Arbitration of Uninsured Motorist Claims Not Required
by Lisa Mann
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Is arbitration of uninsured motorist coverage claims required, upon the demand of one party? The New Mexico Supreme Court says "No."

In two consolidated cases, *McMillan v. Allstate Indemnity Company*, No. 27,897, and *Gallegos v. Allstate Indemnity Company*, 28,055, decided on November 20, 2003, the New Mexico Supreme Court considered the validity of a clause in an Allstate insurance policy that provided: If We Cannot Agree If the insured person or we don't agree on that person's right to receive any damages or the amount, then with the consent of both the insured and Allstate the disagreement will be settled by arbitration. Any such arbitration will not apply to coverage issues. If the insured person and we do not agree to arbitrate, then the disagreement will be resolved in a court of competent jurisdiction.

Although the policy was approved by the New Mexico Superintendent of Insurance, both *McMillan* and *Gallegos* challenged that provision as violating the Superintendent's regulations governing uninsured motorist coverage, specifically § NMAS 13.12.3.17.8.1. That regulation provides: Mandatory Arbitration. If any person making a claim under this endorsement and the company do not agree that the person is legally entitled to recover damages from the owner or operator of an uninsured motor vehicle ... or do not agree as to the amount payable..., then each party shall, upon written demand of either, select a competent and disinterested arbitrator. The two arbitrators so named shall select a third arbitrator, or if unable agree thereon within 30 days, then upon request of the insured or the company, such third arbitrator shall be selected by a judge of a court of record in the county and state in which the arbitration is pending. The arbitrators shall then hear and determine the question or questions so in dispute and the decision in writing of any two arbitrators shall be binding upon the insured and the company... *McMillan* and *Gallegos* relied on this provision in support of their contention that the Allstate policy provision had to be reformed, to include the requirement of mandatory arbitration upon the demand of either party.

In a unanimous opinion, the New Mexico Supreme Court rejected this argument. First, Justice Chavez writing for the Court noted that neither the New Mexico Supreme Court nor the Legislature had ever expressly mandated arbitration as the sole method for adjudicating uninsured motorist claims. The Court rejected any suggestion that such a requirement could be inferred from the New Mexico Uniform Arbitration Act, noting that the Act invalidated arbitration awards where there existed no prior agreement to arbitrate. The Court acknowledged the strong public policy encouraging arbitration as a means to relieve congestion in the court system, speed up resolution of disputes and make resolution of cases more economical to all parties, but noted: "Here, however, the issue is not whether our courts should enforce a lawful agreement to arbitrate, but instead whether New Mexico law compels arbitration where one of the parties has not consented." The Court found "no statutory or public-policy grounds to compel arbitration" where the parties contracted to arbitrate only upon the consent of both parties.

The Court refused to require inclusion in every policy of the Superintendent's language requiring mandatory arbitration, relying on NMSA 1978 § 59A-18-17(B) (1993), which allows the Superintendent to approve any substitute provision which is "not less favorable in any particular to the insured … than the provision otherwise required[.]" The Court found that "Allstate's consensual arbitration provision generally does provide a more favorable benefit to the insured than the mandatory arbitration provision prescribed in the … regulations" because the provision did allow for binding arbitration, but allowed either party to forego arbitration in favor of a trial by jury. "Given the constitutional concerns that would be raised by compelling two private entities to arbitrate a private contract claim, it would be truly anomalous for us to find that it was an abuse of discretion for the Superintendent to approve a contract provision that preserved both parties' right to a trial by jury."

Accordingly, the New Mexico Supreme Court concluded that:

Allstate's consensual arbitration provision in its standard UM endorsement does not violate New Mexico law or public policy. While in no way discounting New Mexico's public-policy preference favoring arbitration, we hold that the Legislature has not expressly required binding arbitration in the adjudication of UM disputes, and the rules and regulations promulgated by the Department of Insurance do not require binding arbitration where the Superintendent of Insurance has approved a substitute UM endorsement that is more favorable to the insured. We hold that, in the context of UM disputes between insurer and insured, where the UM endorsement provides for arbitration only upon the consent of both parties, and where the Superintendent of Insurance has approved such an endorsement, New Mexico law does not compel binding arbitration.

This is a significant holding, particularly in light of the New Mexico Supreme Court's recent decision in *Padilla v. State Farm Mut. Auto. Ins. Co.*, 2003-NMSC-011. In *Padilla*, the Supreme Court refused to upheld an "escape hatch" provision that would have allowed an appeal of a UM arbitration award above Minimum Financial Responsibility Act limits. The effect of the *Padilla* decision's requirement that all UM arbitration awards are binding, makes the consensual arbitration provision upheld in this case a viable and important option.

Counsel for Allstate: Lisa Mann and Jennifer A. Noya, Modrall, Sperling, Roehl, Harris & Sisk, P.A.

Counsel for Gallegos: David Berardinelli Counsel for McMillan: Victor Titus