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# Rodgers Builders, Inc. v. McQueen: Arbitration and Punitive Damages

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# *Rodgers Builders, Inc. v. McQueen:* Arbitration and Punitive Damages

In recent years arbitration has gained popularity as a method of dispute resolution.[1] Arbitration obviates the expense and delay of litigation.[2] Moreover, in a commercial context, arbitration provides a forum in which parties can resolve disputes according to business judgment and experience rather than rules of law.[3] As with most other states and the federal government, North Carolina has encouraged the use of arbitration by enacting legislation that provides a statutory framework for the process.[4] Early commentators believed that arbitration should serve only to resolve ordinary business disputes that involve questions of fact and simple questions of law.[5] Modern statutes, however, permit parties to submit virtually any existing dispute to arbitration and to authorize binding agreements to arbitrate all future claims arising out of contracts.[6] In addition, modern statutes typically provide that arbitrators may fashion remedies without regard to legal standards.[7]

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1. *See* Wilner, *Preface* to M. DOMKE, DOMKE ON COMMERCIAL ARBITRATION at v (rev. ed. 1984).

2. *See* Cohen & Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 269 (1926).

3. *Id.*

4. In 1973 the North Carolina General Assembly enacted the Uniform Arbitration Act. Act of May 22, 1973, ch. 676, 1973 N.C. Sess. Laws 1006 (codified at N.C. GEN. STAT. §§ 1-567.1 to .20 (1983)). There are six "essential aspects" of a "modern" arbitration statute:

> 1. irrevocability of any agreement to submit future disputes to arbitration;
> 2. power of a party, pursuant to a court directive, to compel a recalcitrant party to proceed to arbitration;
> 3. provisions that any court action instituted in violation of an arbitration agreement may be stayed until arbitration in the agreed manner has taken place;
> 4. authority of the court to appoint arbitrators and fill vacancies when the parties do not make the designation, or when arbitrators withdraw or become unable to serve during arbitration;
> 5. restrictions on the court's freedom to review the findings of facts by the arbitrator and his application of the law;
> 6. specification of the grounds on which awards may be attacked for procedural defects, and of time limits for such challenges.

M. DOMKE, *supra* note 1, § 4:01, at 27. The Uniform Arbitration Act contains all six of these attributes. UNIF. ARBITRATION ACT § 1, 7 U.L.A. 4 (1978) (irrevocability "save upon such grounds as exist at law or in equity for the revocation of any contract."); *id.* § 2(a), at 23 (staying of court actions instituted in violation of an agreement to arbitrate); *id.* § 4, at 35 (appointment of arbitrators by court); *id.* § 12, at 55 (scope of review); *id.* § 13, at 68 (modification of awards). Twenty-six states have adopted the Uniform Act, M. DOMKE, *supra* note 1, § 4:02, at 30, and forty states have enacted "modern" arbitration statutes. *Id.* § 4:01, at 28 (rev. ed. 1984 & Supp. 1985). The Federal Arbitration Act is codified at 9 U.S.C. §§ 1-14 (1982).

5. *E.g.*, Cohen & Dayton, *supra* note 2, at 281.

6. *E.g.*, N.C. GEN. STAT. § 1-567.2(a) (1983):

> Two or more parties may agree in writing to submit to arbitration any controversy existing between them . . . or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract . . . . Such agreement or provision shall be valid, enforceable, and irrevocable except with the consent of all the parties, without regard to the justiciable character of the controversy.

*But see* 9 U.S.C. § 2 (1982) (using nearly identical language, but limited to commercial disputes).

7. *E.g.*, N.C. GEN. STAT. § 1-567.13(a)(5) (1983) ("[T]he fact that the relief was such that it

Despite the broad scope of modern arbitration statutes, many courts have held that certain issues may not be submitted to arbitration because public policy requires resolution in a judicial forum.[8] Also, even when the underlying issue is arbitrable, courts have vacated arbitration awards on public policy grounds.[9] In each of these two instances, the courts vitiate or diminish the advantages of arbitration.[10] Thus, when the arbitrability of an issue or an arbitration award is challenged on public policy grounds, the courts, with some difficulty, must weigh the specific public policy asserted in the challenge against the general policy favoring arbitration.[11]

In *Rodgers Builders, Inc. v. McQueen*[12] the North Carolina Court of Appeals held that punitive damages may be awarded in arbitration.[13] Although North Carolina courts had previously not addressed the issue whether claims for punitive damages are arbitrable, other jurisdictions have decided the question and have reached conflicting results. Some courts have held that public policy prohibits arbitrators from awarding punitive damages,[14] while other courts have ruled otherwise because a strong state policy favors arbitration.[15] The *Rodgers* court, by adopting the latter position, has increased the availability and effectiveness of arbitration as an alternative to litigation. The question remains, however, whether any limits will or should be imposed on the power of arbitrators to award punitive damages.[16]

On December 6, 1982, plaintiff Rodgers Builders, Inc. contracted with defendant McQueen Properties, Ltd. to construct a multi-unit housing project on land controlled by defendant James McQueen.[17] The contract contained a clause that provided that any claims arising out of the contract would be submitted to arbitration.[18] Before the project was completed, a dispute arose between the parties and plaintiff demanded arbitration.[19] An arbitration hearing was scheduled for December 14, 1983, but plaintiff later amended its demand for arbitration to seek additional damages and to join an additional party. The arbi-

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could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.").

