Arbitration Law Review

Volume 3 *Yearbook on Arbitration and Mediation* Article 20

7-1-2011

Supreme Court of Colorado Holds that an Excess Insurer Who Endorses a Primary Insurer's Coverage Agreement by Follow-Form is Subject to the Arbitral Clause within that Agreement

Jamie L. Augustinsky

SUPREME COURT OF COLORADO HOLDS THAT AN EXCESS INSURER WHO ENDORSES A PRIMARY INSURER'S COVERAGE AGREEMENT BY FOLLOW-FORM IS SUBJECT TO THE ARBITRAL CLAUSE WITHIN THAT AGREEMENT

By
Jamie L. Augustinsky*

I. INTRODUCTION

In *Radil* v. *National Union Fire Insurance Co*., the Supreme Court of Colorado held that an excess insurer was bound by the arbitration clause in the primary insurer's uninsured/underinsured motorist coverage when the excess insurer endorsed the primary insurer's coverage by follow-form.[1] The court reasoned that since the excess insurer did not provide any limiting language concerning the scope of the coverage, the follow-form endorsement applied to the entire scope of the primary insurer's coverage, including the arbitral clause.[2] Further, the court rejected the excess insurer's argument that a boilerplate statement found at the end of the policy agreement constituted an express disclaimer of the arbitration clause.[3] The court cited Colorado's strong public policy in favor of arbitration as a mechanism of alternate dispute resolution to support its holding.[4]

II. BACKGROUND

Jennifer Radil, Plaintiff, worked as a camp counselor for Sanborn Western Camps ("the employer").[5] On July 10, 2000, the employer scheduled a counselor appreciation day, which included a whitewater raft trip partially paid for by the

* Jamie L. Augustinsky is a 2012 Juris Doctor Candidate at the Pennsylvania State University Dickinson School of Law.
[1] Radil v. Nat'l Union Fire Ins. Co., 233 P.3d 688, 689 (Colo. 2010).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*

employer.[6] Because the employer's vans were not available on that day, a supervisor provided her sport utility vehicle to transport the counselors.[7] The supervisor's daughter drove the vehicle.[8] Because there were more passengers than seats in the vehicle, Radil rode in the space behind the seats, which did not have any passenger restraints.[9] En route, the driver lost control of the vehicle and the vehicle rolled, ejecting Radil and breaking her neck.[10] Radil was seriously injured and rendered a quadriplegic as a result of the accident.[11]

The driver of the vehicle was insured under her mother's automobile liability policy with a $500,000 limit.[12] The employer's primary automobile insurance policy was with Great American Assurance Company ("Great American") and had a $1 million limit.[13] The employer also held a commercial umbrella policy issued by National Union Fire Insurance Company ("National Union"), Defendant, with a $25 million limit.[14] The Great American policy provided uninsured/underinsured motorist ("UM/UIM") coverage and contained numerous terms and conditions defining the policy's coverage.[15] The Great American policy included an arbitration clause, which provided that:

> If we, and an "insured" disagree whether the "insured" is legally entitled to recover damages from the owner or driver of an "uninsured motor vehicle" or do not agree as to the amount of damages that are recoverable by that "insured," then the matter may be arbitrated. However, disputes

[6] *Radil*, 233 P.3d at 690.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Radil*, 233 P.3d at 690.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*

> concerning coverage under this endorsement may not be arbitrated. Either party may make a written demand for arbitration.[16]

National Union's umbrella policy contained a "follow-form endorsement" of Great American's UM/UIM coverage.[17] This endorsement stated that:

> This insurance shall not apply to: Any obligation of the Insured under an "Uninsured Motorist" law. However, if a policy listed in the Schedule of Underlying Insurance provides this coverage:
>
> 1. this exclusion will not apply; and
> 2. the insurance provided by our policy will not be broader than the insurance coverage listed in the Schedule of Underlying Insurance.

