause was unfair because an insured party was unlikely to avoid a high award and be faced with litigation expenses.⁸⁴ Justice Sweeney also stated that such a provision was directly contrary to Ohio's strong public policy in favor of final and binding arbitration by allowing the insurer to "have its cake and eat it too."⁸⁵ The *Trupp* court considered four options in response to this type of clause⁸⁶ and settled on refusing to recognize the limiting provision.⁸⁷ This decision made all arbitration

75. No. 87CV1844, 1989 WL 11266, at *3 (Ohio Ct. App. Feb. 10, 1989) (unpublished decision).

76. *Id.* at *3.

77. No. 15134, 1991 WL 231359.

78. *Id.* at *4.

79. *Id.* at *6.

80. 575 N.E.2d 847 (Ohio Ct. App. 1989).

81. *Id.* at 848.

82. *Id.* at 850.

83. 472 N.E.2d 1061, 1063-64 (Ohio 1984) (Sweeney, J., concurring).

84. *Id.*

85. *Id.* at 1064.

86. The options considered by the *Trupp* court were:

- (1) refusing to recognize the arbitration agreement at all so that neither party could have a claim submitted to arbitration;
- (2) refusing to recognize the limiting clause, so that all awards would be appealable *de novo*;
- (3) refusing to recognize the limiting provision so that all awards were binding; and
- (4) permitting an insured to appeal an award less than the financial responsibility act, but not permitting the insurer to do likewise.

Trupp, 575 N.E.2d at 852.

87. *Id.* at 852-53.

awards in Ohio binding in an attempt to support the court's — and the state's — goal of encouraging arbitration.⁸⁸

Finally, in *Ellison v. General Accident Insurance Co. of America*,⁸⁹ the Ohio Court of Appeals for the Sixth District found a substantially similar arbitration agreement to be unconscionable and against public policy.⁹⁰ The court held that, in accord with public policy, all awards by arbitration regardless of amount should be binding.⁹¹ This result conflicted with the Tenth District Court of Appeals in *Schaefer*.⁹² Although both courts held these similar clauses invalid, the *Schaefer* court held all arbitration awards could be heard *de novo*,⁹³ while the *Ellison* court held that *all* arbitration awards were binding.⁹⁴ Noting the disparity in results, the *Ellison* court moved to certify the issue to the Ohio Supreme Court.⁹⁵

Upon this tangled morass the Ohio Supreme Court was called to impose order and to decide, finally, which path should be followed.

IV. THE INSTANT DECISION

A. *The Plurality*

Justice Douglas, writing for the *Schaefer* plurality, recognized that the inconsistencies in the Ohio courts of appeals had to be rectified.⁹⁶ The court began its opinion by defining the root of the problem as the imprecise use of the word "arbitration" and by noting that "binding arbitration" is redundant and that "non-binding arbitration" is a contradiction in terms.⁹⁷ The court stated that Ohio had a strong public policy in favor of arbitration.⁹⁸ Next, the court examined several definitions of the term "arbitration," including those from case law,⁹⁹ *Black's Law Dictionary*,¹⁰⁰ various treatises,¹⁰¹ and the Ohio statute

88. *Id.*

89. No. 87CV1822, 1991 WL 254232 (Ohio Ct. App. Nov. 15, 1991) (unpublished decision).

90. *Id.* at *2.

91. *Id.*

92. *Id.* at *4.

93. *Schaefer*, 590 N.E.2d at 1249.

94. *Ellison*, 1991 WL 254232, at *4.

95. *Id.*

96. *Schaefer*, 590 N.E.2d at 1244-45.

97. *Id.* at 1245.

98. *Id.* "A number of our cases decided over the course of many years reflect this court's dedication to the strong public policy favoring arbitration." *Id.* (citing Findlay City Sch. Dist. Bd. of Educ. v. Findlay Educ. Ass'n, 551 N.E.2d 186 (Ohio 1990)).

