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If You Lose, It Is Binding, but If You Win—They Get a New Trial: Illinois Uninsured Motorist Arbitration

*Michael J. Hanagan**

I. INTRODUCTION

In *Reed v. Farmers Insurance Group* the Illinois Supreme Court—by a 4-3 vote—upheld an arbitration system in which injury victims are bound by awards below \$20,000, but in which insurance companies can insist on a trial *de novo* for awards over that amount.¹ A recent legislative enactment has complicated the threshold at which awards change from binding to non-binding, by increasing it to \$50,000.² However, even in cases where a higher threshold applies, those injury victims receiving awards below the threshold (or losing on the issue of liability) are bound by the arbitration, while injury victims receiving awards higher than the threshold can be required to re-litigate their cases *de novo* in the court system. This is the arbitration system that awaits Illinois drivers, passengers, and pedestrians who are injured today by uninsured motorists.

In almost all states, when an insurance company sells an automobile insurance policy, the company is required by statute to include in that policy—or, at least offer to include—what is called “uninsured motorist” coverage.³ Uninsured motorist (UM) coverage is intended to protect people who are injured by drivers with no liability insurance.⁴ If an uninsured driver injures a person with UM insurance, then the victim’s own UM coverage functions in large part as if it were the liability insurance for the at-fault driver.⁵

Disputes about whether an injury victim is entitled to UM compensation, and the amount of compensation, are resolved either by the court system or by arbitration. In choosing which system to use, the states fall into three categories. First, about twenty three states prohibit insurance companies from imposing arbitration

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1. *Reed v. Farmers Ins. Group*, 720 N.E.2d 1052 (Ill. 1999) (4-3 decision).

2. In 2003, the Illinois legislature changed the binding/non-binding threshold, by setting it at \$50,000 per person, or the corresponding policy limit for bodily injury or death, *whichever is less*. 215 ILL. COMP. STAT. § 5/143a (2003); *Reed*, 720 N.E.2d 1052.

3. ROBERT H. JERRY II, UNDERSTANDING INSURANCE LAW § 135 (3d ed. 2002) (stating that UM coverage “is now required or required to be offered by statutes in forty-nine states”).

4. ALAN I. WIDISS, UNINSURED & UNDERINSURED MOTORIST INSURANCE § 1.8 (rev. 2d ed. 2000).

5. *Id.* The same common law tort principles that would have applied in a suit against the driver also operate in a UM case. The injury victim must be able to prove that the uninsured driver was negligent, that the negligence was a proximate cause of the injury, and the extent of damages suffered.

in their UM provisions,⁶ and either implicitly or explicitly provide that disputes in UM cases will be resolved within the state court system. Second, about twenty four states neither prohibit nor require UM arbitration, although in those states almost all auto insurance companies impose arbitration under the terms of their insurance policies.⁷ Third, three states require that UM disputes be resolved by arbitration.⁸

The states requiring arbitration are Illinois, California, and Massachusetts.⁹ But unlike the statutes in California and Massachusetts that require binding arbitration, the Illinois statute does something unique: it creates a binding/non-binding threshold.¹⁰ If the arbitration results in an award less than \$50,000 per person, or less than the corresponding policy limit for bodily injury or death, *then the arbitration is binding*.¹¹ While not explicitly stated by the statute, if the arbitration results in an award over the threshold, then the arbitration is not binding. Thus, injury victims receiving low awards (or a finding of no liability) are bound by the arbitration, while injury victims receiving awards over the threshold can be required to re-litigate their cases *de novo* in the court system. In *Reed*, the plain-

6. Several states have arbitration acts that specifically exclude insurance contracts: KAN. STAT. ANN. § 5-401(c) (2003); KY. REV. STAT. ANN. § 417.050(2) (Michie 2004); MO. REV. STAT. § 435.350 (2002); MONT. CODE ANN. § 27-5-114(2)(c) (2003); S.C. CODE ANN. § 15-48-10(b)(4) (2005); S.D. CODIFIED LAWS § 21-25A-3 (Michie 2004); VT. STAT. ANN. tit. 12, § 5653(a) (2004). In several other states, the uninsured motorist statute that requires UM coverage also prohibits arbitration clauses regarding that coverage: GA. CODE ANN. § 33-7-11(g) (2004); MD. CODE ANN., INS. § 19-509(j) (2004); MISS. CODE ANN. § 83-11-109 (2004); TENN. CODE ANN. § 56-7-1206(c) (2004); VA. CODE ANN. § 38.2-2206H (2004); W. VA. CODE § 33-6-31(g) (2004). Finally, other states have an assortment of provisions that effectively prevent mandatory arbitration in UM cases: ARK. CODE ANN. § 23-79-203(a) (Michie 1987) (prohibiting insurance policies from depriving the right to trial by jury on any question of fact); IOWA CODE § 679A.1 (2004) (prohibiting arbitration involving contracts of adhesion or regarding "any claim sounding in tort whether or not involving a breach of contract"); LA. REV. STAT. ANN. § 22:680(5) (2004) (allowing an arbitration provision, but making arbitration optional with the insured); ME. REV. STAT. ANN. tit. 14, § 5948 (2003) (specifically prohibiting arbitration clauses in UM coverage); N.C. GEN. STAT. § 20-279.21(b)(3)(a) (2004) (requiring that auto insurance policies contain a provision that the insurance company shall be bound by a final judgment of the insured against an uninsured motorist, if the insured complies with certain notification requirements); N.D. CENT. CODE § 26.1-40-15.7 (2003); NEV. REV. STAT. ANN. § 690B.017 (Michie 2004) (making arbitration provisions in auto insurance non-binding on the persons protected); OR. REV. STAT. ANN. § 742.504(10) (2003); TEX. CIV. PRAC. & REM. CODE ANN. § 171.002(a)(3) (Vernon 2005) (prohibiting arbitration in cases for personal injury). At least one state has case law prohibiting mandatory arbitration in UM cases. *Heisner v. Jones*, 169 N.W.2d 606 (Neb. 1979) (holding that an arbitration clause in uninsured motorist coverage was void as against public policy). See also Stephen Lamson, *The Impact of the Federal Arbitration Act and the McCarran-Ferguson Act on Uninsured Motorist Arbitration*, 19 CONN. L. REV. 241, 248-51 (1987); JERRY, *supra* note 3, § 84.

7. WIDISS, *supra* note 4, § 22.2.

8. See 215 ILL. COMP. STAT. § 5/143a (2003); CAL. INS. CODE § 11580.2(f) (West 2004); MASS. GEN. LAWS ch. 175, § 111D (2003). Prior to 1995, Oregon had a statute that appears to have allowed either the insurer or insured to unilaterally "elect" arbitration in UM cases. In 1997, the legislature amended the statute and Oregon now allows arbitration only if the parties *mutually* agree to it *after* the dispute arises. OR. REV. STAT. 742.504(10) (2001). For background on the constitutional problems of the previous Oregon statute, see Steven M. Zipper, Note, *Legislatively Mandated Arbitration in Oregon: The Unconstitutionality of the Uninsured Motorist Arbitration and Personal Injury Protection Arbitration Statutes*, 31 WILLAMETTE L. REV. 737 (1995).

9. 215 ILL. COMP. STAT. § 5/143a (2003); CAL. INS. CODE § 11580.2(f) (West 2004); MASS. GEN. LAWS ch. 175, § 111D (2003).

10. 215 ILL. COMP. STAT. § 5/143a (2003).

11. *Id.*

tiff challenged this mechanism, arguing that the statute was unconstitutional and that the corresponding insurance policy provision was unconscionable and against public policy.¹² The Illinois Supreme Court rejected the plaintiff's challenges.¹³

This article asserts that the *Reed* decision is bad as a matter of public policy and that the majority opinion was erroneous on both public policy and constitutional grounds. To set this type of arbitration in its proper context, Part II of this article will examine how UM coverage helps to accomplish a major objective of tort law, why UM coverage is important to anyone who could be hurt by a motor vehicle, and how arbitration became a common method of dispute resolution in UM cases.

Although Illinois is unique in that it is the only state that has a statute imposing a binding/non-binding threshold, many *insurance policies*, sold in other states, articulate this sort of mechanism explicitly in their arbitration provisions.¹⁴ Because of the likelihood that a trial de novo provision will benefit insurance companies disproportionately compared to injury victims, many courts have characterized it as an "escape clause" or "escape hatch."¹⁵ Part II will review how other courts have ruled on the validity of similar "escape clauses."

Part III will then summarize the majority and dissenting opinions in *Reed*. Part IV will analyze some of the principal errors made in the majority opinion and will describe how *Reed* fits in with the current debate regarding mandatory arbitration in the consumer context. Finally, Part IV urges two sets of remedies: First, when it next has a proper case before it, the Illinois Supreme Court should reverse *Reed*, and hold: (1) that the Illinois statutory provision requiring the escape clause is unconstitutional; and (2) that the Illinois statutory provision requiring arbitration of UM cases is unconstitutional. Second, the Illinois General Assembly should amend the state's arbitration act or the insurance code (or both), and enact provisions to prohibit insurance policies from requiring arbitration of

12. *Reed v. Farmers Ins. Group*, 720 N.E.2d 1052, 1055 (Ill. 1999) (4-3 decision).

13. *Id.* at 1061.

14. In all other cases examined by the author, up until 2003, the minimum amount of liability coverage required by the state's financial responsibility law served as the threshold amount that triggered the escape mechanism. In 2003, Illinois departed from this approach by setting the threshold at the corresponding policy limit for bodily injury or death, or \$50,000 per person, *whichever is less*. 215 ILL. COMP. STAT. § 5/143a (2003).

15. See *Pepin v. Am. Universal Ins. Co.*, 540 A.2d 21, 22 (R.I. 1988) (characterizing the provision as an "escape hatch"); *Worldwide Ins. Group v. Klopp*, 603 A.2d 788, 791 (Del. 1992) (calling the provision an "escape hatch" and an "escape device in favor of the insurance company"). See also *Nationwide Mut. Ins. Co. v. Marsh*, 472 N.E.2d 1061, 1064 (Ohio 1984) (6-1 decision) (Sweeney, J., concurring) (stating that the provision allows the insurance company "to have its cake and eat it too"). Black's Law Dictionary defines an escape clause as: "A contractual provision that allows a party to avoid performance under specified conditions; [specifically], an insurance-policy provision—[usually] contained in the "other insurance" section of the policy—requiring the insurer to provide coverage only if no other coverage is available." BLACK'S LAW DICTIONARY 564 (7th ed. 1999). The type of insurance escape clause described in Black's is critically different from the escape clauses discussed in this article. An escape clause in an "other insurance" provision, such as Black's describes, may work no hardship on a person who, in fact, has other insurance to pay for a loss. But the type of escape clauses discussed herein allow the injury victim's insurance company to escape responsibility for paying (at least temporarily, by demanding a trial de novo) when there may be no other insurance available to compensate the victim or pay medical bills. In fact, *it is because the at-fault driver has no insurance* that uninsured motorist coverage is so important.

insurance disputes, and allow arbitration of insurance disputes only when both parties knowingly agree to arbitrate after a dispute has arisen.

II. BACKGROUND

A. Tort law, Uninsured Motorist Coverage & Arbitration

1. Tort Law

The law of torts developed principally as a means to redress harm that one person suffers because of the unreasonable conduct of another. Professor William Prosser has summarized the law of torts as concerning “the allocation of losses arising out of human activities The purpose of the law of torts is to adjust these losses, and to afford compensation for injuries sustained by one person as the result of the conduct of another.”¹⁶ And, commenting specifically on the role of damages, Professor Richard Epstein observes that “even if awards cannot make victims indifferent to the losses, damages can furnish victims with substantial compensation to help them and their families move forward with their lives.”¹⁷

Thus, if an individual is careless, and that carelessness causes harm to another, the law of torts is a means by which the careless one can be made to pay money compensation to the victim of the harm. Although the law has no power to undo certain types of harm, or to prevent their impact on the victim’s future, the law sees compensation as a way to try to counterbalance the harm. Whatever they may use the money for, the essential justice of money compensation is that it enables the injury victim to try to make his or her life better, to make up for the ways in which the injury has made their life worse.

This is not a new approach. The idea of paying money to compensate an injury victim has been used since the earliest recorded times.¹⁸ In addition to the goal of compensating the injury victim, the payment of money damages has also been seen as a means of promoting social order and maintaining the peace.¹⁹

2. Uninsured Motorist Coverage

In any industrialized society, one of the most common instrumentalities of injury is the motor vehicle. Compared to the power and forces produced by even

16. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 6 (3d ed. 1964).

17. RICHARD A. EPSTEIN, TORTS § 17.1 (1999).

18. *Exodus* 21:18-19. The ancient document instructs:

If men quarrel and one hits the other with a stone or with his fist and he does not die but is confined to bed, the one who struck the blow will not be held responsible if the other gets up and walks around outside with his staff; however, he must pay the injured man for the loss of his time and see that he is completely healed.

Id.

19. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 2-3 (1881). Holmes asserted:

It is commonly known that the early forms of legal procedure were grounded in vengeance. Modern writers have thought that the Roman law started from the blood feud, and all the authorities agree that the German law [began] in that way. The feud led to the composition, at first optional, then compulsory, by which the feud was bought off.

Id.

the smallest compact car, human strength is puny and insignificant. In the United States each year, motor vehicles damage or destroy hundreds of thousands of human lives.²⁰ In Illinois alone, during the calendar year 2003, motor vehicle collisions caused 131,279 injuries,²¹ and 1454 deaths.²²

Given the frequency of automobile collisions, and the fact that the law of torts places financial responsibility directly on the shoulders of the at-fault driver, most motorists buy auto insurance to protect themselves from personal liability (and, indirectly, to compensate those whom they might injure). Although liability insurance is *frequently* available to pay compensatory damages to the victims of auto collisions, it is not *always* available. In almost all states, “financial responsibility” laws now require owners to purchase liability insurance for any vehicle they register in the state. Nevertheless, the financially irresponsible/uninsured driver remains a major problem. Dean Robert Jerry comments:

The tort liability system does not always work efficiently to reimburse fully the victims of torts. One weakness of the system is that a person injured by one who lacks either assets to pay a judgment or insurance will not be compensated for [the] loss. The primary way of remedying this gap in protection for victims of automobile accidents is uninsured motorist (UM) coverage²³

And, further, Professor Alan Widiss comments:

In the United States the right to be redressed by another person for injuries resulting from an automobile accident has primarily been predicated on an allocation of fault The vast majority of motorists obviate or transfer at least a portion of this economic risk through the acquisition of automobile liability insurance. However, there have always been individuals—the “financially irresponsible”—who neither purchase insurance nor possess sufficient [personal] financial resources to enable them to respond to such damage claims, thereby creating situations where innocent victims are unable to secure compensation from the person whose negligence caused the injuries.²⁴

The problem of the “financially irresponsible” driver has prompted almost all state legislatures to adopt statutes requiring that insurance companies sell (or at least offer for sale) “uninsured motorist” coverage.²⁵ Because UM benefits are

20. According to the Federal Highway Administration (FHA), motor vehicle crashes are the leading cause of death among Americans under 35 years of age. United States Department of Transportation FHA, Dec. 23, 2004, *Facts, Statistics and Data*, at <http://safety.fhwa.dot.gov/facts/index.htm> (last visited May 12, 2005). In 2003, nationwide, 42,643 people died in motor vehicle collisions, and almost 3 million were injured. United States Department of Transportation FHA, Dec. 23, 2004, *Road Safety Fact Sheet*, at http://safety.fhwa.dot.gov/facts/road_factsheet.htm (last visited May 12, 2005).

21. Illinois Department of Transportation, 2000-2003 Illinois Crash Facts and Statistics 1 (2004), at <http://www.dot.state.il.us/trafficsafety/crashdata00.pdf>.

22. *Id.*

23. JERRY, *supra* note 3, § 135.

24. WIDISS, *supra* note 4, § 1.1.

25. JERRY, *supra* note 3, § 135.

based upon what the injury victim would have been legally entitled to recover from the uninsured motorist, the same common law tort principles that would have applied in a suit against the driver also operate in a UM case.²⁶ Thus, the injury victim must be able to prove that the uninsured driver was negligent, that the negligence was a proximate cause of the injury, and the extent of damages suffered.²⁷

Financial compensation is of obvious importance to the injury victim, but it also has implications for society at large. In cases involving grievous injury with high medical expenses, if private insurance is not available to cover the losses, the cost may ultimately be borne by the taxpayers. If the injury victim's personal assets are consumed, with substantial amounts still unpaid to doctors and hospitals, and if the injury victim is forced to rely on Medicaid or some other public program, society at large—and the taxpayer—ultimately pays the bill. From a public policy viewpoint, considering that the insurance industry is making billions of dollars selling insurance to consumers—many of whom are forced by state laws to buy automobile insurance—it is obviously good public policy to require the insurance industry to help protect responsible motorists by selling them protection against the losses caused by uninsured drivers. But selling such insurance alone is not sufficient; the insurance industry must also pay the claims and resolve disputed claims in a fair and even-handed manner.

3. *The Origins of Arbitration in the Uninsured Motorist Context*

In recent years, alternative dispute resolution methods such as arbitration have found increased acceptance, but the use of arbitration in the UM context predates this movement by several decades.²⁸ Some have suggested that the insurance industry chose arbitration as the dispute resolution mechanism for UM cases in order to avoid or lessen a conflict of interest between the insurance company and the insured.²⁹ For example, one court noted:

[T]he position of an automobile insurer with respect to its insured's culpability at the time of an accident may differ when defending the insured against a third party claim from that when defending itself against an insured's uninsured or underinsured motorist claim. In the former the insurer's interest usually is to minimize that culpability, whereas in the latter two instances its interest frequently is to maximize the insured's fault. We recognize that one of the purposes, at least, of providing for arbitration . . . in uninsured and underinsured motorist coverage endorsements is to minimize that conflict of interest.³⁰

Whether the process of arbitration, rather than a trial, actually affects the conflict of interest situation is debatable. In the most common cases, caused by the

26. *Id.* See also WIDISS, *supra* note 4, § 1.8.

27. WIDISS, *supra* note 4, § 1.8.

28. See *id.* §§ 22.2, 22.3.

29. *Id.* §§ 22.3, 28.3.

30. Schmidt v. Midwest Family Mut. Ins. Co., 426 N.W.2d 870, 874 (Minn. 1988) (emphasis added).

negligence of a single driver, once it becomes clear that the at-fault driver is uninsured, the injured policyholder, now a UM claimant, is thrust into a position that is adverse to her own insurance company. The injury victim wants to recover UM benefits; the insurance company wants to avoid paying. This is an unavoidable conflict, regardless of whether the dispute is ultimately resolved by arbitration or by a trial.

There is another explanation as to why the insurance industry chose arbitration as the dispute resolution mechanism for UM cases; it may have done so to avoid jury trials. One court has observed, “[t]he requirement that parties arbitrate uninsured and underinsured motorist claims is designed, in significant part, to limit the insurer’s exposure by precluding a jury trial with its attendant risks.”³¹

If the insurance industry was concerned about having to defend UM cases in court (with juries viewing the insurance company as a “deep pockets” defendant), then the mechanism of arbitration certainly removes that risk. Regardless of motivations, however, it is important to understand that from the very beginning, the insurance industry itself has been the prime architect of the insurance policies—and of the statutes—pertaining to uninsured motorist protection. Widiss emphasizes this in his treatise:

When dealing with a claim under the uninsured motorist insurance, one of the most important things to remember is that the coverage terms have been almost entirely developed privately by the insurance industry—that is, the policy language defining the scope of coverage afforded by the insurance was prepared and promulgated by the industry in response to significant pressures for changes in the accident compensation system (so that accident victims would be assured a source of indemnification) [T]he public did not directly influence the terms of the coverage.³²

As mentioned previously, almost all states require insurance companies to include UM coverage—or at least offer it—at the same time that they sell a policy of automobile insurance.³³ But most statutes do not go into much detail regarding the nature or scope of the coverage required, and often the statutes consist of no more than a short, simple statement that insurance companies must include (or offer) UM coverage when selling auto liability insurance.³⁴ Widiss comments that:

Whether this legislation is the result of effective lobbying by the insurance industry or simply that these statutes were drafted only with a view to compelling the issuance of the “standard coverage” as conceived by the [insurance] industry, the failure of either the industry to design or the states to specifically define a coverage which provides a full range of protection . . . has led to a continuous flow of litigation by claimants at-

31. *Huizar v. Allstate Ins. Co.*, 932 P.2d 839, 841 (Colo. Ct. App. 1996).

32. WIDISS, *supra* note 4, § 1.14 (emphasis added).

33. JERRY, *supra* note 3, § 135.

34. WIDISS, *supra* note 4, § 1.14.

tempting to secure indemnification in instances where the coverage terms purport either to limit or to preclude recovery.³⁵

4. Uninsured Motorist Arbitration in Illinois

The Illinois statute is similar to those of many other states in that it uses simple language to require that insurance companies sell UM coverage to their customers; it provides:

No policy insuring against loss resulting from liability imposed by law for bodily injury or death . . . arising out of the ownership, maintenance or use of a motor vehicle . . . shall be renewed, delivered, or issued . . . unless coverage is provided therein . . . in limits for bodily injury or death set forth in [s]ection 7-203 of the Illinois Vehicle Code for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles.³⁶

As discussed previously, Illinois is one of three states whose statute requires that UM cases be arbitrated, but the following provision is unique to the Illinois statute:

Any decision made by the arbitrators shall be binding for the amount of damages *not exceeding* \$50,000 for bodily injury to or death of any one person . . . or the corresponding policy limits for bodily injury or death, whichever is less.³⁷

Thus, by means of section 5/143a of the Illinois Insurance Code, the state requires that insurance companies sell UM coverage in all auto policies, requires arbitration of UM claims, and provides that an arbitration award is binding *if it is for \$50,000 or less*.

B. How Other Courts Have Ruled On Similar Escape Clauses

As mentioned previously, many states prohibit insurance companies from imposing arbitration, while three states require that UM cases be resolved by arbitration.³⁸ Of the three states that require arbitration, Illinois is the only state to pro-

35. *Id.*

36. 215 ILL. COMP. STAT. § 5/143a (2003) (emphasis added).

37. *Id.* (emphasis added). Although many insurance policies contain similar escape clauses in their UM and UIM coverages, the author has not found any other instance in which a statute mandates such an escape mechanism.

38. *See infra* Part I. It is common for different state legislatures to come up with different approaches to the same problem. Here, with respect to arbitration of UM cases, some of the states are taking not only different approaches, but opposite approaches, with a few requiring arbitration and many others prohibiting it. It is possible that this reflects a simple philosophical preference for one form of dispute resolution over another. However, it is the author's hypothesis that the statutory approach adopted by many states is more likely the result of interest-based politics, with the insurance industry being a prominent player. Even in a state with no statute on the question, the state's environ-

vide that an arbitration award over a specified threshold is non-binding. Thus, Illinois is the only state that has a statutorily created escape clause. However, even before the legislature amended the Illinois UM statute to include this provision, insurance companies had already been using this escape clause in their insurance policies, both with respect to *uninsured* motorist coverage, as well as *underinsured* motorist coverage.³⁹

Starting around the 1980s (and continuing to the present), injury victims have challenged these contractual escape clauses on multiple grounds. The vast majority of courts that have addressed the escape clause issue have held that these clauses are unenforceable.⁴⁰ In striking down these provisions, the courts initially relied on the rationale that such an escape mechanism violated the state's public policy favoring arbitration to resolve disputes—and by “arbitration” these courts meant *binding* arbitration. Most of the early opinions had an undercurrent of suspicion that the clauses had been drafted in order to give the insurance companies an unfair advantage over injury victims, but the legal basis most explicitly relied

ment may be considered “pro-insurance” because a *laissez-faire* approach allows companies to use their superior bargaining position to simply impose arbitration by means of their insurance policies.

39. Whereas “UM” stands for *uninsured* motorist, and is intended to protect victims of collisions caused by drivers who are *totally uninsured*, “UIM” stands for *underinsured* motorist. UIM is intended to protect victims of collisions caused by drivers who have insurance, but whose insurance coverage is not large enough to compensate for all the damages suffered. For example, the minimum amount of auto liability insurance required in Illinois is \$20,000 per person. 625 ILL. COMP. STAT. § 577-203, 577-601 (2003). If a driver with \$20,000 of liability coverage negligently collides with another vehicle or pedestrian and inflicts \$50,000 of damage on the victim, then the driver with only \$20,000 of liability coverage is “underinsured” with respect to that occurrence. If the injury victim (whether a motorist or pedestrian) has \$50,000 of UIM coverage with her own auto insurance, then the victim's own UIM coverage is supposed to compensate for the loss not covered by the tortfeasor's insurance.