8. M. DOMKE, *supra* note 1, § 19:02, at 281.

9. M. DOMKE, *supra* note 1, § 33:03, at 469-70.

10. This problem becomes apparent when, for example, the underlying issue is held to be nonarbitrable. If the award only is deemed to violate public policy, the issue still may be arbitrated. But court review of the award defeats the goal of avoiding litigation through arbitration and undermines the parties' confidence in arbitration as an effective and final means of dispute resolution. *See* Note, *Judicial Review of Arbitration: The Role of Public Policy*, 58 NW. U.L. REV. 545, 546 (1963).

11. *See* Wilko v. Swan, 346 U.S. 427, 438 (1953); Note, *supra* note 10, at 547.

12. 76 N.C. App. 16, 331 S.E.2d 726 (1985), *cert. denied*, 315 N.C. 590, 341 S.E.2d 29 (1986).

13. *Id.* at 28-29, 331 S.E.2d at 734.

14. *See infra* notes 52-58 and accompanying text.

15. *See infra* notes 59-67 and accompanying text.

16. *See infra* notes 105-110 and accompanying text.

17. *Rodgers*, 76 N.C. App. at 18, 331 S.E.2d at 728.

18. The clause read: " All claims, disputes and other matters in question between the . . . [parties] arising out of, or relating to, the Contract Documents or the breach thereof, . . . shall be decided by arbitration . . . ." *Id.*

19. *Id.* at 18-19, 331 S.E.2d at 728.

trator continued the hearing until January 1984.[20] Before the arbitration process had ended, plaintiff instituted a court action against the defendant for money owed for labor and materials, for fraud, and for unfair and deceptive trade practices, requesting that trial be delayed until the outcome of arbitration.[21] In February 1984, an arbitration award granting plaintiff 407,259 dollars was entered and confirmed.[22] Plaintiff then amended its complaint to allege fraud, unfair and deceptive trade practices, and negligent misrepresentation, and to include a claim for one million dollars in punitive damages.[23] At trial, the court granted defendant's motion for summary judgment on the ground that plaintiff's claims were barred by the doctrine of res judicata.[24]

The North Carolina Court of Appeals considered whether the doctrine of res judicata barred plaintiff's claims.[25] Plaintiff argued that the tort and unfair trade claims were not arbitrable because they exceeded the scope of the arbitration agreement.[26] Thus, plaintiff contended that the doctrine of res judicata would not apply because its claims "could not or should not have been brought forward in the arbitration proceeding."[27]

In an opinion by Judge Whichard,[28] the court of appeals found that plaintiff's tort claims were sufficiently related to the contract and its breach to come within the scope of the arbitration agreement.[29] The court also held that plaintiff's unfair and deceptive trade practices claim was arbitrable.[30]

The court rejected plaintiff's argument that public policy prohibits arbitration of punitive claims, emphasizing the primacy of the state policy favoring arbitration.[31] Because all of the claims were arbitrable and because they fit

20. *Id.* at 19, 331 S.E.2d at 728.

21. *Id.*

22. *Id.*

23. *Id.* at 19-21, 331 S.E.2d at 728-30.

24. *Id.* at 22, 331 S.E.2d at 730.

25. *Id.*

26. *Id.* at 23, 331 S.E.2d at 731.

27. *Id.* A confirmed arbitration award has the same res judicata effect as a final judgment entered by a court. N.C. GEN. STAT. § 1-567.15 (1983) (an order confirming an award "shall be . . . enforced as any other judgment or decree"); M. DONKE, *supra* note 1, § 39:04, at 510. If a particular claim is not arbitrable, however, the claim will not be barred in a subsequent court action even though it arises out of the same cause of action. *See* M. DOMKE, *supra* note 1, § 39:04, at 511.

28. *Rodgers*, 76 N.C. App. at 18, 331 S.E.2d at 728.

29. *Id.* at 25-26, 331 S.E.2d at 732. A dispute may not be arbitrated unless the parties have agreed to submit it to arbitration. Charlotte City Coach Lines, Inc. v. Brotherhood. of R.R. Trainmen, 254 N.C. 60, 68, 118 S.E.2d 37, 43 (1961); M. DOMKE, *supra* note 1, § 12:00, at 151. Other courts have held that arbitration clauses similar to the one discussed in *Rodgers*, *supra* note 18, are broad enough to include tort claims that arise out of the contractual relationship of the parties. *E.g.*, Acevedo Maldonado v. PPG Indus., Inc., 514 F.2d 614, 616 (1st Cir. 1975).

30. *Rodgers*, 76 N.C. App. at 27, 331 S.E.2d at 732. Plaintiff contended that the claim it had filed in court under N.C. GEN. STAT. § 75-1.1 (1985) was not arbitrable because the claim raised public interest implications. *Rodgers*, 76 N.C. App. at 26, 331 S.E.2d at 732. The court held that plaintiff's claim was arbitrable because it was "essentially a private dispute" and was not "asserted to vindicate any strong public policy which requires it to be litigated rather than arbitrated." *Id.* at 27, 331 S.E.2d at 733. Other courts also have held that such claims are arbitrable, distinguishing unfair trade practice claims from antitrust claims which are not arbitrable because they involve strong public interest factors. *See, e.g.*, Flower World of Am., Inc. v. Wenzel, 122 Ariz. 319, 323, 594 P.2d 1015, 1019 (Ariz. Ct. App. 1978).

