1989

Thomas E. Chandler; Dr. Michael E. Allen; Dr. Clark Fullmer; Dr. Rodney W Livingston; Dr. Garth L. Nelson; Dr. Gene M. Richards; Dr. Phillip H. Spencer; Dr. Clive C. Ingram; Dr. David B. Hincks; Dr. Aldean Washburn; Dr. Paul R. Olsen; Members of the Utah Dental Association v. Massachusetts Mutual Life Insurance Company, Gary D. Henderson; Steven G. Sholy; Utah Dental Association : Reply Brief

Utah Supreme Court

Phillip S. Ferguson; Christensen, Jensen & Powell; Gary Christian; Kipp and Christian; David R. Money, Timothy C. Houpt; Jones, Waldo, Holbrook and McDonough; David G. Williams; Snow, Christensen and Martineau; attorneys for defendants.

Norman J. Younker; Fabian & Clendenin; attorneys for appellees.

IN THE UTAH SUPREME COURT

890540-CA

DR. THOMAS E. CHANDLER; DR. MICHAEL E. ALLEN; DR. CLARK FULLMER; DR. RODNEY W. LIVINGSTON; DR. GARTH L. NELSON; DR. GENE M. RICHARDS; DR. PHILLIP H. SPENCER; DR. CLIVE C. INGRAM; DR. DAVID B. HINCKS; DR. ALDEAN WASHBURN; and DR. PAUL R. OLSEN; individually and on behalf of MEMBERS OF THE UTAH DENTAL ASSOCIATION, Plaintiffs/ Appellees, vs. MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, a Massachusetts corporation; GARY D. HENDERSON; STEVEN G. SHOLY; the UTAH DENTAL ASSOCIATION, a Utah incorporated association, Defendants, and BLUE CROSS BLUE SHIELD OF UTAH, Defendant/Appellant.	REPLY BRIEF OF APPELLANT Case No. 890540 Priority No. 16

Appeal From The Decision Of The Third Judicial District Court, The Honorable Timothy R. Hanson, Denying A Motion To Compel Arbitration

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IN THE UTAH SUPREME COURT

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RESPONSE TO APPELLEES' STATEMENT OF ISSUES

Appellant Blue Cross/Blue Shield of Utah ("BCBSU") disputes the assertion of Plaintiffs/Appellees, ("Plaintiffs") that the district court made a "factual finding" that they were prejudiced by the participation of BCBSU in litigation below. The trial court drew a legal conclusion from undisputed facts; the issue on appeal is whether that legal conclusion is correct.

RESPONSE TO APPELLEES' STATEMENT OF FACTS

The statement of facts submitted by the plaintiffs is riddled with improper references to matters which are outside the record. Assertions are made about facts which formed no part of the trial court's decision. Additionally, Plaintiffs include argumentative characterizations of the merits of the lawsuit, which have no bearing on this appeal, in an attempt to infuse a procedural dispute with misplaced emotion.

BCBSU responds to plaintiffs' specific numbered assertions of fact, as follows:

1. Some of the plaintiffs and their family members may indeed suffer from serious illnesses. These facts have not been established, and are wholly irrelevant to this appeal.

2. Prior to July, 1987, the plaintiffs were parties to health insurance contracts which were terminable by BCBSU

upon thirty days written notice for any reason whatsoever other than the health of the subscriber. This issue is, however, irrelevant to this appeal.

3. Plaintiffs' paragraph three is correct, but irrelevant.

4. BCBSU does not dispute the assertions of paragraph four, but they are disputed by other parties, unestablished as yet, and irrelevant to this appeal.

5. The assertions of paragraph five are essentially true, but irrelevant.

6. The facts asserted in paragraph six, in particular the bald assertion that "Uninsureds will never be able to obtain health insurance coverage for the chronic and serious illnesses that they experience," are not established in the record, and are disputed. They are also completely irrelevant to this appeal.

7. Plaintiffs' attempt to explain in paragraph seven their reasons for not originally naming BCBSU as a defendant is gratuitous and improper. No citation to the record supports this assertion; it is not established by the testimony of any witness, and may not be relied upon on appeal.

8. Similarly, plaintiffs' assertion in paragraph eight that "the named defendants began pointing their fingers

at BCBSU" is unsupported in the record, and may not be introduced on appeal.

