

1988

Vali Convalescent and Care Institutions, a Utah corporation v. Utah Department of Health, Division of Health Care Financing : Reply Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Vali Convalescent and Care Institutions v. Utah Department of Health*, No. 880434 (Utah Court of Appeals, 1988).
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BRIEF

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IN THE UTAH COURT OF APPEALS

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VALI CONVALESCENT AND
CARE INSTITUTIONS, a Utah
corporation,

Plaintiff,

vs.

UTAH DEPARTMENT OF HEALTH,
DIVISION OF HEALTH CARE
FINANCING,

Defendant.

)
)
) Case No. 880434-CA
)
) Appeal from the Judgment
) of the Third Judicial
) District Court of Salt Lake
) County, State of Utah
)
)
) Honorable Michael R. Murphy
) Presiding
)

* * * * *

REPLY BRIEF OF APPELLANT VALI
CONVALESCENT AND CARE INSTITUTIONS

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FILED

MAY 3 1989

Mary T. Noonan
Clerk of the Court

IN THE UTAH COURT OF APPEALS

* * * * *

VALI CONVALESCENT AND)	
CARE INSTITUTIONS, a Utah)	
corporation,)	Case No. 880434-CA
)	
Plaintiff,)	Appeal from the Judgment
)	of the Third Judicial
vs.)	District Court of Salt Lake
)	County, State of Utah
UTAH DEPARTMENT OF HEALTH,)	
DIVISION OF HEALTH CARE)	
FINANCING,)	Honorable Michael R. Murphy
)	Presiding
Defendant.)	

* * * * *

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INTRODUCTION

Vali's effort to reply to DOH's brief in this matter was made extremely difficult by the manner in which DOH presented its "facts." As support for the great majority of its alleged facts, DOH cites to its own briefs filed in the lower court, which in almost every instance contained no record authority. DOH has also gratuitously stated "facts" without any support whatsoever, and has grossly distorted the record below in the very few instances in which it is actually referred to. The net result is that a number of facts are now in issue that never were in issue before, and therefore, were not made a part of the record below.

In order to effectively respond to DOH's contentions, Vali has, in some instances, had to supply this Court with facts from its own knowledge and/or records. Vali acknowledges that this is somewhat uncharacteristic on appeal, but requests the Court's indulgence in order that a misleading impression is not left with this Court by DOH's statements in its brief.

STATEMENT OF FACTS

1. At all relevant times, Vali owned and operated four nursing homes which provided health care services to State Medicaid recipients for the time period January 1, 1978 through June 30, 1979. Vali became the owner of these four nursing homes

in March 1977. (Stipulation of Facts, ¶ 1; R. 101, p.. 3; Transcript, pp. 34-35.)

2. In 1978, Vali entered into an agreement with the Utah State Department of Social Services, Department of Health, for each of its four nursing homes to provide these health care services. (Utah State Dept. of Social Services Nursing Facility Provider Agreement; R. 103. p. 3.)¹

3. Vali was to receive monthly payments for the health care services it provided to State Medicaid recipients that amounted to a set figure per patient day based upon the overall costs to run each nursing home. (Brief of Respondent, p. 2)

4. The set figure that was to be paid per patient day was to be calculated from cost information supplied to the Department of Health on a yearly basis. This cost information was supplied to the DOH on forms styled Facility Cost Profiles ("FCPs"). (Brief of Respondent, p. 2)

5. Since Vali was a new nursing home owner for which the DOH had little or no financial information, the first FCPs it filed would be used to determine recipient rates on a prospective basis. In contrast, an established nursing home received

¹ Vali is not aware whether this document was ever made a part of the record. If the Court desires, a copy will be provided prior to oral argument in this matter.

reimbursement on patient rates on a both retrospective and prospective basis. (Brief of Respondent, pp. 5, 11)

6. In January 1980, Vali submitted FCPs to the DOH that specified the services provided by Vali for the period January 1, 1978 through June 30, 1979 and the costs of those services that had been incurred. These were the first FCPs ever filed by Vali with the DOH. (Stipulation of Facts, ¶ 1; See Footnote 1.)

