

1990

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Recommended Citation

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ARBITRATION AWARDS IN UNINSURED AND UNDERINSURED MOTORIST INSURANCE PROVISIONS: WHICH PUBLIC POLICY TO APPLY?

*Mendes v. Automobile Insurance Co. of Hartford*¹

I. INTRODUCTION

Automobile insurance is considered by many to be a necessary evil. Most of us purchase such insurance with two thoughts in mind: How much coverage do I get and what will it cost me? Normally, we get a copy of the policy weeks after signing the agreement. Seldom do we bother to read the lengthy, complicated contract. Many policies contain provisions that give the insurer and/or the insured the right to have certain disputes settled by arbitration instead of litigation.

Over the years, as court dockets have become more and more crowded, arbitration has grown to be highly favored as a means of settling disputes. Consequently, courts give great deference to arbitration awards and reverse them only for specific reasons.

This Note examines how the Connecticut Supreme Court handled a case involving an automobile insurance policy that called for arbitration of disputes concerning uninsured and underinsured motorist coverage, but allowed either party to demand a trial de novo if unsatisfied with the arbitration award.

II. THE CASE

On July 24, 1986, Manuel Mendes acquired automobile insurance coverage from Automobile Insurance Company of Hartford.² On November 17, 1986, Luis Mendes, the plaintiff and an insured under the policy, was injured when struck by an automobile driven by Margaret Monterosso.³ Monterosso's insurance provided her with \$20,000 in bodily injury liability coverage, which plaintiff collected from Monterosso's carrier.⁴

Subsequently, plaintiff sought recovery under the Mendes insurance policy⁵ for his incurred expenses which exceeded the amount recovered from Monterosso's carrier.

1. 212 Conn. 652, 563 A.2d 695 (1989).

2. *Id.* at 653, 563 A.2d at 695.

3. *Id.* at 654, 563 A.2d at 696.

4. *Id.*

5. Manuel Mendes purchased the insurance at issue on his automobiles. Luis Mendes, an insured under the policy, was a pedestrian when struck by Monterosso. Luis was the plaintiff. References to the "Mendes insurance policy" refer to the policy purchased by Manuel that covered Luis.

so's insurance carrier.⁶ The Mendes insurance policy with the defendant insurance company provided that certain disputes over uninsured and underinsured motorist claims were to be settled by binding arbitration.⁷ The policy had an escape clause which provided:

However, either party may make a written demand for a trial if the amount of damages awarded is greater than 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 this demand is not made within 60 days of the decision of the arbitrator(s), the amount of damages awarded by the arbitrator(s) will be binding. (escape clause)⁸

Connecticut's minimum coverage limit for bodily injury liability was \$20,000.⁹

Pursuant to the arbitration provision contained in the Mendes insurance policy, plaintiff requested arbitration with the defendant.¹⁰ A three person arbitration panel heard the claim.¹¹ On September 21, 1988, the panel awarded the plaintiff \$50,000 in underinsured motorist benefits.¹²

However, the defendant did not want to be bound by the arbitrators' decision and demanded a trial de novo, as was provided in the escape clause.¹³ On October 21, 1988, the defendant filed an application with the Superior Court to vacate the arbitration award.¹⁴ Defendant argued that it was entitled to a trial de novo pursuant to the express language in the policy's escape clause since the arbitration awarded exceeded \$20,000.¹⁵ On October 26, 1988, plaintiff filed an application with the Superior Court seeking to confirm the arbitration award and requesting that an order be issued directing the defendant to pay the full amount of the award, plus interest from the date of the award.¹⁶ The trial court granted the plaintiff's request to confirm the arbitrators' award and accordingly denied the

6. *Mendes*, 212 Conn. at 654, 563 A.2d at 696. The defendant's insurance policy provided underinsured motorist coverage in the amount of \$100,000. *Id.* at n.2.

7. *Id.* at 653, 563 A.2d at 695-96.

8. *Id.*

9. *Id.*; see CONN. GEN. STAT. §§ 38-175c, 14-112 (1987).

10. *Mendes*, 212 Conn. at 654, 563 A.2d 696.

11. *Id.* The policy provided that when the amount demanded exceeded \$40,000 the dispute was to be heard by a panel of three arbitrators. *Id.* at 653, 563 A.2d at 695.

12. *Id.* at 654, 563 A.2d at 696.

13. *Id.*

14. *Id.* CONN. GEN. STAT. § 52-418(a)(4) permitted defendant to apply for an order vacating an arbitration award if the arbitrators "exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made." *Mendes*, 212 Conn. at 654 n.3, 563 A.2d at 696 n.3.