9. Paragraph nine contains even more egregious efforts to supplement the record on appeal with unproven facts. Plaintiffs allege that "on September 13, 1988 Uninsureds informed counsel for BCBSU that because of the information obtained in the Mr. West's deposition" they would add BCBSU as a defendant. BCBSU denies that it was informed at this early date that it would be named as a defendant; nothing in the record establishes this fact, no citation to the record supports it, and it was not a part of the record reviewed by the trial court in reaching its decision.

10. In paragraph ten, plaintiffs assert that on September 27, 1988 BCBSU requested that depositions previously scheduled be continued so that BCBSU could be present. BCBSU disputes the assertion; it is unfounded in the record, no citation to the record is given (the only citation is to the notice establishing that the depositions were continued), the trial court did not consider any such evidence, and the attempt to distort the record in this manner is objectionable.

11. Paragraphs eleven, twelve and thirteen are true.

12. Paragraph fourteen represents another unwarranted attempt to expand the record. While it is true that plaintiffs

served a request for production of documents on December 12, there is no basis in the record for stating that "uninsureds began preparing their case against BCBSU" on this date.

13. Paragraphs fifteen through twenty-eight are true, except that BCBSU "participated" in the deposition of Jack Sheets only to the extent that its counsel defended the deposition and asserted appropriate objections; no questions were posed by BCBSU to Mr. Sheets.

14. Paragraph twenty-nine includes yet another improper attempt to supplement the record on appeal. Plaintiffs' assertion that they "finalized document preparation for their case against BCBSU" is unsupported in the record; the fact that document requests were served is the only matter of record.

15. Similarly, in paragraph thirty, plaintiffs claim, without any support in the record, that they "began preparing their response" to interrogatories on March 10, 1989. No evidence was introduced below about what steps, if any, were taken to prepare interrogatory responses, and BCBSU again objects to this impermissible and unfair assertion about facts outside the record.

16. Paragraph thirty-one is true but irrelevant; actions taken by other defendants have no bearing on a determination of how extensively BCBSU participated in the case.

17. Paragraphs thirty-one and thirty-two are true.

18. Paragraph thirty-four contains yet another unfounded, impermissible supplementation of the record with the assertion that the plaintiffs were not relieved of their obligation to respond to interrogatories from BCBSU until April 4. BCBSU believes that communication occurred earlier, but, in any event, no evidence was introduced on this subject below, the record does not support this assertion, and it cannot be relied upon on appeal.

19. Paragraphs thirty-five and thirty-six are true.

SUMMARY OF ARGUMENTS

The district court's decision is not based upon findings of fact which are reversible only if clearly erroneous. The district court concluded that BCBSU had waived its right to compel arbitration on account of its conduct in the litigation prior to invoking this remedy. The facts about the participation of BCBSU in the litigation and the actions taken by the plaintiffs on account of the participation of BCBSU below are a matter of record. No evidentiary hearing was held, no determination was made about the credibility of any witness and no evidentiary conflicts were resolved. Therefore, this court is free to draw its own legal conclusion from the

undisputed facts and should reverse the erroneous conclusion reached by the district court.

Plaintiffs failed to establish below that BCBSU caused them material prejudice by extensive participation in litigation before seeking to compel arbitration. Plaintiffs argue that a delay in asserting the right to arbitration will cause a delay in their recovery. This argument is of no avail since there is no reason to assume that they will recover anything in this lawsuit. Proof of delay is not proof of prejudice. Furthermore, the plaintiffs did not spend significant time or money responding to motions filed by BCBSU, or discovery initiated by BCBSU, nor did they prepare for trial in reliance on the expectation that BCBSU would forgo arbitration. Since there is no evidence which would support a finding of prejudice to the plaintiffs by the conduct of BCBSU, the trial court's conclusion cannot be upheld under any standard of review.

ARGUMENT

POINT I

THIS CASE IS SUBJECT TO REVIEW UNDER THE "CORRECTION OF ERROR" STANDARD

Plaintiffs inaccurately characterize the trial courts' ruling as one based upon findings of fact which can only be

reversed if clearly erroneous. In reality, the trial court resolved no factual issues in reaching its decision; reviewing undisputed facts about the participation of all parties in the litigation, the court concluded that BCBSU waived its right to compel arbitration.

As the United States Court of Appeals for the Second Circuit said in Rush v. Oppenheimer & Co., 779 F.2d 885, 887 (2nd Cir. 1985):

> Where, as here, the concern is whether the undisputed facts of defendants' pre-trial participation in the litigation satisfy the standard for waiver, the question of waiver of arbitration is one of law, (citations omitted) and is fully reviewable on appeal free from the clearly erroneous standard of Fed. R. Civ. P. 52(a) applicable to factual findings by the district court.

