

1998

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

Utah Court of Appeals

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

Andrew H. Stone; Marci Batty; Jones, Waldo, Holbrook & McDonough; Attorneys for Appellant.

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IN THE UTAH COURT OF APPEALS

GERALD McCOY, individually and as
personal representative of the estate of
FRIEDA McCOY, deceased,

Plaintiff and Appellee,

vs.

BLUE CROSS AND BLUE SHIELD OF
UTAH, a Utah corporation,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

Case No. 980246-CA

Priority No. 15

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

Andrew H. Stone (USB #4921)
Marci Batty (USB #8146)
JONES, WALDO, HOLBROOK &
McDONOUGH
170 South Main Street, Suite 1500
Salt Lake City, UT 84101
Telephone: (801) 521-3200

Attorneys for Defendant/Appellant

David R. Olsen (USB #2458)
Jeffrey D. Eisenberg (USB #4029)
DEWSNUP, KING & OLSEN
36 South State Street, Suite 2020
Salt Lake City, UT 84111
Telephone: (801) 533-0400

Attorneys for Plaintiff/Appellee

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Utah Court of Appeals
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Julia D'Alesandro
Clerk of the Court

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David R. Olsen (USB #2458)
Jeffrey D. Eisenberg (USB #4029)
DEWSNUP, KING & OLSEN
36 South State Street, Suite 2020
Salt Lake City, UT 84111
Telephone: (801) 533-0400

Attorneys for Plaintiff/Appellee

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INTRODUCTION

There is one issue presented by this appeal: Whether Appellee Gerald McCoy's insurance policy was effectively amended to include a mandatory arbitration provision. As Blue Cross and Blue Shield of Utah ("Blue Cross") shows below, it was. Mr. McCoy is required to arbitrate his claims against Blue Cross.

McCoy's brief confuses that issue. In presenting his view of the merits of his claim, rather than its arbitrability, Mr. McCoy incorrectly implies that Frieda McCoy died because Blue Cross failed to process her claim for coverage of a bone marrow transplant in a timely manner. Actually, according to McCoy's Complaint, the initial claim for coverage in this case was filed on March 1, 1994. (R. 4). Blue Cross' denial of the claim came shortly thereafter on March 17, 1994. (R. 4). In April, before even appealing Blue Cross' denial, Frieda McCoy received the treatment for which coverage was sought. (R. 5). At all times thereafter, this dispute was not about whether Mrs. McCoy would be able to receive the treatment, but rather, who would pay for treatment already received. McCoy nevertheless paints a picture of Blue Cross causing Frieda McCoy's death by somehow delaying her receipt of the treatment. That is simply a fallacy. More importantly, although Blue Cross' internal handling of Frieda McCoy's claim may be relevant to the underlying merits of McCoy's bad faith claim, it is in no way relevant to the simple issue now before the Court, which is whether a district court is the proper forum for the adjudication of Mr. McCoy's claims.

ARGUMENT

I. THIS COURT CAN MAKE AN INDEPENDENT DETERMINATION BASED UPON THE RECORD IN THIS CASE.

McCoy objects to Blue Cross' articulation of the appropriate standard of review in this case. Blue Cross has cited controlling authority for the proposition that this Court's review of the trial court's ruling should be *de novo*. See e.g., Sosa v. Paulos, 924 P.2d 357, 360 (Utah 1996); In re Infant Anonymous, 760 P.2d 916, 918 (Utah App. 1988). Because the trial court's ruling was based solely on documentary evidence, "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." In re Infant Anonymous, 760 P.2d at 918. This Court is not required to defer to the trial court's findings of fact in this case.

However, even assuming that some deference to the trial court's factual findings is required, there is only one factual finding contrary to Blue Cross' position in this matter, and that finding is clearly erroneous. Specifically, the court found that "Blue Cross relies solely on the affidavit of Ms. [Edwina] Green as evidence that they mailed an arbitration amendment to Mr. McCoy." (R. 277). To the contrary, Blue Cross submitted four affidavits on the issue of mailing: the Affidavit of Edwina Green (R. 30), the Supplemental Affidavit of Edwina Green (R. 242), the Affidavit of Gary

Nelsen (R. 249), and the Affidavit of Gary Warner (R. 237).¹ Clearly, Blue Cross did not rely "solely" on the Affidavit of Edwina Green; the trial court's finding in this regard is plain error, and cannot be sustained under any standard of review.²

Ultimately, where the trial court erred was in criticizing the form of proof offered by Blue Cross. By suggesting that Blue Cross was required to show something more than proof of mailing, the trial court effectively required Blue Cross to show proof of receipt, and by a higher standard than merely a preponderance of the evidence. This ruling contradicts controlling law as well as the plain language of the policy. This error was a legal conclusion, and should therefore be reviewed *de novo*.