7. Vali had been providing services to State Medicaid recipients prior to January, 1980 and had been reimbursed on an interim basis based upon incomplete financial data from the previous owners of the nursing homes. (R. 101, p. 3.)

8. Pursuant to the terms of its contract with Vali, the DOH was required to determine if the costs claimed by Vali in their FCPs were allowable costs in accordance with the reimbursement manual for nursing facilities. The DOH is required to complete this process within a reasonable time and to set new patient rates. In Vali's case, these would be the first rates ever set on the basis of Vali's financial cost information. If Vali was dissatisfied with the results of the audit, it was entitled to three levels of administrative review pursuant to the policies and procedures of the DOH. These three levels of review are entitled Exit Conference, Informal Hearing and Formal Hearing. (Utah State Dept. of Social Services Nursing Facility Provider Agreement; Brief of Respondent, p. 3; Administrative

Hearing Procedures for Medicaid Recipients and Providers; Medicaid State Plan, Attachment 4.19D; See Footnote 1.)

9. The DOH required and does require explicit documentation on costs claimed on any FCPs. (Medicaid State Plan, Attachment 4.19D; See Footnote 1.)

10. Following the filing of Vali's FCPs in January, 1980, the DOH referred the FCPs to the Bureau of Medicaid Fraud. The Bureau of Medicaid Fraud, pursuant to a search warrant, seized every business record of Vali on September 12, 1980.²

11. The reason for the investigation of Vali by the Bureau of Medicaid Fraud was the allegation that Vali had claimed certain costs that had not been incurred. (See Footnote 2.)

12. The Bureau of Medicaid Fraud conducted an exhaustive investigation for a period of 2½ years. At the conclusion of that investigation, on April 22, 1982, the Bureau stated that there was insufficient evidence to support criminal charges against Vali or any of its principals. (Stipulation of Facts, ¶ 2 and Exhibit A thereto.)

13. At the conclusion of the investigation, only part of Vali's business documents were returned, and those were in

² There is no record citation available for this fact. However, Vali does not believe that DOH contests this fact. Vali is in possession of certain documents that support this claim that will be filed if the Court desires.

such disarray as to make them virtually worthless. (R. 160, Ex. 4.)³

14. During the period of the investigation, the DOH did not complete its required audit of the FCPs. During the period of the investigation, once again, Vali was paid an "interim" rate for services it provided to State Medicaid recipients. (Stipulation of Facts, ¶ 2; See Footnote 2.)

15. At the conclusion of the investigation by the Bureau of Medicaid Fraud, the DOH sent letters to Vali claiming it had completed its audit of the FCPs and that Vali owed the DOH the sum of \$177,385.62 for overpayments made. (See Footnote 2.)

16. Following the conclusion of the investigation by the Bureau of Medicaid Fraud, Vali began to reconstruct its business records. Those business records and documents would form the basis of most of Vali's claims during the following Exit Conferences and Informal Hearings. (R. 160; See Footnote 3.)

17. The DOH agreed to hold Exit Conferences which began in 1984. The bulk of those Exit Conferences consisted of Vali supplying documentation in support of its claimed expenses for its FCPs for the time period 1978 and 1979. This

³ This information is from Vali's counsel, who has represented Vali since 1980. No attempt was made to substantiate this fact in the Third District Court because DOH did not raise it as a contested issue.

documentation process could have taken place in 1980 rather than 1984 but for the conduct of the DOH. (See Footnotes 2, 3.)

18. At the conclusion of the Exit Conferences in 1984, the DOH had not completed a computation to determine if Vali still owed the DOH any money. Those Exit Conferences continued until February, 1984. (See Footnote 3.)