All other terms and conditions of this policy remain unchanged.[18]

After being denied worker's compensation benefits, Radil filed a personal injury claim against the employer and the driver of the vehicle as a diversity action in federal court.[19] Meanwhile, Great American filed a declaratory judgment action against the employer and Radil in state court to establish that it had no duty to defend or indemnify the employer.[20] The employer joined National Union as a cross-claim defendant to Great American's action.[21] Radil subsequently filed a cross-claim declaration against National Union, which stated that she was entitled

[16] *Radil*, 233 P.3d at 690.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Radil*, 233 P.3d at 690.

to underinsured motorist benefits under the National Union policy.[22] With National Union's consent, Radil settled her claims against the driver for $500,000 and settled with the employer for the $1 million Great American policy limit in federal court.[23] Radil did, however, reserve her right to seek underinsured motorist benefits from National Union.[24] The employer and Great American then stipulated to a dismissal of their claims in the state court action, leaving only Radil and National Union as parties in this state court proceeding.[25]

Radil moved to either compel arbitration of her claims against National Union, or to amend her cross-claim to include claims for underinsured motorist benefits.[26] National Union moved for summary judgment, claiming that it had no obligation to pay underinsured motorist benefits to Radil.[27] The trial court grant National Union's motion and denied Radil's requests to either compel arbitration or amend her cross-claim.[28] On appeal, the court of appeals vacated the grant of summary judgment to National Union and concluded that Radil was entitled to underinsured motorist benefits under the National Union policy.[29] On remand, Radil again moved to either compel arbitration of her claims or amend her cross-claim.[30] National Union argued that its follow-form endorsement did not incorporate Great American's arbitration clause.[31] The trial court subsequently found that a valid arbitration agreement did exist between Radil and National Union and granted Radil's motion to compel arbitration.[32] In response to National Union's litigation-based waiver defense, the trial court determined that the arbitral

[22] *Id.* at 690-91.
[23] *Id.* at 691.
[24] *Id.*
[25] *Id.*
[26] *Radil*, 233 P.3d at 691.
[27] *Id.*
[28] *Id.*
[29] *Id.* (citing Radil v. Nat'l Union Fire Ins. Co, 207 P.3d 849, 859 (Colo. App. 2008), *cert. denied*).
[30] *Id.*
[31] *Radil*, 233 P.3d at 691.
[32] *Id.*

panel, and not the court, was responsible for determining the validity of this defense.[33] National Union then petitioned the Supreme Court of Colorado to issue a rule to show cause why the trial court should not vacate its order.[34]

III. COURT'S ANALYSIS

A. National Union's Follow-Form Endorsement Bound It to the Arbitral Clause

The Supreme Court of Colorado first discussed the appropriate standard to employ when reviewing a trial court's order compelling arbitration. The court stated that although a trial court's order compelling arbitration is not immediately appealable, the state Supreme Court could exercise its original jurisdiction to review the order.[35] The court further articulated that the existence and scope of an arbitration agreement are questions of law that courts review de novo by applying state contract law principles, resolving all ambiguities in favor of arbitration.[36]

The court then turned its discussion to the issue of whether National Union's follow-form endorsement incorporated the arbitration clause of Great American's UM/UIM endorsement. The court explained that Great American, as the primary policy, included specific terms and conditions within its endorsement that specifically described the scope of its coverage.[37] Further, these terms and conditions constituted the "form" of Great American's coverage and were evidence of the parties' intention on the scope of the coverage.[38] This coverage included an arbitration clause that gave either party to the agreement the right to compel

[33] *Id.*
[34] *Id.*
[35] *Id.* at 691-92.
[36] *Radil*, 233 P.3d at 692.
[37] *Id.*
[38] *Id.*

arbitration of disagreements concerning the entitlement to or amount of the UM/UIM benefits.[39]

The court asserted that National Union's follow-form endorsement of Great American's UM/UIM coverage did not provide any language describing the specific coverage it endorsed.[40] Because there was no express language limiting National Union's UM/UIM coverage, the follow-form endorsement incorporated the entire form of Great American's UM/UIM coverage.[41] To hold otherwise in the absence of any express limiting language would have left the parties guessing as to what the coverage did and did not provide.[42] Because the follow-form endorsement required National Union to assume "any obligation of the Insured under an 'Uninsured Motorist' or 'Underinsured Motorist' law [where] a policy listed in the Schedule of Underlying Insurance provides this coverage," the court concluded that the substance of National Union's obligation was defined by the terms and conditions found within Great American's UM/UIM coverage.[43] Further, the court asserted that National Union could have explicitly rejected or modified the arbitration clause upon issuance of the follow-form endorsement.[44] Because it did not, however, it could not attempt to avoid a particular term of the underlying coverage when its endorsement followed the form of that coverage.[45]

