

1998

# Gerald McCoy, Frieda McCoy v. Blue Cross and Blue Shield of Utah : Brief of Appellant

Utah Court of Appeals

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Jeffrey D. Eisenberg; David R. Olsen; Wilcox, Dewsnup & King; Clark Newhall; Attorneys for Appellee.

Andrew H. Stone; James E. Magleby; Jones, Waldo, Holbrook & McDonough; Attorneys for Appellant.

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BRIEF

UTAH  
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DOCKET NO. 981246

IN THE UTAH COURT OF APPEALS

GERALD McCOY, individually and :  
as personal representative of :  
the estate of FRIEDA McCOY, :  
deceased, :  
Plaintiff, : Case No. 981246  
vs. : Trial Court No.: 970901461PI  
BLUE CROSS AND BLUE SHIELD OF : Priority No.: 15  
UTAH, a Utah Corporation, :  
Defendant. :

BRIEF OF APPELLANT BLUE CROSS AND BLUE SHIELD OF UTAH

APPEAL FROM ORDER ENTERED BY THE THIRD JUDICIAL DISTRICT COURT,  
SALT LAKE COUNTY, STATE OF UTAH,  
THE HONORABLE PAT P. BRIAN PRESIDING

Jeffrey D. Eisenberg (USB #4029)  
David R. Olsen (USB #2458)  
WILCOX, DEWSNUP & KING  
36 South State Street #2020  
Salt Lake City, Utah 84111  
  
Clark Newhall (USB # )  
136 South Main Street  
Salt Lake City, Utah 84101  
  
Attorneys for Appellee  
Gerald McCoy

Andrew H. Stone (USB #4921)  
James E. Magleby (USB #7247)  
JONES, WALDO, HOLBROOK  
& McDONOUGH  
1500 Wells Fargo Plaza  
170 South Main Street  
Salt Lake City, Utah 84101  
  
Attorneys for Appellant  
Blue Cross and Blue Shield  
of Utah

**FILED**

Utah Court of Appeals

OCT 13 1998

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Jeffrey D. Eisenberg (USB #4029)  
David R. Olsen (USB #2458)  
WILCOX, DEWSNUP & KING  
36 South State Street #2020  
Salt Lake City, Utah 84111

Clark Newhall (USB # )  
136 South Main Street  
Salt Lake City, Utah 84101

Attorneys for Appellee  
Gerald McCoy

Andrew H. Stone (USB #4921)  
James E. Magleby (USB #7247)  
JONES, WALDO, HOLBROOK  
& McDONOUGH  
1500 Wells Fargo Plaza  
170 South Main Street  
Salt Lake City, Utah 84101

Attorneys for Appellant  
Blue Cross and Blue Shield  
of Utah

**I. PARTIES TO THIS PROCEEDING**

Appellant is unaware of any parties other than those disclosed in the caption.

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#### IV. STATEMENT OF JURISDICTION

This is an appeal from the trial court's order denying Appellant Blue Cross Blue Shield of Utah's ("Blue Cross" or "Defendant") motion to compel arbitration. Jurisdiction is granted under Utah Code Annotated §§ 78-31a-19(1).

#### V. STATEMENT OF ISSUE PRESENTED FOR REVIEW AND STANDARD OF REVIEW

##### A. Issues

Blue Cross raises the following issues on appeal.

The issue before the Court is whether the McCoy's insurance policy was validly amended to include an arbitration clause requiring that Appellant Gerald McCoy's ("McCoy" or "Plaintiff") claims be submitted to arbitration. Blue Cross appeals the trial court's denial of its motion to compel arbitration. Specifically,

1. Blue Cross appeals the trial court's finding that "Blue Cross relies solely on the affidavit of Ms. [Edwina] Green as evidence that they mailed an arbitration amendment to Mr. McCoy." Findings, ¶ 6. (R. 277). In fact, Blue Cross submitted, with the trial court's permission, Affidavits from two other individuals and a Supplemental Affidavit of Edwina Green showing the arbitration agreement was mailed.

2. Blue Cross appeals the trial court's conclusion that "Ms. Green's affidavit does not rise to the level of proof of mailing." Conclusions, ¶ 4. (R. 278-279). In fact, the evidence of mailing was unrebutted.

3. Blue Cross appeals the trial court's conclusion that Blue Cross "failed to establish that Mr. McCoy's notice of

the arbitration amendment was ever mailed to him." Conclusions, ¶ 5. (R. 279). As noted, the evidence of mailing was essentially un rebutted.

Blue Cross also appeals the trial court's failure to rule on its argument that McCoy's failure to object to the arbitration provision for approximately two years after he admitted becoming aware of the provision constituted binding acceptance of its terms. (R. 233-234)

#### B. Standard of Review

Generally, "[a] trial court's denial of a motion to compel arbitration presents a question of law which [is reviewed] for correctness." Sosa v. Paulos, 924 P.2d 357, 360 (Utah 1996). Ordinarily, a trial court's findings of fact will be upheld unless "clearly erroneous." Drake v. Industrial Com'n of Utah, 939 P.2d 177, 181 (Utah 1997). In this context, however, if the trial court determined there was a disputed issue of fact, the appropriate procedure was to hold an evidentiary hearing. Buzas Baseball v. Salt Lake Trappers, 925 P.2d 941, 949 n.7 (Utah 1996). No such hearing was held; instead, the trial court based its decision on affidavits submitted by the parties. Because the trial court's ruling was based on Affidavits and other documents, review is *de novo*. In re Infant Anonymous, 760 P.2d 916, 918 (Utah App. 1988) ("Because the trial court's finding was based solely on the written materials [affidavits] and involved no assessment of witness credibility or competency, this court is in as good a position as the trial court to examine the evidence *de novo* and determine the facts."); see also Giblin By Helm v.

Giblin, 854 P.2d 816, 824 (Kan. 1993) (applying de novo standard review where controlling facts of case are based upon written or documentary evidence by way of pleadings, admissions, depositions and stipulation, because trial court has no particular opportunity to evaluate credibility of witnesses, and in such situations, appellate court has as good an opportunity to examine and consider evidence as trial court); Heskett v. Heskett, 896 P.2d 1200, 1202 (Okla. App. 1995) (noting that when facts presented to trial court by stipulation, deposition and other documentary material, appellate court was free to substitute its analysis of record for trial court's analysis); Stangler v. Anderson Meyers Drilling Co., 746 P.2d 99, 101-102 (Mont. 1987) (noting that where crucial testimony is taken by deposition, the Supreme Court will examine findings more closely, as it is in as good a position as lower court to assess evidence); Pena v. Westland Dev. Co., Inc., 761 P.2d 438, 445, cert. denied 759 P.2d 200 (N.M. App. 1988) (noting that while ordinarily trial court is proper arbitrator of credibility of witnesses and testimony, where testimony is by deposition, appellate court may evaluate testimony as well as trial court).