15. *Id.* at 654-55, 563 A.2d at 696.

16. *Id.* at 655, 563 A.2d at 696. CONN. GEN. STAT. § 52-417 permitted the plaintiff to apply for an order confirming the arbitration award. *Mendes*, 212 Conn. at 655 n.4, 563 A.2d at 696 n.4.

defendant's request to vacate the arbitration award.¹⁷ The trial court relied on Connecticut General Statute Section 38-175c, which it felt manifests a strong public policy in favor of final arbitral resolution of disputes concerning the amount of uninsured motorist benefits.¹⁸ The trial court determined that the escape clause permitted the defendant to set aside arbitral awards in excess of \$20,000 whenever it chose and as such, violated public policy.¹⁹ The trial court also relied heavily on three out-of-state cases that held similar escape clauses to be void as contrary to public policy.²⁰

The Supreme Court of Connecticut accepted the trial court's analysis and affirmed the granting of plaintiff's request to confirm the arbitration award and to deny the defendant's application to vacate the award.²¹ In affirming, the Supreme Court held that a provision of an automobile insurance policy that provides for binding arbitration whenever disputes arise as to the amount of coverage in uninsured or underinsured claims, yet permits either the insured or the insurer to demand a trial de novo whenever the arbitration award exceeds the statutorily required minimum coverage limit for bodily injury liability, is unenforceable as against public policy.²²

III. LEGAL BACKGROUND

A. *Brief Background of Arbitration*

Arbitration has been defined 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."²³ Historically, though, the common law has disfavored arbitration as a means of settling disputes.²⁴ Courts were reluctant to force parties to settle rights without the protection of a

17. *Id.* at 655, 563 A.2d at 696.

18. *Id.* at 655-56, 563 A.2d at 696-97.

19. *Id.* at 656, 563 A.2d at 697. CONN. GEN. STAT. § 38-175c "requires every uninsured motorist insurance policy that contains 'a provision for binding arbitration to include a provision for final determination of insurance coverage in such arbitration proceeding.'" *Mendes*, 212 Conn. at 655, 563 A.2d at 696.

20. *Mendes*, 212 Conn. at 656-57, 563 A.2d at 696-97; see *Schmidt v. Midwest Family Mut. Ins. Co.*, 413 N.W.2d 178 (Minn. Ct. App. 1987), *aff'd en banc*, 426 N.W.2d 870 (Minn. 1988); *Nationwide Mut. Ins. Co. v. Marsh*, 15 Ohio St. 3d 107, 472 N.E.2d 1061 (1984) (Sweeney, J., concurring); *Pepin v. Am. Universal Ins. Co.*, 540 A.2d 21 (R.I. 1988).

21. *Mendes*, 212 Conn. at 661, 563 A.2d at 699. The defendant also argued on appeal that, if the court held the escape clause to be against public policy, the court should strike the entire arbitration clause. The court refused to address this contention because the defendant did not raise the issue at the trial level. *Id.* at n.6.

22. *Id.* at 658-61, 563 A.2d at 697-99.

23. BLACK'S LAW DICTIONARY 55 (5th ed. 1979) (abridged copy).

24. 2 A. WIDISS, UNINSURED & UNDERINSURED MOTORIST INSURANCE § 22.1, at 139 (2d ed. 1987).

court of law.²⁵ Particularly, courts and legislatures were averse to agreements to arbitrate disputes that may arise in the future.²⁶ From the early 1800's to the 1950's, courts refused to enforce agreements to arbitrate such "future disputes."²⁷ However, we have seen an about-face during the twentieth century. This is evidenced by the fact that every state currently has legislation that modifies the common law rule at least to some degree.²⁸ In many states, however, these statutes do not govern arbitration agreements in insurance contracts.²⁹

One of the building blocks that states have used in developing arbitration statutes has been the Uniform Arbitration Act.³⁰ Arbitration statutes in most states model or copy the Uniform Arbitration Act.³¹ The first Uniform Arbitration Act covered arbitration of existing disputes, but it was not until the 1950's that the revised Act provided for the arbitration of future disputes.³² Without question, the public policy in most states now encourages the use of arbitration by providing for the enforceability of agreements to arbitrate both present and future disputes.³³

B. Arbitration and Contract Principles

As a result of this swing in public policy, we are seeing arbitration provisions being included in contract transactions in increasing numbers.³⁴ It is through contractual relationships between parties that arbitration is able to flourish.³⁵ Parties are able to construct an arbitration system specifically tailored to meet their individual needs.³⁶ This is one reason that arbitration has become such a popular and successful method of resolving disputes without judicial intervention.³⁷

Since arbitration arrangements are so commonly a part of negotiated contracts, they should be conferred all the powers and rights associated with the "freedom of contract" principle.³⁸ Contracts have been a successful element in

25. *Id.* § 23.1, at 147.