99. *Id.* The Ohio Supreme Court had previously defined "arbitration" as "a proceeding for the hearing and *determining* of a dispute between parties in controversy by a person or persons chosen by the parties *instead of* by a judicial tribunal." *Id.* (citing Ohio Council 8, AFSCME v. Ohio Dept. of Mental Health, 459 N.E.2d 220, 222 (Ohio 1984)).

controlling arbitration.¹⁰² All of these sources defined arbitration as absolute, binding, and final.¹⁰³ As such, the court reasoned that the dispute resolution mechanism provided for in the insurance policy was something besides "arbitration,"¹⁰⁴ which required that the result be binding "regardless of the outcome."¹⁰⁵

In analyzing the facts, the *Schaefer* court found that Allstate clearly attempted to bypass the provisions of Ohio Revised Code Section 2711, which required that arbitration awards be binding, by setting up an "escape hatch."¹⁰⁶ Further, the court held that the insurance clause frustrated every public policy favoring arbitration.¹⁰⁷ Allowing this type of provision, the court continued, would subject parties to multiple proceedings, would consume unnecessary time, and would not serve to clear crowded dockets;¹⁰⁸ as such, a provision providing for anything but true arbitration would be held to be unenforceable.¹⁰⁹

The court next determined that prior cases which have interpreted *Ohio Council 8, AFSCME v. Ohio Department of Mental Health*¹¹⁰ to mean that parties are completely free to contract to non-binding arbitration are in error.¹¹¹ The *Schaefer* court held that parties should not be allowed to avoid an arbitrator's award by writing a contract around it.¹¹²

After deciding that the Allstate insurance clause violated public policy, the *Schaefer* plurality next held that in order to treat all parties equally, the subject clause must simply be treated as unenforceable.¹¹³ The result is that either

100. *Id.* *Black's Law Dictionary* defines "arbitration" as "[a]n arrangement for taking and abiding by the judgment of selected persons in some disputed matter, instead of carrying it to established tribunals of justice, and is intended to avoid the formalities, the delay, the expense and vexation of ordinary litigation." BLACK'S LAW DICTIONARY 105 (6th ed. 1990); see *Schaefer*, 590 N.E.2d at 1245.

101. *Schaefer*, 590 N.E.2d at 1246. "The purpose of arbitration is, therefore, to determine a difference or dispute amicably, privately and *finally and, in so doing, to exclude a court of law from such determination.*" *Id.* (quoting FRANCES A. KELLOR, ARBITRATION IN ACTION 3-4 (1941)) (emphasis added by court).

102. *Id.* (citing OHIO REV. CODE ANN. §§ 2711.10, .11, .13).

103. *Id.*

104. *Id.*

105. *Id.* at 1247.

106. *Id.* at 1248; see OHIO REV. CODE ANN. § 2711.01(A).

107. *Schaefer*, 590 N.E.2d at 1248.

108. *Id.*

109. *Id.*

110. 459 N.E.2d 220.

111. *Schaefer*, 590 N.E.2d at 1248. *Ohio Council 8* involved a dispute between a union of state employees and a state agency, where the Ohio Supreme Court decided that mediation and arbitration are not functionally equivalent. *Ohio Council 8*, 459 N.E.2d at 223. The Ohio Supreme Court also held that if parties agreed only to mediation, and not arbitration, the results could not be enforced and could be rejected by either side. *Id.*

112. *Schaefer*, 590 N.E.2d at 1248.

113. *Id.* at 1249.

party to such an arbitration agreement can decide to litigate the issue in the proper court for any reason.

B. The Concurrence

Four justices joined in the concurring opinion, which made the point that the court should not issue a blanket prohibition against the use of agreements for non-binding arbitration.¹¹⁴ The concurrence stated that "non-binding" arbitration is not an oxymoron¹¹⁵ and that such a narrow construction was not only against Section 2711.21 of the Ohio Revised Code,¹¹⁶ but that it also detracted from a widely accepted construction of the term.¹¹⁷ The concurring justices stated that it was not the magic of the word "arbitration" but rather the underlying intent of the parties which should determine the degree to which an award should bind the parties.¹¹⁸ They also stated that there may be provisions of contract law that would control the finality of an award in the event the parties had agreed to "non-binding" arbitration.¹¹⁹

The concurring justices also argued that the state should support non-binding arrangements because, they noted, having parties attempt to resolve their disputes outside of the judiciary, regardless of the form the resolution takes, supports public policy.¹²⁰ Furthermore, the concurring justices believed that the positive effects of these non-binding procedures outweighed any negative effects.¹²¹ Having stated this, the concurring justices stated that they joined the plurality because (1) the bargaining power of the parties was unfair and (2) the results of this agreement would bind the insured in more frequent and less equitable situations than the insurer.¹²² The concurring justices also believed that the court was overstepping its bounds and passing on an issue that was not squarely in front of the court upon certification from the court of appeals.¹²³

114. *Id.* at 1250-51 (Wright, J., concurring).