Fundamentally, the trial court's decision in this case was based on a determination that Blue Cross had failed to meet its burden of demonstrating mailing of the arbitration provision. (R. 277-279). That is a conclusion of law. Accordingly, the trial court's findings in this case, as well as its conclusions of law, should be reviewed *de novo*. In addition, review of these issues must be conducted in light of the well established rule

that under Utah law all doubts are resolved in favor of arbitration. Sosa, 924 P.2d at 359.

### C. Relevant Statutes

1. Section 3 of the Utah Arbitration Act provides:

A written agreement to submit any existing or future controversy to arbitration is valid, enforceable, and irrevocable, except upon grounds existing at law or equity to set aside the agreement or when fraud is alleged as provided in the Utah Rules of Civil Procedure.

Utah Code Ann. § 78-31a-3 (1997).

2. The Utah Insurance Code provides the following regarding the right of an insurer to renew a policy:

[I]f the insurer offers or purports to renew the policy, but on less favorable terms or at higher rates, the new terms or rates take effect on the renewal date if the insurer delivered or sent by first class mail to the policy holder notice of the new terms or rates at least 30 days prior to the expiration date of the prior policy. If the insurer did not give this prior notification to the policy holder, the new terms or rates do not take effect until 30 days after the notice is delivered or sent by first class mail, in which case the policy holder may elect to cancel the renewal policy at any time during the 30-day period.

Utah Code Ann. § 31A-21-303(5)(a) (1994).

3. The Utah Insurance Code provides the following regarding the right of an insurer to modify a policy:

Except as provided in Subsection (3) or (4), or as otherwise mandated by law no purported modification of the contract during the term of the policy affects the obligations of a party to the contract unless the modification is in writing and agreed to by the party against whose interest the modification operates.

Utah Code Ann. § 31A-21-106(2) (Supp. 1996) (emphasis added).

## VI. STATEMENT OF THE CASE

### A. Nature of the Case

This is an appeal from an order denying a motion to compel arbitration. Plaintiff and Appellee Gerald McCoy ("McCoy or "Plaintiff") claims that defendant Blue Cross and Blue Shield of Utah ("Blue Cross" or "Defendant") refused coverage for treatment of for his wife's breast cancer, in particular, a bone marrow transplant, under a health insurance policy issued by Blue Cross. Complaint and Jury Demand ("Complaint"), ¶¶ 7-14 (R. 4-5).

Blue Cross moved for arbitration, based upon language contained in a number of documents. (R. 17-29). In particular, Blue Cross presented evidence that in November of 1985 it sent all individual policy holders a letter (the "First Mailing") and an "Endorsement to Basic Health Care Agreement" (the "Endorsement"), by submission of the Affidavit of Edwina H. Green ("Green I Affidavit"). (R. 31, 34-36). The letter accompanying the Endorsement read, in part:

We would also like to announce that effective January 1, 1986, we will adopt an arbitration procedure for the resolution of any disputes you may have with Blue Cross and Blue Shield of Utah.

(R. 34). The Endorsement included the following arbitration provision:

In the event of any dispute or controversy concerning the construction, interpretation, performance or breach of this Agreement arising between the Employer, Subscriber, eligible Family Member, or the heir-at-law or personal representative of such person, and the Plan, whether involving a claim in tort, contract, or otherwise, the same shall be submitted to the arbitration under the appropriate rules of the American Arbitration Association.

(R. 35).

Blue Cross also presented evidence that in early 1986, all policy holders of individual health insurance policy Qualifier I-Type 57H were sent the new edition of the Health Care Agreement (the "Second Mailing"), incorporating the terms of the Endorsement into the existing policy (the "Amended Policy"). (R. 21, 32, 38-42). The Amended Policy contains a binding arbitration provision which states:

Binding arbitration is the final step for the resolution of any dispute. When you enroll as a Member of the Plan, you agree that any dispute will be resolved by binding arbitration, and agree to give up the right to a jury or court trial for a settlement of such dispute . . . .

(R. 40). The Amended Policy also provides:

In the event of any dispute of controversy concerning the . . . performance . . . of this Agreement arising between the . . . Subscriber, eligible Family Member . . . (and) the Plan, . . . the same shall be submitted to arbitration under the appropriate rules of the American Arbitration Association.

(R. 41). Finally, in 1990 a 1989 reprint of the Health Care Agreement Qualifier I - Type 57H policy, also containing arbitration language (collectively, with the Amended Policy, the "Amended Policies"), was sent to policyholders by mail (the "Third Mailing"). (R. 22, 32, 44-47A). Collectively or separately, the statements in the Endorsement and Amended Policies (the "Arbitration Provisions") called for arbitration of all disputes arising between McCoy and Blue Cross. (R. 4-5).

Plaintiff did not contest the scope of the Arbitration Provisions. Instead, Plaintiff argued, among other things, that

he did not receive any of the First, Second, or Third Mailings. (R. 61, 64-68, 81).

The trial court ordered supplemental briefing on, among others, the issues of notice to the McCoys and "whether or not plaintiff waived objection to arbitration after notice was received by plaintiff (in Jan., 1995)." (R. 228). After supplemental briefing, the trial court denied the motion to compel arbitration, ruling only on the issue of whether Blue Cross proved the Arbitration Provisions were mailed to the McCoys. This appeal followed. (R. 276-280, 281-283).

#### **B. Course of Proceedings**

Plaintiff sued Blue Cross, alleging that Blue Cross refused coverage for treatment for his wife's breast cancer, in particular, a bone marrow transplant, under a health insurance policy issued by Blue Cross.

Blue Cross moved to compel arbitration as to all of these claims. (R. 17-47). After detailed briefing by both parties (R. 60-87, 148-219, 230-268), the trial court denied Blue Cross's Motion to Compel Arbitration, by Order entered on March 5, 1998, and captioned "Findings of Fact Conclusions of Law and Order" (appellant will refer to the trial court's findings of fact as "Findings," the trial court's conclusions of law as "Conclusions" and the March 5, 1998 Order generally as the "Order"). (R. 276-280). The Notice of Appeal was filed March 11, 1998. (R. 281-283).

### C. Disposition in the Trial Court

The district court denied Blue Cross's Motion to Compel arbitration. (R. 276-280). Blue Cross filed this appeal pursuant to Utah Code Annotated §§ 78-31a-19(1). (R. 281-83).