26. *Id.* at 148.

27. *Id.*

28. *Id.* § 22.1, at 139.

29. *Id.*

30. *Id.* at 140.

31. States that have adopted statutes modeled after the Uniform Arbitration Act are Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Wyoming, as well as the District of Columbia. *See Recent Developments: The Uniform Arbitration Act*, 1989 J. DISP. RESOL. 237, 238 n.3.

32. A. WIDISS, *supra* note 24, § 22.1, at 140.

33. *See id.*

34. A. WIDISS, *supra* note 24, § 22.1, at 139.

35. *See id.* at 142.

36. *Id.*

37. *See id.*

38. *Id.* at 142.

modern law, in part, because they are a product of parties "who meet each other on a footing of social and approximate economic equality"³⁹ Thus, the successful use of arbitration also depends on a degree of equality in bargaining power.

The onslaught of large scale business brought about the development and perfection of standardized contracts.⁴⁰ Standardized contracts, once refined, are used in every dealing with the same products or services.⁴¹ Standardized contracts are normally used by businesses with strong bargaining power.⁴² The weaker party typically is not in a position to bargain, either because the stronger party has a monopoly or because the competition uses the same clauses.⁴³ The weaker party is thus placed in the position that it must accept terms dictated by the stronger party, the consequences of which are often understood only in a vague way, if at all.⁴⁴ Standardized contracts thus are often contracts of adhesion.⁴⁵ Although there is some dispute about what actually is a contract of adhesion, most courts would classify the arbitration provisions of insurance contracts as adhesion contracts.⁴⁶

Standard forms used by most insurers for uninsured and underinsured motorist insurance include provisions for arbitration if the insurer and the insured do not agree whether the insured is covered or as to the amount of damages.⁴⁷ However, several states specifically prohibit an insurer's use of arbitration to foreclose a claimant's right to litigate controversies involving the uninsured motorist insurance or prohibit insurance policies from depriving the courts of jurisdiction.⁴⁸

A problem arises in the "freedom of contract" principle since insurance policies are seldom signed or acknowledged by the insured.⁴⁹ Several states have enacted legislation requiring notice to be placed in the insurance contract in a manner which alerts the insured that the contract contains a provision calling for binding arbitration of specific disputes.⁵⁰ In addition, "[j]udicial decisions in many of the states which have enacted either the Uniform Arbitration Act or

39. Kessler, *Contracts Of Adhesion - Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 630 (1943).

40. *Id.* at 631.

41. *Id.*

42. *Id.* at 632.

43. *Id.*

44. *Id.*

45. *Id.*

46. A. WIDISS, *supra* note 24, § 23.2, at 150-51. See also *id.* § 23.6, at 160-65.

47. *Id.* § 22.2, at 142.

48. *Id.* § 23.4, at 154-55. These states are Kansas, Louisiana, Missouri, Nevada, Texas, Arkansas, Georgia, Maryland, Mississippi, South Carolina, South Dakota, Tennessee, Virginia, and West Virginia. *Id.* at 154-56 nn.16-17.

49. *Id.* § 22.3, at 144, § 23.3, at 154.

50. *Id.* § 22.3, at 144 nn. 11-12.

comparable legislation seem to affirm the precept that the parties' decision to use arbitration must be the result of a voluntary agreement."⁵¹

Thus, the use of arbitration provisions in uninsured or underinsured motorist clauses found in motor vehicle insurance contracts has raised the concern that the provisions are not the product of a voluntary agreement of the parties.⁵² One reason for the concern is that the coverage provision of most motor vehicle insurance policies is a "take it or leave it" proposition.⁵³ Additionally, the insured commonly can't even examine the contents of the policy until days or weeks after the application for insurance is completed.⁵⁴ Also, most purchasers of motor vehicle insurance are primarily concerned with the acquisition of liability, collision and comprehensive coverage.⁵⁵ The uninsured or underinsured provisions are generally an insignificant element of the purchaser's motives or concerns.⁵⁶

