

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

**FILED**  
DISTRICT OF NEBRASKA  
AT \_\_\_\_\_ M  
DEC 21 1984  
William L. Olson, Clerk  
Deputy

IN RE:	)	BK 82-1788
	)	BK 82-1789
ROSEN-NOVAK AUTO CO., d/b/a	)	BK 82-1790
ROSEN-NOVAK CHEVROLET, et al.,	)	
	)	
Plaintiffs,	)	CV 84-0-303
	)	CV 84-0-304
EDWARD A. HONZ,	)	CV 84-0-305
	)	CV 84-0-306
Intervenor,	)	CV 84-0-307
	)	CV 84-0-308
vs.	)	
	)	
BLUE CROSS/BLUE SHIELD OF	)	MEMORANDUM
NEBRASKA,	)	
	)	
Defendant..	)	

This matter is before the Court on appeal from a judgment of the Bankruptcy Court of the District of Nebraska entered on April 17, 1984. Three adversary proceedings were consolidated for trial. The plaintiff, Rosen-Novak, and an intervenor, Edward A. Honz (hereafter referred to together as plaintiff or Rosen-Novak), sued Blue Cross/Blue Shield of Nebraska on coverage under a Group Major Medical Contract issued by Blue Cross to Rosen-Novak on February 1, 1982. The plaintiff contended that Blue Cross/Blue Shield had wrongfully cancelled Rosen-Novak's policy retroactively on October 9, 1982. The issue was whether the policy remained in effect from October 1, 1982, to October 14, 1982.<sup>1</sup>

At trial, the plaintiff presented its evidence. At the close of the plaintiff's case, the defendant moved to dismiss the complaint. The Bankruptcy Court granted the motion and dismissed the claim. The plaintiff appeals.

The majority of the facts of this case were stipulated to by the parties and are not in dispute. On February 1, 1982, Blue Cross/Blue Shield issued a Group Major Medical Policy of insurance to Rosen-Novak. The policy required that the monthly premiums be paid in advance by the first day of the month. The policy contained a 31-day grace period for late payment of premiums. At the end of the grace period, if the premiums were still unpaid, the policy would be automatically terminated as of that date.

In each month from February, 1982, through August, 1982, Rosen-Novak paid, and Blue Cross/Blue Shield accepted, the premium after the expiration of the relevant 31-day grace period. Rosen-Novak did not pay the September premium on time or within the grace period. On October 8, 1982, Blue Cross/Blue Shield mailed a letter to Rosen-Novak, which was received on October 9, 1982, stating that the insurance policy was retroactively cancelled back to August 31, 1982.<sup>2</sup>

On October 8, 1982, Rosen-Novak offered to pay the September premium. Blue Cross/Blue Shield refused to accept payment. On October 15, 1982, Rosen-Novak secured major medical insurance from another carrier in regard to claims for medical treatment or other services rendered following October 15, 1982.

On appeal plaintiff argues that the Bankruptcy Court incorrectly ruled that Blue Cross/Blue Shield had properly terminated the insurance policy effective October 1. Plaintiff also contends that because plaintiff was seeking to establish that defendant was estopped from asserting late payment of premiums as a grounds for cancellation, the Bankruptcy Court

erroneously excluded testimony that plaintiff had relied on defendant's practice of accepting late payments. Intervenor Honz raises the additional arguments that: (1) the Bankruptcy Court's denial of his request for a jury trial violated Rule 9015 of the Federal Rules of Bankruptcy Practice and the Seventh Amendment to the Constitution of the United States; and (2) the Bankruptcy Court's failure to allow him to put on any evidence in his case-in-chief violated the Fourteenth Amendment to the Constitution of the United States. Because the Court finds plaintiff's first claim dispositive, the other issues will not be reached.

At trial, plaintiff argued that defendant had waived, or was estopped from asserting, its right to retroactively cancel the group insurance policy. Plaintiff based this argument on defendant's acceptance of premium payments beyond the 31-day grace period for each month from February to August, 1982, the entire time payments were made. According to plaintiff, defendant could not on October 9, 1982, retroactively cancel the policy because of plaintiff's failure to pay the September premium within the grace period. Under the policy, defendant could cancel the policy on five days notice. So, viewing the October 8 letter as a notice of cancellation, plaintiff argued that the policy was in effect until October 14.

The Bankruptcy Court disagreed and ruled that the policy expired at the end of the grace period. The Bankruptcy Court stated that because Blue Cross/Blue Shield had been diligent in seeking timely payment of the premiums there had been no waiver of or estoppel from asserting its rights. The Bankruptcy Court also noted

that in July 1982, the defendant notified plaintiff that it intended to enforce the limits of the grace period. According to the Bankruptcy Court, this statement preserved defendant's right to terminate the policy for failure to pay premiums within the grace period.

