IN THE SUPREME COURT OF THE STATE OF NEVADA

ROCKY MOUNTAIN HOSPITAL AND MEDICAL SERVICE, INC., D/B/A ANTHEM BLUE CROSS AND BLUE SHIELD,
Appellant,
vs.
LISA M. ROSE,
Respondent.

No. 45025

FILED

SEP 29 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE AND VACATING STAY

This is an appeal from a district court order denying a motion to compel arbitration in an insurance dispute. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

Appellant Rocky Mountain Hospital and Medical Service, Inc., d/b/a Anthem Blue Cross and Blue Shield (Anthem), appeals from an order denying a motion to compel arbitration in a dispute over medical insurance claims filed by respondent Lisa M. Rose. The district court concluded that both the arbitration and appeals clauses of the relevant insurance policy were unconscionable. We agree with respect to the arbitration clause.[1]

The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition.

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[1]We have previously concluded that the arbitration clause is reviewable by this court because Anthem's motion to dismiss or for summary judgment was substantively a motion to compel arbitration. See Rocky Mountain Hosp. v. Rose, Docket No. 45025 (Order Granting Stay and Reinstating Briefing, September 13, 2005). We decline to review the enforceability of the appeals clauses as a condition precedent to Rose filing a lawsuit.

Anthem argues that the district court erred in determining that the arbitration and appeals clauses in the instant insurance policy were unconscionable. Conversely, Rose maintains that the district court was correct in its determination.[2]

The party that moves to enforce an arbitration clause has the burden of persuading the district court that the clause is valid.[3] The issue of unconscionability involves mixed questions of law and fact.[4] This court reviews for substantial evidence a trial court's factual findings in support of a conclusion of unconscionability.[5] However, this court reviews de novo the issue of whether, given the trial court's factual findings, a contractual provision is unconscionable.[6]

Before a court can refuse to enforce a contract clause on unconscionability grounds, it must determine that the clause is both procedurally and substantively unconscionable.[7] Both unconscionability requirements, however, need not be present to the same degree.[8] The

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[2]Rose also contends that the mend-the-hold doctrine prevents Anthem from taking the allegedly inconsistent positions that the insurance policy commenced on April 16, 2003, rather than April 1, 2003, while also seeking to enforce the clauses in question against Rose. We conclude that Rose's argument lacks merit. Anthem's positions are not inconsistent.

[3]D.R. Horton, Inc. v. Green, 120 Nev. 549, 553, 96 P.3d 1159, 1162 (2004).

[4]Id.

[5]Id.

[6]Id.

[7]Burch v. Dist. Ct., 118 Nev. 438, 443, 49 P.3d 647, 650 (2002).

[8]Id. at 444, 49 P.3d at 650.

more a clause is procedurally unconscionable, the less it must be substantively unconscionable, and vice versa.[9]

Procedural unconscionability

"A clause is procedurally unconscionable when a party lacks a meaningful opportunity to agree to the clause terms either because of unequal bargaining power, as in an adhesion contract, or because the clause and its effects are not readily ascertainable upon a review of the contract."[10]

Here, the arbitration clause was procedurally unconscionable for three reasons. First, Rose did not have a meaningful opportunity to review the terms of the insurance policy before being bound by them.[11] Anthem sent Rose the terms of the policy only after approving her application for insurance. Rose had no realistic opportunity to bargain and had no choice as to the policy's terms, resulting in a contract of adhesion, which indicates procedural unconscionability.[12]

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[9]See id. (citing Armendariz v. Foundation Health Psychcare, 6 P.3d 669, 690 (Cal. 2000)).

[10]D.R. Horton, Inc., 120 Nev. at 554, 96 P.3d at 1162.

[11]This case is distinguishable from Lovey v. Regence BlueShield of Idaho, 72 P.3d 877 (Idaho 2003), relied on by Anthem. Unlike Lovey, who was renewing a policy and thus had prior access to the arbitration clause, Rose was initiating her first policy with Anthem, and she was not afforded any prior opportunity to review the policy.

We also conclude that the refund provision here does not save the arbitration clause, as Anthem argues. The provision did not provide Rose with the ability to review the agreement before entering into it.

[12]See D.R. Horton, Inc., 120 Nev. at 554, 96 P.3d at 1162; Burch, 118 Nev. at 441-44, 49 P.3d at 645-51.

Second, the arbitration clause is not clearly visible or set apart from the other text in the policy. Its heading is in the same font as the other headings in the contract, and the text of the provision is in the same font as all other provisions in the contract.[13]

Third, the arbitration clause does not clearly put Rose, or any reasonable insured, on notice that she is waiving important rights under Nevada law.[14] Thus, the district court correctly concluded that the arbitration clause was procedurally unconscionable.

Substantive unconscionability

Substantive unconscionability generally relates to the one-sidedness of a contract's terms.[15] Here, the arbitration clause was substantively unconscionable for at least two reasons. First, only "Anthem is not liable for punitive damages or attorney fees." This is a unilateral limitation. Under the clause's language, Anthem could seek punitive damages and attorney fees against Rose but not vice versa. Second, although the discovery limitation is bilateral in that it affects both parties, Anthem can unilaterally limit Rose's right to discovery—even if Rose found that right necessary—because both parties must agree before any

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[13]See D.R. Horton, Inc., 120 Nev. at 555-56, 96 P.3d at 1163-64 (concluding that an arbitration clause was procedurally unconscionable in part because the clause's heading and text were the same as every other provision in the contract and nothing drew attention to the arbitration clause).

[14]See id. at 556-57, 96 P.3d at 1164 (concluding that although an insurer need not explain each of the insured's rights in detail, the clause in question "must at least be conspicuous and clearly put [the insured] on notice that he or she is waiving important rights under Nevada law").

[15]Id. at 554, 96 P.3d at 1162-63.

formal discovery is allowed. Thus, the district court did not err in concluding that the arbitration clause was substantively unconscionable.[16]

CONCLUSION

We conclude that the district court did not err in determining that the arbitration clause was unconscionable. Therefore, the district court properly denied Anthem's motion to dismiss or for summary judgment with respect to the arbitration clause. Accordingly, we

ORDER the judgment of the district court AFFIRMED, and we ORDER the stay in the district court VACATED.

Douglas, J.
Douglas

Becker, J.
Becker

Parraguirre, J.
Parraguirre

[16]Contrary to Rose's argument, we conclude that the reference to both the American Arbitration Association (AAA) rules and state law is not ambiguous because the provision clearly indicates that the AAA only applies to procedure, while state law will apply to substantive determinations. We also note that the shortening of time in an insurance contract to bring a legal action is not per se improper as Rose contends. See State Farm Mut. Auto. Ins. Co. v. Fitts, 120 Nev. 707, 710-11, 99 P.3d 1160, 1162 (2004).

cc: Hon. Steven P. Elliott, District Judge
Nicholas F. Frey, Settlement Judge
Alverson Taylor Mortensen Nelson & Sanders
Leverty & Associates
Washoe District Court Clerk