C. General Enforceability of Arbitration Awards

Many of the issues raised above involve the establishment of the relationship between insurer and insured, and focus on an insurer's ability to force an insured to enter arbitration. However, another important aspect of the law of arbitration as it applies to insurance contracts concerns the enforceability of arbitration awards once the parties have proceeded to that point.⁵⁷ There is an increasing number of cases where courts have settled issues involving arbitration provisions and have either specifically upheld the enforceability of the arbitration provision or implicitly indicated that the clause is enforceable.⁵⁸ Many states have statutes that specifically allow for arbitration awards to be confirmed by a court.⁵⁹ Generally, courts only vacate awards when some sort of arbitrator misconduct is present, such as fraud or dishonesty.⁶⁰

Arbitration awards involving uninsured or underinsured motorist claims have typically received the same deference. However, over the past twenty years courts have increasingly vacated arbitration awards, primarily as a result of disputes concerning the uninsured motorist coverage.⁶¹ The disputes most often arbitrated concern the amount of damages to be awarded or whether coverage exists.⁶²

51. *Id.* § 23.5, at 159.

52. *Id.* § 23.6, at 160.

53. *Id.*

54. *Id.* at 161.

55. *Id.*

56. *Id.*

57. *Id.* § 26, at 275.

58. *Id.* § 23.10, at 171.

59. *See, e.g.,* Mendes, 212 Conn. at 655 n.4, 563 A.2d at 696 n.4 (quoting CONN. GEN. STAT. § 52-417).

60. A. WIDISS, *supra* note 24, § 26.3, at 279-82.

61. *Id.* § 22.4, at 146. *See also id.* § 26, for an analysis of the trends involved in these decisions.

62. *Id.* § 22.2, at 142.

D. *Enforceability of Trial De Novo Provisions*

One exception to the normal deference given to arbitration awards by the courts has involved a common provision that grants the insured and insurer the right to a trial de novo if the arbitration award exceeds a specific amount, typically the statutory minimum liability insurance.⁶³ The issue in the case at hand, *Mendes*, involves the enforceability of such a trial de novo provision.⁶⁴

Three cases in different states have specifically held that a trial de novo provision in the arbitration clause of uninsured motorist insurance is against public policy.⁶⁵ The first of these three cases, *Schmidt v. Midwest Family Mutual Insurance Co.*, held that Minnesota's public policy favors the use of arbitration to resolve disputes between contracting parties and the trial de novo provision was therefore unenforceable.⁶⁶ The appellate court relied on the view that the trial de novo provision skewed the remedy in favor of the insurer, since the insurer is the one who would likely be dissatisfied with an award above \$25,000, the statutory minimum bodily injury requirement.⁶⁷ The appellate court reasoned that awards under \$25,000 would likely be unacceptable to the insured, but the insured would have to accept the result since it would not have the right to a trial de novo.⁶⁸ The appellate court also held that the insurance contract was a contractual relationship which involved unequal bargaining power and little chance for negotiation.⁶⁹ The Minnesota Supreme Court upheld the lower court's analysis.⁷⁰ The higher court also stated that the trial de novo provision resulted in "complete frustration of the very essence of the public policy favoring arbitration" and thus the trial court was warranted in rejecting the provision.⁷¹

The second of the these cases, *Nationwide Mutual Insurance Co. v. Marsh*, was actually decided on grounds other than public policy.⁷² The Ohio Supreme Court threw out the trial de novo provision at issue because the parties did not discuss the provision at the time the insured purchased the policy.⁷³ However, Justice Sweeney, in a concurring opinion, took the chance to analyze the case on the public policy basis.⁷⁴ He stated that the fact that both the insurer and the insured could demand a trial de novo only amounted to a "facial equality," not a

63. See *infra* notes 65-81.

64. *Mendes*, 212 Conn. at 652-53, 563 A.2d at 695.

65. *Schmidt*, 413 N.W.2d 178; *Nationwide Mut.*, 15 Ohio St. 3d 107, 472 N.E.2d 1061 (Sweeney, J., concurring); *Pepin*, 540 A.2d 21.

66. *Schmidt*, 413 N.W.2d 178.

67. *Id.*

68. *Id.*

69. *Id.* at 181.

70. *Schmidt*, 426 N.W.2d 870.

71. *Id.* at 874.

72. *Nationwide Mut.*, 15 Ohio St. 3d 107, 472 N.E.2d 1061.

73. *Id.* at 109, 472 N.E.2d. at 1061-62.