40. *Field v. Liberty Mut. Ins. Co.*, 769 F. Supp. 1135, 1140-41 (D. Haw. 1991) (holding trial de novo provision void for violating public policy favoring binding arbitration as a means of settling disputes and avoiding litigation); *O'Neill v. Berkshire Mut. Ins. Co.*, 786 F. Supp. 397, 400 (D. Vt. 1992) (holding escape hatch in UIM provision void “in the light of patent discrimination” and the state's public policy in favor of binding arbitration); *Padilla v. State Farm Mut. Auto. Ins. Co.*, 68 P.3d 901, 906-07 (N.M. 2003) (reversing prior state supreme court case, and holding that escape clause: (1) violated public policy against dilution of UM coverage; and (2) was void as substantively unconscionable); *Godfrey v. Hartford Cas. Inc. Co.*, 16 P.3d 617, 624 (Wash. 2001) (holding trial de novo clause in UIM provision violated the state arbitration act and was therefore unenforceable); *Huizar v. Allstate Ins. Co.*, 952 P.2d 342, 349 (Colo. 1998) (*en banc*, with two justices dissenting and one not participating) (holding trial de novo clause unenforceable as violating public policies of: (1) preventing dilution of UM coverage; (2) preventing undue delay in access to the courts; and (3) favoring arbitration as an alternative to litigation); *Worldwide Ins. Group v. Klopp*, 603 A.2d 788, 791-92 (Del. 1992) (holding trial de novo provision void as against public policy favoring arbitration and concluding that the lower court “was correct in striking this unconscionable clause”); *Schaefer v. Allstate Ins. Co.*, 590 N.E.2d 1242, 1248 (Ohio 1992) (7-1 plurality decision with four justices concurring in result only) (holding that because of the inclusion of the escape hatch, the insurance policy did not provide for “true arbitration,” and therefore “the entire agreement to ‘arbitrate’ clause” was unenforceable); *Mendes v. Auto. Ins. Co.*, 563 A.2d 695, 699 (Conn. 1989) (holding that escape clause in a UIM provision was unenforceable as against public policies in favor of final arbitral resolution, and against unfair claim settlement practices); *Schmidt v. Midwest Family Mut. Ins. Co.*, 426 N.W.2d 870, 875 (Minn. 1988) (holding trial de novo clause unenforceable for violating public policy favoring arbitration); *Pepin v. Am. Universal Ins. Co.*, 540 A.2d 21, 22-23 (R.I. 1988) (holding that trial de novo provision was void as against public policy which favored binding arbitration and was expressed in the state's arbitration act); *Hoerst v. Prudential Prop. & Cas. Ins. Co.*, 624 A.2d 187, 189 (Pa. Super. Ct. 1993) (2-1 decision) (holding trial de novo provisions void in attempting to destroy the “finality and binding nature” of an arbitrator's decision).

upon by the courts was that the clauses violated the state's public policy favoring arbitration.

As time passed, courts have become more and more explicit in basing their rulings on unconscionability and other grounds. In 1998, the Supreme Court of Colorado, in perhaps the most thorough and analytical decision to that point, held that the standard escape clause in the policy sold by the "good hands" people violated public policy because it not only undermined the finality of arbitration, but because it also delayed access to the courts and diluted the UM protection that the legislature intended to give to victims of uninsured motorists.⁴¹

In 2003, the Supreme Court of New Mexico reversed an earlier decision it had made, and held that the standard escape clause in the policy sold by the "good neighbor" people violated public policy because it diluted UM protection and that it was void because it was substantively unconscionable.⁴²

With two notable exceptions, when courts have struck down escape clauses, the remedy most frequently used has been to excise the offending language, but leave the remaining arbitration agreement intact. In other words, in those cases in which an arbitration decision had already been made, the courts treated it as final and binding on both parties, with neither party eligible for a trial de novo.

The first of the two notable exceptions is the remedy used by the Ohio Supreme Court in *Schaefer v. Allstate Insurance Co.*⁴³ In *Schaefer*, the court examined several definitions of "arbitration," and reasoned that because "arbitration" must be final and binding, the provision in the Allstate policy (which included the standard escape clause) was not really an agreement to arbitrate.⁴⁴ The *Schaefer* court then ruled that the entire "arbitration agreement" in the Allstate policy was unenforceable, and that the parties therefore needed to resolve their dispute in the court system.⁴⁵

David and Jeanette Schaefer were probably pleased with this result. Although there was no dispute that Jeanette suffered from a serious condition caused by a head injury, their insurance company had argued at arbitration that her condition was a result of a fall Jeanette had experienced a year before the auto collision.⁴⁶ Unconvinced that the auto collision had caused Jeanette's condition, the arbitration panel nevertheless believed that the Schaefer family had sustained some injury as a result of the collision, and awarded them \$500 and \$1,500.⁴⁷

On the other hand, in the case involving Janie Fallon-Murphy and Michael Murphy, which was joined with the *Schaefer* case on appeal, it was the insurance company that wanted a trial de novo, following an arbitration award of over \$1,000,000.⁴⁸ Acknowledging that "the sword has two edges," the *Schaefer* court

41. *Huizar*, 952 P.2d at 349-50.

42. *Padilla*, 68 P.3d at 906-07.

43. 590 N.E.2d 1242 (Ohio 1992). For additional discussion of *Schaefer*, see Steven R. Leppard, Note, *Arbitration? Sure, But Only On Our Terms: Escape Clauses in Uninsured Motorist Policies*, 1993 J. DISP. RESOL. 193 (1993).

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

45. *Id.*

46. *Id.* at 1243.

47. *Id.*

48. *Id.* at 1249.

held that those policyholders would lose their arbitration award, and, like the Schaeffers, would have to re-try their case in the court system.⁴⁹

The second notable exception is the remedy used by the Illinois appellate court in the case of *Kost v. Farmers Automobile Insurance Ass'n*.⁵⁰ In *Kost*, the court ruled that because of the unfairness of the trial de novo clause, the insurance company would not be permitted to use it, but that the trial de novo clause could be used by the injury victim.⁵¹

The *Kost* case involved an arbitration award in an *underinsured* motorist case.⁵² As mentioned previously, the Illinois statute governing *uninsured* motorist coverage requires that the insurance policy contain an escape clause in its *uninsured* motorist coverage (making arbitration awards binding only if they are under the applicable threshold).⁵³ But the Illinois statute governing *underinsured* motorist coverage does not require any such mechanism.⁵⁴ The *Kost* court was not faced with a statutorily-mandated escape mechanism. Indeed, in two cases prior to *Kost*, two other districts of the Illinois Court of Appeals held that in the context of *underinsured* motorist coverage, the escape clause was contrary to public policy, unconscionable, and therefore unenforceable.⁵⁵

Thus, in *Kost*, the court held that the proper remedy was to allow the people who purchase the insurance the option of using the trial de novo provision, but to prevent the insurance company from doing so.⁵⁶ Writing for a unanimous court, Judge Goldenhersch stated:

Allowing an insurer who has placed a biased trial de novo provision in a policy to then claim that the provision is void against public policy when an insured attempts to enforce the provision should not be sanctioned by the courts The benefit of a trial de novo should not be withheld from an insured simply because the insurer drafted the provision unfairly. The court should not shelter the defendant's duplicity.⁵⁷

And the court observed:

Defendant may have hoped that unwary claimants would accept lower arbitration awards or that the clause could be used as a tool in negotiation after arbitration to lower insureds' expectation of success and increase the costs of pursuing the claim In any event, it is of the highest irony that a provision that our courts have found to be against public pol-

49. *Id.*

50. *Kost v. Farmers Auto. Ins. Ass'n*, 766 N.E.2d 676 (Ill. App. Ct. 2002).

51. *Id.* at 679.

52. *Id.* at 676.

53. 215 ILL. COMP. STAT. § 5/143a (2003).

54. 215 ILL. COMP. STAT. § 5/143a-2 (2003).

55. *Parker v. Am. Family Ins. Co.*, 734 N.E. 2d 83, 86 (Ill. App. Ct. 2000) (2-1 decision) (holding trial de novo clause unconscionable and contrary to public policy); *Fireman's Fund Ins. Cos. v. Bugailiskis*, 662 N.E.2d 555, 558 (Ill. App. Ct. 1996) (holding trial de novo clause against public policy, considering cost and delay, unequal application of the escape clause, and earmarks of a contract of adhesion).

56. *Kost v. Farmers Auto. Ins. Ass'n*, 766 N.E.2d 676, 679 (Ill. App. Ct. 2002).

57. *Id.*

icy because of manipulative drafting by insurers should now be claimed by defendant to be a shield against an insured's suit.⁵⁸

By way of a short summary, we can classify the remedies courts have used with escape clauses into three approaches: (1) use a knife to cut out the trial de novo provision, but leave the remainder of the arbitration agreement intact and binding on all parties; (2) use an ax to chop away the entire arbitration agreement, and require all parties to resolve their dispute in the court system; or (3) use a scalpel to excise the trial de novo provision from use by the insurance company, but allow it to be used by the insurance customer, who would have had a reasonable expectation of being able to use that provision.⁵⁹

III. SUMMARY OF *REED V. FARMERS INSURANCE GROUP*

A. *Facts and Procedural History*

In April of 1995, Julie Reed was injured while driving in the Illinois town of East Peoria.⁶⁰ At an intersection, a vehicle collided with a second vehicle, and the second vehicle then struck Reed's car.⁶¹ The first driver fled the scene, and was never identified.⁶² Because unidentified hit-and-run drivers are considered to be uninsured motorists under Illinois law,⁶³ in order to be compensated for her injuries, Reed was required to pursue a UM claim against her own insurance company, the Farmers Insurance Group.⁶⁴ The insurance policy that Farmers had sold to Reed contained a clause providing that any UM case would be arbitrated, and that the amount of any arbitration award would be binding "unless the amount of the award for damages exceeds the minimum required limits set forth in the Illinois Financial Responsibility Law."⁶⁵

Reed filed a declaratory judgment action against her insurer, Farmers Insurance Group, in the circuit court of Tazewell County.⁶⁶ Her complaint attacked both the escape clause provision in the insurance policy, as well as the statute requiring that UM claims be submitted to arbitration. She sought to have the insurance policy provision declared void as against public policy, and the statute declared unconstitutional.⁶⁷ In a second count of her complaint, she asked for

58. *Id.* at 679-80.

59. Although *Kost* did not specifically refer to it, the "doctrine of reasonable expectations" is a method of resolving insurance disputes that focuses on what the person buying the insurance would reasonably have expected to receive under the insurance contract. See generally, JERRY, *supra* note 3, § 25D. As *Kost* succinctly puts it: "Refusing to allow plaintiffs to enforce the provision would deny a benefit contracted for . . ." 766 N.E.2d at 679.

60. *Reed v. Farmers Ins. Group*, 720 N.E.2d 1052, 1055 (Ill. 1999).

61. *Id.*

62. *Id.*

63. 215 ILL. COMP. STAT. § 5/143a (2003).

64. *Reed v. Farmers Ins. Group*, 685 N.E.2d 385 (Ill. App. Ct. 1997).

65. *Id.* at 387.

66. See *Reed v. Farmers Ins. Group*, 720 N.E.2d 1052, 1055 (Ill. 1999).

67. *Reed v. Farmers Ins. Group*, 685 N.E.2d 385, 386 (Ill. App. Ct. 1997).

damages for her injury.⁶⁸ Her insurance company moved to dismiss, and the trial court granted the insurance company's motion.⁶⁹

The appellate court reversed and held that the escape clause in the insurance policy was unconscionable.⁷⁰ Further, the court held that the statute that required insurance policies to impose arbitration in UM cases was unconstitutional, because it impaired an insurance customer's freedom of contract.⁷¹ The appellate court stated that "compulsory arbitration takes away the full flexibility of the parties to choose whether to arbitrate and the way arbitration is structured, and detracts from the stated purpose of the statute."⁷²

B. Majority Opinion

The Illinois Supreme Court reversed the appellate court.⁷³ After briefly reviewing the facts of the case, the majority noted that, as required by the Illinois Insurance Code, the insurance policy contained a clause requiring arbitration of any UM claim if the insurance company and the claimant were unable to agree on a settlement.⁷⁴ The majority further noted that—as also required by the Illinois statute—the insurance policy provided that any arbitration award would be binding only if it was less than or equal to the minimum amount of liability insurance required by the Illinois Financial Responsibility Law.⁷⁵ If the arbitration award was for an amount greater than the minimum insurance coverage requirements, then "either party" could reject the award and proceed to trial.⁷⁶

The majority then turned its attention to the procedural history of the case, noting that the plaintiff, Julie Reed, had challenged both the clause permitting a trial de novo for amounts over \$20,000, as well as the statute requiring mandatory arbitration of UM cases.⁷⁷ The majority listed the various arguments advanced by the plaintiff and briefly discussed the reasoning relied upon by the appellate court when it held that the trial de novo provision was unconscionable (and the statute requiring arbitration unconstitutional).⁷⁸

After a review of the pertinent portion of the statute, the majority began its analysis of the plaintiff's arguments.⁷⁹ It first discussed the plaintiff's contention that the trial de novo provision was against public policy.⁸⁰ The majority cited several cases that had been relied on by the plaintiff, and then commented:

68. *Id.*

69. *Id.*

70. *Id.* at 390.

71. *Id.* at 391.

72. *Id.* at 391.

73. *Reed v. Farmers Ins. Group*, 720 N.E.2d 1052, 1061 (Ill. 1999).

74. *Id.* at 1055.

75. *Id.* The Illinois Financial Responsibility Law requires minimum automobile liability insurance coverage in the amounts of \$20,000 because of bodily injury or death to one person, \$40,000 because of bodily injury or death to two or more persons, and \$15,000 because of damage to or destruction of property. 625 ILL. COMP. STAT. 5/7-203 (2002).

76. *Reed*, 720 N.E.2d at 1055.

77. *Id.*

78. *Id.* at 1055-56.

79. *Id.* at 1056.

80. *Reed v. Farmers Ins. Group*, 720 N.E.2d 1052, 1056 (Ill. 1999).