31. *Rodgers*, 76 N.C. App. at 28-29, 331 S.E.2d at 734.

within the scope of the arbitration agreement, the court held that the res judicata effect of the prior arbitration award barred plaintiff's claims.[32]

The *Rodgers* decision may be explained in terms of North Carolina's strong state policy favoring arbitration. North Carolina courts have ruled that, by enacting the Uniform Arbitration Act,[33] the general assembly evinced a legislative intent to encourage parties to submit their disputes to arbitration.[34] Furthermore, the North Carolina Supreme Court has followed the lead of several federal courts that have ruled that doubts concerning the arbitrability of issues should be resolved in favor of arbitration.[35] This pro-arbitration view represents a nationwide trend: courts and legislatures, recognizing the advantages of arbitration,[36] have widened the scope of arbitrable issues.[37]

Despite these strong policies in favor of arbitration, courts have held that certain issues are not arbitrable because other public policies require a judicial resolution. Most of these cases have involved statutory causes of action.[38] In the areas of child custody and support, the courts have permitted the use of arbitration, but awards have been subject to judicial review because a state statute requires that courts protect the interests of the child.[39]

Although no bright-line test exists to determine whether a particular statute embodies a policy that prohibits arbitration,[40] the courts have offered various

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32. *Id.* at 29-30, 331 S.E.2d at 735.

33. *See supra* note 4.

34. *See* Cyclone Roofing Co. v. David M. Lafave Co., 312 N.C. 224, 229, 321 S.E.2d 872, 876 (1984); Thomas v. Howard, 51 N.C. App. 350, 355-56, 276 S.E.2d 743, 747 (1981).

35. Cyclone Roofing Co. v. David M. Lafave Co., 312 N.C. 224, 229, 321 S.E.2d 872, 876 (1984). The *Cyclone Roofing Co.* court relied on the United States Supreme Court's interpretation of the Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1982):

> The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Moses H. Cone Hosp. v. Mercury Constr. Co., 460 U.S. 1, 24-25 (1983). The Supreme Court based its interpretation of the Act on numerous decisions by the federal circuit courts of appeals. *Id.* at 25 n.1.

36. *See supra* text accompanying notes 2-3.

37. *See* M. DOMKE, *supra* note 1, § 12:02, at 155.

38. M. DOMKE, *supra* note 1, § 19:02, at 281; Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481, 482 (1981). The most common example of a nonarbitrable statutory action is an antitrust violation. *See, e.g.*, American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968); Aimcee Wholesale Corp. v. Tomar Prods., Inc., 21 N.Y.2d 621, 237 N.E.2d 223, 289 N.Y.S.2d 968 (1968). For other examples of nonarbitrable claims, see Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (Title VII of the Civil Rights Act); Wilko v. Swan, 346 U.S. 427 (1953) (Securities Act of 1933, 15 U.S.C. §§ 77a to 77bbbb (1982)); Beckman Instruments, Inc. v. Technical Dev. Corp., 433 F.2d 55 (7th Cir. 1970) (patent laws), *cert. denied*, 401 U.S. 976 (1971); Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 431 F. Supp. 271 (E.D. Pa. 1977) (Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (1982)); Homewood Indus. v. Caldwell, 360 F. Supp. 1201 (N.D. Ill. 1973) (trademark laws).

39. *See, e.g.*, Schneider v. Schneider, 17 N.Y.2d 123, 216 N.E.2d 318, 269 N.Y.S.2d 107 (1966); Crutchley v. Crutchley, 306 N.C. 518, 293 S.E.2d 793 (1982); *see also*, Western Union Tel. Co. v. Americans Communications Ass'n, 299 N.Y. 177, 86 N.E.2d 162 (1949) (vacating arbitrator's decision that union could direct nonstriking employees to refuse to handle certain telegrams because the decision would frustrate public policy embodied in a statute that made such refusal unlawful).

40. Sterk, *supra* note 38, at 482-83.

rationales for findings of nonarbitrability. Perhaps the most compelling rationale is that a private resolution of the dispute may adversely affect nonparticipating third parties, whose interests the courts must protect. Such third parties may include the general public, as in antitrust cases,[41] or particular individuals, as in child custody and support cases.[42] In addition, the courts may reason that issues and evidence involved in the dispute are too complex for arbitration,[43] that the dispute should be resolved according to legal principles rather than business expertise and experience,[44] or that the intention of the legislature in enacting the statute in question is best effectuated by holding that the cause of action created cannot be waived by an arbitration agreement.[45]

Although the typical modern arbitration statute places few, if any, limits on the scope of arbitrable issues,[46] the courts have fashioned these public policy exceptions.[47] To hold that an issue is not arbitrable, a court must determine that the imperativeness of the policy in question overrides the advantages of arbitration.[48] This balancing approach is especially difficult when the court must consider a motion to vacate or modify an award, because the statutory scope of judicial review of awards is often extremely limited.[49] As a result, the courts are reluctant to recognize public policy exceptions to modern arbitration

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41. The United States Court of Appeals for the Second Circuit has stated:

> A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public interest. . . . Antitrust violations can affect hundreds of thousands—perhaps millions—of people and inflict staggering economic damage.

American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 826 (2d Cir. 1968).

42. *See supra* note 39 and accompanying text.

43. *See, e.g.*, American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 827 (2d Cir. 1968) (antitrust litigation).