74. *Id.* at 110, 472 N.E.2d at 1063.

true equality.⁷⁵ The trial de novo provision provided the insurer with a method to avoid what it would consider bad results of an arbitration, but the insured did not realistically have the same opportunity.⁷⁶ The provision would permit either party to avoid a high award that it found unfavorable, but the Justice reasoned that it would be very unlikely that an insured would be dissatisfied with a high award.⁷⁷

The third of the three cases, *Pepin v. American Universal Insurance Co.*, was decided in Rhode Island.⁷⁸ The Rhode Island Supreme Court determined that the trial de novo provision was against public policy because it circumvented the whole purpose of arbitration, namely, providing a relatively quick, inexpensive means for resolving disputes.⁷⁹ The court held that a state statute conferred a right to binding arbitration⁸⁰ and that the trial de novo provision attempted to circumvent that right.⁸¹

However, two other state courts have addressed this issue of whether trial de novo provisions in uninsured motorist insurance violate public policy and ruled that such escape clauses did not violate public policy.⁸² The first of these two cases, *Roe v. Amica Mutual Insurance Co.*, resulted in the Florida Supreme Court's ruling that the escape clause in question did not violate public policy.⁸³ The court's reasoning centered on the language of the Florida Arbitration Statute which permitted parties to agree to not be bound by the Florida Arbitration Code.⁸⁴ Thus, the court was not convinced that public policy would be offended by an escape clause allowing a trial de novo.⁸⁵

In addition, the court was not persuaded by the argument that the escape clause gives the insurer a means to avoid an arbitration award when the insured does not practically have the same option available.⁸⁶ It reasoned that the insured could request a trial de novo had the arbitration award been only slightly over Florida's statutory minimum of \$10,000.⁸⁷

75. *Id.* at 100-11, 472 N.E.2d at 1063-64.

76. *Id.*

77. *Id.*

78. *Pepin*, 540 A.2d 21.

79. *Id.* at 22.

80. *Id.* R.I. GEN. LAWS § 10-3-2 (1956, 1985 Reenactment) states, "said arbitration procedure may be enforced at the option of the insured, and in the event the insured exercises said option to arbitrate, then the provisions of this chapter shall apply and be the exclusive remedy available to the insured."

81. *Pepin*, 540 A.2d at 22; R.I. GEN. LAWS 10-3-2 (1985 Reenactment).

82. *Roe v. Amica Mut. Ins. Co.*, 533 So. 2d 279 (Fla. 1988); *Cohen v. Allstate Ins. Co.*, 231 N.J. Super. 97, 555 A.2d 21 (N.J. Super. Ct. App. Div. 1989).

83. *Roe*, 533 So. 2d at 281.

84. *Id.* FLA. STAT. § 6782.02 (1987) provides that an agreement to arbitrate is enforceable provided that the act will 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."

85. *Roe*, 533 So. 2d at 281.

86. *Id.*

87. *Id.* In *Roe*, the arbitrators awarded the insured \$225,735 for personal injuries.

In the second case, *Cohen v. Allstate Insurance*, the New Jersey court stated that the applicable New Jersey statute delineated the situations where arbitration awards could be vacated.⁸⁸ The New Jersey legislature mandated binding arbitration of PIP claims at the option of the insured⁸⁹ and required non-binding arbitration of certain automobile tort claims.⁹⁰ Thus, the court felt it significant that the legislature had not required arbitration of uninsured motorist claims at all.⁹¹

The court also stated that enforcement of the escape clause did not involve judicial vacation of the award; rather, it fulfilled the presumed intent of the parties that the award was to have limited effect.⁹² Since the arbitration provision was a product of the agreement between the insurer and the insured, the court was not allowed to rewrite the contract in order to expand the scope of the arbitration or in any other way make it more effective.⁹³

The insured in *Cohen* also asserted that the escape clause was unconscionable because it afforded the insurer the opportunity to reject high awards where the insured would generally be pleased with such awards.⁹⁴ However, the court was unpersuaded since it could hypothesize situations where the insured could actually benefit from the escape clause, citing *Roe v. Amica Mutual Insurance Co.*⁹⁵

The above discussion outlines the state of the law as it exists across the country. In addition, it is important to be familiar with the specific law in Connecticut, the situs of the case at hand. To begin with, established case law upholds the enforceability of arbitration awards, even regarding uninsured motorist claims.⁹⁶ For example, in *Oliva v. Aetna Casualty & Surety Co.*,⁹⁷ the Connecticut Supreme Court commented that the intent of General Statute Section 38-175c was "to remove from the court and to transfer to the arbitration panel the function of determining . . . all issues as to coverage under automobile liability insurance policies containing uninsured motorist clauses providing for arbitration."⁹⁸

Also, the case law in Connecticut mirrors the above discussion regarding the requirement that agreements to arbitrate disputes must be entered into voluntari-

88. *Cohen*, 231 N.J. Super. at 98, 555 A.2d at 22-23.

89. N.J. REV. STAT. ANN § 39:6A-5c (1990).

90. *Id.* § 39:6A-31.