115. *Id.* at 1250.

116. *See id.* Section 2711.21 provides for the parties to agree to non-binding arbitration in medical, dental, optometric, and chiropractic claims cases and also allows parties to agree to be bound by the arbitration decision. *See* OHIO REV. CODE ANN. § 2711.21(C).

117. *Schaefer*, 590 N.E.2d at 1250.

118. *Id.* at 1251.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 1251-52.

123. *Id.* at 1252-53.

V. COMMENT

It is clear that the Ohio Supreme Court, in deciding *Schaefer*, intended to encourage disputing parties to engage in arbitration.¹²⁴ The court realized that Ohio was dedicated to a strong public policy favoring arbitration¹²⁵ and also recognized the many ill effects of enforcing escape clauses.¹²⁶ The precedent established by the court, in effect, overruled both *Said* and *Trupp* and also overruled the interpretation some courts gave *Ohio Council 8* as to the parties' freedom to contract.¹²⁷ The Ohio Supreme Court had to decide between letting the insurance clause stand, making *all* arbitration awards binding, or simply making the whole clause unenforceable. The court made a major policy decision and broke new ground in holding that the arbitration clause was simply unenforceable.¹²⁸

If the court's goal was to support public policy by encouraging arbitration, then it is difficult to see how the court has met this objective. By declaring the arbitration clause unenforceable, the court opened the door allowing either party to appeal the result immediately. This works directly against the rationale of alleviating crowded court dockets. If anything, the holding serves to add cases to court dockets since dissatisfied parties will most likely appeal. Perhaps the best solution is to follow the court of appeals in *Trupp*, making the escape clause unenforceable but also making any award final and binding.¹²⁹ Both Ohio public policy and Ohio statutes support this view in that they encourage arbitration and provide for a result that is reviewable only through certain prescribed channels.¹³⁰

The *Schaefer* decision does send a message to insurance companies that such one-sided approaches to arbitration will not be tolerated, and, in this respect, it supports public policy and consumer protection. But it is difficult to see how the opinion will support public policy by encouraging the overall use of arbitration. The *Schaefer* decision may encourage the use of *binding* arbitration agreements. But it is equally possible that, when insurance companies draft policies, they will simply eliminate the arbitration clause if it only means that they will ultimately be forced to litigate.

Further, as noted by the concurrence, it is unclear how the opinion serves to encourage the use of arbitration by prohibiting the parties from agreeing to non-binding arbitration.¹³¹ Justice Wright argues correctly that any step toward

124. *See id.* at 1245.

125. *Id.*

126. *See id.* at 1248; *see also supra* note 108 and accompanying text.

127. *See Ohio Council 8*, 459 N.E.2d at 223; *see also supra* note 111 and accompanying text.

128. *See Schaefer*, 590 N.E.2d at 1249.

129. *Trupp*, 575 N.E.2d at 852; *see also supra* notes 80-88 and accompanying text.

130. *See supra* notes 98-105 and accompanying text.

131. *Schaefer*, 590 N.E.2d at 1251 (Wright, J., concurring).

dispute resolution that avoids actual litigation is a step in the right direction.¹³² As long as the agreement is freely bargained for, the parties should be allowed to contract for non-binding arbitration. Justice Wright states that agreements to non-binding arbitration are not *inherently* unconscionable.¹³³ However, contracts of adhesion, similar to the *Schaefer* contract, do present problems when an insured party is subject to unequal bargaining power. In this regard, the decision is overbroad and actually discourages what it seeks to promote.

The U.S. Supreme Court will probably never examine the role escape clauses play in insurance arbitration agreements. The McCarran-Ferguson Act¹³⁴ specifically delegates the authority to regulate matters of insurance to the states;¹³⁵ as a result, federal courts seldom decide cases such as this. The matter has, however, been litigated in many other state forums.