### VII. SUMMARY OF ARGUMENT

Blue Cross principally appeals two aspects of the trial court's ruling denying its motion to compel arbitration. First, Blue Cross appeals the trial court's ruling that Blue Cross did not demonstrate that the Arbitration Provisions were mailed to the McCoys.

In fact, the unrebutted evidence demonstrates that Blue Cross proved the McCoys were mailed the Arbitration Provisions. Blue Cross submitted an Affidavit of Edwina Green ("Green I Affidavit"), and additional affidavits from Keith Stoddard (the "Stoddard Affidavit") and Gary Nelson (the "Nelson Affidavit") as evidence the First Mailing was sent to Mr. McCoy. (R. 237-241, 249-253). In addition, Blue Cross submitted a Supplemental Affidavit of Edwina Green ("Green II Affidavit"). (R. 242-248). The Green II Affidavit specifically set forth the process by which Plaintiff was sent the First Mailing, under either of the two possible subscriber groups the McCoys could have been part of at the time of mailing. Green II Affidavit, ¶¶ 6-14 (R. 244-245). Thus, the McCoys' name and address would have been contained on the magnetic tape sent to the printer. Green II Affidavit, ¶¶ 5-9 (R. 243-244). The Stoddard Affidavit established that in the ordinary course of its business, Image Printing (the "Printer") received this magnetic tape from Blue



Cross and inserted all of the names thereon into the First Mailing. Stoddard Affidavit, ¶¶ 6-9 (R. 238-239). Similarly, the Nelson Affidavit established that in the ordinary course of its business, Progressive Direct Mail Advertising (the "Mailer") received the First Mailing from the Printer, and delivered the mailing to the United States Postal Service. Nelson Affidavit, ¶¶ 6-9 (R. 250-252).

Under Utah law, amendment to the policy and notice by mailing -- when such notice has been agreed to by contract -- is valid and enforceable. Diamond T. Utah, Inc. v. Canal Insurance Company, 361 P.2d 665 (Utah 1961); Bennett Motor Company v. Lyon, 380 P.2d 69 (Utah 1963). And, Baumgart v. Utah Farm Bureau Ins. Co., 851 P.2d 647 (Utah App. 1993), held that, on facts nearly identical to those here, a mere denial of receipt is insufficient to defeat evidence that the insurer followed its standard mailing practice.

Second, Blue Cross also appeals the trial court's implicit rejection of the argument that Plaintiff's retention of the policy for two years after he was admittedly aware of the arbitration provision constituted a waiver of his right to object. The District Court for the Central District of Utah, Judge Winder presiding, has ruled that an insured's retention of an insurance policy for an extended period of time, without objection within a reasonable time, "constitutes an acceptance of the Policy, including the arbitration provision." Imperial Sav. Ass'n v. Lewis, 730 F. Supp. 1068, 1073 (D. Utah 1990); see also Western Farm Bureau Mut. Ins. Co. v. Barela, 441 P.2d 47 (N.M.

1968) (same); Phillis Dev. Co. v. Commercial Standard Ins. Co., 457 P.2d 558 (Okla. 1969) (same). In Imperial Savings, Judge Winder determined that an insured's retention of the policy in question for only eleven months was sufficiently long to constitute an unreasonably long period of time without objection. Id. In this case, McCoy's failure to state his objection for at least two years, after he was admittedly on notice of the arbitration provision, constitutes waiver of any right to object to the inclusion of that arbitration provision in his insurance policy. McCoy is therefore required to arbitrate any disputes over coverage under the Policy.

#### VIII. ARGUMENT

Blue Cross appeals the trial court's ruling denying its motion to compel arbitration. The unrebutted evidence demonstrates that Blue Cross proved the McCoy's were mailed the Arbitration Provisions. Blue Cross also appeals the trial court's implicit rejection of the argument that Plaintiff's retention of the policy for two years after he was admittedly aware of the arbitration provision constituted a waiver of his right to object.

##### A. Background - Factual Record<sup>1</sup>

In the Complaint and Jury Demand ("Complaint"), Plaintiff Gerald McCoy ("McCoy" or "Plaintiff") claimed that defendant Blue

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<sup>1</sup> Although Appellant does not believe it necessary to marshall the evidence on appeal because the issue is whether to grant a motion to compel arbitration (which is favored under Utah law), this section also serves to marshall all the evidence presented to the trial court on the relevant issues.

Cross and Blue Shield of Utah ("Blue Cross" or "Defendant") improperly refused coverage for treatment for his wife's breast cancer, in particular, a bone marrow transplant, under a health insurance policy issued by Blue Cross. Complaint, ¶¶ 7-14 (R. 4-5). Specifically, McCoy alleged claims arising out of his purchase of a Blue Cross "Qualifier One" policy of health insurance (the "Policy") through Blue Cross, effective on October 3, 1985. Complaint, ¶ 3 (R. 3).

Blue Cross moved to compel arbitration, based upon language contained in the Policy since January, 1986. (R. 17-29). In particular, Blue Cross presented evidence that it sent all individual policy holders a letter and an "Endorsement to Basic Health Care Agreement" (the "Endorsement") in November of 1985 (the "First Mailing"), by submission of the Affidavit of Edwina H. Green ("Green I Affidavit"). (R. 31, 34-36). The letter accompanying the Endorsement read, in part:

We would also like to announce that effective January 1, 1986, we will adopt an arbitration procedure for the resolution of any disputes you may have with Blue Cross and Blue Shield of Utah.

(R. 34). The Endorsement included the following arbitration provision:

In the event of any dispute or controversy concerning the construction, interpretation, performance or breach of this Agreement arising between the Employer, Subscriber, eligible Family Member, or the heir-at-law or personal representative of such person, and the Plan, whether involving a claim in tort, contract, or otherwise, the same shall be submitted to the arbitration under the appropriate rules of the American Arbitration Association.

(R. 35).

Blue Cross also presented evidence, also through the Green I Affidavit, that in early 1986, all policy holders of individual health insurance policy Qualifier I-Type 57H were sent the new edition of the Health Care Agreement (the "Second Mailing"), incorporating the terms of the Endorsement (the "Amended Policy"). (R. 21, 32, 38-42). The Amended Policy contains a binding arbitration provision which states:

Binding arbitration is the final step for the resolution of any dispute. When you enroll as a Member of the Plan, you agree that any dispute will be resolved by binding arbitration, and agree to give up the right to a jury or court trial for a settlement of such dispute . . . .

(R. 40). The Amended Policy also provides:

In the event of any dispute of controversy concerning the . . . performance . . . of this Agreement arising between the . . . Subscriber, eligible Family Member . . . (and) the Plan, . . . the same shall be submitted to arbitration under the appropriate rules of the American Arbitration Association.

