

1978

Utah Chiropractic Association, Inc., v. Equitable Life Assurance Society of The United States And Deseret Mutual Benefit Association : Reply Brief of Appellant Utah Chiropractic Association, Inc.

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Robert Dyer; Attorney for Respondent

Recommended Citation

Reply Brief, *Utah Chiropractic Assoc. v. Equitable Life Assurance Society*, No. 15345 (Utah Supreme Court, 1978).
https://digitalcommons.law.byu.edu/uofu_sc2/790

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

TABLE OF CONTENTS

	<u>Page</u>
<u>ARGUMENT</u>	1
I. <u>THE INAPPLICABILITY OF THE UTAH RULES</u> <u>OF CIVIL PROCEDURE TO A PETITION FOR</u> <u>DE NOVO JUDICIAL REVIEW OF A DECISION</u> <u>BY THE INSURANCE COMMISSIONER HAS NEVER</u> <u>BEEN ADDRESSED BY THIS COURT</u>	1
II. <u>THAT A NOTICE OF APPEAL CAN BE A</u> <u>JURISDICTIONAL REQUIREMENT IS NOT THE</u> <u>ISSUE IN THIS CASE</u>	4
III. <u>RESPONDENT SELECTIVELY AND INACCURATELY</u> <u>APPLIES VARIOUS RULES OF THE UTAH RULES</u> <u>OF CIVIL PROCEDURE TO DENY APPELLANT ITS</u> <u>RIGHT TO DE NOVO JUDICIAL REVIEW OF AN</u> <u>INSURANCE COMMISSIONER'S DECISION</u>	5
<u>CONCLUSION</u>	9

TABLE OF AUTHORITIES

CASES:

<u>National Advertising Co. v. Utah State Road Commission</u> , 26 Utah 2nd 132, 486 P.2d 383 (1971) . .	2, 3
<u>Watson v. Anderson</u> , 29 Utah 2d 36, 504 P.2d 1003 (1973)	7

STATUTES:

Utah Code Annotated 1953, As Amended, Section 31-4-9	2, 5
Utah Code Annotated 1953, As Amended, Section 31-4-10	2, 5

RULES:

Utah Rules of Civil Procedure, Rule 6(a)	8, 9
Utah Rules of Civil Procedure, Rule 6(e)	8, 9
Utah Rules of Civil Procedure, Rule 73(a).	2, 3
Utah Rules of Civil Procedure, Rule 73(h)-(m) . . .	3, 1
Utah Rules of Civil Procedure, Rule 79	6, 1
Utah Rules of Civil Procedure, Rule 79(a).	6
Utah Rules of Civil Procedure, Rule 79(b).	6
Utah Rules of Civil Procedure, Rule 81	3
Utah Rules of Civil Procedure, Rule 81(d).	7
Federal Rules of Civil Procedure, Rule 58	6

	<u>Page</u>
AUTHORITIES CITED:	
6A Moore's Federal Practice ¶58.01[8]	7
7 Moore's Federal Practice ¶204.02[2]	4
<u>Ad Hoc Relief for Untimely Appeals</u> , 65 Colum. L. Rev. 97 (1965).	4

IN THE SUPREME COURT
OF THE STATE OF UTAH

UTAH CHIROPRACTIC ASSOCIATION, INC.,)
)
Plaintiff-Appellant,)
)
vs.)
)
EQUITABLE LIFE ASSURANCE)
SOCIETY OF THE UNITED STATES)
and DESERET MUTUAL BENEFIT)
ASSOCIATION,)
)
Defendants-Respondents.)

REPLY BRIEF OF APPELLANT

UTAH CHIROPRACTIC ASSOCIATION, INC.

The contentions of respondent Deseret Mutual Benefit Association ("DMBA") are contrary to the policy of the State of Utah and would impose an impossible burden on any party seeking judicial review of an arbitrary, capricious action by an administrative agency.

I. THE INAPPLICABILITY OF THE UTAH RULES
OF CIVIL PROCEDURE TO A PETITION FOR
DE NOVO JUDICIAL REVIEW OF A DECISION
BY THE INSURANCE COMMISSIONER HAS
NEVER BEEN ADDRESSED BY THIS COURT

Respondent DMBA inaccurately asserts, without citation, that the question presented to this Court for review is "neither

novel nor unusual." There is no reported case which rejects or ignores the Insurance Code provisions, Sections 31-4-9 and 31-4-10 of the Utah Code Annotated 1953, as amended, governing review of Insurance Commissioner decisions by the District Court of Salt Lake County and imposes instead Rule 73(a) of the Utah Rules of Civil Procedure governing appeals from district courts to this Court. The only case cited by DHBG, National Advertising Co. v. Utah State Road Commission, 26 R. 132, 486 P.2d 383 (1971), does not impose Rule 73(a) on a party seeking review of an administrative decision. That case instead upheld the District Court's jurisdiction to review an administrative agency's decision, even though ". . . the record showed a certified mailing of notice of decision several months before court action was initiated." One reason for holding that the ". . . trial court was within its prerogative and had jurisdiction to review the action of the commission" was because the Court was concerned about the aggrieved party's ability to determine "what appears to be a definite and final refusal of the Commission" (Id. at 384.)