The court next addressed and rejected National Union's argument that the statement "all other terms and conditions of this policy remain unchanged" expressly disclaimed the arbitration clause.[46] The court found that this statement was a boilerplate statement that appeared at the end of each National Union

[39] *Id.*
[40] *Id.*
[41] *Radil*, 233 P.3d at 692.
[42] *Id.*
[43] *Id.* at 690.
[44] *Id.*
[45] *Id.*
[46] *Radil*, 233 P.3d at 690.

endorsement, regardless of the specific content of each endorsement.[47] Because this statement was ambiguous, the court reasoned that it must construe the statement in favor of arbitration.[48] Accordingly, this ambiguous, boilerplate statement found at the end of National Union's endorsement did not expressly disclaim the arbitration clause found within Great American's UM/UIM coverage.

Because National Union endorsed the entirety of Great American's coverage form and did not expressly disclaim the reference to arbitration found within that coverage, the court concluded that National Union was subject to arbitration pursuant to the coverage form.

B. The Trial Court Must Determine the Defense of Litigation-Based Waiver

National Union next argued that, even if it was bound by the arbitration agreement, the trial court erred in its determination that the defense of litigation-based waiver should be decided by the arbitral panel.[49] The court stated the general rule that absent clear party intent to the contrary, trial courts and not arbitrators determine the scope of an arbitration agreement.[50] When a court determines the scope of an arbitration agreement, it applies a presumption favoring arbitration unless it finds "positive assurance that the arbitration provision is not susceptible of any interpretation that encompasses the subject matter of the dispute."[51] Because the court determined that the plain language of the arbitration clause in Great American's UM/UIM endorsement was expressly of limited scope, it decided that the defense of litigation-based waiver was outside the scope of the arbitral

---

[47] *Id.*
[48] *Id.*
[49] *Id.* at 693-94 n.3 (citing Ehleiter v. Grapetree Shores, Inc., 482 F.3d 207, 217-19 (3d. Cir. 2007) (explaining that a litigation-based waiver defense arises when one party argues that the opposing party has waived its right to arbitrate by actively litigating the case in court)).
[50] *Id.* at 693.
[51] *Radil*, 233 P.3d at 693.

agreement.[52] The arbitration agreement expressly stated that it only applied to "disputes over entitlement to or recoverable amount of UM/UIM damages."[53] A litigation-based waiver defense, however, is a procedural defense that is unrelated to the issue of entitlement to or amount of damages.[54] Accordingly, the court concluded that it found "positive assurance that the arbitration provision is not susceptible of any interpretation that encompasses a defense of litigation-based waiver," and that the arbitration panel lacked jurisdiction to determine this defense.[55]

In arriving at this determination, the court explained the policy rationale behind the presumption that trial courts, and not arbitrators, decide the claims of litigation-based waiver.[56] Trial courts are better-suited to decide these claims than arbitrators because litigation-based waiver defenses depend upon parties' conduct before the trial court and "implicates trial court procedures with which arbitrators may have less familiarity."[57] Accordingly, the trial courts are in a better position to decide whether a request for arbitration after litigation is just an attempt at forum shopping.[58] Further, it is inefficient to send a waiver claim to an arbitrator because if the arbitral panel decides that a party waived its right to arbitrate, it will send the proceedings back to the trial court "without having made any progress with respect to the merits of the dispute."[59] Finally, litigation-based waiver is a procedural question that is wholly unrelated to the merits of the dispute, which the parties intended to be decided by an arbitrator.[60] If parties intend for a litigation-based waiver claim to be decided by the arbitrator, they could expressly provide for this

[52] *Id.* at 694.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Radil*, 233 P.3d at 694.
[57] *Id.*
[58] *Id.*
[59] *Id.* at 695.
[60] *Id.*

in the contract.[61] Absent express language to the contrary, however, the court followed the presumption that the trial court and not the arbitrator must determine the validity of the defense.[62]