(R. 41). Finally, Blue Cross presented evidence through the Green I Affidavit that, in 1990, a 1989 reprint of the Health Care Agreement Qualifier I - Type 57H policy, also containing arbitration language (collectively, with the Amended Policy, the "Amended Policies"), was distributed to policyholders by mail (the "Third Mailing"). (R. 22, 32, 44-47A). Collectively or separately, the statements in the Endorsement and Amended Policies (the "Arbitration Provisions") called for arbitration of all disputes arising between the McCoy's and Blue Cross.

Plaintiff responded by arguing, among other things, that he did not receive any of the First, Second or Third Mailings, (R. 61, 64-68, 81), by filing the Affidavit of Gerald McCoy ("McCoy I Affidavit"). (R. 79-85). The relevant portions of the McCoy I Affidavit follow:

5. I was a senior contract manager on the Trans-Alaska pipeline and have reviewed and managed other contracts professionally. As a businessman involved in the formation and administration of contracts, I am aware of the importance of documenting changes in contracts and the importance of record keeping.

6. My wife, Frieda McCoy, was librarian and was also aware of the importance of record keeping.

7. My wife and I kept all documents and correspondence we received from Blue Cross relating to the Qualified I plan.

8. I have reviewed my records and have not found a copy of the November 25, 1985, letter and endorsement attached to the Affidavit of Edwina H. Green dated May 27, 1997, as Exhibit A, nor have I found copies of the Health Care Agreements portions of which are attached to Ms. Green's affidavit as exhibits B and C.

9. I do not recall ever having received copies of any of the attachments to Ms. Green's affidavit at any time before January 1995, nor do I recall ever having received any other copy of the policy between November 1985 and January 1995. Because of my work in contracts, I believe I would remember if I had received a copy of the endorsement attached as exhibit A to Ms. Green's affidavit.

(R. 80-81).

In addition, Plaintiff admitted he was on notice of the arbitration provision by at least January, 1995:

10. To the best of my knowledge, I never received notice of the arbitration requirement that Blue Cross alleges was added to the policy effective January 1, 1986, until some time in January 1995.

(R. 81) (emphasis added). McCoy also admitted being placed on notice of the existence of arbitration language much earlier.

In addition, McCoy admitted that since at least 1994, when the McCoy's received medical services, they were sent an Explanation of Benefits ("EOB") form. (R. 84). Plaintiff himself presented evidence to the trial court that the EOB forms sent to (and received by) the McCoy's provided on the front of the form:

If you disagree with our decision on your claim, you may ask us to reconsider. You also have the right to arbitration.

And provided on the back of the form:

If you are dissatisfied with the decision following review, you may have the right to have the matter arbitrated in accordance with the rules of the American Arbitration Association.

EOB, attached as Exhibit 12 to McCoy I Affidavit (R. 135-136) (emphasis added). Plaintiff contended he did not read these words, and would not have understood this language to require arbitration. (R. 84).

After Blue Cross replied to Plaintiff's arguments, (R. 148-215), and argument was held (R. 228), the trial court ordered supplemental briefing on, among others, the issues of notice to the Plaintiff of the arbitration provisions, and "whether or not plaintiff waived objection to arbitration after notice was received by plaintiff (in Jan., 1995)." (R. 228).

Blue Cross submitted, pursuant to the Court's order, additional affidavits from Keith Stoddard (the "Stoddard Affidavit") and Gary Nelson (the "Nelson Affidavit") as evidence the First Mailing was received by Mr. McCoy. (R. 237-241, 249-253). In addition, Blue Cross submitted a Supplemental Affidavit of Edwina Green ("Green II Affidavit"). (R. 242-248).

As discussed in detail below, the Green II Affidavit specifically set forth the process by which Plaintiff was sent the First Mailing, under both of the two possible subscriber groups the McCoy's would have been part of at the time of mailing. Green II Affidavit, ¶¶ 6-14 (R. 244-245). Thus, the McCoy's' name and address would have been contained on the magnetic tape sent to the printer. Green II Affidavit, ¶¶ 5-9 (R. 244-245). The Stoddard Affidavit established that in the ordinary course of its business, Image Printing (the "Printer") received this magnetic tape from Blue Cross and inserted all of the names thereon into the First Mailing. Stoddard Affidavit, ¶¶ 6-9 (R. 238-239). Similarly, the Nelson Affidavit established that in the ordinary course of its business, Progressive Direct Mail Advertising (the "Mailer") received the First Mailing from the Printer, and delivered the mailing to the United States Postal Service. Nelson Affidavit, ¶¶ 6-9 (R. 250-252).

Plaintiff submitted the Supplemental Affidavit of Gerald McCoy ("McCoy II Affidavit") wherein he contended, for the first time, that when he admittedly learned of his right to arbitration

in January, 1995, he understood it as optional, not mandatory.  
McCoy II Affidavit, ¶¶ 2-5 (R. 265-66).

The trial court issued its "Findings of Fact, Conclusions of Law and Order" on February 26, 1998. The trial court ruled that Blue Cross did not establish that the arbitration provisions were mailed to the McCoy's, ruling, in relevant part, as follows:

#### FINDINGS OF FACT

. . . .

6. Blue Cross relies solely on the affidavit of Ms. Green as evidence that they mailed an arbitration amendment to Mr. McCoy.

. . . .

#### CONCLUSIONS OF LAW

4. Ms. Green's affidavit does not rise to the level of proof of mailing. Ms. Green's affidavit cannot say whether or not Mr. McCoy's name and address were actually on the tape, an important fact in determining whether or not Mr. McCoy's arbitration amendment was ever mailed.

5. Blue Cross has failed to establish that Mr. McCoy's notice of arbitration amendment was ever mailed to him. Consequently, Blue Cross cannot apply the arbitration amendment to him.

(R.276-279). As discussed below, Blue Cross appeals the trial court's Findings, Conclusions, and Order.

#### **B. The Trial Court Erred in Its Ruling That the McCoy's Did Not Agree to the Arbitration Provisions**

1. Blue Cross Did Not Rely Solely on the Green I Affidavit as Evidence the Arbitration Agreement Was Mailed to the McCoy's

Blue Cross appeals the trial court's finding that "Blue Cross relies solely on the affidavit of Ms. [Edwina] Green as



evidence that they mailed an arbitration amendment to Mr. McCoy." Findings, ¶ 6 (R. 277) (emphasis added). In fact, Blue Cross submitted Affidavits from two other individuals, the Stoddard Affidavit and the Nelson Affidavit, as evidence the First Mailing was received by Mr. McCoy. (R. 237-241, 249-253). In addition, Blue Cross submitted the Green II Affidavit. (R. 242-248). It is apparent, therefore, that the trial court not only erred in finding that Blue Cross relied "solely" upon the Green I Affidavit, but that the trial court also improperly failed to consider the contents of the Green II Affidavit, and the Stoddard and Nelson Affidavits. The specific evidence presented by these affidavits is discussed below.