Of the states which have considered this issue, two have held the escape clauses enforceable and in accord with public policy. The Supreme Court of Florida decided in *Roe v. American Mutual Insurance Co.*¹³⁶ that no public policy was adversely affected and that the parties were statutorily entitled to agree to non-binding arbitration.¹³⁷ In *Cohen v. Allstate Insurance Co.*,¹³⁸ a New Jersey court held that an escape clause was not unconscionable, was not against public policy, and would not necessarily tilt in favor of the insurance company.¹³⁹ New Jersey, like Florida, has statutes which specifically allow such agreements.¹⁴⁰

Apart from these two exceptions, both based on statutes that allow agreements to non-binding arbitration, the great majority of states hold escape clauses unenforceable and against public policy. Of this majority, few concur with the Ohio Supreme Court in *Schaefer*.¹⁴¹ Holding such escape clauses unenforceable while affirming the arbitrators' award, however, does enjoy wide support.¹⁴² The common rationale is that simply to allow the parties to go to

132. *See id.* at 1251-53.

133. *Id.* at 1252.

134. 15 U.S.C. §§ 1011-1015 (1988). This Act provides for the preference for state law over federal law in regulating the insurance industry. *See* Lamson, *supra* note 2, at 245.

135. *See* 15 U.S.C. § 1012(a).

136. 533 So. 2d 279. This case overrules *Berger v. Fireman's Fund Insurance Co.*, 515 So. 2d 997 (Fla. Dist. Ct. App. 1987), which held an analogous provision unenforceable.

137. *Roe*, 533 So. 2d at 281 (citing FLA. STAT. ANN. § 682.02 (West 1987)).

138. 555 A.2d 21 (N.J. Super. Ct. App. Div. 1989).

139. *Id.* at 23-24.

140. *See id.* at 22-23 (citing N.J. STAT. ANN. §§ 2A:24-8, 17:28-1 (West 1991)).

141. The Supreme Court of Minnesota held in *Schmidt v. Midwest Family Mutual Insurance Co.*, 426 N.W.2d 870 (Minn. 1988), that an escape clause was unenforceable but made no clear indication as to whether the award reached was binding or whether the parties were free to take the issue to trial. *See id.* at 874-75.

142. *See, e.g.*, *Field v. Liberty Mut. Ins. Co.*, 769 F. Supp. 1135, 1141 (D. Haw. 1991) (holding that Hawaii law and public policy mandated that the award of the arbitrators be binding; the award was reviewable only to the extent allowed by statute); *United Servs. Auto. Ass'n v. Superior Court*, 270 Cal. Rptr. 376, 378 (Ct. App. 1990) (in a case brought by insurer to have an escape clause

trial violates not only their intent to arbitrate but also the state's interest in encouraging arbitration, a sensible and practical rationale.

VI. CONCLUSION

While the Ohio Supreme Court makes a clear attempt to encourage arbitration among parties, the court should have more narrowly tailored its decision to fit the needs of both public policy and individuals by allowing any arbitration award to be binding regardless of the existence of an escape clause. In so doing, the court would align itself with the majority of forums that have considered the issue. The court would also facilitate the timely, efficient, and final resolution of many types of claims — a policy with which few courts could disagree.

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voided, the court held the clause unenforceable and against public policy, and confirmed the award of the arbitrators); *Mendes v. Automobile Ins. Co.*, 563 A.2d 695, 699 (Conn. 1989) (holding the escape clause to be against public policy and unenforceable, and affirming plaintiff's application to confirm the award of the arbitrator); *Worldwide Ins. Group v. Klopp*, 603 A.2d 788, 791-92 (Del. 1992) (holding the escape clause against public policy of state and affirming the lower court's judgment based on arbitrator's award); *Pepin v. American Universal Ins. Co.*, 540 A.2d 21, 22-23 (R.I. 1988) (holding escape clause void as against public policy and sustaining plaintiffs' motions to confirm arbitrators' awards); *see also Goulart v. Crum & Forster Personal Ins. Co.*, 271 Cal. Rptr. 627, 628 (Ct. App. 1990).