II. ARBITRATION IS MANDATORY BECAUSE BLUE CROSS ESTABLISHED THE EXISTENCE OF A VALID AGREEMENT TO ARBITRATE.

Where, as here, a valid agreement to arbitrate exists, both the Federal Arbitration Act and the Utah Arbitration Act require arbitration. 9 U.S.C. § 2; Utah Code Ann. § 78-31a-4(1) (1985). Blue Cross has established that a valid arbitration provision existed in Gerald McCoy's policy for nearly a decade prior to this dispute. Specifically, Blue Cross has shown that in 1985, Mr. McCoy was mailed an endorsement and cover letter (collectively, the "First Mailing") amending his policy to

¹ McCoy correctly notes that the Affidavit of Gary Warner is incorrectly entitled "Affidavit of Keith Stoddard". This is simply a typographical error; the affidavit was properly executed by Mr. Warner.

² A trial court's finding of fact is clearly erroneous if it is against the clear weight of the evidence. State v. Walker, 743 P.2d 191, 193 (Utah 1987). That standard is easily met with respect to the contested finding here.

include a mandatory arbitration provision. Blue Cross has also shown that under the express terms of the policy, notice of such a modification was effective upon mailing. In addition, Blue Cross has shown that Mr. McCoy was twice mailed copies of the amended policy, including the arbitration provision, in 1986 and again in 1990 (respectively, the "Second Mailing" and "Third Mailing"). This evidence is more than sufficient to establish the existence of a valid agreement to arbitrate.

A. Blue Cross Met its Burden as to Proof of Mailing.

McCoy relies primarily on Litster v. Utah Valley Community College, 881 P.2d 933, 940-42 (Utah Ct. App. 1994), as support for the proposition that Blue Cross did not meet its burden of proof of mailing. However, the evidence Blue Cross submitted in the trial court was clearly sufficient under Litster to establish proof of mailing. In Litster, this Court noted:

Courts have long recognized that modern business practices make direct proof of mailing impractical, and have thus acknowledged the validity of alternate means of establishing proof of mailing by office custom. . . . "[I]t has been recognized that, in large offices which handle a volume of mail, direct proof with respect to a particular letter is impractical. The courts have held that proof of 'settled custom and usage of [the sender's] office regularly and systematically followed in the transaction of its business' may, in such cases, suffice."

Id. at 939 n.4 (internal citations omitted).

Under Litster, in order to establish an office mailing custom, a party must provide direct evidence that a document was prepared. Id. at 940. Once preparation has been established, proof of mailing may be made by evidence of usual business

practice. Id. In the instant case, Blue Cross submitted the Affidavit of Edwina Green, which stated that in November of 1985, Blue Cross prepared an endorsement including the arbitration amendment. (R. 31). The Supplemental Affidavit of Edwina Green stated that Ms. Green directed the preparation of a magnetic tape with the names of all Blue Cross subscribers who would be affected by the amendments. (R. 243). Ms. Green testified that Mr. McCoy was such a subscriber, because the effective date of his policy establishes that his name would have been on that tape.³ (R. 243). Ms. Green further testified that the magnetic tape was sent to Image Printing on or about November 14, 1985, "for printing of the subscribers' names and addresses on the cover letter to the amendment endorsement." (R. 244). The Affidavit of Gary C. Warner stated that Blue Cross delivered the magnetic tape to Image Printing, together with Blue Cross letterhead, for the printing of the endorsements and cover letters. (R. 238). The invoice Image Printing sent to Blue Cross for the printing confirmed that 30,356 letters and cover letters were, in fact, prepared. (R. 248).⁴

³ As previously noted, Mr. McCoy's name was originally input into Blue Cross' system as a subscriber to a 1GE plan, which is a group plan, on or about October 1, 1985. (R. 244). Approximately one week later, Mr. McCoy's insurance was converted to a 57H non-group individual contract. Id. The magnetic tape prepared at Ms. Green's instruction included the names of all subscribers to both types of plans. Id.