Some courts that have invalidated provisions similar to the one at issue here have observed that the nonbinding character of the award conflicts with the goals of arbitration, which is designed to promote finality and judicial economy. Other cases that have invalidated these provisions believe that they are unfairly structured in favor of the insurer, because the insurer is free to reject large awards, but the insured does not enjoy a corresponding right to reject small awards.⁸¹

These cases were distinguished from other jurisdictions. The court reasoned that the plaintiff's public policy challenge was unpersuasive, on the grounds that the *de novo* mechanism was itself "an expression of public policy," because it was required by statute. The majority noted that "[i]n each of the foreign decisions cited [which invalidated] similar measures, the special provision allowing the rejection of awards over a specified threshold was inserted by the insurer without legislative authorization [I]n contrast, the [Illinois] legislature has determined that uninsured-motorist coverage must contain this provision"⁸²

The majority concluded that the statutory requirement was dispositive in the *Reed* case, stating:

The public policy of the state is found in its constitution, its statutes, and its judicial decisions We do not believe that the provision challenged here . . . can be said to be violative of public policy—the provision is required by statute and appears in the plaintiff's insurance contract by virtue of legislative action.⁸³

The majority next turned to the issue of whether the statute interferes with the parties' freedom of contract.⁸⁴ Discussing the United States Constitution first, the majority observed that it only prohibits state actions that "impair the obligation of pre-existing contracts."⁸⁵ Because the plaintiff had not asserted that the statute interfered with a pre-existing contract, the majority reasoned that the United States Constitution did not apply to the issue.⁸⁶ The majority then characterized the plaintiff's argument stating that "the plaintiff's objection instead seems to be that the statute violates her freedom to contract because it requires that the arbitration clause be part of her insurance policy."⁸⁷

According to the majority, "[t]he right of individuals to contract as they please arises from considerations of due process"⁸⁸ and due process (in the context of economic legislation) only requires that the statute be "rationally related to a legitimate governmental purpose."⁸⁹ Beginning its due process analysis, the ma-

81. *Id.* at 1057 (internal citations omitted).

82. *Id.*

83. *Id.*

84. *Id.* at 1058.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Reed v. Farmers Ins. Group*, 720 N.E.2d 1052, 1058 (Ill. 1999).

89. *Id.*

majority stated that “we need not be convinced that the method chosen by the legislature constitutes the best or most efficient means of dealing with the problem at hand. Rather, it is sufficient if the legislation bears a rational relationship to a legitimate governmental interest.”⁹⁰

The majority then noted that the purpose of the Illinois UM statute is to provide “at least minimum insurance coverage” to persons injured by uninsured motorists, and it asserted that the arbitration provision in the statute was rationally related to that goal.⁹¹ Two possible justifications were given for the legislature’s actions: “In drafting [the arbitration provision], the legislature could well have concluded that mandatory binding arbitration for smaller claims—those falling below \$20,000—would help reduce litigation costs and would promote the speedy resolution of those cases.”⁹² The court further reasoned that “if awards under financial responsibility limits were not binding, then an insurer could defeat the statutory purpose of the coverage by seeking review of arbitral awards under those limits.”⁹³ The majority then wrapped up its freedom of contract/rational relation analysis by observing, “[l]egislation enjoys a strong presumption of constitutionality,” and that the court did not believe the plaintiff had overcome the presumption.⁹⁴

The next constitutional issue to be examined was whether the statute violated the due process rights of UM claimants by denying them “access to the courts.”⁹⁵ Here, the majority referred to the decision of the United States Supreme Court in *Hardware Dealers Mutual Fire Insurance Co. v. Glidden Co.*⁹⁶ *Hardware Dealers* involved a Minnesota statute that required fire insurance policies to include a provision for mandatory arbitration.⁹⁷ The statute provided that the arbitration proceeding would determine a single issue: the amount of loss caused by any particular fire.⁹⁸ All other issues would be resolved in the court system.⁹⁹ The Supreme Court held that the Minnesota statute was constitutional.

The majority in *Reed* quoted a paragraph from the *Hardware Dealers* opinion, containing the following core rationale:

[T]he requirements of the Fourteenth Amendment . . . are satisfied if the substitute remedy is substantial and efficient. We cannot say that the determination by arbitrators . . . of the single issue of the amount of loss under a fire insurance policy, reserving all other issues for trial in court, does not afford such a remedy . . .¹⁰⁰

The *Reed* majority continued:

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 1058-59.

95. *Id.* at 1059.

96. *Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151 (1931).

97. *Id.*

98. *Id.* at 155-56.

99. *Id.* at 156.

100. *Reed v. Farmers Ins. Group*, 720 N.E.2d 1052, 1059 (Ill. 1999) (quoting *Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151 (1931)).

The arbitration requirement at issue here is not significantly broader than the one approved by the Supreme Court in *Hardware Dealers*. This court has previously determined that arbitration under section 143a is limited to two issues: whether the insured is entitled to recover damages from the operator or owner of an uninsured vehicle, and the amount of damages under the policy.¹⁰¹

Concluding its discussion of the issue, the majority determined that the “narrow range of issues” that the Illinois statute requires to be arbitrated makes it similar to the statute approved in *Hardware Dealers*.¹⁰² The majority’s analysis continued by next considering whether the statute violated equal protection or constituted invalid special legislation under the Illinois Constitution. Because, the majority asserted, the UM statute did not impinge on a fundamental right or create a suspect classification, it therefore only needed to meet the rational relationship test.¹⁰³ The majority concluded its discussion of the issue by saying that its earlier consideration of the possible rational relationship answered these challenges as well.¹⁰⁴

After resolving the federal constitutionality of the provision, the *Reed* majority considered whether the mandatory arbitration imposed by the UM statute violated the right to a jury trial guaranteed by the Illinois Constitution. The state constitution provides: “The right of trial by jury as heretofore enjoyed shall remain inviolate.”¹⁰⁵

In support of this point, the plaintiff cited *Grace v. Howlett*,¹⁰⁶ which invalidated a no-fault auto insurance statute, but the majority said that the jury trial issue had been more recently addressed in *Martin v. Heinold Commodities*.¹⁰⁷ The *Martin* case held that litigants were not entitled to a jury trial in suits brought pursuant to the Illinois Consumer Fraud statute.¹⁰⁸ The court reasoned that the jury trial right guaranteed in the Illinois Constitution was limited to actions that existed under the English common law at the time that the constitution was adopted.¹⁰⁹ The majority returned to the *Grace* case and concluded the jury trial issue by asserting:

We do not believe that *Grace* is controlling here. The action at issue in *Grace* was a common law claim for personal injuries arising from a motor vehicle accident. In the present case, in contrast, the underlying claim is one for [UM] coverage, a remedy that did not exist at common law but instead was recently devised by the legislature.¹¹⁰

101. *Id.*

102. *Id.*

103. *Id.* at 1060.

104. *Id.*

105. ILL. CONST. art. I, § 13.

106. *Grace v. Howlett*, 283 N.E.2d 474 (Ill. 1972).

107. *Martin v. Heinold Commodities*, 643 N.E.2d 734 (Ill. 1994).

108. *Id.*

109. *Id.* at 758-59.

110. *Reed v. Farmers Ins. Group*, 720 N.E.2d 1052, 1060 (Ill. 1999).

The last issue the majority addressed was whether the arbitration provision of the statute “create[d] a system of fee officers.”¹¹¹ The Illinois Constitution specifically prohibits fee officers from the judicial system.¹¹² The majority pointed out that the UM statute was silent regarding the parties’ responsibility to pay the fees of the arbitrators, and thus it was a matter controlled by the insurance policy.¹¹³ Referring then to the specific insurance policy used by the parties, the court noted that it required an equal division of the costs, but that it had an exception that provided, “in no event shall the expenses of arbitration to the insured person reduce recovery below the minimum limits required by the Illinois Financial Responsibility Law.”¹¹⁴ The majority pointed out that arbitration awards under the UM statute did not have to be entered by a court, and concluded that it did not believe that UM arbitrators could be said to become “fee officers in the judicial system.”¹¹⁵

C. Dissenting Opinion

Justice Bilandic wrote the dissenting opinion, and was joined Justice Heiple and Justice Harrison.¹¹⁶ The dissent indicated that it would hold the mandatory arbitration portion of the UM statute unconstitutional.¹¹⁷ It observed that although statutes do carry a presumption of constitutionality, it is the duty of the Illinois Supreme Court “to protect the rights of individuals against acts beyond the scope of legislative power,”¹¹⁸ and that “[i]f a statute is unconstitutional, this court must declare it invalid.”¹¹⁹

The dissent observed that the imbalanced arbitration clause is not consistent with the purpose of the Illinois statute because:

The purpose . . . is to provide at least minimum insurance coverage to an insured who has been injured by an uninsured motorist. The arbitration clause is not rationally related to this purpose. Making awards below \$20,000 binding on the insured has no relation to providing minimum insurance coverage to individuals injured by uninsured motorists.¹²⁰

The dissent also pointed out that a majority of courts have found that this type of mechanism unfairly favors insurance companies, and then quoted from the opinion in *Klopp*, calling the provision an escape hatch for insurance compa-

111. *Id.* at 1060-61.

112. ILL. CONST. art. VI, § 14 (emphasis added). The pertinent provision states:

Judges shall receive salaries provided by law which shall not be diminished to take effect during their terms of office. All salaries and such expenses as may be provided by law shall be paid by the State, except that Appellate, Circuit and Associate Judges shall receive such additional compensation from counties within their district or circuit as may be provided by law. *There shall be no fee officers in the judicial system.*

113. *Reed*, 720 N.E.2d at 1060.

114. *Id.* at 1061.

115. *Id.*

116. *Id.* (Bilandic, J., dissenting).

117. *Id.*

118. *Id.* at 1061-62.

119. *Id.* at 1062.

120. *Id.*

nies.¹²¹ Finally, the dissent distinguished the statute that the United States Supreme Court had upheld in the *Hardware Dealers* case, pointing out that the statute in that case was “truly neutral” and did not favor insurance companies to the detriment of their insureds.¹²²

IV. ANALYSIS

A. *How Reed Erred*

1. *The Escape Clause*

The escape clause issue in *Reed* has two possible points of focus. First, whether the insurance policy provision is unconscionable or otherwise sufficiently defective to invalidate it. Second, whether the Illinois statutory provision that requires the insurance escape clause is unconstitutional or otherwise legally defective. Here, we focus on the statute.

First of all, the statutory provision requiring the escape clause seems strongly at odds with Illinois public policy articulated by numerous court decisions,¹²³ as well as the Illinois Constitution. More importantly, in requiring that insurance policies contain the escape clause, the statute is unconstitutional in at least two respects: (1) it violates the promise of “prompt” justice under the Illinois Constitution; and (2) it deprives UM injury victims of equal protection of the laws guaranteed by the Illinois Constitution, as well as the Fourteenth Amendment of the United States Constitution.¹²⁴

Starting with the public policy issue, we note that the majority in *Reed* said that the de novo mechanism did not violate public policy, because since it was required by statute, it was itself “an expression of public policy.” The court asserted that a state’s public policy “[i]s found in its constitution, its statutes, and its judicial decisions We do not believe that the provision challenged here . . .

121. *Id.* (quoting *Worldwide Ins. Group v. Klopp*, 603 A.2d 788 (Del. 1992)).

122. *Id.* at 1063.

123. Many cases have discussed the purpose of the UM statute, oftentimes using almost identical language. The 1992 Illinois Supreme Court opinion in the *Hoglund* case put it this way: “[T]he public policy behind the uninsured motorist statute is to place the injured party in substantially the same position he would be in if the uninsured driver had been insured.” *Hoglund v. State Farm Mut. Auto. Ins. Co.*, 592 N.E.2d 1031, 1035 (Ill. 1992). The escape clause conflicts with that public policy. It forces UM injury victims into a two-step system in which if they “lose” the first round (by getting an award under \$50,000), then they are bound by it, and yet, if they “win” the first round, then the insurance company can say “that didn’t count.” The escape clause also imposes greater delay and greater costs upon UM injury victims than they would have had if they had been able to litigate against an insured driver in the court system. Thus, the escape clause is clearly contrary to the public policy of putting UM injury victims in “substantially the same position” they would have been in if the uninsured driver had been insured.

124. In pertinent part, the Fourteenth Amendment provides: “No State shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1. Because it is an Illinois statute that requires arbitration of UM claims, as well as the escape clause allowing insurance companies to demand a trial de novo arbitration awards over \$50,000, there is “state action.” The Illinois statute affects both “liberty” interests (such as the right to contract), and “property” interests (such as the ownership of a cause of action against the victim’s insurance company).

can be said to be violative of public policy—the provision is required by statute and appears in the plaintiff’s insurance contract by virtue of legislative action.”¹²⁵

It is important to restate the first part of that statement: “The public policy of the state is found in its constitution, its statutes, and its judicial decisions”¹²⁶ Even though the statute in this case requires the escape clause (and thus may be considered some statement of public policy), the provision requiring it seems to be in conflict with the following portion of the Illinois Constitution: “Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly.”¹²⁷

As a statement of public policy, this section of the Illinois Constitution would be controlling over any public policy embodied in a statute. But this section is not simply a statement of public policy. It is part of the Illinois Constitution, and as such, is much more than a statement of public policy: it creates constitutional rights that may not be abridged by a statute, whatever the purpose of the statute, or the motivations of the legislature that passed it. Thus, the point of the following discussion is not merely that the escape clause violates a public policy in favor of prompt justice, but also that the statute requiring the escape clause is unconstitutional because it violates the constitutional guarantee that every person shall obtain justice promptly.