44. *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974) (Title VII of the Civil Rights Act); American Safety Equip. Corp. v. J.P. Maguire Co., 391 F.2d 821, 827 (2d Cir. 1968). A major motivation for choosing arbitration over litigation is that arbitration permits disputes to be resolved according to the arbitrator's business expertise rather than rules of law. *See supra* text accompanying note 3.

45. *See* Wilko v. Swan, 346 U.S. 427, 438 (1953) (securities laws). One commentator has suggested that the best rationale for the *Wilko* decision is that securities sales agreements are not freely negotiated and arbitration agreements should not be imposed in situations of unequal bargaining power. *See* Sterk, *supra* note 38, at 517-18.

46. *See supra* note 6 and accompanying text. The North Carolina arbitration statute provides only two exceptions to its operation: arbitration agreements which stipulate that the Act shall not apply, and arbitration agreements in labor contracts that do not expressly provide that the Act shall apply. N.C. GEN. STAT. § 1-567.2(b) (1983). Parties always may limit the scope of arbitrable issues in their agreement. *See* M. DOMKE, *supra* note 1, § 12:00, at 151.

47. *See supra* notes 38-39 and accompanying text.

48. *See supra* notes 10-11 and accompanying text.

49. Note, *supra* note 10, at 548-49; *see, e.g.*, N.C. GEN. STAT. § 1-567.13-.14 (1983). The North Carolina Supreme Court has held that the statutory grounds for vacatur, modification, and correction of an award are exclusive. Cyclone Roofing Co. v. David M. Lafave Co., 312 N.C. 224, 234, 321 S.E.2d 872, 879 (1984) (citing Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter, 41 N.C. App. 407, 411, 255 S.E.2d 414, 418 (1979)). Although a public policy exception might be justified by the statutory provision for vacatur when arbitrators have "exceeded their powers," *see, e.g.*, N.C. GEN. STAT. § 1-567.13(a)(3) (1983), one commentator has argued that a better approach would be to construe the arbitration statute so as to accommodate other important state policies. Note, *supra* note 10, at 549.

statutes,[50] and generally they have limited them to situations in which submission of the dispute to arbitration conflicts with an important legislative policy.[51]

The New York Court of Appeals departed from this traditional judicial reluctance in *Garrity v. Lyle Stuart, Inc.*[52] by holding that public policy prohibits arbitrators from awarding punitive damages. The *Garrity* decision did not rest on a statutory policy, but rather on the court's finding that the granting of punitive damages constitutes a form of punishment, which only the state can impose.[53] The court reasoned that the party who selects the arbitrator may influence his or her decision, thereby creating the danger of economic coercion through the imposition of punitive damages[54] awarded without the supervision and review present in an action at law.[55] The dissent argued that the award should have been confirmed because it was "neither irrational nor unjust."[56] According to the majority, however, such a standard would not prevent abuse of the arbitrator's power and, contrary to the arbitral goal of avoiding litigation, would permit courts to review awards for their justness.[57]

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50. M. DOMKE, *supra* note 1, § 33:03, at 470.

51. *See supra* note 38 and accompanying text. For examples of the courts' unwillingness to vacate awards on the basis of nonstatutory policies, see Revere Copper & Brass, Inc. v. Overseas Private Inv. Corp., 628 F.2d 81 (D.C. Cir.), (arbitrator failed to apply rule of *contra proferentum* in construing insurance contract), *cert denied*, 446 U.S. 983 (1980); Sprinzen v. Nomberg, 46 N.Y.2d 623, 389 N.E.2d 456, 415 N.Y.S.2d 974 (1979) (arbitrator enforced restrictive covenant by enjoining covenantor from engaging in like employment); Staklinski v. Pyramid Elec. Co., 6 N.Y.2d 159, 160 N.E.2d 78, 188 N.Y.S.2d 541 (1959) (arbitrator awarded specific performance of an employment contract).

52. 40 N.Y.2d 354, 353 N.E.2d 793, 386 N.Y.S.2d 831 (1976). *Garrity* was the first case to hold unequivocally that punitive damages may not be awarded in arbitration under a modern arbitration statute. The Appellate Division of the New York Supreme Court previously had vacated an award of punitive damages. Publishers' Ass'n v. Newspaper & Mail Deliverers' Union, 280 App. Div. 500, 114 N.Y.S.2d 401 (1952). However, that court later refused to vacate an arbitrator's award of a penalty made pursuant to a liquidated damages clause and noted that the applicable arbitration statute at the time of the *Publishers' Ass'n* decision had been repealed and replaced by one that broadened the scope of arbitrable issues. Associated Gen. Contractors, N.Y. State Chapter, Inc. v. Savin Bros., Inc., 45 A.D.2d 136, 141-42, 356 N.Y.S.2d 374, 380 (1974), *aff'd*, 36 N.Y.2d 957, 335 N.E.2d 859, 373 N.Y.S.2d 555 (1975) (per curiam). The court also stated that the *Publishers' Ass'n* decision had ignored the critical question whether the policy prohibiting an award of punitive damages outweighs the policy favoring arbitration. *Id.* at 142, 356 N.Y.S.2d at 380. The *Garrity* majority distinguished *Savin Bros.* on the grounds that the contract in that case contained a liquidated penalty provision, *Garrity*, 40 N.Y.2d at 357, 353 N.E.2d at 795, N.Y.S.2d at 833, but the dissent rejected this distinction. *Id.* at 363-64, 353 N.E.2d at 799, 386 N.Y.S.2d at 837 (Gabrielli, J., dissenting). A student commentator also has stated that the two cases are irreconcilable. Note, *Punitive Damages in Arbitration: The Search for a Workable Rule*, 63 CORNELL L. REV. 272, 282-83 (1978).