⁴ McCoy points to an apparent discrepancy between the number of pages printed and the number sent as evidence that some letters which should have been sent were not. However, he raises this issue for the first time on appeal; it was not raised in the trial court. Consequently, under well-established principles of appellate procedure, the argument has
(continued...)

The foregoing evidence distinguishes the instant case from the facts in Litster, in which the only evidence of preparation was an attorney's statement that he had instructed his secretary to prepare a document, and that it was her normal practice to comply with his instructions within one or two days. Here, Blue Cross provided evidence of the actual preparation of the endorsement, the preparation of the magnetic tape of the subscribers' names and addresses, the receipt of the magnetic tape by the printer, and the printer's confirmation of completion of the task. This case easily meets the standard in Litster, because Blue Cross has submitted abundant "direct evidence . . . pertaining to the preparation of the letter." Litster, 881 P.2d 933, 941 (Utah App. 1994).

Under Litster, once a party establishes that the document was prepared, habit or custom evidence is sufficient to establish that it was mailed. Id. at 940. Here, Blue Cross has shown, by the Affidavits of Gary C. Warner and Gary Nelsen, that

⁴ (...continued)
been waived. Connor v. Union Pacific Railroad Co., 1998 Utah LEXIS 67 (Utah 1998) (declining to address issues raised for first time on appeal); Julian v. State, 966 P.2d 249 (Utah 1998) ("We therefore follow our longstanding rule that we will not consider issues raised for the first time on appeal.") (citing Monson v. Carver, 928 P.2d 1017, 1022 (Utah 1996)). Moreover, the evidence in the record on which McCoy relies is an invoice from Image Printing, which indicates only that 70 more letters were printed than were mailed. The invoice does not establish, nor does anything else in the record, that the discrepancy means that 70 subscribers were not mailed the endorsements. There is no credible reason to even infer as much. However, even assuming that out of more than 30,000 affected subscribers, 70 were not mailed endorsements, the probability of Mr. McCoy being one of those 70 is minuscule. Blue Cross is only required to show proof of mailing by a preponderance of the evidence. Clearly, under any view of the evidence submitted to the trial court, it is more likely than not that Blue Cross mailed Gerald McCoy an endorsement amending his policy to include mandatory arbitration.

Image Printing delivered these specific endorsements and cover letters to Progressive Direct Mail Advertising ("Progressive"). The Affidavit of Gary Nelsen states that Mr. Nelsen then coordinated the mailing of the endorsements and cover letters, and sets forth the usual business practice of Progressive in completing such projects. (R. 250). That practice was as follows: Progressive would receive printed documents from a commercial printer, such as Image Printing. Progressive would then pre-fold the letters and all enclosures to fit into window envelopes, and employees would put the folded letters and enclosures into the insertion machine, which would collate and insert the correct number of pieces into each envelope. The envelopes would then be sealed, metered, sorted, and delivered to the United States Postal Service, together with the appropriate form completed by Progressive employees. After verifying the mailing weight, the Postal Service would then take control of the mailing, and provide Progressive with confirmation on the number of pieces mailed. (R. 250-52).

The foregoing evidence is plainly sufficient under Litster to establish that the endorsement was sent to Mr. McCoy. Blue Cross provided direct evidence of the preparation of the endorsements, and also met its burden as to proof of mailing. It would be an impossible standard for Blue Cross to meet if it were required to prove conclusively that it has specific recollection of sending Mr. McCoy's particular envelope and of inserting the endorsement into that envelope. Litster recognizes this impracticality. 881 P.2d at 939 n.4 (quoted above). Given the vast number of Blue Cross subscribers, such a requirement would render the notice provision in Blue

Cross' insurance contracts meaningless. Such a result would be contrary to Utah law, under which a contract provision making notice effective upon mailing is valid and enforceable. See Diamond T. Utah, Inc., v. Canal Insurance Company, 361 P.2d 665 (Utah 1961); Baumgart v. Utah Farm Bureau Ins. Co., 851 P.2d 647, 651-52 (Utah App. 1993) cert. denied, 862 P.2d 1356 (Utah 1993). Where such a provision exists, as here, proof of actual notice is simply not necessary under Utah law, and Mr. McCoy cannot make it otherwise merely by denying any recollection of receipt. Blue Cross has met its burden on this issue. By the First Mailing, Blue Cross effectively amended Gerald McCoy's policy to include a mandatory arbitration provision.

