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Rejecting the Intertwining Doctrine: Favoring ADR while Hindering Judicial Efficiency and Economy

Michael Bekesha

NOTES

Rejecting the Intertwining Doctrine: Favoring ADR While Hindering Judicial Efficiency and Economy

Ingold v. AIMCO/ Bluffs, LLC. Apartments[1]

I. INTRODUCTION

Often the scope of arbitration clauses does not include all potential claims.[2] When the provision fails to provide for all disputes, courts may proceed in one of two ways to resolve both arbitrable and nonarbitrable claims: enforce the arbitration clause with respect to the arbitrable claims, or ignore the private contract and litigate all issues at once. The Colorado Supreme Court, in *Ingold v. AIMCO*, chose the former—rejecting the intertwining doctrine. In doing so, Colorado aligned itself with the position that the United States Supreme Court embraced over twenty years ago. This casenote will discuss whether the Colorado Supreme Court acted prudently and wisely in rejecting the intertwining doctrine.

II. FACTS AND HOLDING

In July of 2001, Chris and Cindy Ingold ("Ingolds") agreed to a one-year lease with Boulder Creek Apartments ("Boulder Creek") in Denver, Colorado.[3] Included in the contract was an arbitration clause, which stated, "All disputes between the parties concerning the provisions of this Lease shall be submitted to arbitration . . . ."[4]

When the Ingolds took possession of the apartment in August, the unit contained a foul odor as a result of a ruptured sewer pipe underneath the building.[5] Upon taking residence in September, the odor had subsided.[6] Although the odor persisted throughout the year,[7] the Ingolds renewed the lease in August 2002 after Boulder Creek assured them that the problem would be addressed.[8]

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1. 159 P.3d 116 (Colo. 2007).

2. *See generally* MARTIN DOMKE ET AL., DOMKE ON COMMERCIAL ARBITRATION § 15:6 (3d ed. 2007).

3. *Ingold*, 159 P.3d at 118. The court noted, "For purposes of this proceeding the factual allegations set forth in the Ingolds' complaint are accepted as true." *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. The extent of the odor is unclear. *Id.* The court simply stated that the odor remained "either because the sewer pipe was inadequately repaired or because sewage from the initial rupture was not removed from underneath the apartment building." *Id.*

8. *Id.* The lease renewal was for an additional year,+ and it can be inferred that the 2002 lease contained the same arbitration clause as the original agreement. *Id.*

The odor remained, and the Ingolds began to suffer health problems associated with mold and bacteria.[9] The Ingolds subsequently consulted a physician and hired two experts.[10] Both experts concluded that the apartment contained mold and bacteria.[11] Thereafter the Ingolds abandoned the Boulder Creek apartment in November of 2002.[12] The Ingolds did not remove their possessions and refused to pay the November rent.[13] Upon learning of the Ingolds' actions, Boulder Creek denied the existence of health problems and informed the Ingolds that failure to pay their outstanding rent was a breach of the lease.[14] Moreover, Boulder Creek demanded $6,095.55 as a termination fee and withheld the Ingolds' security deposit.[15]

In October of 2004, the Ingolds filed suit in Boulder County district court against Boulder Creek, AIMCO/Bluffs, LLC Apartments and the apartment manager, James Macias.[16] The claims included: "eight tort claims, a claim for violation of the Colorado Consumer Protection Act . . . and a claim for violation of the Wrongful Withholding of Security Deposits Act . . . ."[17] The defendants moved for dismissal for lack of subject matter jurisdiction arguing that the arbitration clause contained in the lease agreement prevented the courts from hearing the Ingolds' claims.[18] The Ingolds responded that they were "fraudulently induced unto entering the Lease based on the Defendants' representations that the apartment was habitable."[19] Therefore, the arbitration clause would be void, and the court could not enforce it. [20]

The district court found that Boulder Creek did not commit fraud, that the arbitration clause applied to all ten claims, and that all defendants were parties to the lease.[21] Therefore, the court dismissed the Ingolds' complaint and ordered the Ingolds to arbitrate their claims pursuant to the lease agreement.[22] The Ingolds appealed. They argued that the court had jurisdiction because not all of their claims were within the scope of the arbitration clause and that the arbitration clause only applied to Boulder Creek the court had jurisdiction.[23]

Upon appeal, the Colorado Supreme Court sought to determine whether the district court properly applied the arbitration clause.[24] The parties did not dispute