In the instant case a similar problem is presented. There is no docket or other formal registry for decisions by the Commissioner of Insurance. Therefore, it would be impossible for an aggrieved party to comply with the Rule 73(a) requirement that notice of appeal be given within one month.

entry of the judgment in the District Court's docket. Appellant Utah Chiropractic Association, Inc. and any other person seeking review of an Insurance Commissioner's decision cannot determine precisely when the Rule 73(a) one month requirement would begin to run, and, therefore, when a Notice of Appeal should be filed.

Respondent's argument that National Advertising requires rejection of jurisdiction in this case has a second flaw. National Advertising simply does not impose the Rule 73(a) requirement. This Court merely mentioned in a footnote that the Rule 81 reference to other Utah Rules of Civil Procedure may be applicable when reviewing decisions of administrative agencies. That footnote reference is entirely consistent with appellant's position that if this Court holds that the Utah Rules of Civil Procedure are applicable to de novo review of the decisions of the Commissioner of Insurance, then it should be Rule 73 (h)-(m) governing de novo review in the district court, rather than Rule 73(a), governing this Court's review "on the record" of district court judgments. As explained at pages 14-17 of Appellant's Brief, appellant timely filed the Petition for Review of Orders of Commissioner of Insurance under Rule 73(h)-(m).

These questions of whether the Utah Rules of Civil Procedure govern de novo review of decisions by the Commissioner of Insurance and, if they do, which subparagraphs of the Utah

Rules of Civil Procedure govern, have never been addressed by this Court. National Advertising, in affirming the exercise of jurisdiction, does not reach these questions yet emphasizes the State of Utah's policy "[t]hat a party aggrieved or adversely affected by an arbitrary action of an administrative agency or executive official should have access to the court and redress." (citations omitted) (Id. at 384 n. 4.) Implementation of that policy is what appellant seeks in this case.

II. THAT A NOTICE OF APPEAL CAN BE A JURISDICTIONAL REQUIREMENT IS NOT THE ISSUE IN THIS CASE

Respondent argues at length (Respondent's Brief: 13-18) that "in many instances" precise procedural steps are imposed upon a party seeking an on the record review of District Court judgments by the Supreme Court of the State of Utah. That appellant does not dispute. Although the occasional injustice resulting from precise filing dates has been criticized (7 Moore's Federal Practice ¶204.02[2]; Ad Hoc Relief for Untimely Appeals, 65 Colum. L. Rev. 97 (1965)), these injustices and criticism are not at issue. The cases cited by respondent requiring a notice of appeal to be filed after entry of a judgment in the docket to obtain this Court's review of a District Court decision have dealt with determining filing dates and recognized appeals to this Court. The instant case, however, seeks review, apparently for the first time, by the

"district court for Salt Lake County" pursuant to Insurance Code Sections 31-4-9 and 31-4-10, U.C.A. 1953, as amended. How to apply those Insurance Code provisions for de novo review of the Commissioner of Insurance decisions is the issue. The Insurance Code does not provide precise, determinable dates for commencing this de novo review, and the Commissioner of Insurance does not have a docketing or registry system from which precise dates could be measured. It is in this context of the impossibility of complying with Rule 73(a) that the decision of whether appellant is to be denied a court review of an administrative order is presented. The decision which should be made is to implement the unquestioned policy of the State of Utah to permit that judicial review; and, therefore, this case should be remanded for a decision on the merits.

III. RESPONDENT SELECTIVELY AND INACCURATELY APPLIES VARIOUS RULES OF THE UTAH RULES OF CIVIL PROCEDURE TO DENY APPELLANT ITS RIGHT TO DE NOVO JUDICIAL REVIEW OF AN INSURANCE COMMISSIONER'S DECISION

Even assuming this Court holds that the Utah Rules of Civil Procedure provision for appealing a decision from a district court to the Supreme Court of the State of Utah apply to a de novo review of an Insurance Commissioner's decision, appellant still timely filed its Petition for Review of Orders of Commissioner of Insurance. Respondent argues that Rule 73(a) should apply, but that argument requires the extraordinary

preliminary conclusion that signature by the Insurance Commissioner is "synonymous with the entry of a judgment in the district court." (Respondent's Brief at 12.) Respondent offers neither a citation nor an explanation of why that conclusion should be reached.