In addition, as established by the Affidavit of Edwina Green, Blue Cross twice sent Mr. McCoy copies of the amended policy, which included the mandatory arbitration provision. (R. 32, 38-47). Mr. McCoy has offered no evidence that the arbitration provisions weren't mailed; rather, he states only that he cannot recall receiving them, although he acknowledges receiving, from time to time, explanations of claims processed referring to a right of arbitration. (R. 135-136). This lack of knowledge, merely a denial of recollection, is not sufficient to rebut the evidence of mailing submitted by Blue Cross.

The difficulty Mr. McCoy faces in rebutting Blue Cross' proof of mailing is simply the result of the original contract, which provides that notice is effective upon mailing. The risk of non-receipt, and the concomitant risk of proving that a particular

allegedly unreceived piece of a mass-mailing was somehow omitted, lies squarely with the subscriber. Ten years before this dispute arose, Mr. McCoy agreed, by accepting the policy issued to him, that notice of amendments would be effective when mailed. The parties allocated that risk, and the Court should not disturb that allocation by requiring Blue Cross to prove that Mr. McCoy received that endorsement.

Finally, Blue Cross again notes that, if accepted, McCoy's argument would mean that, to amend its policy by mail, Blue Cross would be forced to send all endorsements by certified mail or similar means. In turn, Blue Cross would be required to collect, compile, and review hundreds of thousands of certified mail receipts each year, cross referencing them to ensure that each subscriber had acknowledged receipt. This would necessitate the hiring of an entire staff to collect and maintain these records. Moreover, Blue Cross would need to maintain these records indefinitely, in this case, for over ten years. The law cannot require Blue Cross to take such prohibitively expensive and onerous steps to amend its policy.

B. McCoy Did Not Argue Below that Blue Cross Did Not Show First Class Mailing.

McCoy argues that Blue Cross "did not meet its burden of showing that it complied with the contract requirements for notice." Brief of Appellee, p. 25. McCoy contends that Blue Cross has not demonstrated compliance with this provision because it has not shown that the endorsements were sent by first class mail. Notably, McCoy offers no proof to the contrary, and, again, Blue Cross need only show the

existence of an arbitration agreement by a preponderance of the evidence.⁵ In any event, this issue was not raised in the trial court. Because Blue Cross was never given the opportunity to respond to this claim by providing evidence that the endorsements were mailed first class, that issue cannot be considered on appeal. See e.g., Connor v. Union Pacific Railroad Co., 1998 Utah LEXIS 67 (Utah 1998); Julian v. State, 966 P.2d 249 (Utah 1998).

C. Blue Cross' Modification of the Policy Complied with Governing Law.

McCoy contends that Blue Cross did not effectively amend its policy to include an arbitration provision because it did not comply with a provision of the former Insurance Code, which required a nonprofit insurer, such as Blue Cross, to file a copy of any endorsement with the insurance commissioner and obtain approval of the form before delivering it to subscribers. Utah Code Ann. § 31-37-16(1)(a) (Supp. 1985). Under that statute, any form would be deemed approved unless rejected within fifteen days by the insurance commissioner. Utah Code Ann. § 31-37-16(1)(b) (Supp. 1985). McCoy argues, again, for the first time in this appeal, that fifteen days had not passed from the time the endorsement was filed with the insurance commission and the time it was mailed to subscribers. Therefore, the argument goes, Blue Cross

⁵ The fact that the Nelsen Affidavit states that Progressive's employees presorted the envelopes in order to obtain a discount on the postage rate does not mean that the materials were not mailed first class. Under the postal regulations in effect at the time of the First Mailing, a presort discount was available on first class mail. Direct Marketing Ass'n v. U.S. Postal Service, 778 F.2d 96, 109 (2d Cir. 1985).

violated the statute. However, this argument was not raised in the district court, and McCoy cannot raise it now. Connor v. Union Pacific Railroad Co., 1998 Utah LEXIS 67 (Utah 1998); Julian v. State, 966 P.2d 249 (Utah 1998). Had this argument been raised below, Blue Cross would have had the opportunity to show that it had obtained the approval of the insurance commissioner before sending out the endorsement, and therefore complied with the statute. Blue Cross never had that opportunity, and this argument cannot properly be considered on appeal.⁶

McCoy next cites § 31A-21-106(2) of the Utah Insurance Code for the proposition that the arbitration provision is unenforceable because McCoy did not "agree" to it. That statute provides:

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).