91. *Cohen*, 231 N.J. Super at 98, 555 A.2d at 23.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at _____, 555 A.2d at 24.

96. *Mocarski v. United Serv. Auto. Ass'n.*, 3 Conn. App. 250, 487 A.2d 206 (1985); *Oliva v. Aetna Casualty & Sur. Co.*, 181 Conn. 37, 434 A.2d 304 (1980); *Sowell v. Travelers Indem. Ins. Co.*, 31 Conn. Supp. 413, 332 A.2d 792 (1974). *Cf. Long v. Gen. Accident Fire & Life Assurance Corp., Ltd.*, 29 Conn. Supp. 322, 285 A.2d 789 (1971).

97. 181 Conn. 37, 434 A.2d 304 (1980).

98. *Id.* at 42, 434 A.2d at 306.

ly.⁹⁹ This voluntary requirement specifically involved an uninsured motorist claim in *Hartford Accident & Indemnity Co. v. Travelers Insurance Co.*¹⁰⁰ In *Hartford*, the insured attempted to arbitrate whether the other motorist involved in an accident was uninsured.¹⁰¹ However, the insurance contract only provided for arbitration of disputes over whether the insured was entitled to recover, and disputes over the amount the insurer was obligated to pay.¹⁰² The court refused to force the insurer to arbitrate an issue that it had not voluntarily agreed to submit to the arbitration process.¹⁰³ It is within the above framework that the Connecticut Supreme Court entered the *Mendes* case.

IV. THE INSTANT DECISION

As stated above, the Connecticut Supreme Court relied on three rationales in declaring the "escape clause" in issue to be contrary to public policy.¹⁰⁴ However, it is important to note that the court characterized insureds as laymen who might not be represented by counsel.¹⁰⁵ It was from this perspective that the court approached the case.¹⁰⁶ In discussing the escape clause, the court decided that it was "wishful thinking" on the part of the defendant to believe that a layman was adequately put on notice by the language in the escape clause.¹⁰⁷ The court portrayed the plaintiff as an "unwary claimant" who was "lured" into an arbitration process favored by the courts, just to discover that an award above \$20,000 was nonbinding and that the defendant could demand a trial.¹⁰⁸

In reaching its decision, the Connecticut Supreme Court accepted the analysis of the trial court, which included two rationales for its decision.¹⁰⁹ The court then offered a third rationale of its own.¹¹⁰

First, the court accepted the trial court's reliance on General Statute Section 38-175c which requires uninsured motorist coverage in all motor vehicle liability insurance policies and requires that where arbitration is provided for, it shall be binding.¹¹¹ Even though Section 38-175c actually addresses the arbitrability of the question of whether the claimant is covered, the trial court determined that the

99. *Hartford Accident & Indem. Co. v. Travelers Ins. Co.*, 25 Conn. Supp. 414, 206 A.2d 847 (1964); *Gores v. Rosenthal*, 150 Conn. 554, 192 A.2d 210 (1963).

100. 25 Conn. Supp. 414, 206 A.2d 847 (1964).

101. *Id.* at 415, 206 A.2d at 848.

102. *Id.*

103. *Id.* at 416, 206 A.2d at 849.

104. *Mendes*, 212 Conn. at 658-61, 563 A.2d at 697-99.

105. *Id.* at 659, 563 A.2d at 698.

106. *Id.*

107. *Id.*

108. *Id.* at 659-60, 563 A.2d at 698.

109. *Id.* at 655-58, 563 A.2d at 696-98.

110. *Id.* at 660, 563 A.2d at 698-99.

111. *Id.* at 655-56, 563 A.2d at 696-97.

statute manifests a strong public policy favoring final arbitration of uninsured motorist insurance policies.¹¹²

Second, the court agreed with the trial court's reliance on three out-of-state cases.¹¹³ All three cases are significantly similar to the case at hand in that the facts in each case are very similar and that each case involves an escape clause virtually identical to the one in question here.¹¹⁴ The court cited *Schmidt v. Midwest Family Mutual Insurance Co.*, which held that the escape clause "skew[ed] the trial de novo remedy in favor of the insurer," which is more likely to be dissatisfied with an award above the statutory minimum liability coverage.¹¹⁵ The *Schmidt* court characterized the situation as "one of unequal bargaining power and little opportunity for negotiation."¹¹⁶ The *Schmidt* court also held that the escape clause "contravenes public policies favoring arbitration and judicial economy."¹¹⁷