53. *Garrity*, 40 N.Y.2d at 358-59, 353 N.E.2d at 796-97, 386 N.Y.S.2d at 833-34. Although the arbitration in *Garrity* involved a contract dispute that traditionally may not have warranted punitive damages, the court expressly held that arbitrators could not award punitive damages even in situations in which they could be awarded by a court. *Id.* at 358, 353 N.E.2d at 796, 386 N.Y.S.2d at 833. The court also held that parties may not agree to authorize arbitrators to award punitive damages. *Id.* at 360, 353 N.E.2d at 797, 386 N.Y.S.2d at 834.

54. *Id.* at 358, 353 N.E.2d at 796, 386 N.Y.S.2d at 833-34.

55. *Id.* at 360, 353 N.E.2d at 797, 386 N.Y.S.2d at 835. The court specifically referred to the trial court's power to alter awards of punitive damages and to the appellate court's power to modify awards. *Id.*

56. *Id.* at 365, 353 N.E.2d at 800, 386 N.Y.S.2d at 838 (Gabrielli, J., dissenting).

57. *Id.* at 359, 353 N.E.2d at 796, 386 N.Y.S.2d at 834.

Although two other jurisdictions have followed *Garrity*,[58] federal district courts consistently have held that punitive damages may be awarded by arbitrators under the Federal Arbitration Act.[59] In *Willoughby Roofing & Supply Co. v. Kajima International, Inc.*[60] the court found no public policy that would justify prohibiting arbitrators from awarding punitive damages, and the court recited several reasons to support its decision. First, the value of arbitration partly depends on the flexibility that arbitrators may exercise in fashioning remedies.[61] Second, because the arbitrator is an expert in the field, he or she may be better equipped than a judge or jury to determine the proper amount of damages.[62] Last, if arbitrators do not have the discretion to award punitive damages, a plaintiff who is entitled to such relief must arbitrate first and then proceed to trial on the sole issue of damages. Such a process is wasteful and destroys the major advantage of arbitration, which theoretically is avoiding the expense and delay of litigation.[63]

Certain state courts also have refused to follow the *Garrity* rule. The California Court of Appeals upheld an arbitration award of punitive damages pursuant to a medical malpractice claim.[64] The court reasoned that to deny arbitrators the power to award punitive damages for a claim that traditionally gives rise to such relief would frustrate the legislature's intent to encourage arbitration of medical malpractice claims.[65] The Florida Court of Appeals permitted arbitration of a claim under Florida's "civil theft statute" which authorizes a treble damage remedy.[66] Although the court conceded that the statute is "remedial in its purpose" and "embodies public policy," it held the claim arbitrable because the effect of a violation on the public would be incidental and the issue involved was not complex.[67]

The North Carolina Court of Appeals in *Rodgers* relied primarily on the reasoning of the *Willoughby* decision and held that arbitrators have the power to award punitive damages.[68] The court did not deny the basic premise in *Garrity*

58. *See* School City v. East Chicago Fed'n of Teachers, Local # 511, 422 N.E.2d 656, 662-63 (Ind. Ct. App. 1981); Shaw v. Kuhnel & Assocs., Inc., 102 N.M. 607, 609, 698 P.2d 880, 882 (1985).

59. *See* Willoughby Roofing & Supply Co. v. Kajima Int'l, Inc., 598 F. Supp. 353 (N.D. Ala. 1984), *aff'd*, 776 F.2d 269 (11th Cir. 1985); Willis v. Shearson/Am. Express, Inc., 569 F. Supp. 821 (M.D.N.C. 1983).

60. 598 F. Supp. 353 (N.D. Ala. 1984), *aff'd*, 776 F.2d 269 (11th Cir. 1985).

61. *Id.* at 361-62.

62. *Id.* at 363-64.

63. *Id.* at 364.

64. Baker v. Sadick, 162 Cal. App. 3d 618, 208 Cal. Rptr. 676 (1984).

65. *Id.* at 630, 208 Cal. Rptr. at 684. A California statute specifically provides for the arbitration of medical malpractice claims. CAL. CIV. PROC. CODE § 1295 (West 1982).

66. Sabates v. International Medical Centers, Inc., 450 So. 2d 514 (Fla. Dist. Ct. App. 1984).

67. *Id.*

68. *Rodgers*, 76 N.C. App. at 28, 331 S.E.2d at 733-34. North Carolina courts previously have adopted federal policies concerning arbitration. *See supra* note 35 and accompanying text. In *Rodgers* the court of appeals held that it was appropriate to look to federal cases to determine the arbitrability of issues because North Carolina and federal policies were identical in that respect. *Rodgers*, 76 N.C. App. at 24, 331 S.E.2d at 731. Interestingly, those states that have denied arbitrators the power to award punitive damages also have modern arbitration statutes and avowed policies favoring arbitration. School City v. East Chicago Fed'n of Teachers, Local # 511, 422 N.E.2d 656, 661 (Ind. App. 1981) (interpreting IND. CODE ANN. §§ 34-4-2-1 to -22 (Burns 1971)); Shaw v.