2. The Supplemental Affidavits Established Proof of Mailing the Arbitration Provisions

Blue Cross appeals the trial court's conclusion that "Ms. Green's affidavit does not rise to the level of proof of mailing." Conclusions, ¶ 4 (R. 278-279). Blue Cross also appeals the trial court's conclusion that it "failed to establish that Mr. McCoy's notice of the arbitration amendment was ever mailed to him." Conclusions, ¶ 5 (R. 279). A review of all the affidavits submitted demonstrates that Blue Cross met its burden of proof. And, the evidence regarding mailing was unrebutted.

Contrary to the trial court's rulings, the Green I Affidavit established that, at the direction of Ms. Green:

the programming department of [Blue Cross] prepared a tape of all subscribers who were to receive the [First Mailing]. The tape containing the subscriber list was

forwarded to Image Printing of Salt Lake City during the week of November 11, 1985. Image Printing printed the subscriber letter and inserted each subscriber's name and address on Blue Cross and Blue Shield of Utah letterhead. The completed letter, with the endorsement prepared by Blue Cross and Blue Shield of Utah was then forwarded to Progressive Direct Mail Advertising of Salt Lake City for mailing.

Green I Affidavit, ¶ 4 (R. 31) (emphasis added); see also Green II Affidavit, ¶ 5 (R. 243) (same). The Green II Affidavit specifically detailed the process by which Plaintiff was sent the First Mailing, under either of two policies the McCoy's could have been covered by at the time of mailing:

6. According to BCBSU's current records, on or about October 1, 1985, Mr. McCoy's name was input into BCBSU's system as a subscriber to a 1GE plan, which is a group plan.

7. Approximately one week later, Mr. McCoy's insurance was converted to the above-mentioned 57H non-group individual contract.

8. On or about November 11, 1985, a magnetic tape was made that would have included Mr. McCoy, since he was then carried on the BCBSU system as a subscriber under 57H non-group, individual contract, and all such subscribers were included on the magnetic tape.

9. In addition, also included on the magnetic tape were all subscribers under the 1GE group plan of which Mr. McCoy had been a subscriber for approximately two weeks. Thus, even if Mr. McCoy's membership had not yet been transferred to the 57H non-group individual contract subscribers, he would still have been included in the mailing by virtue of his having been a member of the 1GE group plan because that particular group plan was included in the mailing.

Green II Affidavit, ¶¶ 6-9 (R. 244-245) (emphasis added)

Thus, the trial court's conclusion that Ms. Green "cannot say" whether the McCoy's name and address was included on the

tape is clearly in error; the clear preponderance of evidence is that it would have been on the magnetic tape. (R. 244-245).

Further, Blue Cross showed that the tape was then used to mail the printed amendments:

10. On or about November 14, 1985, the magnetic tape was sent to Image Printing ("Image") for printing of the subscribers' names and addresses on the cover letter to the amendment endorsement.

11. In addition, at the time the foregoing magnetic tape was sent to Image for preparation of the mailing materials, Mr. McCoy's name and address had not been removed from the list of names and addresses on the magnetic tape.

12. After Image printed the mailing materials, it forwarded those materials to Progressive Direct Mail Advertising ("Progressive") for the insertion of the materials into envelopes and the actual mailing of the materials.

13. After sending the mailing materials to Image, I received confirmation from Image that Progressive had completed the bulk mailing of 30,356 pieces of mail on November 25, 1985.

14. I also received confirmation from Image, in the form of an invoice date December 6, 1985, that Progressive had mailed 30,356 pieces of mail to BCBSU subscribers.

Green II Affidavit, ¶¶ 10-14 (R. 244-245). The Stoddard Affidavit established that in the ordinary course of its business, Image Printing (the "Printer") received the magnetic tape from Blue Cross, and inserted all of the names thereon into the First Mailing. Stoddard Affidavit, ¶¶ 6-9 (R. 238-239). Similarly, the Nelson Affidavit established that in the ordinary course of its business, Progressive Direct Mail Advertising (the "Mailer") received the mailing from the Printer, and delivered

the mailing to the United States Postal Service. Nelson Affidavit, ¶¶ 6-9 (R. 250-252). In addition, the Green I Affidavit established that the McCoy's were sent the Second Mailing and Third Mailing, containing the Amended Policies, as policyholders. Green I Affidavit, ¶ 7 (R. 22, 32, 44-47A ).

The evidence of mailing was unrebutted. Mr. McCoy has never offered any evidence that the Arbitration Provisions were not mailed. Instead, he only argues that he did not receive any of the First, Second or Third Mailings. This is insufficient under Utah Law, which requires only proof that the Arbitration Provisions were mailed, as explained in the next section.

3. Even if True, the Fact That Mr. McCoy Did Not Receive the First, Second, or Third Mailings is Irrelevant; Proof of Mailing is Enough

As noted, Plaintiff's response to Blue Cross was that he did not receive the mailing. However, the issue is not whether Mr. McCoy received any of the mailings, but whether the Arbitration Provisions were mailed. Under the terms of the Policy -- the same document Mr. McCoy admits he received ("Complaint, ¶ 3 (R. 3)) -- Mr. McCoy agreed the terms of the Policy could be amended by mailing -- not receipt. And, under Utah law, Blue Cross had the explicit right to modify the policy by mail. The second issue is addressed first.

The McCoy's agreed, under the terms of the Policy (and the Amended Policies) that notice by mail was acceptable. In addition, Plaintiff agreed, under the terms of the Policy (and

the Amended Policies), that Blue Cross had the "absolute right" to modify the Policy upon such notice.

Specifically, under the Policy, Plaintiff agreed that the terms of riders duly issued by Blue Cross became part of the agreement between Plaintiff and Blue Cross:

"Agreement" means this document and attached riders when duly issued by the Plan, the Subscriber's Identification Card issued in connection with this document, the Subscriber's health statement, and the Subscriber's application in any supplemental applications to the Plan for healthcare benefits hereunder.

Policy, p. 23 (R. 150, 195) (emphasis added). Under the Policy, Plaintiff agreed to abide by any modification of the terms of the Policy upon written notice:

#### D. MODIFICATION OF AGREEMENT

The Plan shall at all times have the absolute right to modify or amend this Agreement from time to time; provided, however, that no such modification or amendment shall be effective until thirty (30) days after written notice thereof has been given to the Subscriber.