By requiring arbitration, and also by requiring a trial de novo provision applicable to all arbitration awards over \$50,000, the UM statute is contrary to the constitutional guarantee that every person shall obtain justice *promptly*. The escape clause creates a “gauntlet” for the injury victim, in which arbitration is only a first step—necessitating effort and expense, to be sure—but only a first step that is time-consuming and functions as only a precursor to litigation.¹²⁸

As noted above, several courts have examined and struck down similar escape clauses imposed by the insurance policies of various companies.¹²⁹ Among the other difficulties created by the escape clause, many of those courts have specifically mentioned the problem of delay. For example, the Minnesota Supreme Court commented:

By permitting resort to the court system for a trial de novo notwithstanding the absence of any claimed impropriety in the arbitration process itself, by fostering multiple hearings in multiple forums, by increasing the costs to the contracting parties, and, by *unnecessarily, and without real cause, extending the time consumed in resolving the controversy* [the escape clause] likewise operates to defeat goals designed to promote judicial economy and respect for the judicial system.¹³⁰

125. *Reed v. Farmers Ins. Group*, 720 N.E.2d 1052, 1057 (Ill. 1999).

126. *Id.*

127. ILL. CONST. art. I, § 12.

128. That is, it is a precursor to litigation if the injury victim is not bound by a low or \$0 arbitration award.

129. See discussion *infra* Part II.A(4)(b).

130. *Schmidt v. Midwest Family Mut. Ins. Co.*, 426 N.W.2d 870, 874 (Minn. 1988) (emphasis added). In *Schmidt*, the insurance company (with a compulsory arbitration clause and an escape clause in its policy) argued that its customer had derived sufficient benefits from the arbitration proceeding to

Delay favors insurance companies. Among other things, it allows them to earn interest on the funds that rightfully belong to injury victims with meritorious cases, and it increases the risk to the injury victim (who has the burden of proof) that when the time finally comes to prove her case, vital evidence or witnesses may no longer be available. Prior to 1978, the Illinois UM statute did not require arbitration,¹³¹ although many insurance companies imposed arbitration by means of their insurance policies. The arbitration requirement was added to the statute by Public Act 80-1135 (although the arbitration provision did not contain an escape clause requirement at that time). One of the reasons given for requiring arbitration under the statute was to provide an alternate way of naming arbitrators if the insurance company resorted to the delay tactic of being slow to name an arbitrator.¹³² In one case, the Illinois Supreme Court noted:

At the time that the arbitration provision was added to section 143a(1), *the purpose of the legislation*, as explained by its principal sponsor, Senator Rock, *was to expedite the processing of uninsured motorist claims*. According to the Senator, insurance companies that wanted to postpone the payment of meritorious claims would attempt to delay the selection of a panel of arbitrators to handle the particular case. The aim of the provision was to ensure that matters could be submitted to one arbitrator alone if the parties were unable to agree on a panel in a timely fashion.¹³³

Given that the legislative purpose of the 1978 amendment was “to expedite the processing of uninsured motorist claims,” it is striking that twelve years later the legislature again amended the statute to require that all insurance policies contain the trial de novo clause in their UM provisions.¹³⁴ If insurance companies used the naming of arbitrators as a delaying tactic, then the trial de novo/escape clause certainly provides a much better delaying tactic. Clearly, the amendment of the statute to require the trial de novo clause was *not* intended “to expedite the processing of uninsured motorist claims,” but, of course, different legislatures can have different agendas. Regardless of the purpose of the statutory provision requiring the escape clause, no statute may infringe on the constitutional right to obtain justice promptly, as guaranteed by the Illinois Constitution.

The statute requiring the escape clause is also constitutionally defective in that it deprives UM injury victims of equal protection of the laws guaranteed by

serve as a basis for estoppel. *Id.* at 872. When questioned as to what benefit Schmidt had received, the insurance company asserted that “by demanding arbitration, Schmidt retained in himself a benefit consisting of the right to demand a trial de novo if the [arbitration] award exceeded \$25,000.” *Id.* From the point of view of the consumer who wishes to have his case resolved, this so-called benefit may seem similar to asking a Chicago cab driver to take you to O’Hare Airport, and then having him take you (without your permission) to Midway Airport instead. When you arrive at Midway, the cab driver then points out the benefit you have derived from him taking you to Midway—you can now ask him to take you to O’Hare.

131. *State Farm Fire & Cas. Co. v. Yapejian*, 605 N.E.2d 539, 541 (Ill. 1992).

132. *Id.* at 542.

133. *Id.*

134. Illinois Public Act No. 86-841, § 1, eff. Jan. 1, 1990; Illinois Public Act No. 86-1155, § 1, eff. July 1, 1991.

the Illinois Constitution and the Fourteenth Amendment of the United States Constitution. The statutorily-mandated escape clause treats UM victims in an unfairly different way than it treats insurance companies. Although the escape clause would allow “either party” to request a trial de novo for arbitration awards over \$50,000, the “either party” phrase is an illusion of equality. In a case decided by the Supreme Court of Ohio, Justice Sweeney explains why allowing *both* parties, the insurer and the insured, to avoid arbitration awards in excess of \$12,500 is not “entirely fair”:

This “facial equality” is not a true equality, however, because both parties are bound only by low awards, which are likely to be in [the insurer’s] favor. High awards can be avoided by either the insured or [the insurer], but it is unlikely that an insured would ever seek to avoid a high award, even if he was unsatisfied by it, because by avoiding the award and seeking a trial the insured would incur additional legal expense while also placing at risk the entire award that he already has received. Thus, the real impact and effect of [the escape clause] is to give [the insurer] the power to avoid high arbitration awards, regardless of whether those awards are fair and just.¹³⁵

The real impact of the escape clause is to give the insurance company the power to avoid high arbitration awards, “regardless of whether those awards are fair and just.”¹³⁶ But the provision has another side to it, also favorable to the insurance company. The provision is also a trap for injury victims, because, to paraphrase Justice Sweeney, another impact of the escape clause is to give the insurance company the power to bind injury victims to low arbitration awards, “regardless of whether those awards are unfair and unjust.”¹³⁷

2. *The Escape Clause Flunks the Rational Basis Test*

Except in cases requiring a higher standard, in order for most statutes to survive a challenge that they deprive persons of equal protection of the laws, they must meet the rational basis test.¹³⁸ The rational basis test requires that the statute have a legitimate governmental objective as its *end*, and use a rational *means* to attain that end.¹³⁹ The majority in *Reed*, in its rational basis discussion of the escape clause, stated:

135. *Nationwide Mut. Ins. v. Marsh*, 472 N.E.2d 1061, 1063 (Ohio 1984) (Sweeney, J., concurring).

136. *Id.*

137. *Id.*

138. The Supreme Court has outlined the scope of the Equal Protection Clause of the Fourteenth Amendment based on various factors. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-40 (1985). Generally, a state’s legislation “is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.” *Id.* This is the “rational basis” test; it has been described as a “low hurdle.” *Reed v. Farmers Ins. Group*, 720 N.E.2d 1058 (Ill. 1999).

139. See *Reed*, 720 N.E.2d at 1058-59.

The purpose of section 143a is to provide at least minimum insurance coverage to an insured who has been injured by an uninsured driver. We believe that the arbitration provision is rationally related to that goal. In drafting [the arbitration provision], the legislature could well have concluded that mandatory binding arbitration for smaller claims—those falling below \$20,000—would help reduce litigation costs and would promote the speedy resolution of those cases [I]f awards under financial responsibility limits were not binding, then an insurer could defeat the statutory purpose of the coverage by seeking review of arbitral awards under those limits.¹⁴⁰

A careful reading of this passage shows that the majority articulates three things: (1) that a possible *end* of the UM statute is to provide at least minimum coverage to a UM injury victim; (2) that a possible *end* of the escape clause provision is to reduce costs and speed resolution by requiring awards under the then-current threshold of \$20,000 to be binding; and (3) that a possible *means* of accomplishing the end of cheaper and faster resolution is by preventing “insurance companies” from reviewing awards under \$20,000.¹⁴¹

Items two and three require our greatest attention, but first we will consider the ends and means of the original statute. The original Illinois UM statute, enacted decades ago, did *not* require arbitration of UM claims, and did *not* require insurance policies to have an escape clause or trial de novo provision; it simply required that insurance companies selling automobile insurance also had to sell UM coverage to their customers.

The original statute clearly passes the rational basis test. The *end* of that statute—the legitimate governmental purpose—was to compensate people injured by uninsured drivers and, additionally, to prevent those injury victims from having to draw on taxpayer-funded charity or welfare programs. The *means* of that statute—requiring insurance companies to sell UM coverage to their customers—was also rational. The insurance companies authorized to do business in the state of Illinois make substantial profits selling their insurance to Illinois consumers, and it is fair and logical that, as one condition of making those profits, those insurance companies should be required to also sell their customers protection against uninsured motorists. That rationale seems even stronger now because in 1989 the state began requiring that all owners of vehicles registered in Illinois purchase automobile insurance.¹⁴² Few other industries have customers compelled by law to buy their products.¹⁴³

In contrast to the original UM statute, the statutory provision requiring that insurance policies include an escape clause does *not* meet the rational basis test.¹⁴⁴

140. *Id.* at 1059 (internal citations omitted).

141. At the time that the case was decided, the threshold at which awards became binding was \$20,000 (a recent legislative enactment has increased that threshold to \$50,000).

142. 625 ILL. COMP. STAT. 5/7-601 (2002).

143. Although the purpose of statutorily-required auto insurance may be the general protection of the public, an incidental effect is that it increases the revenues of the insurance industry.

144. *Reed v. Farmers Ins. Group*, 720 N.E.2d 1052, 1058 (Ill. 1999). The court stated that:

[T]he legislature could well have concluded that mandatory binding arbitration for smaller claims—those falling below \$20,000—would help reduce litigation costs and would promote the speedy resolution of those cases [I]f awards under financial responsibility limits were not

The first stated end—to “reduce costs” and “speed resolution” of cases—seems to be a legitimate governmental purpose. But the *means* it chooses—making awards binding below a certain threshold—on UM cases only—is not rational or fair. A critical analysis demonstrates why.

First, the statute applies only to UM injury victims, and not to all injury victims. For example, if a person injured by an insured driver receives a \$0 verdict in court, then that injury victim has a right to review by an appellate court. In contrast, if a person injured by an uninsured driver receives a \$0 award in arbitration, then that injury victim has virtually no remedy. UM arbitration is governed by the Illinois version of the Uniform Arbitration Act,¹⁴⁵ and under that statute, an arbitration award can be “vacated” only if it was “procured by corruption, fraud, or other undue means.”¹⁴⁶ Thus, in most cases, even if an arbitrator or arbitration panel makes a mistake of law, the arbitration award cannot be vacated.¹⁴⁷ Treating UM injury victims as second-class citizens is not rational, and it certainly does *not* place them in substantially the same position they would have been in if the uninsured driver had been insured.

Another problem with using the \$50,000 threshold to determine what awards are binding is that it does not necessarily limit the binding effect to only “smaller claims.” In this respect, the *Reed* majority simply assumed that arbitration awards always value cases correctly. In fact, a UM claimant may be entitled to very substantial damages, and yet through an error in the arbitration process, he or she may receive a low or \$0 arbitration award.¹⁴⁸

A third problem with using the \$50,000 threshold is that it is arbitrary. The financial responsibility statute requires owners of vehicles registered in Illinois to buy liability insurance.¹⁴⁹ If a person violates that statute by driving with no insurance, the \$50,000 binding/non-binding threshold has no rational bearing on the insurance customer who has paid a higher premium in order to get higher UM protection, such as \$100,000 or \$300,000.

Not only is the threshold arbitrary, but it produces drastically different results in the two categories it creates. For example, arbitration awards just below \$50,000 are totally binding, no matter how unfair or unjust the result may be. But arbitration awards just above \$50,000 are totally non-binding, no matter how fair or just the result. And, considering this latter situation, one has to wonder if the legislative purpose was schizophrenic. Was the end purpose of treating awards over \$50,000 as totally non-binding to increase litigation costs and to promote

binding, then an insurer could defeat the statutory purpose of the coverage by seeking review of arbitral awards under those limits.

Id.

145. See *Calabrese v. State Farm Mut. Auto. Ins. Co.*, 543 N.E.2d 215, 216-18 (Ill. App. Ct. 1989).

146. 710 ILL. COMP. STAT. 5/12 (2002).