The court further acknowledged that its holding on this matter was consistent with other jurisdictions which have held that litigation-based waiver defenses are properly determined by trial courts.[63] Additionally, its decision still followed the precedent set by the Supreme Court of the United States in *Howsam v. Dean Witter Reynolds, Inc*.[64] Federal and state courts both before and after *Howsam* have found that litigation-based waiver defenses were properly determined by trial courts.[65]

IV. SIGNIFICANCE

This case is significant because it reaffirms the strong public policy in favor of arbitration.[66] The court specifically stated that its holding "is supported by Colorado's public policy favoring arbitration as a mechanism of alternative dispute resolution."[67] National Union attempted to argue that a boilerplate statement found at the end of its endorsement constituted a waiver of the arbitration clause in Great American's policy.[68] The court, however, found this statement to be ambiguous and articulated the rule that ambiguous statements should be construed in favor of

[61] *Radil*, 233 P.3d at 695.
[62] *Id.*
[63] *Id*. at 694.
[64] *Id.* at n.3 (citing Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002) (holding that there is a presumption that procedural defenses compelled to arbitration are properly determined by the arbitrator)).
[65] *Id.* (citing Ehleiter v. Grapetree Shores, Inc., 482 F.3d 207, 217-19 (3d. Cir. 2007) (reasoning that the *Howsam* holding only referred to "waiver, delay, or like defenses arising from non-compliance with contractual conditions precedent to arbitration" and did not upset the "traditional rule that courts, not arbitrators" should decide the validity of litigation-based waiver defenses)).
[66] *See* Southland Corp. v. Keating, 465 U.S. 1, 10-11 (1984).
[67] *Radil*, 233 P.3d at 692.
[68] *Id.* at 693.

arbitration.[69] With this reasoning, the court attempted to indicate its preference for the resolution of disputes in arbitral proceedings rather than in the courts. Arbitration is a quicker way to achieve a final, binding solution to disputes than are court proceedings. Further, while decisions of a trial court can be, and oftentimes are, overturned by a higher court, decisions of an arbitral panel are given much more finality and will only be overturned by the courts in rare cases under the statutory or common law grounds for vacatur.[70] Accordingly, courts prefer arbitration to free the court system of the time-consuming trials and inevitable appeals that arise when parties attempt to resolve their disputes in court. The Supreme Court of Colorado deemed arbitration to be a sufficient method for dispute resolution, and articulated that the strong state policy in favor of arbitration should prevent courts from removing a case from arbitration just because one party argued that an ambiguous statement constituted a waiver of the arbitral clause.

The decision also informs parties that if they want to avoid an arbitration agreement, they must explicitly provide for the exclusion of arbitration within the contractual agreement.[71] The United States Supreme Court has held that arbitration is a matter of contract, not coercion.[72] Accordingly, courts cannot force parties to arbitrate when the parties' agreement does not contain an arbitral clause.[73] Parties are free to make valid agreements through contract and can choose whether or not to include the recourse to arbitration as a method for dispute resolution in those agreements. If, however, one party endorses an agreement which contains an arbitral clause, that party will be bound by that arbitral clause unless it explicitly

---

[69] *Id.*
[70] Under FAA §10, vacatur will only be ordered if the arbitrators are corrupt, exceed their powers, or ignore the parties' fundamental rights or the material terms of the arbitration agreement. The three common law grounds that supplement these statutory grounds for vacatur of an arbitral award are an arbitrator's manifest disregard of the law, an arbitrary and capricious arbitral award, or an arbitral award that violates public policy. *See* THOMAS E. CARBONNEAU, ARBITRATION LAW IN A NUTSHELL 230 (Thomson/West 2007).
[71] *See Radil*, 233 P.3d at 692.
[72] *See* Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. 468 (1989).
[73] *See Radil*, 233 P.3d at 692.

rejects it. When endorsing Great American's policy, National Union could have specifically contracted around the arbitral clause by providing a waiver of the right to arbitration. Because National Union did not explicitly waive the arbitral clause, but endorsed the arbitral clause as it stood in Great American's policy, it was bound by the terms and conditions within that clause. Through this ruling, the court affirmed the presumption in favor of arbitration and informed future follow-form endorsers to be aware of the terms and conditions of the policy they are endorsing. If they endorse a policy that contains an arbitral clause, they will be bound by that clause and compelled to arbitrate their disputes unless they take the affirmative steps to explicitly contract around the arbitral clause.