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9. *Id.*
10. *Id.*
11. *Id.* The Ingolds hired a microbiologist who concluded that the unit contained mold and bacteria. *Id.* The Ingolds informed Boulder Creek's manager, James Macias, of the findings. *Id.* Mr. Macias inspected the crawl space and attic of the Ingolds' apartment and disagreed with the microbiologist. *Id.* Thereafter the Ingolds hired a second expert. *Id.* An industrial hygienist examined the same area and determined that the crawl space and attic "contained toxic levels of mold and bacteria." *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 118-19.
17. *Id.*
18. *Id.* at 119.
19. *Id.*
20. *Id.* The Ingolds and Boulder Creek were the only two parties to sign the lease agreement. *See id.* at 118. Mr. Macias was the property manager and AIMCO/Bluff was the parent company. *Id.*
21. *Id.* at 118.
22. *Id.* at 119.
23. *Id.*
24. *Id.*

that the tort claims and the claim for violation of the Colorado Consumer Protection Act against AIMCO/Bluffs, LLC Apartments were arbitrable; however, the Ingolds argued that the claim for violation of the Wrongful Withholding of Security Deposits Act and the tort claims against the third parties were not arbitrable.[25] On May 29, 2007, the court abandoned Colorado precedent favoring the intertwining doctrine when it held that the arbitrable claims must be arbitrated pursuant to contract even though the Ingolds' complaint also contained claims and parties not subject to arbitration.[26]

III. LEGAL BACKGROUND

Over the past two decades, arbitration has become a more attractive and more utilized alternative to litigation.[27] Parties find that arbitration provides participants with a "quick, efficient, and economical method of resolving disputes."[28] Arbitration reduces the burden on the parties and the court system by offering a process other than judicial review.[29] However, in many circumstances "a dispute between parties to an arbitration agreement concerns some issues that are arbitrable, and some issues that are not arbitrable."[30] With more parties seeking arbitration, the courts must determine how they should handle the nonarbitrable claims arising out of the same operative facts as the arbitrable claims.[31]

A. The Development of the Intertwining Doctrine

In *Wilko v. Swan*,[32] the U.S. Supreme Court questioned what a court should do when arbitrable claims are joined with nonarbitrable claims or those not subject to arbitration.[33] In deciding that "when it is impractical if not impossible to sepa-

25. *Id.*

26. *Id.* at 119, 125.

27. Anthony G. Buzbee, *When Arbitrable Claims are Mixed with Nonarbitrable Ones: What's a Court to do?*, 39 S. TEX. L. REV. 663, 664 (1998).

28. *Id.*

29. *Id.* at 664-65.

30. Lee R. Russ, *Manner of Proceeding When Not All Disputed Issues are Arbitrable*, *in* 15 COUCH ON INS. § 212:6 (2007).

31. Mary Elizabeth Bierman, *Mixed Arbitrable and Nonarbitrable Claims in Securities Litigation:* Dean Witter Reynolds, Inc. v. Byrd, 34 CATH. U. L. REV. 525, 527 (1985).

32. 346 U.S. 427 (1953). For a discussion of the *Wilko* case, see B. Judson Hennington, III, *Unravelling the Intertwining Doctrine:* Dean Witter Reynolds, Inc. v. Byrd, 37 ALA. L. REV. 457, 457-58, 463 (1986).

33. Eric B. Liebman & Burkeley N. Riggs, *The State of the Intertwining Doctrine in Colorado*, 36-JAN COLO. LAW. 15, 16 (2007) (In reaching its decision, the Court sought "to balance the FAA's policy emphasizing 'the desirability of arbitration as an alternative to the complications of litigation' with the 1933 Act's policy of protecting investors and forbidding a waiver of those rights."). In *Wilko*, a customer sued his broker alleging misrepresentations and omissions in stock transactions according to the Federal Securities Act of 1933. *Wilko*, 346 U.S. at 428-29. The defendant moved to compel arbitration in accordance with the arbitration agreement between the two parties. *Id.* at 429. The district court refused the motion and found that the arbitration agreement deprived the plaintiff of statutory remedies. *Id.* at 429-30. Subsequent to a reversal by the appellate court, the Supreme Court reversed the court of appeals. *Id.* at 430, 438. The Court decided in favor of the Federal Securities Act because "the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act." *Id.* at 438.

rate out non-arbitrable federal securities law claims from arbitrable contract claims, a court should deny arbitration in order to preserve its exclusive jurisdiction over the federal securities act claims," the intertwining doctrine was born.[34] Succinctly defined, the intertwining doctrine permits the trial court to deny arbitration as to the arbitrable claims and try all claims together when arbitrable and nonarbitrable claims arise out of the same transaction and are factually and legally intertwined.[35]