⁶ Even assuming that Blue Cross had not yet obtained approval when the endorsements were mailed, the amendment would nevertheless have become effective with respect to the McCoy policy when the endorsement was approved, or when the Insurance Code was amended in 1986. It seems that by raising a number of new issues on appeal (e.g., first class mailing, the supposedly missing letters, and compliance with Section 31-37-16(1)(b)), McCoy is trying to give this Court any possible reason to reject the mandatory arbitration clause, appealing to some hoped for judicial hostility toward arbitration. See Brief of Appellee, pp. 43-49. McCoy's view that the arbitration process is somehow rigged in favor of insurance companies is an outdated and unquestionably rejected approach to the question of arbitrability.

Plaintiff fails to consider that he explicitly agreed, under the terms of the policy, that the industry standard practice of notice by mail was acceptable, and would constitute adequate notice of modification. In addition, McCoy explicitly agreed, under the terms of the policy, that Blue Cross had the "absolute right" to modify the Policy upon such notice. Specifically, under the policy, McCoy explicitly agreed that the terms of riders duly issued by Blue Cross became part of the agreement:

"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 thereunder.

(R. 202) (emphasis added). Under the policy, McCoy explicitly 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.

(R. 202) (emphasis added).

Finally, under the policy, McCoy explicitly agreed that notice as provided for in the policy would be deemed 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 on the records of the Plan.

(R. 205) (emphasis added).

McCoy therefore agreed to the modification of the policy within the meaning of the statute, and that agreement is valid under Utah law. See e.g., Diamond T. Utah, Inc. v. Canal Insurance Co., 361 P.2d 665 (Utah 1961). McCoy 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 is purportedly attempting to enforce. Mr. McCoy agreed to be governed by 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.

Moreover, McCoy argues that the term of the policy was indefinite, so that any modification of the policy necessarily falls within Section 31A-21-106(2). In making this argument, McCoy reads that section out of its context in the Insurance Code, which is not so inflexible. It cannot be disputed that premiums were paid, and the policy thereby renewed, quarterly. (R. 31, 34-35, 39). Blue Cross complied strictly with the statutory requirements for changes in policy terms at renewal:

If 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 policyholder notice of **the new terms** or rates at least 30 days prior to the expiration date of the prior policy.

Utah Code Ann. § 31A-21-303(5)(a).

McCoy simply reads this specific provision on renewal out of the statute.

There is no real conflict in the two statutory sections. Section 106(2) addresses the

problem of an insurer collecting a premium based on one contract, then making that contract less favorable. Section 303(5) specifically addresses renewals, and specifically authorizes changes to be made by sending notice by mail. McCoy's argument, if accepted, would make it more difficult for an insurer to modify a policy than to cancel it. In order to make a minor modification to a continuing policy, an insurer would have to characterize its action as a cancellation, coupled with an offer to issue a new, modified policy. By including renewals in section 303(5), Utah's Insurance Code spares insurers these legal gymnastics, and insureds the confusion that they would engender.

McCoy next argues that the arbitration provision is invalid because Blue Cross did not comply with Utah Admin. R. 540-122-4(5), which requires that, before an insurer can make a binding arbitration provision part of a policy, it must include in the application or binder "a prominent statement substantially as follows":

ANY MATTER IN DISPUTE BETWEEN YOU AND THE COMPANY MAY BE SUBJECT TO ARBITRATION AS AN ALTERNATIVE TO COURT ACTION PURSUANT TO THE RULES OF (THE AMERICAN ARBITRATION ASSOCIATION OR OTHER RECOGNIZED ARBITRATOR), A COPY OF WHICH IS AVAILABLE ON REQUEST FROM THE COMPANY. ANY DECISION REACHED BY ARBITRATION SHALL BE BINDING UPON BOTH YOU AND THE COMPANY. THE ARBITRATION AWARD MAY INCLUDE ATTORNEY'S FEES IF ALLOWED BY STATE LAW AND MAY BE ENTERED AS A JUDGMENT IN ANY COURT OF PROPER JURISDICTION.