In accord: Fisher v. A.G. Becker Paribas Inc., 791 F.2d 691, 693 (9th Cir. 1986).

No evidentiary hearing was held below and no testimony was taken on the issue raised by this appeal. The plaintiffs attempt to characterize the court's decision as fact finding by arguing that the court reviewed "many sources of information including the Uninsured's verified complaint and attached exhibits, affidavits of each of the eleven uninsureds and attached exhibits, the written contract between BCBSU and the

Uninsureds, summaries of deposition testimony . . . etc." (Brief of Appellees, p. 12.) However, none of these materials contain evidence which was relied upon by the court in ruling on the issue of waiver.

The plaintiffs below resisted the motion to compel arbitration on several grounds; among them that the right to arbitrate was waived, but also because plaintiffs claim they were not properly notified of the inclusion of an arbitration provision in their contract, and that the provision was otherwise unenforceable. The affidavits of the plaintiffs went only to the question whether they received notice of the arbitration amendment, with some admitting receipt and some denying it. (R 608-648). The trial court, however, never reached this issue.

Similarly, the court's review of the contract and the complaint would only have been for the purpose of determining whether the complaint alleged causes of action which were within the scope of the arbitration provision, another issue not addressed by the court. As to depositions, the record discloses that none were published. No deposition testimony was relied upon, or cited, except in plaintiffs' persistent attempts to inject arguments about the merits of the dispute into the resolution of this procedural issue.

The question of waiver, as explained in BCBSU's opening brief, rests solely upon a determination of whether BCBSU's participation in the lawsuit prior to demanding arbitration was substantial, and significantly prejudicial to the plaintiffs. The participation of BCBSU and of other parties in the litigation is a matter of record, reflected by filing dates, the presence and absence of discovery notices, etc. No conflicting testimony or evidentiary disputes had to be resolved to identify the facts about the parties' conduct in the litigation.

In Matter of Adoption of Infant Anonymous, 760 P.2d 916, 918 (Utah App. 1988), the Utah Court of Appeals reviewed the decision of a trial court that a parent's consent to adoption was not knowingly given. The court described the applicable standard of review as follows:

> Normally we would review this determination by the factfinder under the standard set forth in Utah R. Civ. P. 52(a), giving great deference to the trial judge's ability to assess the credibility of witnesses and setting aside the finding only if clearly erroneous. However, because no evidentiary hearing was held, Judge Moffat had before him only the affidavits of the natural mother, the counselor, and the obstetrician, described above, the transcript of the June 24 appearance before Judge Murphy, and the natural mother's written consent to adoption executed that day. Because the trial

> court's finding was based solely on these written materials 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.

It is true, as pointed out by plaintiffs, that the Court of Appeals for the Fifth Circuit (unlike the Second and Ninth Circuits) held in Price v. Drexel Burnham Lambert, Inc., 791 F.2d 1156, 1159 (5th Cir. 1986) that a finding of waiver of the right to arbitrate is a legal conclusion, but that the findings upon which the conclusions were based are predicate questions of fact which may not be overturned unless clearly erroneous. However, even courts which might adhere to this mixed standard of review note that where the trial court makes no predicate findings of fact, the decision is treated on appeal as a purely legal one which "follows from the undisputed facts of defendants' pre-trial participation in litigation", Page v. Moseley, Hallgarten, Estabrook & Weeden, Inc., 806 F.2d 291, 294, note 2 (1st Cir. 1986).

In its memorandum decision and separate order the trial court did no more than state that "[t]he court finds that Blue Cross & Blue Shield has participated in the litigation since being joined as a party defendant to such an extent that

any right to arbitration has been waived and that the arbitration would work a substantial prejudice on the remaining parties" (R 709, 720) (Appendix to Opening Brief of BCBSU). These are not "predicate factual findings" which are entitled to deference on appeal. The trial court looked at a record which contained no testimony or evidentiary conflicts and reached a legal conclusion which was wrong. This court should correct its error.

POINT II

THE RECORD DOES NOT SUPPORT A FINDING THAT BCBSU SUBSTANTIALLY PARTICIPATED IN LITIGATION TO THE PREJUDICE OF THE PLAINTIFFS

Apparently, the parties do not disagree about the legal test which applies to a claim of waiver of the right to arbitrate: a party waives an otherwise enforceable right to arbitrate a dispute only by substantial participation in litigation which materially prejudices the party opposing arbitration. Furthermore, plaintiffs do not deny that there is a presumption in favor of arbitration and that one who claims waiver bears a heavy burden of proof; Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983); (see also other authorities cited under Point I of the opening brief of BCBSU).

