MONTANA SUPREME COURT

INSURANCE AGENCY: Arbitration clause valid and enforceable . . . special concurrence in Kloss did not create independent analysis . . . validity of non-compete/liquidated damages clauses improperly determined by Judge, should be determined by arbitrator . . . Todd affirmed, reversed.

Western States Ins. Agency hired Debra Larsen as a "personal lines" agent in 5/00. It supplied a book of business and required her to sign a Producer's Employment Agreement which had a 1-year term and statement that THIS AGREEMENT IS SUBJECT TO ARBITRATION. WSI required her to re-sign each March. It included a non-compete clause and 200% liquidated damages clause. She resigned in 7/05 to start her own agency. WSI informed her of its intent to enforce the non-compete and damages clause, but referred its clients covered by the non-compete clause to her when it lacked the resources to serve them. Larsen objected to the fact that WSI could enjoy a short-term increase in profits by referring clients to her while enforcing the damages clause against her, noting that it could receive twice the value of the commissions without expending any time or resources. She sued requesting a declaratory judgment that the entire Agreement was an unconscionable contract of adhesion and therefore WSI could not enforce the arbitration clause, and that the non-compete and damages clauses were unreasonable restrictions on trade which should be voided as against public policy. Judge Todd determined that terms of the Agreement, particularly the arbitration clause, fell within Larsen's reasonable expectation, and that the non-compete and liquidated damages clause satisfied the Curl (Mont. 2005) time/space/consideration test and were reasonable based on Larsen's status as an insurance veteran. Larsen appeals.

Todd correctly determined that the arbitration clause was valid and enforceable as within Larsen's reasonable expectation. Relying on Kloss (Mont. 2002), Larsen asserts that the Agreement was standardized, the party with superior bargaining power prepared it, she did not have the opportunity to negotiate it, and WSI did not explain it to her. She also argues that the pervasive nature of arbitration clauses in insurance employment agreements rendered it unreasonable in that her refusal to accept it would have shut her out of the industry. However, as Todd noted, simply being adhesive does not render a contract invalid and unenforceable under the Kloss analysis. It also must fall outside the weaker party's reasonable expectation or be unconscionable. Todd considered her 20 years in the industry, her entering into similar agreements at WSI and other agencies, and that the Agreement stated in bold that it was subject to arbitration. Larsen argues that Justice Nelson's special concurrence in Kloss required the Court to consider whether she knowingly waived her right to redress before court and jury. However, the concurrence served primarily to further explicate the rationale that animates the principal holding and analysis of Kloss; it does not stand for an independent analysis of arbitration clauses.

In light of Martz (Mont. 2006) and Buckeye (US 2006), Todd properly heard and determined validity of the arbitration clause. However, he then exceeded his authority when he decided further substantive issues under the Agreement. Those issues should be decided by an arbitrator according to terms of the Agreement. His decision as to validity of the non-compete and liquidated damages clauses is vacated. Remanded for arbitration.

Morris, Gray, Rice, Cotter, Leaphart.

Larsen v. Western States Ins. Agency, DA 06-802, 10/22/07.

Tom Singer (Axilon Law Group), Billings, for Larsen; Jared Dahle and Randall Nelson (Nelson & Dahle), Billings, for WSI.