that punitive damages are imposed in civil actions not to redress private wrongs, but to punish and deter wrongful conduct as a matter of public policy.[69] Indeed, North Carolina case law clearly recognizes that an award of punitive damages does involve public policy.[70] Nevertheless, the *Rodgers* court disagreed with the *Garrity* majority's conclusion that private parties may not enforce this policy through the process of arbitration.[71]

The primary concern of the *Garrity* majority was the potential for abuse if arbitrators were permitted to award punitive damages.[72] This potential for abuse exists because (1) selection of the arbitrator by one party may bias his or her decision, and (2) arbitration does not entail the same procedural safeguards as a trial.[73] However, this argument does not address the specific issue of punitive damages, but rather attacks the arbitration process itself. By submitting a dispute to arbitration, a party voluntarily gives up certain rights and protections that exist in an action at law.[74] Parties would not submit any disputes to arbitration if they did not believe that a fair resolution could be obtained. Furthermore, the review of awards must be limited to retain the value of avoiding litigation.[75]

Although the power to impose punitive damages does create some danger of excessive and unjust awards, arbitration statutes typically provide that the courts may vacate an award if an arbitrator was partial or corrupt.[76] In addition, several courts have held that an award will be vacated if it is "completely irrational"[77] or evidences a "manifest disregard" of the law.[78] Although the North Carolina Supreme Court has held that the statutory grounds for vacatur are exclusive,[79] it could adopt such a standard of review if faced with an appropriate case. Because the courts may review all awards to determine whether they meet this standard, the rationale of the *Garrity* majority, that applying such a standard to punitive damage awards would permit undue judicial interference,[80] is unpersuasive. Furthermore, the charge that punitive damage awards may reflect prejudice rather than impartial judgment applies equally well to jury

Kuhnel & Assocs., Inc., 102 N.M. 607, 608, 698 P.2d 880, 881-82 (1985) (interpreting N.M. STAT. ANN. §§ 44-7-1 to -2 (1978)); Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354, 364-65, 353 N.E.2d 793, 800, 386 N.Y.S.2d 831, 837-38 (1976) (Gabrielli, J., dissenting) (interpreting N.Y. CIV. PRAC. LAW § 7501 (McKinney 1980)).

69. *Garrity*, 40 N.Y.2d at 358, 353 N.E.2d at 795, 386 N.Y.S.2d at 833.

70. *See, e.g.*, Newton v. Standard Fire Ins. Co., 291 N.C. 105, 113, 229 S.E.2d 297, 302 (1976); *supra* notes 48-51 and accompanying text (discussing public policy exceptions).

71. *Rodgers*, 76 N.C. App. at 27-29, 331 S.E.2d at 734-35.

72. *See supra* text accompanying notes 54-55.

73. *See supra* text accompanying notes 54-55.

74. *See* Crutchley v. Crutchley, 306 N.C. 518, 523, 293 S.E.2d 793, 796-97 (1982).

75. *See supra* note 10 and accompanying text.

76. *See, e.g.*, N.C. GEN. STAT. § 1-567.13 (1983).

77. *See* Swift Indus., Inc. v. Botany Indus., Inc., 466 F.2d 1125, 1131 (3d Cir. 1972); Lentine v. Fundaro, 29 N.Y.2d 382, 385, 278 N.E.2d 633, 635, 328 N.Y.S.2d 418, 422 (1972).

78. Wilko v. Swan, 346 U.S. 427, 436-37 (1953).

79. *See supra* note 49.

80. *See supra* text accompanying notes 56-57.

awards.[81] Finally, if the parties do not wish to permit arbitrators to impose punitive damages, they can expressly prohibit punitive damages in the arbitration clause of their contract.[82]

Moreover, rationales that traditionally have justified other public policy exceptions to arbitration simply do not apply to the arbitrator's discretion to award punitive damages.[83] Although other exceptions have derived from legislative policies,[84] punitive damage awards involve a common-law policy that does not directly affect the interests of outside parties.[85] In a typical contract dispute, the issues and evidence should not be too complex for arbitration, nor should the parties be required to resolve their disputes according to legal principles. The courts have not permitted arbitration of antitrust or employment discrimination claims because private parties may not resolve such disputes on the basis of commercial considerations.[86] In contrast to the relative inexperience of trial courts, the arbitrators' knowledge and experience regarding particular businesses best enable them to determine whether certain commercial conduct warrants the imposition of a penalty.[87]

In addition, when the courts prevent arbitrators from awarding punitive damages, they create practical problems that reduce the value and efficiency of arbitration as an alternative to litigation: disgruntled parties could demand a separate trial on the issue of damages and, at the same time, arbitrators would lose their discretion to fashion remedies according to their business expertise.[88] Profound difficulties arise because, unlike other public policy exceptions that prohibit the arbitration of certain causes of action, the punitive damages exception only prohibits a certain remedy. This prohibition contravenes the express intent of legislatures that have authorized arbitrators to grant relief that could not be obtained from a court;[89] legislative policy favors flexibility in arbitration awards.

Several commentators have noted that punitive damages can serve as a valuable tool for the arbitrator, especially when he or she must arbitrate disputes that arise out of long-term contracts such as collective bargaining agreements.[90] In such situations, compensatory damages may be inadequate or difficult to determine, and the threat of a punitive remedy may be the only way to ensure compliance with the agreement.[91] This example demonstrates that arbitrators

81. *See* Comment, *"Extra Contractual" Remedies for Breach of Contract in North Carolina*, 55 N.C.L. REV. 1125, 1132 (1977).