Whether this court applies a "correction of error" or a "clearly erroneous" standard, the record does not support the trial court's finding of waiver. Except for those few cases which hold that mere failure to assert the defense of arbitration in an answer constitutes waiver (a legal position the plaintiffs themselves do not advocate), neither party has identified any case in which participation in litigation as minimal as that of BCBSU was held to constitute a waiver.

Plaintiffs persist in comparing the facts of the case at bar to those of Reid Burton Const. Co. Inc. v. Carpenters District Council, 614 F.2d 698 (10th Cir. 1980). In the Reid Burton case, a labor union sought to compel arbitration after the trial of the case had begun, having previously disavowed the applicability of the arbitration contract, and after participating in a pre-trial conference without raising the arbitration defense. In contrast, the trial court below specifically found that the case was not ready for a trial setting (R 458), no hearing had been held on any matter before arbitration was sought, and no motion had been filed by BCBSU seeking relief of any kind.

More importantly, the trial court never made a clear factual finding of prejudice and nothing in the record supports a finding that plaintiffs were prejudiced by BCBSU's delay in

moving to compel arbitration. The trial court, as noted, stated that "arbitration would work a substantial prejudice on the remaining parties." (R 720). This observation reveals the flaws in the trial court's legal analysis. It is wholly irrelevant whether other defendants are burdened by arbitration; they are not subject to the arbitration agreement and would have no standing to claim it was waived.[1/] Moreover, the question is not whether arbitration itself would prejudice the opposing party, but whether the delay in its assertion caused prejudice.

Neither the trial court nor the plaintiffs have succeeded in explaining how the plaintiffs have been prejudiced by the timing of BCBSU's arbitration motion. The plaintiffs continue to argue that a delay in moving to compel arbitration has delayed them in obtaining the relief they seek. This argument assumes that plaintiffs' position on the merits is

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1/ Plaintiffs argue under Point IV of their brief that the other parties will be prejudiced by having plaintiffs' claims against BCBSU subject to arbitration and that it will be inconvenient to everyone to proceed in separate forums. This "prejudice", as noted in the opening brief of BCBSU, is inherent in the finding that two of the parties agreed to arbitrate their dispute; it has nothing to do with the question whether delay has caused prejudice and is irrelevant to this appeal. Furthermore, none of the other parties did oppose the motion of BCBSU to compel arbitration.

correct and that they will obtain the relief they seek. No court addressing the question of prejudice starts with this assumption; it amounts to nothing more than the contention that delay itself proves prejudice, a position which is simply not the law, Rush v. Oppenheimer & Co., supra, 779 F.2d at 887, ("It is beyond question that defendants' delay in seeking arbitration during approximately eight months of pretrial proceedings is insufficient by itself to constitute a waiver of the right to arbitrate, for in addition, prejudice to Rush must be demonstrated"). Furthermore, since arbitration is a streamlined process, it is impossible to know whether a delay in moving to compel arbitration will actually result in a delay of the disposition of the case, even if that question were dispositive.

Instead, courts have almost invariably focused their analysis on whether the party seeking arbitration has filed motions or engaged in discovery which caused the opposing party to spend significant time and money it would not otherwise have expended; Rush v. Oppenheimer & Co., supra, Board of Educ. Taos Mun. v. The Architects, 103 N.M. 462, 709 P.2d 184 (N.M. 1985); Lee v. Grandcor Medical Systems, Inc., 702 F. Supp. 252 (D. Colo. 1988); Bengiovi v. Prudential-Bache Securities, Inc., [1984-1985 Transfer Binder], Fed. Sec. L. Rep. (CCH) § 92012 at

91,018 (D.D.C. April 25, 1985) (". . . plaintiff has been required to produce documents, answer deposition questions, and file an opposition to the summary judgment motion . . . In light of this delay in seeking arbitration and the resulting prejudice to plaintiff, Pru-Bache cannot now to [sic] rely on the Customer Agreement to compel arbitration.")

BCBSU filed neither a motion for summary judgment nor any other motion but a motion to compel arbitration. Plaintiffs, unable to point to this frequently cited source of prejudice, are left having to contend that they were prejudiced by the participation of BCBSU in discovery. This position is untenable.