Policy, p. 36 (R. 202) (emphasis added).

Finally, under the Policy, Plaintiff agreed that notice as provided for in the Policy would be deemed given and received once placed in the mail:

Notices. Any notice to the Subscriber provided for in this Agreement shall be deemed to have been given to and received by the Subscriber when deposited in the United States Mail with first class postage prepaid and addressed to the Subscriber at the address shown in the records of the Plan.

Policy, p. 42 (R. 205) (emphasis added).

The Utah Supreme Court has held that where parties to a contract agree to notice by mail, actual notice is not required to enforce the terms of the agreement. In Diamond T. Utah, Inc. v. Canal Insurance Company, 361 P.2d 665 (Utah 1961), the Utah Supreme Court addressed the enforceability of a provision in an insurance policy which provided that "The mailing of notice as aforesaid shall be sufficient proof of notice." Id. at 667. The Diamond T Court upheld the provision, reasoning as follows:

The foregoing provision, known in the insurance trade as a "standard cancellation clause," has been the subject of many court decisions. The majority of these decisions, under what we believe to be the best reasoning, hold that the actual receipt of the cancellation notice by the insured is not a condition precedent to the cancellation of the insurance by the insurer, provided the cancellation notice itself contains a fixed date on which the cancellation is to become effective. The rationale of these decisions is that the express terms of the contract uphold the sufficiency of a notice deposited in the mail, and that such provision, being unambiguous, must be enforced as written.

Id. (emphasis added); see also, Bennett Motor Company v. Lyon, 380 P.2d 69, 71 (Utah 1963) (citing Diamond T and observing "The policy itself contained what is known as a 'standard cancellation clause' in which it was provided the mailing of notice would be sufficient notice. Such provisions have been recognized.")). This rule was followed by the Utah Court of Appeals as recently as 1993.<sup>2</sup> See Baumgart v. Utah Farm Bureau Ins. Co., 851 P.2d

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<sup>2</sup> And, as the Utah Supreme Court noted in Diamond T, sufficiency of notice by mail is the majority rule. See, e.g., Bell v. Patrons Mut. Ins. Ass'n, 816 P.2d 407, 409 (Kan. App. (continued...))

647, 651-52 (Utah App.) cert. denied, 862 P.2d 1356 (Utah 1993) (citing and following Diamond T).

Plaintiff also argued below that he did not agree to modification of the original Policy to include an arbitration provision, citing a provision of the Utah Insurance Code for the proposition that Blue Cross could not modify the Policy during its term (R. 65):

Except as provided in Subsection (3) or (4), or as otherwise mandated by law no purported modification of the contract during the term of the policy affects the obligations of a party to the contract unless the modification is in writing and agreed to by the party against whose interest the modification operates.

Utah Code Ann. § 31A-21-106(2) (Supp. 1996) (emphasis added).

However, Section 31A-21-106(2) (entitled "Incorporation by reference") states only that modification of an insurance policy must be in writing (not that Plaintiff's agreement to the modification be in writing) and that Plaintiff must have "agreed" to the modification. The statute does not, however, require

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<sup>2</sup> (...continued)  
1991) (holding that where policy provided that "proof of mailing of any notice shall be sufficient proof of notice," "[n]either statute nor public policy requires the [insured] to have actually received the mailed notice of cancellation."); Quintana v. Tenn. Farmer's Mut. Ins. Co., 774 S.W. 2d 630, 633 (Tenn. App. 1989) ("A majority of the courts construing similar clauses have held the insured need not actually receive the notice in order for the cancellation to be effective."); Har-Con Corp. v. Aetna Cas. & Sur. Co., 757 S.W. 2d 153, 154 (Tex. App. 1988) ("Where the parties have contracted as to the terms of cancellation of an insurance policy, and have expressly agreed that mailing of notice shall suffice for proof of notice of cancellation, the cancellation is effective upon the mailing of notice, even if the addressee never actually receives the notice.").

Plaintiff's agreement to take any particular form or be at any particular time. It cannot be disputed that Plaintiff was on notice that the Policy had been modified, by at least January of 1995, and probably earlier because he received EOB forms expressly referencing the right to arbitrate. As noted, Plaintiff agreed even further in advance that his agreement would become effective upon mailing of notice.

Furthermore, the Policy was not, as Plaintiff contended, modified during its term. Premiums on the McCoys' policy were due each quarter, and this modification was made effective at the end of its quarterly coverage. (R. 31, 34-35, 39). Notice by mail is explicitly allowed by the Insurance Code at the time of renewal, if rates increase or the policy is renewed on "less favorable terms"<sup>3</sup>:

[I]f the insurer offers or purports to renew the policy, but on less favorable terms or at higher rates,

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<sup>3</sup> Blue Cross does not agree that an arbitration provision is a "less favorable" term. In fact, Utah courts have ruled that arbitration is avored for over a century. See, e.g. Buzas Baseball v. Salt Lake Trappers, 925 P.2d 941, 946 (Utah 1996) ("[T]he Utah Arbitration Act "'reflects long-standing public policy favoring speedy and inexpensive methods of adjudicating disputes.'" (citation omitted); Robinson & Wells, P.C. v. Warren, 669 P.2d 844, 846 (Utah 1983) ("The Territory and State of Utah have had statutory provisions for arbitration of disputes since 1884."); Giannopoulos v. Pappas, 80 Utah 442, 15 P.2d 353, 356 (Utah 1932) ("Arbitration is favored in the law . . . ."). In fact, arbitration grants Plaintiff the right to compel arbitration against Blue Cross, creating a mutually beneficial and reciprocal right in each of the parties, to the mutual benefit of each party. The mutual right to arbitrate is, in fact, ordinarily of significant benefit to an insured, who often does not have the financial resources to wage a traditional protracted legal battle against an insurance company.



the new terms or rates take effect on the renewal date if the insurer delivered or sent by first class mail to the policy holder notice of the new terms or rates at least 30 days prior to the expiration date of the prior policy. If the insurer did not give this prior notification to the policy holder, the new terms or rates do not take effect until 30 days after the notice is delivered or sent by first class mail, in which case the policy holder may elect to cancel the renewal policy at any time during the 30-day period.

Utah Code Ann. § 31A-21-303(5)(a) (1994) (emphasis added).<sup>4</sup>

Under Utah law, the Insurance Code specifically states that the new terms are effective if notice is given by first class mail. Again, as under the specific terms of the Policy, there is no requirement of actual notice.