Subsequent to the *Wilko* decision in 1953, federal district courts inconsistently applied the intertwining doctrine and the appellate courts split on the doctrine's application.[36] The Fifth, Ninth, and Eleventh Circuits adopted the intertwining doctrine, and the Sixth, Seventh, and Eighth Circuits rejected it.[37] If a court applies the doctrine, the trial court proceeds with hearing all claims regardless of an existing arbitration agreement. However, if a court rejects the doctrine, those claims that fall under the scope of an arbitration agreement must be arbitrated, and any other, nonarbitrable claims, must proceed through the court system.[38]

B. The Intertwining Doctrine in Federal Court: Dean Witter Reynolds, Inc. v. Byrd

After thirty years of inconsistent application, the United States Supreme Court settled the doctrinal conflict in 1985.[39] In *Dean Witter Reynolds, Inc. v. Byrd*,[40] the Court addressed the question "whether to compel arbitration of pendent state-law claims when the federal court will in any event assert jurisdiction over a federal-law claim . . . ."[41]

In *Byrd*, a customer filed a complaint in federal district court against the defendant broker-dealer claiming violations of federal and state securities laws after the customer's securities portfolio declined by more than half its value over a span of six months.[42] The plaintiff "alleged that the broker traded without prior consent, excessively traded, and misrepresented the account's status."[43] "The agreement between the customer and broker contained an arbitration clause requiring arbitration of disputes concerning the customer agreement."[44] The defendant, therefore, "filed a motion to compel arbitration of the pendent state law claims" and sought a stay of litigation with respect to the federal securities claims.[45] Following a denial of the motion and affirmation of the ruling by the district and circuit courts, respectively, the Supreme Court "held that the intertwining doctrine

34. *Id.*; Hennington, *supra* note 32, at 463.
35. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 216-17 (1985).
36. Liebman & Riggs, *supra* note 33, at 16.
37. *Id.*
38. *Id.*
39. *Id.*
40. 470 U.S. 213 (1985).
41. *Id.* at 216.
42. Liebman & Riggs, *supra* note 33, at 16 (citing *Byrd*, 470 U.S. at 213).
43. *Id.* (citing *Byrd*, 470 U.S. at 213).
44. *Id.* (citing *Byrd*, 470 U.S. at 213).
45. *Id.* (citing *Byrd*, 470 U.S. at 213).

does not apply to arbitration agreements governed by the Federal Arbitration Act."[46]

In its opinion, the Court outlined the competing interests and arguments both favoring and rejecting the intertwining doctrine.[47] The Court stated that district courts should decline to compel arbitration for two reasons.[48] First, the intertwining doctrine "preserve[s] . . . the court's exclusive jurisdiction over the federal securities claim [and] arbitration of an 'intertwined' state claim might precede the federal proceeding and the fact finding done by the arbitrator might thereby bind the federal court through collateral estoppel."[49] Second, a federal district court "avoids bifurcated proceedings and perhaps redundant efforts to litigate the same factual questions twice."[50]

In contrast, the Court concluded that although there are strong reasons to compel a single litigation encompassing all claims, the Arbitration Act requires courts to compel arbitration of arbitrable claims, when one of the parties files a motion to compel.[51] "[T]he Act, both through its plain meaning and the strong federal policy it reflects, requires courts to enforce the bargain of the parties to arbitrate, and 'not substitute [its] own views of economy and efficiency' for those of Congress."[52]

The plain language of the Arbitration Act provides that "written agreements to arbitrate controversies arising out of an existing contract 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'"[53] The language is clear and definite: "it mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." Congress did not expressly or impliedly provide the courts with discretion.[54]

Along with the unequivocal language of the Arbitration Act, the legislative history substantiates that Congress intended to "ensure judicial enforcement of privately made agreements to arbitrate."[55] The Court, therefore, rejected the argument "that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims."[56]

Prior to *Byrd,* the intertwining doctrine had established that "arbitrable and nonarbitrable claims must be heard together, provided that they arise out of the same transaction and are so intertwined that hearing them separately would frustrate the purposes of the Arbitration Act and the federal securities laws."[57] Subsequent to Byrd, federal courts enforced agreements to arbitrate even though both arbitrable and nonarbitrable claims existed.[58] Although there was conflict be-