82. *See Willoughby*, 598 F. Supp. at 365.

83. *See supra* text accompanying notes 39-53.

84. *See supra* notes 38-39 and accompanying text.

85. *See Garrity*, 40 N.Y.2d at 363, 353 N.E.2d at 799, 386 N.Y.S.2d at 837 (Gabrielli, J., dissenting); Sterk, *supra* note 36, at 531; Note, *supra* note 52, at 289-91.

86. *See supra* notes 43-44 and accompanying text.

87. *See supra* text accompanying note 62.

88. *See supra* text accompanying notes 61-63. For an extensive criticism of the *Garrity* decision in this regard, see Note, *supra* note 52.

89. *See supra* note 7 and accompanying text.

90. *See* Note, *The Enforceability of an Arbitrator's Award of a Penalty*, 52 COLUM. L. REV. 943, 945 (1952); Note, *supra* note 52, at 291-95.

91. Note, *supra* note 52, at 294.

must be able to create a remedy that meets the demands of a specific situation, and that the arbitrator's discretion would be severely hampered by the prohibition of a particular remedy.

Another problem with the punitive damages exception arises because arbitrators need not explain how they determine the amount of an award, nor must they designate particular amounts as compensatory or punitive.[92] Thus, if the courts alone decided the issue of punitive damages, a reviewing court would need to examine carefully a challenged award in two respects—not only whether the award actually was punitive, but also what amount represented punishment rather than compensation. Although the *Garrity* court argued that empowering arbitrators to award punitive damages would necessitate extensive review of awards,[93] the denial of this power may require even greater judicial interference in arbitration.[94] In *Garrity* the court had no difficulty deciding how much of the award to vacate because the arbitrator designated part of the award as punitive.[95] An award may not be vacated, however, on the grounds that the arbitrator made a mistake of law or fact.[96] Thus, an arbitrator who wished to impose a punitive sanction might escape judicial review by including a punitive sanction in the compensatory portion of the award,[97] which would make it a nonreviewable mistake.

Yet another concern exists that, by submitting a dispute to arbitration, a plaintiff might unwittingly forfeit the right to punitive damages because of the res judicata effect of arbitration awards.[98] Although the *Rodgers* decision stated that claims would not be barred if they were not arbitrable,[99] at least one court has barred a claim for punitive damages even though the arbitrators were not permitted to grant them.[100] Moreover, even if the punitive damages claim is not barred, parties may decide to forego their claims rather than endure a separate trial on the issue of punitive damages. In either case the policy underlying puni-

92. *See* Wilko v. Swan, 346 U.S. 427, 436 (1953); Ball-Thrash Co. v. McCormack, 172 N.C. 677, 679, 90 S.E. 916, 917 (1916); Note, *supra* note 52, at 295.

93. *See supra* text accompanying note 57.

94. *See* Note, *supra* note 90, at 945; Note, *supra* note 52, at 295-99; Note, *Arbitration and Award—Court Vacates Assessment of Punitive Damages in Contract Arbitration Because it Would Not Grant Such Damages in a Suit*, 66 HARV. L. REV. 525, 526 (1953).

95. *Garrity*, 40 N.Y.2d at 355, 353 N.E.2d at 794, 386 N.Y.S.2d at 832.

96. *See* Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 236, 321 S.E.2d 872, 880 (1984) (refusing to modify arbitrator's award on grounds that arbitrator's decisions in calculating award were "inappropriate").

97. *See* Note, *supra* note 52, at 300. One court that followed the *Garrity* rule so rigidly adhered to the label rather than the substance of an award that it refused to consider the vacated portion of an award as attorney's fees, which comprised the true measure of the damages, simply because the arbitrator labelled it "punitive." School City v. East Chicago Fed'n of Teachers, Local # 511, 422 N.E.2d 656, 661 n.10 (Ind. Ct. App. 1981).

98. *Willoughby*, 598 F. Supp. at 363; Note, *Arbitration: The Award of Punitive Damages as a Public Policy Question*, 43 BROOKLYN L. REV. 546, 550-51 (1976).

99. *See supra* text accompanying notes 31-32.

100. *See* United States Fidelity & Guar. Co. v. DeFluiter, 456 N.E.2d 429, 432 (Ind. Ct. App. 1983). The court barred the claim because plaintiff had voluntarily submitted the dispute to arbitration. *Id.* Although a claim that arises under a binding arbitration agreement might not be barred, the decision undoubtedly will result in the litigation of claims that would have been arbitrated if punitive damages were available.

tive damages is defeated because the defendant's wrongful conduct goes unpunished.

The *Rodgers* court held that arbitrators can award punitive damages, but the decision arose from a context in which punitive damages could also be obtained in court.[101] Such a context obviates traditional policy reasons that have justified prohibiting punitive damages awards.[102] The courts should not permit the arbitration of a claim while preventing the arbitrator from granting appropriate relief. The *Garrity* rule[103] would deter any plaintiff with a punitive damages claim from submitting that claim to arbitration, and this result directly conflicts with legislative policy encouraging parties to arbitrate "any controversy existing between them."[104]

The *Rodgers* decision did not address the question whether arbitrators could award punitive damages when such relief would not be available in an action at law. Punitive damages generally are not available for breach of contract, unless a tort accompanies the breach.[105] If the arbitrator awards punitive damages for a simple breach, then the policy arguments for vacating such an award become stronger. No separate trial would be required if the plaintiff sought punitive damages but knew an arbitrator could not award them because a court would not grant punitive damages. Similarly, the inability of arbitrators to impose punitive damages would not deter the submission of disputes to arbitration. Finally, the *Garrity* court's concerns regarding the abuse of punitive sanctions by private parties[106] become much more relevant when punishment is inflicted in cases in which the common law deems such a remedy inappropriate.