Plaintiff cannot now, more than ten years after agreeing to the terms of the Policy allowing modification and notice by mail, contend that he is not bound by the very terms of the document he

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<sup>4</sup> Numerous courts have enforced similar statutes, holding that actual receipt is not required under these circumstances. See, e.g. Atlanta Cas. Co. v Sweeney, 868 S.W.2d 501, 503 (Ark. 1994) ("Whether the notice was received by [the insured] is irrelevant according to the statute, as 'proof of mailing' is 'sufficient proof of notice.'"): Balboa Ins. Co. v Hunter, 299 S.E.2d 91, 92 (Ga. App. 1983) (holding that under statute allowing written notice to be delivered "by depositing such notice in the United States Mail" meant that "actual receipt of the notice is not necessary to effect cancellation if the notice of cancellation properly addressed and stamped for first class delivery was delivered to the postal authorities and a receipt obtained therefore."); Hemperly v Edna Casp. & Sur. Co., 516 So.2d 1202, 1204 (La. App. 1987) (holding that under Louisiana statute, "[p]roof of mailing, notice of cancellation to the named insured of the address shown on the policy shall be sufficient proof of notice. Proof of receipt of that notice is not required."); Isaacson v DeMartin Agency, Inc., 893 P.2d 1123, 1125 (Wash. App. 1995) ("Although [the insured] stated she did not receive a cancellation notice an insurer is not required to prove actual receipt if statutory mailing procedures are followed.").

is purportedly attempting to enforce. Plaintiff agreed by contract<sup>5</sup> to certain procedures, and the law in the state of Utah at all times has held these procedures to be acceptable and controlling of the issues here.

4. Blue Cross Presented Sufficient Proof of Mailing

In essence, the trial court ruled that the evidence provided by Blue Cross, that the McCoy's name and address was in the computerized database, and that their name and address was placed on a magnetic tape, and that the magnetic tape was used to generate the First Mailing, and the other evidence offered, was insufficient to prove the Arbitration Provisions were mailed to the McCoy's. See Order (R. 276-279)

By rejecting Blue Cross' proof on this issue, in the face of nothing more than Plaintiff's failure to recall that any of the three mailings were received, the trial court effectively converted the requirement of proof of mailing into one of proof of receipt. In contracts allowing change by mailing, under Utah law, "receipt . . . by the insured is not a condition precedent"

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<sup>5</sup> The rationale of Diamond T, that the parties are bound by the explicit terms of their contract, remains the rule under the current Insurance Code. The Utah Supreme Court in Allen v. Prudential Property & Cas. Ins., 839 P.2d 798 (Utah 1992), considered "the legislative policy underlying the Insurance Code," stating that the Code expresses an intent that "freedom of contract" be maintained, Utah Code Ann. § 31A-1-102(7), and that written contracts be the primary means by which this freedom to contract be exercised. See, e.g., id. §§ 31A-21-301 to -404 (1991 & Supp. 1991) (setting forth detailed provisions authorizing and governing insurance contract clauses and setting forth acceptable methods by which various clauses can be modified by the parties). Id. at 806.

to enforcement of the terms of the mailing. Diamond T, 361 P.2d at 667 (emphasis added). Blue Cross is not required to show proof of receipt, and the trial court erred in implicitly imposing this requirement contrary to Utah law. Service Fire Ins. Co. v. Markey, 83 So. 2d 855, 856 (Fla. 1955) ("The policy provision did not require mailing by registered mail and we can not read such a requirement into the contract.").

In fact, under Utah law, the Affidavits submitted by Blue Cross defeat McCoy's denial of receipt of the Arbitration Agreements. The Utah Court of Appeal addressed this identical issue in Baumgart v. Utah Farm Bureau Ins. Co., 851 P.2d 647 (Utah App. 1993). In Baumgart, the policy at issue provided that a cancellation notice "must be delivered or mailed by first class mail." Id. at 651-52. The insured challenged the cancellation, presenting an affidavit "in which he claim[ed] he never actually received the cancellation notice. Id. at 652 (emphasis added). The Court of Appeals specifically found that because the insurer followed its "usual business procedure," and offered evidence that the cancellation was mailed, the insured's denial of receipt did not create an issue of fact sufficient to survive summary judgment:

Even given [the insured's] allegation that he never received the cancellation notice, he only infers that [the insurer] never mailed it. He offers no "specific facts showing that there is a genuine issue for trial" as required by Utah Rule of Civil Procedure 56(e).

Id. at 652 (emphasis added); cf. Bennett Motor Co. v. Lyon, 14 Utah 2d 161, 380 P.2d 69, 71-72 (Utah 1963) (holding insufficient proof of mailing where insurer failed to show it had followed routine office mailing practice).

In this case, it is undisputed that Blue Cross followed its usual and routine mailing procedures to send the McCoys no less than three mailings, each of which included an arbitration provision. As in Baumgart, the McCoys only challenge to this proof is a self-serving denial that it was received. As in Baumgart, a mere denial of receipt is insufficient. Accordingly, Blue Cross produced sufficient proof to show proof of mailing.<sup>6</sup>

The obvious purpose of a contractual provision allowing notice by mailing -- rather than receipt -- is to allow amendment of the terms of a policy, held by thousands, through an efficient and effective manner, at minimum cost. The notice by mailing provision, a valid and enforceable term of the contract, shifted the risk to the policy holder that a mailing would not be received. The trial court's ruling deprived Blue Cross of this contract benefit, specifically intended to avoid the very problem in this case, and shifted risk of non-receipt (or failure to recall receipt) back to Blue Cross.

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<sup>6</sup> Blue Cross notes the cancellation of a policy has much greater adverse implication for an insured than an arbitration provision. Even in the cancellation context, the Baumgart court ruled that (1) notice by mailing was sufficient by the terms of the policy; and (2) that the proof-of-mailing requirement was met.

The trial court's alternative, requiring Blue Cross (and, implicitly, every other insurer in the State of Utah) to send all mailings to insureds by certified mail or similar means, would require delivery of literally hundreds of thousands of pieces of certified mail every year. Insurers would then be required to hire an entire staff for the sole purpose of collecting, compiling, reviewing the hundreds of thousands of certified mail receipts from each mailing, and cross referencing them to be sure each subscriber had acknowledged receipt. And, the insurer would be required to maintain these records indefinitely -- in this case for over ten years.<sup>7</sup> Plaintiffs have not, and cannot, cite any authority requiring an insurer to deliver an arbitration provision added to an insurance policy to the insured by certified mail.<sup>8</sup>

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<sup>7</sup> Plaintiff was allegedly unaware of the existence of the Arbitration Provisions for approximately nine years from the date of the First Mailing. Specifically, it is undisputed that the McCoys enrolled under the Policy on or about October 16, 1985, and the Policy was amended in November of 1985, to become effective on January 1, 1986. Despite the Second and Third Mailings and the fact that Plaintiff's subsequent Explanation of Benefits forms refer to the right to arbitration, Plaintiff claims he did not discover this change until over nine years later, in January of 1995. Memorandum in Opposition, ¶¶ 1, 6, p. 2 (R. 61).