19. Vali was not satisfied with the result of the Exit Conferences and, on March 25, 1983, timely requested an Informal Hearing on several matters not resolved by the Exit Conferences. (Brief of Respondent, p. 6)

20. Informal hearings were held during 1984 to resolve largely documentary problems on cost issues in the FCPs. On October 25, 1984, during one portion of the informal hearing process, a request was made of the DOH to recompute a total figure in light of the changes in the FCPs made during the Exit Conferences and the Informal Hearings to date. On December 7, 1984, the DOH sent a letter to Vali indicating that the DOH now owed Vali \$223,046.66 as a result of those changes. This represents a change in the DOH's position of \$400,432.28 (the DOH's claim originally that Vali owed \$177,385.62 to the position that the DOH now owed Vali \$223,046.66). (See Footnotes 2, 3; Stipulation of Facts, ¶ 7 and Exhibit D thereto)

21. The DOH issued a check in the amount of \$185,466.66 on January 31, 1985. This figure represents \$223,046.66, minus \$37,580 to be held by the DOH on another

unrelated issue. (Stipulation of Facts, ¶ 7 and Exhibit D thereto)

22. In January 1985, Clark Graves, an Assistant Attorney General assigned to the case, drafted a Release of All Claims to accompany the check for \$185,466.66. Counsel for Vali and Graves were unable to agree on the language to be contained in the Release of All Claims due to the issue of whether any interest was due on that money. The DOH, through its counsel and its audit manager, was fully aware that Vali intended to make a claim for interest, by January, 1985. (Transcript, pp. 129, 138-139)

23. The check for \$185,466.66 was returned unnegotiated to the DOH and the Informal Hearing process continued its normal administrative course. The Informal Hearing concluded on February 28, 1985, and a decision was issued by the DOH concluding that it now owed Vali \$272,362.03, exclusive of any interest. This figure represented a change in the DOH's position of \$449,747.65 (the DOH's claim originally that Vali owed them \$177,385.62 to the position that the DOH now owed Vali \$272,362.03). (Stipulation of Facts, ¶ 13 and Exhibit H thereto)

24. The DOH and Vali agreed that the \$272,362.03 figure represented money due to Vali for all issues raised at the Informal Hearing. The DOH and Vali further agreed and do agree that interest on any amounts due was not discussed at the Informal Hearing. (Stipulation of Facts, ¶¶ 12, 21)

25. A meeting was held at the DOH's office on March 13, 1985. Participants included the acting director of the Division of Health Care Financing, an Informal Hearing officer, an audit manager, Clark Graves--Assistant Attorney General, Richard Brown, James B. Lee and Spencer E. Austin, counsel for Vali. At that meeting, Vali informed the DOH that the issue of interest had not been settled by the Informal Hearings. All parties agreed that interest had not been raised as a definable issue during the Informal Hearings. The DOH agreed that the \$272,362.03 amount should be paid to Vali and if Vali believed it had any issue regarding interest, that could be taken up in a Formal Hearing. (Stipulation of Facts, ¶ 20; Transcript, p. 77.)

26. On or about May 16, 1985, the DOH issued a check in the amount of \$274,223.17 to Vali, which Vali cashed on that date. This check represented \$272,362.03 in underpayments made to Vali and \$1,861.14 in interest, from the date of DOH's agreement to pay to the date of payment. (Stipulation of Facts, ¶¶ 23, 24 and Exhibits Q and R thereto.)

27. Subsequently, Vali made a timely request for a Formal Hearing, at which the single issue was whether Vali was entitled to any interest on the principal sum paid. (Stipulation of Facts, ¶ 25.)

28. After evidence was received at the Formal Hearing, the Administrative Law Judge found in favor of Vali and stated in his written opinion:

There is nothing complex or mysterious about it. Respondent should pay the claimant interest and ought to do so without further delays.

(R. 13-48, p. 7.)

29. The Executive Director of the Department of Health, without having heard any evidence, overturned that decision and denied Vali any interest on the sum of money previously paid. (Brief of Respondent, p. 9.)

RESPONSE TO DOH'S STATEMENT OF FACTS

In its Brief of Respondent/Cross-Appellant, the DOH in its Statement of Facts has taken certain "facts" out of context, and totally distorted the events cited.

DOH FACT 8 - Vali's interim rate for the time period of the FCPs was calculated upon FCPs filed by former owners of the Vali facilities. That interim rate was not based upon financial data provided by Vali.