147. *Id.*

148. An example of this sort of result may be present in the case of Alan Laatz, in which the sole arbitrator inquired about Laatz’s pending workers’ compensation claim. *Laatz v. Intergovernmental Risk Mgmt. Agency*, 784 N.E.2d 877 (Ill. App. Ct. 2003). In a trial court, the workers’ compensation claim would be a “collateral source,” not proper for a jury or judge to consider in determining either liability or damages. After being told (by the opposing attorney) that the compensation case was still pending, the arbitrator later made a finding that Laatz had been more than 50% at fault, and thus was not “legally entitled to recover” compensation for his injuries. *Id.* at 878 (holding that the inquiry about the workers’ compensation case did not amount to grounds for vacating the arbitration award).

149. 625 ILL. COMP. STAT. § 5/7-601 (2003).

delay of those cases? If that is so, then the rationality of that end needs to be re-examined in light of the Illinois Constitution which provides that every person shall obtain justice by law freely and promptly.¹⁵⁰

As a final point on the escape clause, “[I]f awards under financial responsibility limits were not binding, then an insurer could defeat the statutory purpose of the coverage by seeking review of arbitral awards under those limits.”¹⁵¹ Here, the stated end is to prevent insurance companies from defeating the purpose of UM coverage by appealing arbitration decisions. Whether this would defeat the purpose of the UM statute is debatable, and thus the end itself may not be “a legitimate governmental purpose.” But assuming that it is, the means—making only awards under \$50,000 binding—is irrational. Because insurance companies would be more likely to appeal higher awards, if the end purpose of the statutory provision is to prevent insurance companies from defeating the purpose of UM coverage by appealing arbitration decisions, then it is irrational to make only low awards binding, while simultaneously giving insurance companies the option of a trial *de novo* on higher awards. And if, as the majority suggests, the purpose was to prevent insurance companies from appealing, it is irrational to make those lower awards binding on the injury victims as well the insurance companies. Given the legislative end theorized by the majority, the statute uses an irrational means to accomplish it.¹⁵²

3. Mandatory Arbitration

Even if the escape clause were not present in the Illinois UM statute, the statute would still be unconstitutional because the UM statute forces UM injury victims to arbitrate their cases, rather than allowing them to resolve their cases in court. The Illinois court system has well-established rules of evidence and procedural safeguards that are not found in arbitration proceedings. Like the escape clause issue, the mandatory arbitration issue in *Reed* has two possible points of focus. First, whether the insurance policy provision that requires arbitration is unconscionable or otherwise sufficiently defective to invalidate it. Second, whether the Illinois statutory provision that requires arbitration is unconstitutional or otherwise legally defective. Again, this article focuses on the statute.

The statutory provision requiring arbitration of all UM cases is unconstitutional in at least three ways: (1) mandatory arbitration deprives UM injury victims of access to the courts, and thus deprives them of due process of law guaranteed by the Illinois Constitution, as well as the Fifth and Fourteenth Amendments of the United States Constitution; (2) mandatory arbitration deprives UM injury victims of the right to a jury trial guaranteed by the Illinois Constitution; and (3) mandatory arbitration deprives UM injury victims of equal protection of the laws guaranteed by the Illinois Constitution, as well as the Fourteenth Amendment of the United States Constitution.

150. See ILL. CONST. art. I, § 12.

151. *Reed v. Farmers Ins. Group*, 720 N.E.2d 1052, 1058 (Ill. 1999).

152. The author is *not* advocating that insurance companies should have less rights than injury victims. Parties on *both sides* should have equal rights, should receive equal protection of the laws, and should be treated the same—fairly.

4. Mandatory Arbitration Deprives Injury Victims of Access to the Courts

The majority in *Reed* seemed to treat access to the courts as a due process issue, with the test being whether the state action—in this case the statutory provision requiring arbitration of UM cases—is rationally related to a legitimate governmental purpose.¹⁵³ Although, as discussed above, the *Reed* majority said that the legislature could have believed that mandatory binding arbitration for awards under the then-current threshold of \$20,000 would help reduce litigation expenses and speed resolution of those cases, the majority did not explicitly articulate a justification for the use of arbitration *per se*.

Instead, in responding to the issue of “access to the courts,” and upholding the arbitration compelled by the statute, the *Reed* majority relied on the United States Supreme Court case of *Hardware Dealers’ Mutual Fire Insurance Co. v. Glidden*,¹⁵⁴ saying that the “narrow range of issues” that the Illinois statute requires to be arbitrated makes it similar to the statute approved in *Hardware Dealers*.¹⁵⁵ However, the range of issues subject to arbitration under the Illinois statute is really quite broad, and the statute approved in *Hardware Dealers* is significantly different from the statute that governs Illinois UM cases.

Alluding to the escape clause, the minority in *Reed* correctly observed that the statute in *Hardware Dealers* established a “truly neutral” process—certainly an important point.¹⁵⁶ In addition, there are several other major differences between the Minnesota statute in *Hardware Dealers* and the Illinois statute that requires UM arbitration.

First of all, it may be significant to note that although the United States Supreme Court used the term “arbitration” when discussing the Minnesota statute in *Hardware Dealers*, the statute itself did not use that term. In that portion of the statute quoted by the Court,¹⁵⁷ it used variants of the terms “appraisal” eight times, but never the term “arbitration” in any form. This choice of terminology is significant because the term “appraisal” refers to a much more limited focus than does the term “arbitration.” Jerry explains that the use of an appraisal proceeding is specifically intended “to resolve only questions of property valuation and questions of fact concerning the loss, not other disputed issues [T]he work of appraisers is analogous to that of masters, who reach findings on particular submitted fact questions for the benefit of the court that must decide the entire case.”¹⁵⁸

Similarly, a federal case, determining the applicability of the Federal Arbitration Act (FAA), observed that “there is generally a great distinction between arbitration and appraisal, for while arbitration may be wide in its scope, an appraisal is limited to the narrow issue of the amount of loss.”¹⁵⁹

153. *Reed v. Farmers Ins. Group*, 720 N.E.2d 1052, 1059-60 (Ill. 1999).

154. *Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151 (1931).

155. *Reed*, 720 N.E.2d at 1058.

156. *Id.* at 1063 (Bilandic, J., dissenting).

157. *Hardware Dealers*, 284 U.S. at 155 n.1.

158. JERRY, *supra* note 3, § 84.

159. *Rastelli Bros., Inc. v. Netherlands Ins. Co.*, 68 F. Supp. 2d 440, 446 (D. N.J. 1999) (holding that an “appraisal” clause could not be enforced under the FAA because it was not an “arbitration” clause).

This distinction between a narrowly focused appraisal, and the broader scope of an arbitration, makes the Minnesota statute that *Hardware Dealers* held constitutional significantly different than the Illinois UM arbitration statute. In *Hardware Dealers*, the statute required that fire insurance policies include specific provisions for the selection of appraisers.¹⁶⁰ The statute in *Hardware Dealers* required that Minnesota fire insurance policies include provisions that: (1) limited the appraisal procedure to only the single issue of estimating the value of a loss caused by a fire (except for fires in which the building was a “total loss”); (2) allowed either party to demand an appraisal of a fire loss, but waived that procedure if neither party did so; and (3) did *not* provide a mechanism for an “appraisal de novo” if the original appraisal exceeded a certain amount. This was the statute about which the United States Supreme Court concluded:

Granted . . . that the state, in the present circumstances, has power to prescribe a summary method of ascertaining the amount of loss, the requirements of the Fourteenth Amendment . . . are satisfied if the substitute remedy is substantial and efficient. We cannot say that the determination by arbitrators . . . of the single issue of the amount of loss under a fire insurance policy, reserving all other issues for trial in court, does not afford such a remedy¹⁶¹

In contrast, the Illinois UM arbitration statute is significantly different. It is different, first of all, because the scope of its arbitration procedure is much broader. The appraisal procedure in *Hardware Dealers* dealt only with the single issue of the amount of a fire loss, whereas the arbitration procedure under the Illinois UM statute not only decides the “amount of loss” (i.e., the damages sustained by the injury victim), it also decides *all the other issues normally decided in a jury trial*.

For example, in addition to damages, the Illinois arbitration procedure decides whether the uninsured driver was legally liable (i.e., negligent or in some other way legally responsible), whether the injury victim was contributorily negligent (or whether any other affirmative defense affects the right of the injury victim to recover), whether the amount of damages should be reduced as a conse-

¹⁶⁰ *Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 155 n.1 (1931). The statute was as follows:

In case of loss, *except in case of total loss* on buildings, under this policy and a failure of the parties to agree as to the amount of the loss . . . the amount of such loss shall . . . be ascertained by two competent, disinterested and impartial *appraisers* . . . the insured and this company each selecting one . . . and the two so chosen shall first select a competent, disinterested and impartial umpire; provided that if . . . the two *appraisers* cannot agree on such an umpire, the presiding judge of the district court . . . may appoint such an umpire”

Id. (emphasis added). Further, this provision was also included:

Unless within fifteen days after a statement of . . . loss has been rendered to the company, either party, the assured or the company, shall have notified the other in writing that such party demands an *appraisal*, such right to an *appraisal* shall be waived; the *appraisers* together shall then estimate and *appraise* the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of the loss.

Id. (emphasis added).

¹⁶¹ *Id.* at 159.

quence of comparative fault, and whether the factual and medical evidence is sufficient to prove that the collision was a proximate cause of the injuries and any ongoing pain or disability complained of by the victim. Because all of these issues are resolved in arbitration, errors with respect to the law or the facts would not be subject to appellate review.

In contrast, the Minnesota statute in *Hardware Dealers* “reserved for trial” all issues other than the valuation of the fire loss. Those issues “reserved for trial” would include whether the fire insurance company was legally liable to pay for the loss, whether the fire victim had breached any condition of the fire insurance policy (or whether any other affirmative defense affected the right of the fire victim to recover) and whether the factual and scientific evidence was sufficient to prove that the fire originated in a way that would require the insurance company to indemnify the victim for the loss. Because all of these issues are resolved in court, their proof would be subject to the rules of evidence and procedure, with the safeguard of the right of appellate review.

The Illinois UM arbitration statute is also different from the Minnesota statute with respect to the appropriateness of using “expert appraisers.” In the *Hardware Dealers* statute, the appraisal procedure was limited to estimating the value of property damaged or destroyed by a fire, something that expert appraisers would likely do better than a jury. In contrast, the issues to be determined in Illinois UM cases—negligence, contributory negligence, proximate cause, and damages—are routinely handled by Illinois courts and juries in cases where the at-fault driver has insurance.¹⁶²

Another difference between the two statutes is that, although the *Hardware Dealers* statute established an appraisal procedure to estimate the amount of a fire loss, that procedure did not apply “in case of total loss on buildings.” Conceivably, the Minnesota legislature may have reasoned that the total loss of a building was such a substantial loss that the value of that loss should be determined in the court system, rather than by the appraisal procedure. In contrast, the Illinois UM arbitration statute requires arbitration for all losses caused by an uninsured motorist, even if that loss is the death of a human being.

Yet another difference between the two statutes is that the Minnesota statute makes its appraisal procedure “mandatory” only if one of the parties demands appraisal. If neither party makes such a demand within the applicable time limit, then the right to the appraisal procedure is waived, and the value of the loss is determined in court, along with all the other issues in the case. In contrast, the Illinois UM arbitration statute automatically requires arbitration of *all* UM cases, and the parties have absolutely no choice in the matter.

5. *Mandatory Arbitration Deprives Injury Victims of the Right to a Jury Trial*

The Illinois UM arbitration provision is also unconstitutional because it deprives UM injury victims of the right to a jury trial guaranteed by the Illinois Con-

162. Considering that victims injured by *insured* drivers routinely use the court system to resolve their disputes, and that the court system is both competent and experienced at resolving these disputes, it does not seem rational to *force* victims injured by *uninsured* drivers to use a different system.

stitution. The Illinois Constitution provides that “[t]he right of trial by jury as heretofore enjoyed shall remain inviolate.”¹⁶³ In holding that the jury trial right did not apply to UM cases, the majority in *Reed* cited *Martin v. Heinold Commodities*,¹⁶⁴ in which the court had previously held that litigants were not entitled to a jury trial in an action brought pursuant to the Illinois Consumer Fraud statute. Following the reasoning in *Martin*, the majority in *Reed* asserted that the jury trial guarantee in the Illinois Constitution only applies to actions that existed under the English common law at the time the constitution was adopted.¹⁶⁵ With respect to *Reed*’s case, the majority determined:

In the present case . . . the underlying claim is one for uninsured motorist coverage, a remedy that did not exist at common law but instead was recently devised by the legislature. The state constitutional guarantee of a jury trial ‘was not intended to guarantee a trial by jury in special or statutory proceedings unknown to the common law.’¹⁶⁶

The majority’s reasoning is faulty because unlike the statute in the *Martin* case, the UM statute does not create a statutory cause of action unknown at the common law. The UM statute *does* require insurance companies to sell UM coverage, but a suit to enforce rights under an insurance policy is nothing more than an old-fashioned action based on contract.¹⁶⁷ Because suits based on contract existed in the common law long before the Illinois Constitution was adopted, Article I, section 13 of the Illinois Constitution applies to such cases, even if the underlying contract right is based upon an insurance policy provision required by statute.¹⁶⁸

The Supreme Court of New Mexico addressed the same issue recently in the case of *Lisanti v. Alamo Title Insurance*.¹⁶⁹ In that case, the New Mexico Supreme Court held that a state regulation requiring arbitration in certain cases was unenforceable because it deprived the parties of their constitutional right to a jury trial.¹⁷⁰ Nicholas and Geraldine Lisanti had purchased title insurance from Alamo Title Insurance, and a dispute arose regarding Alamo’s responsibility under the insurance policy.¹⁷¹ A New Mexico statute had given the superintendent of insur-

163. ILL. CONST. art. I, § 13.

164. *Martin v. Heinold Commodities*, 643 N.E.2d 734 (Ill. 1994).