<sup>8</sup> For service of papers, once personal service is obtained, the Utah Rules of Civil Procedure require nothing more than mailing to the "last known address" of a party or their attorney. Utah R. Civ. P. 5(b)(1). The Rules do not require proof of receipt. Nor does the Utah common law require more of insurers. Diamond-T, 361 P.2d at 667.

**C. The McCoy's Accepted the Arbitration Agreement by  
Accepting the Blue Cross Policy for Over Two Years**

The trial court also failed to rule on, and therefore implicitly rejected, Blue Cross's argument that McCoy's failure to object to the arbitration provision for approximately two years after he became aware of the arbitration provision constituted an acceptance of its terms. (R. 233-234).

In this case, Mr. McCoy retained the Blue Cross policy for over twelve years following the issuance of the Endorsement, and two years following his admitted knowledge of the arbitration clause before deciding it was time to object to the arbitration clause. Specifically, although McCoy admits to learning of the arbitration provision in January of 1995, (see McCoy I Affidavit at ¶ 10) (R. 81), he did not object until Blue Cross moved to compel arbitration, and he still remained a subscriber until April 16, 1997. See Green II Affidavit at ¶ 18 (R. 245).<sup>9</sup> McCoy had at least two years to review the arbitration provisions of the policy and decide that he did not like the arbitration provision.

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<sup>9</sup> In his second affidavit, Plaintiff contended that, as with the arbitration language in the EOB, he did not understand that the arbitration provision was mandatory and not optional. (R. 266). However, Plaintiff does not, and cannot, dispute he was on actual notice of the arbitration provision in January, 1995, and on constructive notice at least a year earlier from the EOB forms. Under Judge Winder's decision in Imperial Savings, infra, his continued retention of the policy and payment of premiums for at least two years after notice constitutes waiver of his right to object.

Plaintiff's failure to object constitutes an acceptance of the arbitration clause; it also belies his affidavit statement that he "would have sought another health insurance policy that did not require arbitration" had he known about the clause in his Blue Cross contract. See McCoy I Affidavit at ¶ 24 (R. 84-84). Instead, McCoy decided to voice his objection only after BCBSU attempted to have his dispute with it arbitrated, as McCoy's policy clearly mandates.

The District Court for the Central District of Utah, Judge Winder presiding, ruled that an insured's retention of an insurance policy for an extended period of time, without objection within a reasonable time, "constitutes an acceptance of the Policy, including the arbitration provision." Imperial Sav. Ass'n v. Lewis, 730 F. Supp. 1068, 1073 (D. Utah 1990); see also Western Farm Bureau Mut. Ins. Co. v. Barela, 441 P.2d 47 (N.M. 1968) (same); Phillis Dev. Co. v. Commercial Standard Ins. Co., 457 P.2d 558 (Okla. 1969) (same). In Imperial Savings, Judge Winder determined that an insured's retention of the policy in question for only eleven months was sufficiently long to constitute an unreasonably long period of time without objection. Id.

McCoy's failure to state his objection for at least two years, after he was admittedly on notice of the arbitration provision, constitutes waiver of any right to object to the inclusion of that arbitration provision in his insurance policy.

McCoy is therefore required to arbitrate any disputes over coverage under the Policy.

**D. Plaintiff Does Not Contest the Application of the Arbitration Provisions to the Claims.**

As noted, Plaintiff did not contest that that scope of the Arbitration Provisions is broad enough to cover all claims asserted in the Complaint. (R. 27-28, 60-77). As noted, arbitration is favored, and if "the scope of an arbitration clause is debatable or reasonably in doubt, the clause should be construed in favor of arbitration . . . ." <sup>10</sup> Lindon City v. Engineers Const. Co., 636 P.2d 1070, 1073 (Utah 1981) (citation omitted). Accordingly, upon remand, the trial court should direct that all of the claims in the Complaint proceed in arbitration.

**IX. CONCLUSION**

The trial court erred when it found that Plaintiff was not bound by the Arbitration Provisions, and declined to rule that Plaintiff's acceptance of the Policy for two years after he learned of the arbitration provision constituted a waiver. Blue

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<sup>10</sup> Plaintiff also argued below that (1) assent to the Arbitration Provisions was somehow procured by fraud, and (2) that under the Utah Arbitration Act, an allegation of fraud in the Complaint defeats arbitration. (R. 70-71; 74-75).

However, under controlling law, a mere allegation of fraud as to the contract as a whole is insufficient to defeat arbitration. Prima Paint Corp. v. Flood & Conklin, 388 U.S. 395, 403-04 (1967). And, even were a general fraud allegation sufficient to defeat arbitration, Plaintiff failed to allege fraud with the requisite particularity. Educators Mutual Insurance Association v. Allied Property and Casualty and Insurance Company, 890 P. 2d 1029, 1032 (Utah 1995).



Cross has come forward with sufficient and un rebutted evidence the Arbitration Provisions were mailed, and Plaintiff admits to at least receiving notice of some references to arbitration. Accordingly, Blue Cross is entitled to a reversal of the trial court's order denying the Motion to Compel Arbitration on all issues raised in the Complaint.

DATED this 13~~th~~ day of October, 1998.

JONES, WALDO, HOLBROOK & McDONOUGH

By 

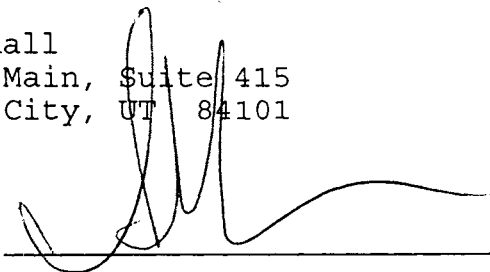
Andrew H. Stone  
James E. Magleby  
Attorneys for Blue Cross  
and Blue Shield of Utah

CERTIFICATE OF SERVICE

I hereby certify that on the 13<sup>th</sup> day of October, 1998,  
I caused to be mailed, postage prepaid, a true and correct copy  
of the foregoing **APPELLANT'S BRIEF**, to the following:

Jeffrey D. Eisenberg  
David R. Olsen  
2020 Beneficial Life Tower  
36 South State  
Salt Lake City, UT 84111

Clark Newhall  
136 South Main, Suite 415  
Salt Lake City, UT 84101



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