DOH FACT 9 - There was no dispute regarding the FCPs that were submitted for the time period January 1, 1978 to June 30, 1979. The DOH simply refused to follow its normal procedures in conducting a desk audit and allowing the owner of Vali to present such documentary evidence as they felt necessary to support their costs.

DOH FACT 10 - The Bureau of Medicaid Fraud did not undertake the investigation of Vali on its own initiative but had the matter referred to them by the DOH.

DOH FACT 11 - Paragraph 2 of the Stipulation does not indicate that settlement negotiations were stayed pending the conclusion of the investigation. Paragraph 2 indicates that the DOH could not complete its adjustments to the FCPs in 1980 due to the investigation that was being conducted by the Bureau of Medicaid Fraud. Vali did not consent to any delay in the normal adjustment process to the FCPs.

DOH FACT 13 - Following the conclusion of the investigation, the DOH claimed that Vali owed it approximately \$177,385.62 in overpayments.

DOH FACT 14 - Vali did not voluntarily wait until March 25, 1983 in which to request an informal administrative hearing. On September 12, 1980, the Bureau of Medicaid Fraud, pursuant to a search warrant, seized virtually every business document of Vali. Following the conclusion of the investigation in April 1982, only partial records were returned to Vali. Those records that were returned were in such a disarray as to make them virtually worthless without literally hundreds of hours at reconstruction. (See Footnote 3.)

DOH FACT 15 - The DOH wishes this Court to believe that the exit conferences and informal hearings in this matter were delayed entirely as a result of Vali. In fact, there were several delays that were requests from the DOH on the basis of their employees being unavailable for said hearings. (See Footnotes 2, 3.)

DOH FACT 16 - The record citation for Fact 16 actually shows a disallowance of slightly more than \$450,000. It should also be noted that the exit conferences and informal hearings were in large part an effort of Vali to document its claimed expenses on the FCPs. (See Footnotes 2, 3.)

DOH FACT 18 - There was no proposed "final settlement" on March 20, 1985. The record indicates that, as early as December 1984, the DOH was aware that Vali intended to reserve the issue of interest to be raised at a later time.

DOH FACT 19 & 20 - There was no "final settlement" regarding the interest issue. The DOH was aware, as early as December of 1984, that regardless of the settlement of the principal claim, Vali intended to preserve its claim to interest to be raised at a later time.

DOH FACT 21 - Paragraph 21 of the Statement of Facts by the DOH is an absolute distortion of the record and the facts. Dennis Pettey, Audit Manager for the DOH, and Clark Graves, Assistant Attorney General assigned to this matter, admitted in the formal hearing of this matter that they were aware that Vali intended to make a claim for interest as early as December, 1984. (See ¶ 22, supra.)

DOH FACT 24 - The check delivered to Vali, made reference to in paragraph 24, was not for the full settlement amount to Vali. The check for \$274,223.17 represented payment on principal only, on issues raised in the informal hearing. It

should further be noted that the check contained no restrictive endorsement and no release of any claims accompanied the check.

DOH has also misstated several facts in its "Response to Vali's Statement of Facts," at pp. 10-14 of its brief. Vali's response to those misstatements is as follows:

1. DOH's assertions in paragraph 1 of its response facts consist largely of semantics and rhetoric that require no response. However, in response to the last sentence of paragraph 1, Vali submits that Form 271-A's are submitted and paid on the basis of the rate that was established from previously submitted FCPs. In Vali's case, DOH did not use its FCPs, but instead, established an arbitrary interim rate from which the Form 271-A's would be paid. Therefore, while Vali may have been timely paid on a monthly basis for its Form 271-A's, the basis for its claim, that was ultimately resolved in its favor even by DOH, is that it was not paid the amount to which it was actually entitled.

2. In response to DOH's response paragraph 3, Vali submits that it has not asked this Court to determine the precise dates when payments were due to Vali, nor the amounts due, in order to reach a conclusion as to the amount of interest owing. Indeed, that calculation will be a fairly complex undertaking that will require an evidentiary hearing, which has thus far been denied Vali due to the trial court's denial of its interest claim as a matter of law. In any event, as has been discussed previously in this brief, and as will be discussed more fully

hereinafter, DOH's gratuitous, self-serving and unsupported representation that circumstances "were not normal because Vali grossly overstated its claims," is an utter falsehood that is entirely without factual foundation.