165. *See id.* at 758-59.

166. *Reed v. Farmers Ins. Group*, 720 N.E.2d 1052, 1060 (Ill. 1999) (quoting *People ex rel. Keith v. Keith*, 231 N.E.2d 387 (Ill. 1967) & *People v. Niesman*, 190 N.E. 668 (Ill. 1934)).

167. *See Molodyh v. Truck Ins. Exch.*, 744 P.2d 992, 996 (Or. 1987) (holding that the jury trial right guaranteed in the Oregon Constitution applied to cases in which a jury trial was customary at the time of adoption, and observing that “a jury trial on factual issues concerning an insurance policy long has been an established practice in this country”).

168. It is also worth noting that although UM coverage is an invention of the twentieth century (as is the motor vehicle), the issues to be decided in a UM case are all common law issues that have been around for hundreds of years: *negligence*, *proximate cause*, and *damages*. These common law issues determine what amount, if any, the injury victim is “legally entitled to recover” from the owner or operator of an uninsured motor vehicle.

169. *Lisanti v. Alamo Title Ins. of Tex.*, 55 P.3d 962, 968 (N.M. 2002) (holding that mandatory arbitration regulation violated the state’s constitutional right of trial by jury in a suit against title insurance company for breach of contract).

170. *Id.*

171. *Id.* at 963.

ance authority to promulgate regulations, and based on that authority, the superintendent had adopted a regulation requiring arbitration of any title insurance claims seeking less than \$1,000,000.¹⁷² Also pursuant to state law, the superintendent of insurance had drafted a uniform title insurance policy (including an arbitration clause), and state statute required that title insurance companies could only use the forms promulgated by the superintendent.¹⁷³

The Lisanti asserted that mandatory arbitration violated their right to a jury trial under the state constitution.¹⁷⁴ In language very similar to that of the Illinois Constitution, the New Mexico Constitution provides that “the right to trial by jury as it has heretofore existed shall be secured to all and remain inviolate.”¹⁷⁵ Commenting upon this provision, the New Mexico Supreme Court explained that “the phrase ‘as it has heretofore existed’ refers to the right to a jury trial as that right existed in the Territory of New Mexico immediately prior to the adoption of the state constitution.”¹⁷⁶ Responding to the insurance company’s argument that the right to sue under a title insurance policy did not exist at the time the state constitution was adopted, the court noted:

[W]e think that the relevant question is whether the more generally described cause of action, such as breach of contract or breach of fiduciary duty, was triable to a jury in 1912. The inquiry urged by Alamo is too narrow. It would allow the evisceration of the right to a jury trial on traditional common law claims when those claims are brought in a factual context that could not have existed in 1912. It is unreasonable, for example, to say that no jury trial right attaches to a breach of contract claim concerning the purchase of a computer simply because computers did not exist when the New Mexico Constitution was adopted.¹⁷⁷

Paraphrasing the Supreme Court of New Mexico’s statement, we can make a parallel statement regarding UM cases in Illinois: It is unreasonable to say that no right to a jury trial attaches to a breach of contract claim concerning UM coverage simply because UM coverage did not exist when the Illinois Constitution was adopted.

For the above reasons, the Illinois statutory provision requiring arbitration of UM cases violates the jury trial right guaranteed by the Illinois Constitution, and the statute is therefore unconstitutional.

6. Mandatory Arbitration Deprives Injury Victims of Equal Protection

The Illinois UM arbitration provision is also unconstitutional because it deprives UM injury victims of equal protection of the laws guaranteed by the Illinois Constitution, as well as the Fourteenth Amendment of the United States Constitu-

172. *Id.*

173. *Id.* at 963-64.

174. *Id.* at 964.

175. *Id.* at 965. The Illinois Constitution provides: “The right of trial by jury as heretofore enjoyed shall remain inviolate.” ILL. CONST. art. 1, § 13.

176. *Lisanti*, 55 P.3d at 965.

177. *Id.* (internal citations omitted).

tion. If the UM arbitration statute did not require the escape clause mechanism, then one might argue that the statute is a rational means of obtaining prompt and economical resolution of disputes. However, even without the escape clause, it would still be constitutionally flawed, because the statute only applies to UM cases. By cutting off access to the courts by UM injury victims, the statute irrationally discriminates against that class of injury victims, depriving them of equal protection of the laws.

Other injury victims in Illinois are able to vindicate their legal rights in a court of law, using well-established rules of evidence and procedure, and with the safeguard of an appellate review for legal errors or substantial factual errors. To be even more specific, other victims of motorists who are *insured* are able to vindicate their legal rights in a court of law. The injuries and damages suffered by victims of *uninsured* motorists are equally serious, and equally deserving of protection by the same legal system.

B. Reed in a Larger Context: The Mandatory Arbitration Problem

1. Consensual Arbitration

Arbitration has been described as “a process in which a third party (or panel of third parties) not a judge renders a decision in a dispute.”¹⁷⁸ As a method of dispute resolution, arbitration has been used since the earliest times.¹⁷⁹ Until the early twentieth century, United States courts refused to enforce private agreements to arbitrate disputes on the grounds that such agreements improperly “ousted” the court system of its jurisdiction.¹⁸⁰ However, in the early 1920s, in response to demands by business and commercial interests, New York and New Jersey passed the first statutes making private arbitration agreements enforceable.¹⁸¹ Shortly thereafter, in 1925, the United States Congress passed a similar statute, the FAA,¹⁸² with enforcement provisions and procedures originally believed to apply only to disputes that had the potential to wind up in federal court.¹⁸³

The proponents of these early arbitration statutes were businessmen who wanted a cheaper, faster, and more private method of resolving business-versus-business disputes than that available in the court system. At the time, the prevailing intention was that arbitration would be used by parties who had comparable bargaining power, and who mutually agreed to its use:

The passage of the FAA was non-controversial. Virtually no interest group or legislator rose to speak in opposition to the bill. However, when a few persons did question whether the FAA might allow busi-

178. Jean R. Sternlight, Arbitration Class Materials 1 (2003) (unpublished manuscript, on file with author).

179. LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION & LAWYERS 503 (2d ed. 1997).

180. CARRIE J. MENKEL-MEADOW ET AL., DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL 481 (2004).

181. *Id.* at 486.

182. 9 U.S.C. §§ 1-307 (2004).

183. RISKIN & WESTBROOK, *supra* note 179, at 516.

nesses to use form contracts to impose arbitration on unwilling persons such as employees or insurance customers, the advocates of the bill assured Congress that this was not the intent of the legislation.¹⁸⁴

As Professor Jean Sternlight states: “Congress passed the FAA to enable two or more well-informed businesses voluntarily and knowingly to select arbitration in lieu of litigation, rather than to allow large businesses to impose binding arbitration on ignorant consumers and employees through the use of form contracts.”¹⁸⁵

During the following decades, support for private arbitration gained momentum, and more states passed their own statutes, many modeled on the Uniform Arbitration Act.¹⁸⁶ Sternlight has explained that up until 1966, court decisions in the federal and state systems remained true to the original intent that “arbitration should be based on actual knowing consent by both parties.”¹⁸⁷ Then, things started to change. From 1967 to 1982, stating that arbitration should be favored in the context of international commerce, the United States Supreme Court planted the seeds for reinterpretation of the FAA. But, it did not yet rule that the FAA applied to state courts, or that by means of the FAA, supposedly private arbitration clauses could preempt state law—or state constitutions.¹⁸⁸

2. *Consensual Arbitration Becomes Mandatory Arbitration*

A significant turning point came in 1983, when the United States Supreme Court announced that “courts should favor arbitration over litigation.”¹⁸⁹ However, the courts have failed to examine the origin or constitutional implications of such favoritism:

[T]he Supreme Court and lower courts have frequently reiterated the contention that federal policy favors arbitration over litigation, but have never explained the source of this policy The Court has not made any attempt to reconcile the supposed federal policy favoring arbitration with the Constitution’s mandate of jury trials, due process, and decisions by life-tenured judges.¹⁹⁰

184. MENKEL-MEADOW ET AL., *supra* note 180, at 487 (emphasis added).

185. Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court’s Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TULANE L. REV. 1, 14-15 (1997) [hereinafter Sternlight, *Rethinking*] (discussing how so-called “agreements” to arbitrate, as enforced by courts, may unconstitutionally deprive persons of their right to a jury trial, a judge, and due process of law).

186. RISKIN & WESTBROOK, *supra* note 179, at 515. See also Timothy J. Heinsz, *The Revised Uniform Arbitration Act: Modernizing, Revising, and Clarifying Arbitration Law*, 2001 J. DISP. RESOL. 1 (2001) (commenting on the modifications made in the most recent version of the UAA).

187. Sternlight, *Rethinking*, *supra* note 185, at 16.

188. *Id.* at 16-17.

189. *Id.* at 17.

190. *Id.* at 18-19.

In subsequent years, the Supreme Court has promoted an extraordinarily broad application of the FAA,¹⁹¹ and it has held that the FAA, in conjunction with “private” arbitration clauses, can preempt a wide variety of state laws, many designed to protect consumers and employees.¹⁹² In effect, this has given businesses the capacity to evade statutes and administrative regulations that were enacted to protect the public.¹⁹³ In his 1997 article, David Schwartz observes:

The Supreme Court has created a monster. With the Court’s enthusiastic approval, pre-dispute arbitration clauses—agreements to submit *future* disputes to binding arbitration—have increasingly found their way into standard form contracts of adhesion.

....

The doctrine of rigorous enforcement of adhesive pre-dispute arbitration clauses—what I call “compelled arbitration”—has given large firms the power to displace the judiciary from its role in enforcing common law claims and statutory rights This is particularly troubling where regulatory statutes are involved. The enforcement of adhesive arbitration clauses allows firms to lessen the regulatory impact of statutory claims—in short, to *deregulate themselves*.¹⁹⁴

It gets worse. In a ruling that gives predatory contracts unprecedented power, the Supreme Court has actually held that the FAA preempts state statutes designed to protect consumers from hidden “agreements” to arbitrate:

[I]n *Doctor’s Associates, Inc. v. Casarotto*, an 8-1 Court held that the FAA even preempted a state’s requirement that a contract containing an arbitration clause include notification on the first page of the contract. *Allied-Bruce* and *Doctor’s Associates*, taken together, will void many

191. See *id.* at 19-39. In one case, the Court condescendingly noted: “The pre-New Deal Congress that passed the Act in 1925 might well have thought the Commerce Clause did not stretch as far as has turned out to be the case.” *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 275 (1995). The Court held that even if the parties do not “contemplate” an interstate commerce transaction, the FAA nevertheless applies to all transactions as broadly as “the limits of Congress’ Commerce Clause power.” Curiously, however, despite the plain language of the FAA, the court provided that it does not apply to “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce,” other courts have held that it applies to “virtually all employees involved in interstate commerce.” Sternlight, *Rethinking*, *supra* note 185, at 19.

192. See generally Sternlight, *Rethinking*, *supra* note 185, at 19-39.

193. It is critical to understand that such an arbitration “agreement” is not limited to only changing *procedural rights* by substituting an arbitration proceeding in place of a court adjudication. Such an “agreement” can also revise the *substantive rights* of the parties, even eliminating some of those rights.

194. David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 36-37 (1997) (emphasis added).

laws enacted by states to protect consumers and others from potentially unfair arbitration¹⁹⁵

Thus, under current law, parties with superior bargaining power can draft their contracts to force (or trick) people they deal with into so-called “agreements” to arbitrate any dispute that may arise between the parties. They can thereby “oust” the courts of their jurisdiction, “deregulate” themselves from many annoying statutes and regulations, and force upon the weaker party an arbitration system under which legal and constitutional rights can be diminished—or extinguished.