The court also accepted the trial court's reliance on the concurring opinion in *Nationwide Mutual Insurance Co. v. Marsh*. That concurrence states that even though both the insured and the insurer could demand a trial de novo if unsatisfied with the arbitration award "[t]his 'facial equality' is not a true equality, however, because both parties are bound only by low awards, which are likely to be in Nationwide's favor."¹¹⁸ The court further cites the *Nationwide* concurring opinion, which notes that "the escape clause contravened Ohio's strong public policy in favor of final and binding arbitration."¹¹⁹

The court also relied on *Pepin v. American Universal Insurance Co.*, which emphasizes that the escape clause evaded "[t]he whole purpose of arbitration, namely, providing an expedient and inexpensive mechanism for finally resolving disputes"¹²⁰

The Connecticut Supreme Court found a third rationale for its holding.¹²¹ It reasoned that an insurance company could use this type of escape clause to apply pressure on a claimant who received a large arbitration award to accept a settlement or compromise by threatening to demand a trial de novo.¹²² The

112. *Id.*

113. *Id.* at 656-58, 563 A.2d at 696-97; *Schmidt*, 413 N.W.2d 178; *Nationwide Mut.*, 15 Ohio St. 3d 107, 472 N.E.2d 1061; *Pepin*, 540 A.2d 21.

114. *Schmidt*, 413 N.W.2d at 179; *Nationwide*, 15 Ohio St. 3d at ___, 472 N.E.2d at 1061-62 n.2; *Pepin*, 540 A.2d at 22.

115. *Mendes*, 212 Conn. at 656, 563 A.2d at 697 (quoting *Schmidt*, 413 N.W.2d at 180).

116. *Id.* at 656-57, 563 A.2d at 697 (quoting *Schmidt*, 413 N.W.2d at 181).

117. *Id.* at 657, 563 A.2d at 697 (quoting *Schmidt*, 413 N.W.2d at 181).

118. *Id.* at 657, 563 A.2d at 697 (quoting *Nationwide Mut.*, 15 Ohio St. 3d at ___, 472 N.E.2d at 1063).

119. *Id.*

120. *Id.* at 657, 563 A.2d at 697 (quoting *Pepin*, 540 A.2d at 22).

121. *Id.* at 660, 563 A.2d at 698-99.

122. *Id.*

court offered General Statute Section 38-61(6)(k) as evidence of "a strong public policy against such unfair claim settlement practices."¹²³

Thus, in affirming the trial court, the court held that the provision of the automobile insurance policy that provided for binding arbitration whenever disputes arose as to the amount of coverage in uninsured or underinsured claims, yet permitted the insurer to demand a trial de novo whenever the arbitration award exceeded \$20,000, was unenforceable as against public policy.¹²⁴

V. COMMENT

As stated above, the Connecticut Supreme Court relied on three rationales in declaring the "escape clause" in issue to be contrary to public policy.¹²⁵ However, it is important to note that the court characterized the insured as a layman who might not be represented by counsel.¹²⁶ It was from this perspective that the court approached the case.¹²⁷ In discussing the escape clause, the court decided that it was "wishful thinking" on the part of the defendant to believe that a layman was adequately put on notice by the language in the escape clause.¹²⁸ The court portrayed the plaintiff as an "unwary claimant" that was "lured" into an arbitration process favored by the courts, just to discover that an award above \$20,000 was nonbinding and that the defendant could demand a trial.¹²⁹

A. *The Court Ignores Two Cases That Go in the Opposite Direction*

In arriving at its decision that the escape clause in defendant's policy violated public policy, the court accepted the trial court's reliance on three out-of-state cases, *Schmidt*, *Nationwide* and *Pepin*. However, the court either failed to, or chose not to, discuss two other cases that held that similar escape clauses did not violate public policy: *Roe v. Amica Mutual Insurance Co.* and *Cohen v. Allstate Insurance Co.*¹³⁰ Would a consideration of these two other cases make a difference? It seems not. The language in this court's opinion clearly indicates that it was sympathetic with the insured.

123. *Id.* (§ 38-61(6)(k) provides that it is an unfair claim settlement practice to have a business practice that makes it known to insureds or claimants that the insurance company has "a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration.").

124. *Mendes*, 212 Conn. at 661, 563 A.2d at 699.

125. *Id.* at 658-61, 563 A.2d at 697-99.

126. *Id.* at 659, 563 A.2d at 698.

127. *Id.*

128. *Id.*

129. *Id.* at 659-60, 563 A.2d at 698.

130. *Roe* was decided in October, 1988, and *Cohen* was decided in February, 1989. Both cases were available to the defendant and the court as *Mendes* was argued in June, 1989.