Id. The regulation also requires that the disclosure be made prior to the execution of the insurance contract. Id.

In relying on this regulation, McCoy ignores that the regulation was not even adopted until 1989, three years after Blue Cross amended McCoy's policy to include an arbitration provision. A similar situation was presented in Imperial Sav. Ass'n v. Lewis, 730 F. Supp. 1068 (D. Utah 1990). In that case, the insured argued that the insurer's failure to comply with R540-122(4)(5) made an insurance policy's arbitration provision unenforceable. However, the policy had been issued nine months before the regulation was enacted. Judge Winder rejected the insured's argument, stating:

The fact that [the insurer] did not meet the prior disclosure guidelines of the Rule, promulgated some nine months after the Policy was issued, does not render this arbitration provision invalid. The disclosure requirements did not become effective until after the Rule was promulgated. The court, therefore, finds no statutory impediment to the Policy's arbitration provision.

Id. at 1075. The same is true here. Blue Cross could hardly have anticipated the enactment of the regulation some three years later. For this reason, the regulation does not prevent enforcement of the arbitration provision.

In addition, the regulation is unenforceable, for two reasons. First, the Insurance Code specifically prohibits the insurance commissioner from adopting mandatory clauses such as that required by the regulation.⁷ Utah Code Ann.

⁷ Section 31A-21-203(1) provides: "The commissioner may not adopt mandatory uniform clauses." Utah Code Ann. § 31A-21-203(1). The statute does allow the commissioner to adopt authorized clauses, but only upon making certain limited findings. Id.
(continued...)

§ 31A-21-203(1). Second, the United States Supreme Court has held that a similar statute was preempted by the Federal Arbitration Act, because it conditioned the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally.⁸ Doctor's Associates, Inc. v. Casaratto, 517 U.S. 681 (1996).

In Casaratto, the Court considered a Montana statute which provided that, for an arbitration provision to be enforceable, the first page of the contract had to contain a notice provision typed in underlined capital letters. This statute was held unlawful under § 2 of the Federal Arbitration Act, which provides that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Section 2, the Court explained, prohibits states from "singling out arbitration provisions for suspect status," and requires that "such provisions be placed 'upon the

⁷ (...continued)

There is no evidence that such findings were made here. In any event, the regulation does not merely authorize the disclosure clause, but mandates it. For this reason, it is prohibited by § 31A-21-203(1).

⁸ The Federal Arbitration Act applies in this case. The Act is applicable to any "contract evidencing a transaction involving commerce. . . ." 9 U.S.C. § 2. McCoy's policy clearly "involves commerce." In the district court, Blue Cross submitted the Affidavit of Linda Nelson, which established that the policy provided the McCoys with coverage throughout the United States, that "Blue Cross pays claims arising in many states other than Utah to providers throughout the country," that "Blue Cross enters into agreements with other Blue Cross Plans throughout the country in order to provide this coverage," and that "[c]laims are investigated and processed over interstate telephone lines and are frequently made and paid using the United States mail." (R. 216-218).

same footing as other contracts.'" Casaratto, 517 U.S. at 687. The Court reiterated that states may not "decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause." Id. at 686.⁹

The regulation at issue here is similarly flawed. It conditions the enforceability of arbitration provisions on a special notice requirement not applicable to contracts generally. The regulation is preempted by the Federal Arbitration Act, and is unlawful. McCoy's reliance on the regulation is misplaced; there is simply no statutory basis for the trial court's refusal to enforce the arbitration provision.

III. IF THE COURT DETERMINES THAT MR. MCCOY'S POLICY WAS EFFECTIVELY AMENDED TO INCLUDE AN ARBITRATION PROVISION, REMAND TO THE TRIAL COURT FOR CONSIDERATION OF PLAINTIFF'S ADDITIONAL ARGUMENTS IS NOT THE PROPER REMEDY.