Nevertheless, a rule that authorizes punitive damage awards only in those cases in which legal grounds for such a remedy exist would create several problems. The courts would have to scrutinize carefully a challenged award to ascertain whether sufficient grounds support the award. Because arbitrators are not bound by substantive law or rules of evidence[107] and because they need not explain their awards,[108] this determination may require extensive judicial review. In addition, in several situations punitive damages would serve a useful or even appropriate purpose even when a court could not grant them.[109] Finally,

101. In *Rodgers* plaintiff's claim for punitive damages was based on the allegation that defendant's false representation was "grossly negligent and committed with reckless disregard of plaintiff's rights and interests . . . ." *Rodgers*, 76 N.C. App. at 21, 331 S.E.2d at 729. Although punitive damages generally are unavailable in an action for breach of contract, they may be awarded when the breach is accompanied by aggravated tortious conduct. *See* Newton v. Standard Fire Ins. Co., 291 N.C. 105, 111-12, 229 S.E.2d 297, 301 (1976). For an extensive discussion of when punitive damages will be permitted for breach of contract in North Carolina, see Comment, *supra* note 81.

102. *See supra* text accompanying notes 53-57.

103. *See supra* notes 52-53 and accompanying text.

104. N.C. GEN. STAT. § 1-567.2(a) (1983); *see supra* note 6 and accompanying text.

105. *See supra* note 101. In *Garrity*, the arbitrator had awarded punitive damages for breach of contract. *Garrity*, 40 N.Y.2d at 356, 353 N.E.2d at 794, 386 N.Y.S.2d at 832. However, the court explicitly held that an arbitrator could not award punitive damages even when they could be awarded in an action at law. *See supra* note 53.

106. *See supra* text accompanying notes 54-55.

107. *See* Crutchley v. Crutchley, 306 N.C. 518, 523, 293 S.E.2d 793, 797 (1982).

108. *See supra* text accompanying note 92.

109. *See supra* text accompanying notes 90-91. One commentator has suggested that courts take

legislatures have recognized the value of permitting arbitrators to fashion remedies without regard to legal principles.[110]

Although some potential for abuse would exist if arbitrators were authorized to award punitive damages, the difficulties that would arise when courts deny or limit the arbitrator's discretion outweigh this potential. Legislative endorsement of arbitration indicates a general confidence in the process as an alternative to litigation. Knowledgeable and experienced arbitrators would not impose penalties without justification.[111] Because arbitrators resolve disputes with regard to business considerations rather than legal expertise, they should be permitted to punish and deter conduct they deem reprehensible, even if a court would not or could not make a similar award. If glaring abuses occur and the award is manifestly unjust, then the court may vacate the award.[112]

The *Rodgers* decision represents a reaffirmation of North Carolina's strong policy in favor of arbitration. The court rejected a rule that would have reduced the scope of arbitrable issues and severely hampered the arbitrator's ability to grant appropriate relief. Given the difficulties inherent in any attempt to impose broad limitations on arbitral remedies, the courts should proceed on a case-by-case basis, separately identifying those specific instances in which the use of arbitration contravenes important state policies.[113]

MITCHELL J. BENOWITZ

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an intermediate position by permitting arbitrators to award punitive damages in certain situations that traditionally have not given rise to their availability. *See* Note, *supra* note 52, at 306-08. The commentator offers an analytical framework to determine if a punitive award should stand: (1) Did the parties expressly or impliedly agree to empower the arbitrators to impose punitive damages?; (2) Can the apparently punitive award actually be categorized as compensatory?; and (3) Is the award "reasonably necessary to protect societally useful exchange?" *Id.* Such an approach would retain arbitrators' flexibility in fashioning relief while ensuring that punitive sanctions are imposed in accordance with state policy. But this approach requires extensive judicial review and involves a complex analysis that may be difficult to apply. The commentator admits that "this intensive review will require judicial effort." *Id.* at 306.

110. *See supra* note 7. Although such statutes would seem to prohibit the courts from vacating an award on the grounds that the remedy would not be available in a judicial proceeding, vacatur could be justified on public policy grounds. *See supra* text accompanying notes 46-49.

111. Those courts that have vacated punitive awards rely exclusively on policy grounds, and they have rejected contentions that the awards should stand because they were not unreasonable. *See* School City v. East Chicago Fed'n of Teachers, Local # 511, 422 N.E.2d 656, 661 n.10 (Ind. Ct. App. 1981); *Garrity*, 40 N.Y.2d at 360, 353 N.E.2d at 797, 386 N.Y.S.2d at 835. One other court that adopted the *Garrity* rule actually had decided the case before it on other grounds, but the court held that claims for punitive damages are not arbitrable. *See* Shaw v. Kuhnel & Assocs., Inc., 102 N.M. 607, 608-09, 698 P.2d 880, 882 (1985).

112. *See supra* text accompanying notes 77-78.

113. Note, *supra* note 10, at 548.