3. DOH's response paragraph 4 is yet another self-serving, unsupported recitation of alleged "fact." It should be noted that the reason for the Bureau of Medicaid Fraud's conduct is, at best, a matter of pure speculation in this proceeding.

4. In its response paragraph 5, DOH suggests that Vali's claim that its business records were essentially destroyed by the criminal investigation is a fabrication. There is, however, a factual foundation for that contention (See ¶ 13 hereof), and the mere denial of it in DOH's Answer hardly establishes that the allegation is false.

ARGUMENT

I. EXTINGUISHMENT DOES NOT EXIST IN THIS STATE AND IS CONTRARY TO ITS PUBLIC POLICY.

In DOH's Response Brief, it contends that Vali is not entitled to interest under the common law of Utah because (1) the issue of common law entitlement to interest was not raised in the court below, and (2) any right to interest that Vali may have had is now barred by the doctrine of "extinguishment." With respect to the first argument, the law in Utah is that "matters neither raised in the pleadings nor put in issue at the trial cannot be

considered for the first time on appeal." Bundy v. Century Equipment Company, Inc., 692 P.2d 754, 758 (Utah 1984).

As DOH is well aware, the issue of Vali's common law interest entitlement was indeed considered by the lower court in this case. In fact, in his Memorandum Decision of February 11, 1988, Judge Murphy resolved the majority of pending issues but specifically withheld decision on the issue of common law interest entitlement, stating, "the only remaining theory available to Vali is premised on Utah cases allowing pre-judgment interest." Memorandum Decision p. 5. Thus, the entire purpose for the post-Memorandum Decision briefing was to discuss interest entitlement under Utah common law. As such, it is somewhat disingenuous for DOH to now represent to this Court that the issue has never before been considered.

DOH's second argument involves the concept of "extinguishment," which DOH claims bars Vali from recovery of interest. The concept of extinguishment, which appears to be accepted in only a few other jurisdictions, primarily on the basis of out-dated law, precludes recovery of interest where interest is sought as "damages" and the plaintiff has accepted payment of principal. See, e.g., Phillips Petroleum Co. v. Riverview Gas Compression Co., 409 F.Supp 486 (N.D.Tex. 1976) (refusing to apply extinguishment in that case, but citing, as authority for that concept, United Brothers of Friendship v. Kennedy, 193 S.W. 253 (Tex.Civ.App. 1917) and 1 C.J. 546). Interest is recoverable

as "damages" when the right to its recovery is not based on a contract, express or implied. See, e.g., Ray F. Fischer Co. v. Loeffler-Green Supply Co., 289 P.2d 139 (Okla. 1955). In the Fischer case, extinguishment was statutorily imposed, but the court managed to distinguish the case before it in order to avoid its application.

In this case, there is, at least arguably, an implied contract to pay interest since Vali's claim is derived from a contract that, by statute, includes an interest provision. As such, Vali is not seeking interest as "damages," and the extinguishment concept would not be applicable even in those jurisdictions that have adopted it. Notably, DOH refers this Court to American Jurisprudence on this issue, rather than to any case law.

As the sole support for application of the extinguishment concept in this State, DOH cites Cox Construction Co., Inc., v. State Road Commiss., 583 P.2d 85 (Utah 1978). Interestingly, Cox provides no support for the extinguishment concept. In fact, the only holding in Cox with respect to interest was that, based on the principle of accord and satisfaction, the plaintiff had conceded any right any right it may have had to recover interest. Significantly, the Cox court specifically noted that the parties "may well have reserved the issue of interest for the trial court's determination," but had failed to do so. 583 P.2d at 87. Thus, the Cox holding not only fails to support the

extinguishment concept, but is directly contrary to it. However, even the Phillips Petroleum court, which did recognize the extinguishment concept, noted that the plaintiffs' failure to "reserv[e] their right to later sue for interest" was significant. 409 F.Supp. at 493. From this, it appears that, even in jurisdictions that recognize the concept, extinguishment does not apply where, as here, the plaintiff reserved its right to claim interest when it accepted payment of principal.

