STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF JOHN MICHAEL SIEFKA, Deceased,

Plaintiff-Appellee,

v

FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN/FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN,

Defendant-Appellant.

UNPUBLISHED
August 12, 1997

No. 194748
Gratiot Circuit Court
LC No. 95-003756-CZ

Before: Bandstra, P.J., and Griffin and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right from an order granting summary disposition to plaintiff and requiring the parties to resolve their dispute by binding arbitration. We affirm.

Plaintiff's decedent, an insured of defendant, was struck and killed by a motor vehicle insured by another company. Plaintiff claims that the other insurer's policy limit is inadequate to satisfy the damages sustained, that the driver and owner of the negligent vehicle are uncollectible, and that, therefore, defendant should pay benefits under its policy's underinsured motorist rider. Plaintiff requested defendant's consent to settle with the allegedly negligent motorist for his policy limit, but defendant rejected this proposal. Plaintiff also requested arbitration of its underinsured benefits claim, but defendant rejected the request as premature.

Defendant argues that the trial court erred when it ordered the parties to resolve their dispute by binding arbitration because plaintiff has not yet obtained a judgment against or entered into an authorized settlement with the allegedly negligent motorist. We disagree. The trial court properly ordered arbitration of the parties' dispute because the insurance contract contained an arbitration clause, the disputed issues were arguably within the clause, and the dispute was not expressly exempted from arbitration by the terms of the contract. *DAIIE v Reck*, 90 Mich App 286, 290; 282 NW2d 292

(1979) (outlining the three-part test for determining arbitrability). As modified by its underinsured endorsement, the policy provides for binding arbitration when "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 [under]insured automobile because of bodily injury to the insured, or do not agree as to the amount of payment which may be owing . . . ." Therefore, any disagreement as to the existence of coverage or the amount thereof is to be resolved by binding arbitration and the parties' dispute is within the terms of this arbitration clause. This clause does not expressly exempt this or any other dispute from the arbitration requirement.

Defendant argues that a precondition to arbitration is created by the endorsement's exhaustion clause, which provides that defendant is not required to make payments before other sources (in this case, the other insurer) have been exhausted. This clause, however, only creates a precondition to payment of a claim, not to arbitration, and the effect, if any, that this clause has upon plaintiff's claim should be determined by the arbitrators. Defendant also implies that proceeding to arbitration would violate its right to reject any proposed settlement and its subrogation rights. Proceeding to arbitration does not affect these rights, however, because defendant would still have to consent to any settlement and its subrogation rights have not been disturbed. Cf. *Linebaugh v Farm Bureau Mutual Insurance*, ____Mich App___; ___NW2d ___ (Docket No. 194913, issued 7/15/97).

Defendant has not demonstrated any reason to depart from the basic test of arbitrability discussed above, and to the contrary, public policy concerns require submission of this dispute to arbitration. Agreements to arbitrate disputes are judicially enforceable. MCL 600.5001(2); MSA 27A.5001(2). Arbitration clauses in insurance contracts are to be construed liberally in favor of arbitration. *Reck*, *supra*. Further, defendant's refusal to permit settlement or to act on its subrogation rights places plaintiff in the position of litigating liability and damages twice -- once in court against the allegedly negligent motorist and a second time against defendant in arbitration. See *Maryland Casualty Co v McGee*, 32 Mich App 539, 545-546; 189 NW2d 44 (1971) (the benefits of arbitration are negated by "attempts to segregate disputed issues into arbitrable sheep and judicially-triable goats (or *vice versa*)").

We affirm.

/s/ Richard A. Bandstra
/s/ Richard Allen Griffin
/s/ E. Thomas Fitzgerald