46. *Id.* (citing *Byrd,* 470 U.S. at 216).
47. *Byrd,* 470 U.S. at 216-18.
48. *Id.* at 217.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* (quoting Dickinson v. Heinold Secs., Inc., 661 F.2d 638, 646 (7th Cir. 1981)).
53. *Id.* at 218 (quoting 9 U.S.C. § 2 (1982)).
54. *Id.*
55. *Id.* at 219.
56. *Id.*
57. Hennington, *supra* note 32, at 466.
58. Liebman & Riggs, *supra* note 33, at 16.

tween the Arbitration Act's goal of contract enforcement and the judicial system's desire for efficient and speedy dispute resolution, Congress favored enforcing private agreements.[59] Since the federal legislature found protecting the contractual rights of the parties to be compelling, without countervailing legislation favoring one proceeding, the courts adhered to Congressional mandate.[60] "The potential for bifurcated proceedings" no longer superseded "the primary goal of the [Arbitration] Act--the enforcement of agreements to arbitrate."[61]

C. The Intertwining Doctrine in Colorado: 1981-2007

Prior to *Byrd*, the Colorado Supreme Court adopted the intertwining doctrine.[62] In *Sandefer v. District Court*,[63] a customer filed a writ of mandamus contending that the trial court erred in ordering the customer to submit to arbitration in a suit against her securities broker for breach of fiduciary duty, common law fraud, and violation of the Colorado Securities Act.[64] The plaintiff argued that only the third claim should and could be arbitrated.[65] Although inconsequential to the case before it,[66] the court considered whether the ruling of the trial court to compel arbitration of all claims "was correct in view of the public policy favoring arbitration, the allegations in the complaint, the time and expense of separate arbitration and judicial proceedings, and the possibility of inconsistent decisions in separate proceedings."[67] After a thorough analysis of the *Wilko* decision and subsequent federal decisions, the court found in favor of the developing intertwining doctrine.[68] The Court explained:

> If the claims are found to be inextricably intertwined, the court will deny arbitration in order to avoid duplication of effort and the possibility of ending the controversy in arbitration and losing the opportunity to try the securities claim in accord with Wilko. . . . On the other hand, if the claims are distinct, the court must sever the action and allow the nonstatutory claims to go to arbitration because the findings of the arbitrator will neither encroach upon nor duplicate the findings of the trial court. This analysis results in maximizing judicial efficiency and resource allocation while still fulfilling the policy dictates of the securities laws.[69]

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59. *Byrd*, 470 U.S. at 221.
60. *Id.*
61. Liebman & Riggs, *supra* note 33, at 16 (citing *Byrd*, 470 U.S. at 221).
62. Sandefer v. Dist. Ct. 635 P.2d 547 (Colo. 1981) (partially overruled on other grounds).
63. *Id.*
64. *Id.* at 548.
65. *Id.* at 548-49.
66. The Colorado Supreme Court did not find that the lower court had examined the arbitration clause with respect to the other claims. The court explained, "The court of appeals only considered the application and effect of the Colorado Securities Act, and there was no discussion in the opinion of the arbitrability of any claim other than that arising out of the Colorado Securities Act. In short, we do not read *Sandefer* as foreclosing consideration by the respondent court of whether the common law claims should be arbitrated." *Id.* at 549.
67. *Id.*
68. *Id.* at 550.
69. *Id.* (citations omitted).

In other words, a court retains jurisdiction over claims subject to an arbitration clause where the factual determinations and legal conclusions are inextricably intertwined with non-arbitrable claims.[70]

Post *Byrd*, the Colorado courts decided several cases providing the courts with the opportunity to abandon the intertwining doctrine established in *Sandefer*, but instead frequently addressed and applied the intertwining doctrine.[71] As of January 2007, "the Intertwining Doctrine, as a Colorado common law doctrine, and as applied to the [Colorado Unified Arbitration Agreement], is the law in Colorado . . . ."[72]

IV. INSTANT DECISION

In *Ingold v. AIMCO*, the Colorado Supreme Court reconsidered its adherence to the intertwining doctrine.[73] The court explained that since the *Byrd* decision it had not directly considered its holding in *Sandefer*; therefore, Colorado courts continued to follow and expand the intertwining doctrine.[74] In deciding whether to further or reject the intertwining doctrine, the court started with an analysis of the Colorado Uniform Arbitration Act ("CUAA").[75] In reviewing the plain language of the Act, the court explained, "Unless the existence of the arbitration agreement is disputed, 'the court *shall* order the parties to proceed with arbitration . . . .'" This language leaves no discretion to the trial court whether to compel arbitration."[76]