DOH has attempted to "bootstrap" its argument that Vali waived its right to interest into an argument that extinguishment bars its claim. As will be discussed more fully hereinafter, the evidence in this case fully supports the conclusions of both the ALJ and Judge Murphy that Vali in fact reserved its claim for interest against the DOH. As such, DOH's "extinguishment" argument is without merit.

In any event, to impose any artificial device to deny recovery of interest simply because, as here, the plaintiff accepted payment of principal, with reservation of its right to recover interest, would be both arbitrary and in conflict with the public policy of this State. It is clear that Utah law favors the settlement of disputes. See, e.g., Alvin G. Rhodes Pump Sales v. Industrial Commission, 681 P.2d 1244 (Utah 1984). In this case, DOH delayed payment to Vali of sums legitimately due it for a period of not just days or weeks or months, but several years, during which time, Vali operated without

sufficient reimbursement and the DOH had use of its money. In the midst of that delay, Vali was faced with three options: (1) refuse any payment and litigate its entire claim, (2) accept payment of principal and waive any right to recover interest, or (3) accept payment of principal and reserve the right to interest as the sole issue for litigation.

Vali chose the latter option, only to be met with DOH's arguments that (1) Vali waived its right to recover interest, a claim that was not accepted by either the ALJ or the trial judge in this case, and (2) even if Vali did not waive its right to interest, it cannot have it because of "extinguishment." Contrary to DOH's assertions, this case cannot logically be distinguished from the case of United States v. Consolidated Edison Co. of N.Y., Inc., 590 F.Supp. 266 (S.D.N.Y. 1984). As in that case, the scenario proposed by DOH would put Vali to the "Hobson's choice" of accepting principal and no interest as its sole recovery, or going without the money to which it was entitled for an additional, unknown, period of time in order to litigate the entire matter, which would subject both Vali and the already overused court system to a burden that is justified against neither. Application of the extinguishment concept, at least as it has been defined by DOH, would effectively eliminate a plaintiff's incentive to settle any portion of its claim, since such a settlement would jeopardize, or do away with, the

remainder of the claim. Such a result would clearly be contrary to the public policy of this State.

Vali is entitled to interest by both Utah common law, existing since before 1890 (See Wasatch Min. Co. v. Crescent Min. Co., 24 P. 586 (Utah 1890)) and by legislative enactment (Utah Code Ann. § 15-1-1). Acceptance of DOH's proposal to deny Vali this longstanding and well-established right is not justified by any law, common or statutory, ever adopted in this State. DOH's extinguishment claim is but one more contrived effort to deprive Vali of what is its right--the payment of interest on amounts not paid when due.

II. SECTION 15-1-1 ESTABLISHES A "RIGHT" TO RECOVER INTEREST ON AMOUNTS OVERDUE.

In its brief in this matter, DOH contends that § 15-1-1 does not "create" a cause of action for interest, but merely establishes the legal rate where a cause of action for interest is based on common law or contract. Therefore, DOH argues, Vali's claim is really a common law claim that is barred by the doctrine of extinguishment. Vali does claim entitlement to interest under the common law, and DOH's extinguishment argument, applicable only to that claim, has already been dealt with in

Section I hereof. However, Vali also claims a statutory "right" to recover interest pursuant to Utah Code Ann. § 15-1-1.⁴

DOH's assertion that § 15-1-1 creates no cause of action for interest depends entirely upon its argument that, since a right to interest already existed at common law, enactment of the statute could not "create" such a right. This novel proposition, for which no authority is cited, would effectively deprive the Utah legislature of the power to make law. Indeed, Vali is not aware of any principle that supports the proposition that a cause of action may not statutorily be created where it already exists at common law. In fact, legislatures routinely codify existing common law and sometimes add clarification or additional elements to claims. In this case, the Utah legislature clarified the applicable rate of interest, which apparently never had been specified at common law.