The *Mendes* court could have easily distinguished the case before it from *Roe*. The *Roe* court rejected arguments that the escape clause, which was identical to the one in our case, violated Florida public policy. The *Roe* court relied on Florida Statute Section 682.02, which calls for the enforceability of arbitration agreements.¹³¹ However, the cited statute permits parties to agree to not be bound by the statute.¹³² The Connecticut statute has no such provision. In fact, the statute requires that uninsured motorist insurance include "a provision for final determination of insurance coverage in such arbitration proceeding."¹³³ The court used this language to find that the statute indicated a strong public policy in favor of binding arbitration in uninsured motorist insurance.¹³⁴

The *Cohen* case would not have been so easily distinguished from the case at bar. First, Cohen, the insured, argued that the court had no basis to vacate the award, since the New Jersey statute specified the situations where a court could vacate an arbitration award, and none of those situations applied.¹³⁵ The New Jersey court easily quashed this argument by stating that it was not vacating the award, but merely enforcing the agreement that the parties had made as to the use of a trial de novo.¹³⁶

The *Cohen* court, as did the *Roe* court, also relied on statutory authority to decide that the escape clause did not violate public policy.¹³⁷ The *Cohen* court decided that since the New Jersey statutes did not actually require binding arbitration of uninsured motorist claims, the public policy was "to encourage resort to arbitration while preserving full flexibility to the parties to elect or reject, and to structure and limit, that process as they choose."¹³⁸ The *Cohen* court also rejected the plaintiff's argument that the escape clause permitted the insurer to get out of high awards, while the insured was bound by low awards.¹³⁹ The court argued that it could hypothesize situations where the insured would welcome the chance to demand a trial de novo.¹⁴⁰

131. *Roe*, 533 So. 2d at 281 (§ 682.02 states that an agreement to arbitrate "shall be valid, enforceable, and irrevocable without regard to the justiciable character of the controversy; provided that this act 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.").

132. *Roe*, 533 So. 2d at 281.

133. *Mendes*, 212 Conn. at 655, 563 A.2d at 696.

134. *Id.* at 656-57, 563 A.2d at 696-97.

135. *Cohen*, 231 N.J. Super. at ___, 555 A.2d at 22-23.

136. *Id.* at ___, 555 A.2d at 23.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at ___, 555 A.2d at 24.

B. *Why Courts Have Gone Opposite Directions on Nearly Identical Escape Clauses and Public Policies Favoring Arbitrations*

So, the scene is set. Which view of the enforceability of the escape clause found in uninsured or underinsured motorist insurance provisions is the best? All of the courts in the above cases emphasize the strong public policy in favor of enforcing arbitration. Yet, on virtually identical factual situations and escape clauses, the courts have gone in completely opposite directions. What makes the difference?

It seems to this author that the conflict boils down to where a court places its sympathies. On the one hand the *Roe* and *Cohen* courts easily dismissed any notion that insured is in a contractual situation with the insurance companies where the companies call all of the shots and the insured is at their mercy. This is how the *Mendes*, as well as the *Schmidt*, *Nationwide* and *Pepin*, courts would characterize the relationship between the insurance companies and the insured.

Do the *Roe* and *Cohen* courts place too much emphasis on the fact that the escape clauses are the product of contractual relationships in which the parties are free to bargain as to the terms? This author thinks so. Clearly these two courts have ignored the reality that individuals who purchase automobile insurance have absolutely no ability to bargain as to the terms of the coverage. If the insureds in these cases had been large corporations that maintain large fleets of motor vehicles, such as UPS or Federal Express, the bargaining powers of the insured and the insurer would have arguably been on a more even basis. However, the average purchaser of automobile insurance is in the position to merely select the type of coverage he or she wants at the lowest cost. Such persons don't negotiate over the amount of premiums to be paid, the claims settlement process, or anything else. They merely "take it or leave it."

The *Mendes* court recognized this reality, as did the *Schmidt*, *Nationwide*, and *Pepin* courts. The insurance contract is arguably an adhesion contract.¹⁴¹ Thus, these courts have put themselves in the position to protect the insured where it is clear that he or she is at a great disadvantage in the contractual relationship.

Of course, these two courts did not rely solely on this line of analysis. However, this analysis sheds light on why these courts were willing to say that the escape clauses violated the public policy favoring arbitration, when the *Roe* and *Cohen* courts maintained that the same escape clauses did not violate the same public policy that favors arbitration.

L. DEAN WILSON

141. A. WIDISS, *supra* note 24, § 23.2, at 151. See also *Schmidt*, 413 N.W.2d at 181.