McCoy argues that, in the event this Court determines that Mr. McCoy's policy included an arbitration provision, the Court should remand the case to the trial court for consideration of McCoy's alternative arguments as to why he should not be

⁹ The regulation also violates the Utah Arbitration Act, which, like the Federal Act, requires courts to enforce arbitration provisions. Utah Code Ann. 78-31a-4(1) (1985); Buzas Baseball v. Salt Lake Trappers, 925 P.2d 941, 947 n.5 (Utah 1996) ("[T]he provisions of the Utah Arbitration Act are nearly identical to those contained in the Federal Arbitration Act."). Accordingly, the Utah Act, like its Federal counterpart, should be construed to invalidate the regulation. Buzas, 925 P.2d at 947 n.5 ("Identity in language [in Utah and federal statutes] presumes identity in construction, so that we look to federal . . . law for guidance.") (quoting Brickyard Homeowner's Ass'n Management Comm. v. Gibbons Realty, 668 P.2d 535, 540 (Utah 1983)).

required to arbitrate. Remand, however, is not the proper remedy; McCoy should have raised all of his arguments in this appeal. Issues that could be raised in a first appeal, but are not raised, are thereafter waived. MacKay v. Hardy, 1998 Utah LEXIS 93 (Utah 1998) (citing Debry v. Cascade Enters, 935 P.2d 499, 502 (Utah 1997)). "The reason for this rule is simple: Judicial economy and the parties' interests in the finality of judgments are in no way furthered if parties are allowed to engage in piecemeal appeals." Id.

McCoy raised a panoply of arguments in the trial court as to the enforceability of the arbitration provisions. The trial court based its denial of Blue Cross' Motion to Compel Arbitration on the issue of notice of amendment. However, it is axiomatic that an appellate court can uphold a trial court's decision for any reason supported by the record. Rees v. Intermountain Health Care, Inc., 808 P.2d 1069, 1078 n.20 (Utah 1991); Projects Unlimited Inc. v. Copper State Thrift & Loan Co., 798 P.2d 738, 743 (Utah 1990). For that reason, McCoy should have raised all arguments supporting the trial court's denial of Blue Cross' Motion to Compel Arbitration in this appeal. Failure to do so constituted a waiver of those arguments. McCoy's proposed remedy of remand, if accepted, could result in an endless number of piecemeal appeals. Such a result is contrary both to Utah law and to common sense. McCoy's request for remand for consideration of his other arguments should therefore be denied.

IV. THE PRESUMPTION IN FAVOR OF ARBITRATION APPLIES IN THIS CASE.

McCoy asserts that policy considerations weigh against the enforcement of the mandatory arbitration provision in this case. In doing so, McCoy ignores the strong public policy favoring arbitration evidenced by both the Federal Arbitration Act and the Utah Arbitration Act, as well as interpretive case law. McCoy's arguments against arbitration have clearly been rejected by Congress and the Utah State Legislature, which both enacted legislation upholding the validity of arbitration clauses.¹⁰ Presumably, those bodies did not enact that legislation blindly. Rather, after consideration of both the advantages and disadvantages of arbitration, those bodies determined that the advantages of arbitration sufficiently outweighed any adverse effects.

In addition, the Utah Supreme Court has stated that "the Utah Arbitration Act 'reflects a long-standing policy favoring speedy and inexpensive methods of adjudicating disputes.'" Buzas Baseball v. Salt Lake Trappers, 925 P.2d 941, 946 (Utah 1996) (internal citation omitted). The court has also noted that "[t]he Territory and State of Utah have had statutory provisions for arbitration of disputes since 1884,"

¹⁰ For example, McCoy offers general arguments against arbitration, such as the fact that arbitrator's decision does not have a *stare decisis* effect, that arbitration is not conducted publicly, that discovery may be limited, that evidentiary objections may be handled differently, and that arbitrators are somehow the servants of insurance companies. These arguments fail to overcome the strong public policy favoring arbitration, and present no legitimate reason why Blue Cross should not be able to compel arbitration of Mr. McCoy's claims.

Robinson & Wells, P.C. v. Warren, 669 P.2d 844, 846 (Utah 1983), and that "arbitration is favored in the law." Giannopoulos v. Pappas, 15 P.2d 353, 356 (Utah 1932). In short, many years of jurisprudence have rejected the notion of arbitration as an inferior remedy. In light of this strong public policy, McCoy's attacks at arbitration generally are clearly insufficient to overcome the enforceability of Blue Cross' valid arbitration provision.