DOH attempts to distinguish the statutes in United States v. Consolidated Edison, supra, and Girard Trust Co. v. United States, 270 U.S. 163 (1926) on the basis of their use of the term "shall" in relation to the recovery of interest. Thus, the New York statute in Consolidated Edison, began "interest shall be recovered . . . ," and the federal statute in Girard provided that "interest shall be allowed and paid . . ." In

⁴ VALI also claims a statutory right to interest pursuant to Utah Code Ann. § 15-6-2, which claim is dealt with in Section III hereof.

contrast, but also in conformance with these statutes, the Utah statute provides that "the legal rate of interest for the loan or forbearance of any money . . . shall be" (emphasis added). Admittedly, this statute could have been more artfully drafted. However, the term chosen by the Utah legislature is mandatory rather than permissive. Moreover, the Utah statute is not limited to situations where a common law right to interest exists, or where a contract specifically provides for interest but is silent as to its amount--limitations that could easily have been enacted. Instead, the legislature chose to provide that the rate of interest for the forbearance of money shall be 6%. As such, it appears that the legislature intended that interest would, and should, be paid on overdue obligations in this State.

Vali has established that it had a legal right to money that was not paid when due. The failure to make payment when due benefited DOH by its use of Vali's money for a substantial period of time. This is just the kind of situation that was meant to be encompassed within § 15-1-1, and Vali is entitled to recover interest pursuant to that statute, in addition to the common law of this State.

III. THE ONLY "DISPUTE" RELATING TO VALI'S CLAIM WAS A RESULT OF DOH'S REFUSAL TO ALLOW VALI TO GO THROUGH THE ORDINARY ADMINISTRATIVE PROCESS.

As an alternative basis for recovery, Vali has relied on the Utah Prompt Payment Act (Utah Code Ann. §§ 15-6-1, et seq.), which requires DOH to pay interest on all overdue obligations. In response, DOH relies on § 15-6-4, which is an exception to the interest requirement, applicable if the failure to timely pay is a result of a "dispute" over the amount due.

In its "Statement of Facts" and its "Response to Vali's Statement of Facts" DOH attempts to create the impression that Vali's claim, which was derived from the FCPs it submitted in 1980, 1981, and 1982, was the subject of a dispute of major significance, which "dispute" was so substantial as to warrant a criminal investigation, and which resulted in a compromise of Vali's claim that was in excess of \$700,000. These allegations have been dealt with in the Factual Statement of this brief and will not be reiterated in depth here.

However, what the facts establish is that Vali submitted FCPs, beginning in 1980, that could and should have been subjected to the normal audit procedure in which Vali would have been asked to provide certain documentation, following which, DOH would have performed a routine mathematical calculation to determine a prospective rate of payment to Vali, as well as whether, retrospectively, Vali was entitled to additional funds.

Had that process been handled in the ordinary course, as it could have been, in 1980, Vali would have received money back from DOH at that time and also would have received an accurate prospective rate.

In fact, as shown in Vali's foregoing factual statement, DOH's "dispute" was almost entirely a matter of documentation--something that arises in virtually any request for payment by FCPs. Furthermore, Vali was not given an opportunity, until some two years later, to go through the ordinary procedure of exit conferences, during which, documentation of its claim was requested and supplied.

In addition, DOH continued to insist, for some four years, that Vali owed it money, without ever having given Vali an opportunity to document its claim. The delay was more than usually burdensome for Vali, as the criminal investigation had resulted in a loss of many of its necessary documents. In any event, the first time that DOH actually ran calculations on Vali's FCPs, after the exit conferences, in late 1984, it discovered that Vali was entitled to receive money back. DOH then offered to pay Vali over \$223,000. Ultimately, DOH paid Vali over \$272,000, in principal only.