Mandatory arbitration “agreements” can be used to give companies an advantage over consumers or employees by: (1) requiring high “fees” to initiate a claim; (2) providing that arbitration will take place in a distant location; (3) abolishing certain remedies; (4) preventing class actions; (5) “rigging” the selection of arbitrators; and (6) shortening the time limit in which to bring a claim.¹⁹⁶

In exchange for whatever private system of “justice” is forced upon them, consumers and employees can lose: (1) the right to a jury; (2) the right to a public hearing; (3) the right to discovery of evidence in the possession of others; and (4) the right to appeal legal errors or substantial factual errors.¹⁹⁷

Some supporters of mandatory arbitration argue that even if it is presented in a form contract, it is accepted voluntarily, and that mandatory arbitration is beneficial not only for the companies that use it, but also for society as a whole, as well as individual consumers and employees.¹⁹⁸ Among the benefits to consumers and employees (it is argued), is the ability to resolve disputes more quickly and inexpensively.¹⁹⁹ Stephen Ware contends: “Relative to litigation, arbitration provides opportunities for a business to save on its dispute-resolution costs. If arbitration does, in fact, lower these costs then arbitration lowers the prices (and interest rates) consumers pay because competition forces businesses to pass their cost-savings on to consumers.”²⁰⁰

Ware’s contention may be at least partially true, but not all of the supposed cost-savings are likely to be distributed to consumers; some portion will probably be retained by businesses to increase their profit margins. And just *who* should decide which legal rights—or constitutional rights—get “processed away” so that businesses can achieve greater profit margins? Should *businesses* decide that?

3. *How Reed Fits in With the Mandatory Arbitration Problem*

Although many of the problems with mandatory arbitration are present in the *Reed* case, and in Illinois UM arbitration in general, the unique circumstances in

195. Sternlight, *Rethinking*, *supra* note 185, at 20 (internal citations omitted). In *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995), the Supreme Court held that the FAA (with its power to preempt state law) applies to all transactions as broadly as “to the limits of Congress’ Commerce Clause power.”

196. MENKEL-MEADOW ET AL., *supra* note 180, at 548.

197. *Id.*

198. *Id.* at 552.

199. *Id.*

200. Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 89 (2001).

Reed resulted in the issues being framed quite differently.²⁰¹ Specifically, the big difference is the Illinois statute.²⁰²

Whereas in the more general consumer context a suit contesting mandatory arbitration might involve the issue of whether a consumer knowingly agreed to an arbitration clause, in the Illinois UM context that is not an issue because the Illinois UM statute requires the arbitration clause.²⁰³ With the statutory provision in place, an insurance customer's agreement—or even knowledge that the clause is present in the insurance policy—is not relevant.

Similarly, in the more general consumer context, consumers might argue that an arbitration procedure designed by a business entity is unfair or unconscionable. In *Reed*, the plaintiff made that argument regarding the escape clause, but the majority rejected it, again on the grounds that the UM statute required the escape clause.

Thus, another way to look at the *Reed* situation is that insurance consumers in Illinois are one step behind those fighting mandatory arbitration in the more general consumer context. That is, until the arbitration provision in the Illinois UM statute is declared unconstitutional, or until it is corrected by the General Assembly, that provision puts an additional barrier between UM injury victims and the right to a jury trial, due process, and equal protection of the laws. Once that barrier is broken down, Illinois insurance consumers will then be confronting the next question, namely: should the insurance industry—with its superior bargaining position—be allowed to force customers to give up their constitutional rights, and submit to an arbitration system designed by the insurance industry itself?

In the national debate over mandatory arbitration, one major issue is whether consumers voluntarily and knowingly agree to arbitration. Even if it is lurking in the fine print, customers purchasing a product or service may have an opportunity to discover the arbitration clause before they make their final decision. In contrast, the insurance customer is in a much worse position, because the insurance customer does not get to inspect the product (the insurance contract) at the time that he or she is purchasing it. The standard practice in the insurance industry is for the customer to fill out an application, pay for the insurance, and then, several days or weeks later, the insurance company mails a copy of the insurance policy to the customer.

Commenting on “agreements” to arbitrate in insurance policies, Widiss states:

[A]n insurance policy represents neither a voluntary written agreement by a purchaser to submit future disputes to arbitration nor a knowledgeable waiver on behalf of all other persons who are insured (and thus may become claimants) of the right to a judicial determination. The processes and procedures incident to an adjudication in the courts—especially pre-trial procedures such as discovery, the opportunity for a jury trial, and the right to an appellate review of the trial court actions—are frequently very important matters. Claimants should not lose these rights as a conse-

201. *Reed v. Farmers Ins. Group*, 720 N.E.2d 1052 (Ill. 1999)

202. See 215 ILL. COMP. STAT. § 5/143a (2003).

203. *Id.* (demanding that “[n]o policy shall be renewed, delivered, or issued for delivery . . . unless it is provided therein that any dispute . . . shall be submitted to the American Arbitration Association”).

quence of an arbitration clause set forth by insurers in the midst of a multipaged and complicated insurance policy form.²⁰⁴

With respect to the problem of bargaining power, in the general consumer context many customers dealing with a business entity may be presented with a “take-it-or-leave-it” choice. If the consumer wants a credit card, telephone service, or any number of other products or services, then they may have no practical choice but to accept the so-called “agreement” to arbitrate contained in the form contract prepared by the business entity. If a particular consumer is knowledgeable enough to look in the fine print for an arbitration “agreement,” and if that consumer would rather avoid accepting such a condition in the contract, then that consumer does have two other choices: either attempt to buy the product or service from another source that does not insist on an arbitration clause, or simply forego purchasing the product or service from any source.

As a practical matter, this may not give the consumer very much real choice, but in contrast, the insurance customer in Illinois has no choice whatsoever. By statute, owners of vehicles registered in Illinois are compelled to purchase automobile insurance.²⁰⁵ Even if the Illinois statute did *not* require arbitration of UM cases, the insurance customer would still be compelled by the state to purchase insurance, and—because the insurance industry clearly favors arbitration over the courts—insurance companies probably would still impose arbitration by means of their policies. Even if the Illinois statute did *not* require arbitration of UM cases, unless legislation is enacted to protect insurance consumers, the end result may be that they will still wind up with an arbitration clause, this time forced upon them by the superior bargaining position of the insurance industry.

Finally, perhaps the most important thing to understand about how Illinois UM cases fit in with the general problem of mandatory arbitration is they do not have to fit in. To put it another way, unlike mandatory arbitration imposed by other business entities, states do have the power to prevent insurance companies from imposing mandatory arbitration on their state-compelled customers; how states can accomplish this is described in the next section.

C. Recommended Action

For the reasons set forth above in Part IV, when it next has a proper case before it, the Illinois Supreme Court should reverse *Reed* and hold: (1) that the Illinois statutory provision requiring the escape clause is unconstitutional; and (2) that the Illinois statutory provision requiring arbitration of UM cases is unconstitutional.

However, judicial action alone will not be enough to protect insurance consumers and injury victims; legislative action is also imperative. The reason for this is that even if these statutory provisions are declared unconstitutional, the insurance industry would still attempt to impose mandatory arbitration through their insurance policies.

204. WIDISS, *supra* note 4, § 23.15.

205. 625 ILL. COMP. STAT. 5/7-601 (2002).

Therefore, the Illinois General Assembly should amend the Arbitration Act and/or the Insurance Code to accomplish the following: (1) prohibit insurance policies from requiring arbitration; and (2) allow arbitration of insurance disputes only when both parties knowingly agree to arbitrate after a dispute has arisen.

Statutes which accomplish this—without impairing the ability of other businesses to use arbitration clauses reached with true agreement—are already in existence in several states. Missouri, for example, achieves this by means of its Uniform Arbitration Act, which declares that any arbitration agreement “between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.”²⁰⁶ However, the Missouri legislature curtails the scope of the act by providing that “contracts of insurance and contracts of adhesion” are exempted and courts may reject enforcement of an arbitration clause in those circumstances.²⁰⁷

In comparison, Georgia, while requiring insurers to include a UM provision in all policies “issued or delivered” within the state, prohibits the imposition of arbitration in UM cases by this provision within the insurance code:

No endorsement or provisions shall contain a provision requiring arbitration of any claim arising under any endorsement or provisions, nor may anything be required of the insured, subject to the other provisions of the policy or contract, except the establishment of legal liability; nor shall the insured be restricted or prevented, in any manner, from employing legal counsel or instituting legal proceedings.²⁰⁸

Neither of these statutes prohibit arbitration if both parties *knowingly agree* to arbitrate *after a dispute has arisen*. Arbitration can have advantages over litigation, but the law should not allow a party with stronger bargaining power to force it upon another.

Either the Missouri or Georgia approach would work in Illinois. But whatever approach is used, it is important that any statutory solution be specifically directed toward the business of insurance, in order that it may rely upon the McCarran-Ferguson Act to protect it from federal preemption.²⁰⁹ Under current law, a generally-phrased state statute prohibiting arbitration would be preempted by the FAA, but statutes that “regulate the business of insurance” are *not* subject to such preemption because “the McCarran-Ferguson Act . . . gives state laws regulating the business of insurance primacy over federal law.”²¹⁰

For example, in a 2001 case, the Missouri statute quoted above was challenged by an insurance company seeking to enforce an arbitration clause in its

206. MO. REV. STAT. § 435.350 (2002) (regarding the validity of arbitration agreements and exceptions).

207. *Id.*

208. GA. CODE ANN. § 33-7-11 (2004).

209. 15 U.S.C. §§ 1011-1015. For a good example of the McCarran-Ferguson Act in action, see *Ciccarelli v. Blue Cross of Cal.*, 2003 WL 150045, at *5 (Cal. Ct. App. 2003). The *Ciccarelli* court explains, “An act of Congress may not be construed to ‘invalidate, impair, or supercede’ a state law enacted ‘for the purpose of regulating the business of insurance’ unless the federal act ‘specifically relates to the business of insurance.’” *Id.* (emphasis in original) (quoting *Smith v. Pacificare Behavioral Health of Cal.*, 113 Cal Rptr. 2d 140 (Cal. Ct. App. 2001)).

210. JERRY, *supra* note 3, §§ 84, 21. See also Lamson, *supra* note 6, at 248-51.

policy. The company argued that the FAA preempted Missouri's anti-arbitration provision, but the federal appeals court upheld the Missouri statute, in accord with the McCarran-Ferguson Act.²¹¹

Finally, any legislative solution in Illinois should consider a few specifics about how UM cases would be handled in the court system. As mentioned above, it would not be difficult for the courts to re-assume jurisdiction of these cases because the issues involved are the same issues that are involved in other auto collision cases, which the courts handle on a daily basis. But whether the uninsured driver is known or unknown, if suit is commenced against that driver there must be a mechanism by which the UM insurance company can receive notice of the suit, and an opportunity to defend, either in the name of the uninsured driver or its own name.

The Georgia UM statute contains several provisions designed to give the insurance company adequate notice, particularly taking into account the fact that a defendant's lack of insurance may not be discovered until litigation is underway. Regarding service of summons on the UM insurance company, the Georgia statute also provides: "In any case arising under this Code section where service upon an insurance company is prescribed The return of service upon the insurance company shall in no case appear upon the original pleadings in such case."²¹² This latter portion seems intended to allow the insurance company to remain in the background, and thus avoid the "deep pockets" problem.

With respect to the insurance company's right to defend, the Georgia UM statute also provides:

In the case of a known owner or operator of such vehicle, either or both of whom are named as a defendant in such action, the insurance company issuing the policy [containing UM coverage] shall have the right to file pleading and take other action allowable by law in the name of either the known owner or operator or both or itself.²¹³

If either the owner or operator of any vehicle causing injury or damages is unknown, an action may be instituted against the unknown defendant as "John Doe," and a copy of the action and all pleading thereto shall be served as prescribed by law upon the insurance company issuing the policy [containing UM coverage] as though the insurance company were actually named as a party defendant; and the insurance company shall have the right to file pleadings and take other action allowable by law in the name of "John Doe" or itself.²¹⁴

211. *Standard Sec. Life Ins. Co. of N.Y. v. West*, 267 F.3d 821, 823 (8th Cir. 2001) (holding that FAA was "inverse-preempted" under McCarran-Ferguson Act, by Missouri Arbitration Act that prohibited insurance contracts from using "pre-dispute" arbitration clauses).

212. GA. CODE ANN. § 33-7-11(d) (2004).

213. *Id.*

214. *Id.*

V. CONCLUSION

Most states require owners of vehicles to purchase liability insurance to protect others they may injure, but there will always be irresponsible or insolvent drivers who fail to comply with the law. When a driver with no insurance injures another driver—or a passenger—or a pedestrian—UM coverage becomes an important method by which the injury victim can be compensated for medical bills, lost earnings, and other damages suffered from the impact.

When an injury victim must make a claim against their own insurance company for uninsured motorist benefits, it is important to remember that they have paid a premium—perhaps for several years—in order to have this protection. And when they present a claim for benefits, it is not fair—and it is not constitutional—to treat those injury victims as second-class citizens by forcing them into a system that deprives them of access to the courts, deprives them of the right to a jury trial, and deprives them of the other protections of the law that other injury victims are entitled to and receive every day. And it is especially appalling to force those injury victims into an arbitration system in which, if they lose, it is binding—but if they win, their insurance company gets a new trial.