Rule 79 provides in detail precisely the type of Register of Actions and Judgment Docket which the District Clerk must maintain. Rule 79(a) provides in part that: "entry of an order of judgment shall show the date the entry was made." Rule 79(b) similarly provides in part that the Judgment Docket must record the "judgment; time of entry; where entered; in judgment book" and other essential details to enable parties to protect their rights. To suggest, as respondent does, that mere signature by the Insurance Commissioner is "synonymous with this precise "entry of judgment" procedure ignores the Utah Rules of Civil Procedure and violates the theory of carefully drafted rules regarding entry of judgment and resulting appeal time computation. As Professor Moore explains, the analogous Entry of Judgment Rule 58 of the Federal Rules of Civil Procedure was amended most recently in 1963 to eliminate the uncertainties resulting from courts writing and signing opinions or memoranda decisions and thereby creating "doubt whether the purported entry of judgment was effective, starting the time running for post-verdict motions and for the purpose of appeal."

(6A Moore's Federal Practice ¶58.01[8].) This Court in 1973 measured the time for appeal from the date of the Judgment was entered and not the date the judgment was signed in Watson v. Anderson, 29 Utah 2d 36, 504 P.2d 1003 (1973). Commencing a time period from the Insurance Commissioner's signature ignores the requirements of Rule 79 of the Utah Rules of Civil Procedure, this Court's decision in Watson v. Anderson, supra, and violates the theory of exactness in measuring time periods from "entry of judgment."

By arguing that "signature" is synonymous with "entry of judgment", respondent ignores the very rule which is the basis for its argument that appellant should be denied a judicial review of the Commissioner of Insurance decision. Rule 81(d) provides:

These Rules shall apply to the practice and procedure in appealing from or obtaining a review of any order, ruling or other action of an administrative board or agency, except in so far as the specific statutory procedure in connection with any such appeal or review is in conflict or inconsistent with these Rules."

The Insurance Code has no provisions dealing with "entry of judgment". Therefore, Rule 79 would apply according to Rule 81(d). Instead, respondent by selective application of Rule 81(d) tries to have it both ways - Rules 73(a) applies because that denies appellant a hearing but Rule 73(h)-(m) and Rule 79 do not apply because appellant would be entitled

to a hearing. This argument, based on the admitted "bias" in the rules and law" which so concerned the lower court, deny appellant a de novo review on the merits and should be rejected by this Court.

Finally respondent inaccurately presents the computations of time methods of Rule 73(h), 6(e), and 6(a).

Rule 73(h) provides in part:

An appeal may be taken to the district court from final judgment rendered in a city or justice court within one month after notice of entry of such judgment . . . (emphasis added)

Rule 6(e), modifying Rule 73(h), Utah Rules of Civil Procedure, provides:

Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice of other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period. (emphasis added)

Finally, Rule 6(a), Utah Rules of Civil Procedure provides in pertinent part:

In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday . . . (emphasis added)

The decision of the Commissioner of Insurance which appellant petitioned for the de novo review of is dated April 25, 1977; notice was given to the appellant by mail. Therefore, appellant had until Tuesday, May 31, 1977, in which to file its petition for review in the district court of Salt Lake County, pursuant to Rule 73(h), 6(e), and 6(a), Utah Rules of Civil Procedure.

Appellant filed its "Petition for Review of Orders of Commissioner of Insurance," Civil Action No. 242775, in a timely manner on May 27, 1977.

For the convenience of the Court, a timetable is set out hereinbelow:

Monday, April 25, 1977:	Commissioner of Insurance signed orders--mailed copy to petitioner
Wednesday, May 25, 1977:	One month after orders signed
Friday, May 27, 1977:	Petition filed and served
Saturday, May 28, 1977:	One month and three days for notice by mail (a Saturday)
Sunday, May 29, 1977:	(a Sunday)
Monday, May 30, 1977:	(a legal holiday)
Tuesday, May 31, 1977:	Petition for Review due under Rules 73(h), 6(a), and 6(e)

CONCLUSION

Appellant complied with both the Insurance Code and the Utah Rules of Civil Procedure in seeking a judicial de novo

review of a long-delayed decision by the Commissioner of Insurance. Respondent argues selectively, inaccurately, and out citation that appellant should be denied its fundamental right to an impartial hearing. This Court should rectify the lower court's concern about the "big gaps" in this area of law and remand the case for a hearing on the merits.

DATED this 7th day of April, 1978.

Respectfully submitted,

BERMAN & GIAUQUE

By: Gordon Strachan
Gordon Strachan
Attorney for Plaintiff-Appellant
500 Kearns Building
Salt Lake City, Utah 84101
Telephone: (801) 533-8383

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of April, 1978, I mailed a true and correct copy of the foregoing Reply Brief of Appellant Utah Chiropractic Association, Inc. to Robert Dyer, attorney for respondent Deseret Mutual Benefit Association, 336 South Third East, Salt Lake City, Utah 84111; F. Burton Howard, counsel for respondent Equitable Life Assurance Society of the United States, 1010 Kennecott Building, Salt Lake City, Utah 84113; Robert J. Lodewick Jr., associate counsel for Equitable Life Assurance Society of the United States, 1285 Avenue of the Americas, New York, New York 10019; and William G. Gibbs, Special Assistant to the Attorney General, counsel for the State Insurance Department, 351 South State Street, Salt Lake City, Utah 84111.

Gordon Shacdan