Thus, DOH changed its position almost \$450,000, from claiming \$177,000 due to it, to paying Vali \$272,000. At the same time, DOH claims in its brief that it originally "disallowed" \$760,000 of Vali's claim and ultimately "disallowed"

approximately \$700,000.⁵ Therefore, while DOH admits that its "dispute" was limited to \$60,000, the facts establish that the change in their position was in the amount of almost \$450,000. These figures make it clear that, even accepting all of DOH's initial "disallowances," Vali was owed money from the outset, and should have been paid. It was clearly DOH's failure to follow its own administrative procedures that caused the delay in payment, not any "dispute" over the amount due. At most, DOH could claim a dispute as to \$60,000, and the remaining money should have been paid timely.

Indeed, if the mere fact that DOH disallowed a portion of Vali's claim creates a "dispute" that precludes payment of interest, then the Utah Prompt Payment Act would be effectively eviscerated. The entire administrative payment process, beginning with submittal of FCPs, consists of audits, documentation and "disallowance" of portions of claims. Vali's position is that, in its case, that process took over five years, rather than the usual six months. It was the administrative process, imposed upon Vali by DOH, that caused the delay in payment, not any dispute. All "disputes" could and should have been resolved within that six-month period. Pursuant to the express terms of the Utah Prompt Payment Act, Vali is entitled to interest on

⁵ The factual basis for these figures was not supplied by DOH and Vali admits their accuracy only for the purposes of this argument.

amounts that were not paid when due, and this case should be remanded to the District Court for an evidentiary hearing on the amount of interest owed.

IV. THE EVIDENCE IN THIS CASE ESTABLISHES THAT VALI DID NOT WAIVE ITS RIGHT TO CLAIM ENTITLEMENT TO INTEREST.

DOH's entire argument to the effect that the settlement of principal bars Vali's claim for interest is premised on its utterly false representation to this Court that DOH was unaware of Vali's intention to claim interest until after the "settlement" was entered and the principal had been paid. In fact, as detailed in Vali's foregoing Response to DOH's Statement of Facts, very early on in the negotiations, Vali made it clear to DOH that it was not conceding its right to claim interest. (See ¶ 22 of Vali's Statement of Facts). Both DOH's attorney and its audit manager admitted as much at the formal hearing in this matter. Vali repeatedly refused to accept any tender of principal that was tied to execution of a release of its claim to interest. That refusal ultimately resulted in DOH's tender of a check to Vali that was unrestricted with respect to Vali's interest claim.

DOH's assertion, in its brief, that it was unaware of Vali's intent to claim interest at the time of the "settlement" is a gross misrepresentation of both the facts and the record in this case. DOH was well aware, prior to its agreement to pay and when it tendered in excess of \$272,000.00 to Vali on or about May

16, 1985, that Vali intended to claim interest. Indeed, DOH was aware of Vali's intent to claim interest, and of Vali's steadfast refusal to take any action that would compromise its right to claim interest, as early as December, 1984 or January, 1985, in the midst of the informal hearing process, and several months before the check was tendered.

The findings of the ALJ and the District Court Judge on this issue are amply supported by the limited existing evidentiary record in this case, notwithstanding DOH's gross distortion of the underlying facts. The lower court's finding that Vali did not waive, or otherwise compromise, its claim for interest by its conduct in the administrative process should be affirmed.

CONCLUSION

Vali is entitled to claim interest under both the common law of this State and under two separate Utah statutes. The lower court's decision denying Vali interest, as a matter of law, was in error and should be reversed. In addition, the lower court's finding that, as a matter of fact, Vali did not waive its right to seek interest against DOH is amply supported by the record and should be affirmed.

DATED this 3rd day of May, 1989.



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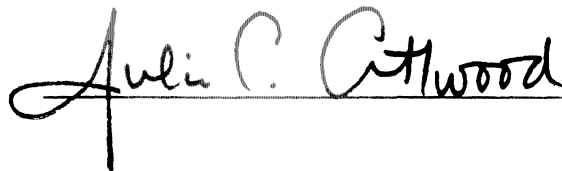
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Convalescent and Care Institutions

MAILING CERTIFICATE

I hereby certify that I caused to be mailed, postage prepaid, four true and correct copies of the foregoing REPLY BRIEF OF APPELLANT VALI CONVALESCENT AND CARE INSTITUTIONS to the following on this 3rd day of May, 1989:

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