The Court is persuaded that the Bankruptcy Court's ruling was clearly erroneous. As the Supreme Court of Nebraska said in Robbins v. National Life and Accident Insurance Co., 182 Neb. 749, 157 N.W.2d 188 (1968), "A past course of conduct of acceptance of premiums after the grace period may establish a waiver by the insurer to declare a forfeiture for failure to pay premiums on the stipulated date." 152 Neb. at 755, 157 N.W.2d at 192. In the instant case, defendant accepted plaintiff's payment of premium after the grace period had expired during each and every month the insurance policy was in effect. This was not the mere indulgence of an occasional late payment. Rather, it was a pattern of accepting such late payments.

The Bankruptcy Court relied upon defendant's July 8 letter, stating that future failures to pay the premium within the grace period would not be tolerated, in holding that there had been no waiver. Certainly at that point defendant had not permanently waived its right to enforce the policy's requirement of timely payment and the company would have been within its rights to treat the policy as cancelled the next time plaintiff failed to pay its premium before the expiration of the grace period. However, as indicated by the joint stipulation of facts, defendant continued to accept premiums after the grace period. The July and August premiums

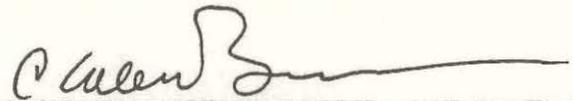
were paid and accepted more than 31 days past their due dates. Thus, as indicated, defendant accepted payment beyond the grace period for every month during which the policy was in effect, even after July 8, 1982.

Under such circumstances, the Court holds that, as a matter of law, defendant waived its right to treat the insurance policy as cancelled due to plaintiff's failure to pay the September premium within the grace period. The policy remained in effect through October 14, the earliest date on which the policy could be cancelled by the October 8 letter. Of course, plaintiff remains liable to defendant for the premiums for September and October 1 through 14. When they are paid, all claims against the policy should be honored by defendant.

An order in conformance with this Memorandum shall be filed this date.

DATED this 21st day of December, 1984.

BY THE COURT:



---

C. ARLEN BEAM  
UNITED STATES DISTRICT JUDGE

## FOOTNOTES

<sup>1</sup>The parties are in dispute as to a reading of the Bankruptcy Court's judgment. Defendant's cancellation letter, dated October 7, 1982, stated that the policy was retroactively cancelled to August 31, 1982. At trial, however, defendant admitted, as plaintiff contends, that if the letter was an effective retroactive cancellation, it could not take effect, because of the 31-day grace period, until October 1, 1982. The parties agreed that the disputed period was from October 1 through 14, 1982. Plaintiff contends, however, that the Bankruptcy Court's judgment treats the policy as cancelled as of August 31, 1982. Although there may be some ambiguity, the Court treats the Bankruptcy Court's judgment as finding the policy cancelled as of October 1, 1982, not August 31, 1982.

<sup>2</sup>As noted in Footnote 1, the date on which defendant is actually claiming the policy ended was October 1, 1982.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

**FILED**  
DISTRICT OF NEBRASKA  
AT \_\_\_\_\_ M.  
BK 82-1788  
BK 82-1789 DEC 21 1984  
BK 82-1790  
William L. Olson, Clerk  
By \_\_\_\_\_ Deputy

IN RE: )  
)  
ROSEN-NOVAK AUTO CO., d/b/a )  
ROSEN-NOVAK CHEVROLET, et al., )  
)  
Plaintiffs, )  
)  
EDWARD A. HONZ, )  
)  
Intervenor, )  
)  
vs. )  
)  
BLUE CROSS/BLUE SHIELD OF )  
NEBRASKA, )  
)  
Defendant. )

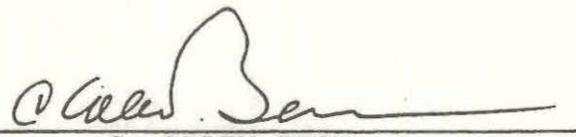
CV 84-0-303  
CV 84-0-304  
CV 84-0-305  
CV 84-0-306  
CV 84-0-307  
CV 84-0-308

In conformance with the Memorandum filed this date,

IT IS ORDERED that the judgment of the Bankruptcy Court finding that the Group Major Medical policy of insurance between plaintiff and defendant was cancelled effective October 1, 1982, is reversed. The policy remained in effect through October 14, 1982. Plaintiff shall pay defendant the premiums for September and October 1 through 14, 1982. When they are paid, all claims against the policy shall be honored by defendant.

DATED this 21st day of December, 1984.

BY THE COURT:



C. ARLEN BEAM  
UNITED STATES DISTRICT JUDGE