McCoy also contends that the arbitration provision is somehow unfair because it "worked only one way," since "Blue Cross would never have any reason to appeal its own decision." This argument misses the point: Just as the arbitration provision gives Blue Cross the right to compel the arbitration of a claim brought against it in court, it also gave Mr. McCoy the right to force Blue Cross into arbitration, without having to incur the expenses associated with traditional litigation. In other words, the arbitration provision meant that Mr. McCoy did not have to file a lawsuit in order to obtain independent review of Blue Cross' denial of his claim. This provision cannot truly be called one-sided. It confers an obvious benefit upon each of the parties, and its validity is supported by controlling law.

Finally, McCoy contends that the arbitration provision is unenforceable in this case for constitutional reasons, because he did not unequivocally and knowingly waive his right to a jury trial. However, McCoy overlooks the well-established principle of Utah law that arbitration provisions are not strictly construed. Rather, they are liberally construed in favor of arbitration. Lindon City v. Engineers Const.

Co., 636 P.2d 1070, 1073 (Utah 1981); Docutel Olivetti v. Dick Brady Systems, Inc., 731 P.2d 475 (Utah 1986). Requiring an unequivocal waiver would, in essence, amount to strict construction against arbitration. This is clearly not the law in Utah. If all doubts are resolved in favor of arbitration, as Utah law requires,¹¹ arbitration will necessarily be ordered in equivocal cases, or cases in which one party claims he did not understand the clause's full import. While the rights to access to the courts and to jury trials are of constitutional importance, they are not sacrosanct, and courts routinely and frequently find them unintentionally waived.¹²

Moreover, equal in dignity to the rights to jury and court access under Utah's Constitution is the fundamental right to contract. Utah Const. Art. I Section 18. See also Section 27. Blue Cross contracted with Mr. McCoy, since 1985, that its coverage of the McCoy's was subject to a right in both parties to compel the favored remedy of arbitration. The clause is unambiguous. Such contractual provisions are favored under Utah law, and are construed broadly. Lindon City, 636 P.2d 1070 (Utah 1981); Docutel Olivetti Corp., 731 P.2d 475 (Utah 1986). The Utah Supreme

¹¹ See e.g., Docutel Olivetti v. Dick Brady Systems, Inc., 731 P.2d 475, 479 (Utah 1986); Lindon City v. Engineers Const. Co., 636 P.2d 1070, 1073 (Utah 1981).

¹² Even outside the arbitration context, both the right to a jury trial and access to the courts are easily unintentionally waived. One need only omit a jury demand, or fail to pay a fee to waive a jury trial. Utah R. Civ. Pro. 38(d) (1987). There is nothing knowing or voluntary about such an omission, and yet it is binding. Similarly, one may waive access to the courts effectively by merely allowing a statute of limitations to run, or failing to take other simple actions (such as complying with the notice requirements of governmental immunity acts).

Court has squarely rejected the notion that such unambiguous and statutorily favored contracts violate a party's right to court access or a jury trial. Lindon City, 636 P.2d at 1074. In short, there is no constitutional impediment to the enforcement of the arbitration provision in this case.

CONCLUSION

Gerald McCoy's insurance policy was effectively amended in 1985 to include a mandatory arbitration provision. Blue Cross has demonstrated, by a preponderance of the evidence, the existence of a valid agreement to arbitrate. Blue Cross submitted abundant evidence establishing that the endorsement amending the policy was mailed to Mr. McCoy, and that evidence is sufficient under controlling Utah law and the express terms of McCoy's policy. Mr. McCoy has presented no legitimate reason why the arbitration provision should not be enforced, relying instead on general attacks against arbitration and his testimony that he doesn't remember receiving the endorsement. Such arguments are simply insufficient to overcome the evidence presented by Blue Cross. The proper forum for Mr. McCoy's claims against Blue Cross is arbitration. The trial court's order denying Blue Cross' Motion to Compel Arbitration and Stay Proceedings should be reversed.

DATED this 16 day of February, 1999.

JONES, WALDO, HOLBROOK &
McDONOUGH

By Marci Batty

Andrew H. Stone

Marci Batty

Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 16 day of February, 1999, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT, to the following:

David R. Olsen
Jeffrey D. Eisenberg
WILCOX, DEWSNUP & KING
36 South State Street, Suite 2020
Salt Lake City, UT 84111

Attorneys for Appellee