BCBSU didn't schedule a single deposition. The depositions of the plaintiffs were taken by codefendants before BCBSU was ever named as a party. The only depositions taken after BCBSU was joined were depositions <u>scheduled and taken by the plaintiffs</u>. How could the plaintiffs have been prejudiced by the attendance of BCBSU at depositions they scheduled and took? Plaintiffs imply that they were prejudiced when BCBSU identified and produced a corporate spokesman for a deposition in response to their request. Plaintiffs have not shown, however, or even argued that they would not have sought this

discovery in arbitration[2/] or that the results were wasteful rather than beneficial.

Plaintiffs make the absurd argument that they were prejudiced by receiving interrogatory answers and documents from BCBSU. Most of the documents were already produced in response to a subpoena served upon BCBSU prior to being joined as a defendant. (R 180). Moreover, plaintiffs did not contend that they received documents or information which would not be sought or used in arbitration.

Admittedly, BCBSU served discovery requests upon the plaintiffs which they were never required to answer. Plaintiffs improperly attempt to supplement the record on appeal with the assertions that they began preparing their responses the day they received them and nearly completed them before being relieved of the duty to answer. The record is devoid of any evidence that the plaintiffs expended time or resources responding to discovery from BCBSU and it is clear that BCBSU obtained no benefit from any such discovery. As the District Court for the District of Colorado observed, "courts generally have held that rights under an arbitration agreement are only waived where the parties have engaged in extensive

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[2/] Discovery is permitted under the Utah Arbitration Act. See, Utah Code Ann. § 78-31a-6(3)(6).

pre-trial discovery, and where the party opposing arbitration will suffer material prejudice . . .", Lee v. Grandcor Medical Systems, Inc., 702 F. Supp., at 255 (emphasis supplied). Without question, BCBSU was not a participant in extensive pre-trial discovery which materially prejudiced the plaintiffs.

Finally, plaintiffs feebly attempt to bring themselves within the holding of cases that where one party has completed trial preparation before arbitrability is asserted, the other party has suffered prejudice. Plaintiffs improperly assert in their statement of facts that they began preparing their case against BCBSU in December, 1988 and completed "document preparation" for their case against BCBSU on March 10, 1989 when they served BCBSU with interrogatories and requests. Again, the plaintiffs flout this court's rules by attempting to add evidence to the record which was not introduced below. Not only are these assertions irrelevant, but they lack credibility. Neither a trial nor a pre-trial was scheduled when BCBSU moved to compel arbitration. No party claimed below to have been near completion of discovery or involved in trial preparation.

In this case, unlike many others where the issue is raised, BCBSU was only one of several defendants, and the other parties engaged in litigation for a year before it was joined.

In the four and one-half month interval between the answer and motion of BCBSU, discovery proceeded exactly as it would have had BCBSU not been joined. Plaintiffs have not established any way in which their time and resources were wasted by the brief presence of BCBSU in the lawsuit. A finding of prejudice simply cannot be supported.

CONCLUSION

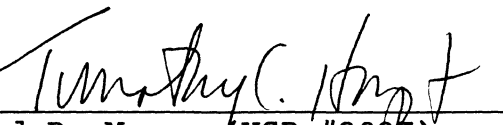
The facts which underlie this appeal were not disputed below. From the moment it was named as a defendant, BCBSU was engaged responding to a barrage of discovery from the plaintiffs and other parties. Its conduct in the litigation was wholly responsive. It filed no motions and obtained no discovery from other parties. As a result, the plaintiffs did not expend time and money litigating with BCBSU in ways that would be wasted if the matter is arbitrated. These facts are easily discernible from the record.

The parties agree that BCBSU should be deemed to have waived its right to arbitrate only if it substantially participated in litigation to the material prejudice of the plaintiffs before seeking arbitration. Because the participation of BCBSU was neither substantial nor prejudicial,

it did not waive its right to arbitrate. The contrary conclusion of the district court should be reversed.

DATED this 31st day of October, 1990.

JONES, WALDO, HOLBROOK & McDONOUGH

By 

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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of October, 1990, I caused to be mailed, postage prepaid, true and correct copies of the foregoing REPLY BRIEF OF APPELLANT to each of the following:

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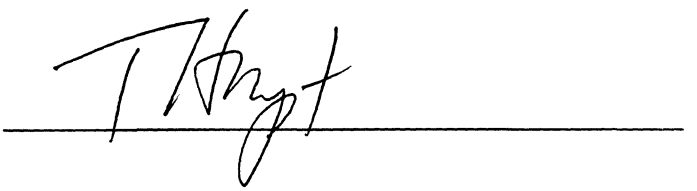

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