COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 99-0574

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

RICHARD G. BERQUIST AND JERRY M. THOMPSON, ON BEHALF OF THEMSELVES AND ALL PERSONS SIMILARLY SITUATED,

PLAINTIFFS-APPELLANTS,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for St. Croix County: SCOTT R. NEEDHAM, Judge. *Reversed and cause remanded with directions*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. The plaintiffs, former American Family Mutual Insurance Company agents who served for at least fifteen consecutive years and then left the company, appeal a summary judgment dismissing their breach of contract action against American Family. The trial court concluded that American

Family did not breach any contractual obligation imposed by a health care contract when it created a separate risk pool for the former agents and discontinued a 20% premium subsidy for them. They had previously enjoyed the same premium structures as active agents. Because we conclude that the health care contract should be construed to accord the former agents the same premium structure as active agents, we reverse the judgment and remand with directions to grant summary judgment on liability in favor of the former agents.

¶2 The former agents have a health care contract with American Family. Provisions of this contract allow the former agents to continue coverage under "this plan" or "this policy" upon payment of the premiums when due.[1] As of January 1, 1993, American Family put inactive long-term agents in a newly created separate risk pool resulting in higher premiums for that group. The trial court ruled that the health care policy did not provide the plaintiffs with a vested right to the subsidized lower premium rate and specifically reserved the right for American Family to adjust the premium rates. The court further concluded that the former agents were independent contractors, distinguishing them from employees who were held to have a vested entitlement under similar facts. *See* ***Schlosser v. Allis-Chalmers Corp.***, 86 Wis.2d 226, 271 N.W.2d 879 (1979).

¶3 An insurance policy is ambiguous if it is reasonably susceptible to more than one meaning. *See* ***Ehlers v. Johnson***, 164 Wis.2d 560, 563, 476 N.W.2d 291, 293 (Ct. App. 1991). Ambiguities in the contract are construed

[1] We refer to "health care contract" and "policy" interchangeably.

against the drafter.[2] *See* ***Dairyland Equip. Leasing v. Bohen***, 94 Wis.2d 600, 609, 288 N.W.2d 852, 856 (1980). Therefore, any provision in the policy that is reasonably susceptible to an interpretation granting a benefit to the insured will be construed in that manner.

¶4 Focusing on the fifteen-year eligibility clause, American Family contends that this language is a condition of eligibility, not a promise. That is one interpretation. The portions of the policy that grant the former agents with fifteen years of service the right to continue "this policy" upon payment of the premiums subject to the terms of "this plan" can also be reasonably construed to give the insureds the benefit of a premium structure identical to that of active agents. The creation of a risk pool combining the former agents with fifteen years' service and the active agents, coupled with the right to continue "this plan," created a reasonable expectation that the former agents would continue to have the same premium structure as the active agents. We conclude that the entire clause allowing former agents to continue coverage under "this policy" is susceptible to the reasonable interpretation that it promises continuation in the same risk pool created by "this plan." Therefore, the contract must be construed in this manner.

¶5 The trial court focused on a policy provision that allows an adjustment of the premium. The former agents acknowledge that the premiums can be adjusted. The benefit conferred by the policy is not the right to a certain premium. Rather, it is the right to have the same premiums as active agents.

[2] American Family argues that other law, construing ambiguities against an employer, should not apply because the former agents were independent contractors. We rely on well-settled law that ambiguous contracts should be construed against the drafter. Whether the insureds were employees is not relevant to this issue.

¶6 American Family argues that the continuation clause is not the equivalent of a retirement benefit because it is found in the health insurance contract, not the "Career Agent's Agreement," and because the agents are independent contractors, not employees. These distinctions do not affect our analysis. The terms of the health insurance policy can reasonably be construed to assure continued participation in "the plan" regardless whether either the insureds are employees or the continuation clause constitutes a retirement benefit.

¶7 The policy also contains a provision allowing American Family to cancel "the plan" at any time without notice if it replaces "the plan" by issuing another plan to the company. It also reserves the right for the company to change "this plan" at any time. These provisions on their face allow American Family to take away the specific promises regarding renewability made elsewhere in the contract. Regardless whether the right to renewability is viewed as a retirement benefit or whether the former agents were employees, American Family cannot rely on this general language to defeat a promise to continue "this plan." To condone such reliance would in effect create an illusory contract. Specifically, that which is renewable cannot be ascertained when the participants may renew "this plan" while the right to cancel or replace "this plan" is reserved. If an interpretation renders the contract illusory, that construction must be rejected. *See* ***Nodolf v. Nelson***, 103 Wis.2d 656, 660, 309 N.W.2d 397, 399 (Ct. App. 1981).

¶8 American Family argues that ***Roth v. City of Glendale***, 224 Wis.2d 800, 593 N.W.2d 62 (Ct. App. 1999), compels a different result. ***Roth*** involved an issue that is not presented in this case. In ***Roth***, this court concluded that an annual offer of health care benefits is not equivalent to a retirement benefit. The union in that case negotiated a new contract as each old contract expired. The employee contribution toward the health care premium remained a negotiable item

at the expiration of the term. ***Id***. at 806-07, 593 N.W.2d at 65. Here, the renewal promise was not subject to a finite term and was not periodically renegotiated. The agreement to treat inactive long-term agents as they had been treated when they were active agents by keeping them in the same plan as active agents did not involve any language that expressly allowed for this promise to be renegotiated.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.