Similarly, the court found the *Byrd* reasoning compelling. With respect to the Federal Arbitration Act, the court summarized, "The intertwining doctrine unreasonably interferes with the parties' decision to arbitrate their disputes, because it allows the trial court to negate the effect of an arbitration clause without a statutory basis for doing so."[77] Arbitration agreements are not mutable and the courts should not interfere.[78]

Even though the court found the *Byrd* reasoning persuasive, it had to overcome the precedent set forth in *Sandefer*. The court explained, "Although this court strongly adheres to the doctrine of stare decisis, we will overrule a prior holding if we are 'clearly convinced that the rule was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come from departing from precedent.'"[79] The court was clearly convinced that the *Sandefer* holding was incorrect—primarily because the court based its ruling on

70. Liebman & Riggs, *supra* note 33, at 15.

71. *Id. See generally* Lawrence St. Partners, Ltd. v. Lawrence St. Venturers, 786 P.2d 508, 511 (Colo. Ct. App. 1989); Grohn v. Sisters of Charity Health Servs. Colo., 960 P.2d 722, 724 (Colo. Ct. App. 1998); Atmel Corp. v. Vitesse Semiconductor Corp., 30 P.3d 789, 797 (Colo. Ct. App. 2001); Eagle Ridge Condo. Ass'n v. Metro. Builders, Inc., 98 P.3d 915, 919 (Colo. Ct. App. 2004).

72. Liebman & Riggs, *supra* note 33, at 20.

73. *See* Ingold v. AIMCO/Bluffs, L.L.C. Apartments, 159 P.3d 116, 123-25 (Colo. 2007).

74. *Id.* at 124.

75. *Id.*

76. *Id.* (quoting COLO. REV. STAT. § 13-22-204(1) (2005)).

77. *Id.* at 125.

78. *Id.*

79. *Id.* (quoting People v. Blehm, 983 P.2d 779, 788 (Colo. 1999)).

case law that had since been overturned.[80] The court, therefore, adopted the reasoning in *Byrd*: "[T]he intertwining doctrine, while motivated by reasonable considerations of judicial economy, did not sufficiently take into account the unequivocal language of the Federal Arbitration Act, which is identical to the language of the CUAA applicable here."[81]

Based on the belief that Colorado should not continue to adhere to the intertwining doctrine, the court emphatically declared:

> We therefore reject the intertwining doctrine and hold that claims that are subject to an arbitration agreement must be arbitrated regardless of their joinder with non-arbitrable claims. Claims that are not subject to arbitration should be stayed or proceed separately in litigation based on the discretion of the trial court. *Sandefer* is overruled to the extent that it recognizes the intertwining doctrine.[82]

The court mandated that the Ingolds arbitrate their tort and CCPA claims against Boulder Creek and that the trial court hear the Ingolds' claim against Boulder Creek for violation of the Security Deposits Act.[83] Moreover, any additional claims against third parties must also be litigated, not arbitrated.[84] The Ingolds must proceed with the arbitrable and nonarbitrable claims separately.[85]

V. COMMENT

By forcing the Ingolds into two separate proceedings, the Colorado Supreme Court surprised the state's legal community in rejecting the intertwining doctrine. However, it was the court's timing, not its analysis that caused attorneys, judges, and ADR professionals to take notice. The United States Supreme Court and many state courts had already dealt with the issue.[86] In fact, the intertwining doc-

80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. The following cases provide a sampling of states rejecting the intertwining doctrine. Alabama: McKee v. Hendrix, 816 So. 2d 30, 34 n.1 (Ala. Civ. App. 2001) ("Courts must rigorously enforce agreements to arbitrate, even if doing so means piecemeal litigation."); Florida: Kinder Mobile Home Sales, Inc. v. Clemens, 794 So. 2d 677, 679 (Fla. Dist. Ct. App. 2000) ("[C]ontractual duty to arbitrate cannot be avoided by assertion of claims against additional parties."); Nevada: Benson Pump Co. v. S. Cent. Pool Supply, Inc., 325 F. Supp. 2d 1152, 1159-1160 (D. Nev. 2004) (Existence of nonarbitrable claims did not preclude arbitration.); New Jersey: Garfinkel v. Morristown Obstetrics & Gynecology Assoc., P.A., 773 A.2d 665, 673 (N.J. 2001) ("The Court concludes that plaintiff's claims should be so joinded. 'Just as we view piecemeal litigation as anathema, we also look with disfavor upon the unnecessary bifurcation of disputes between judicial resolution and arbitration.'"); Pennsylvania: In re Brown, 311 B.R. 702, 712 (Bankr. E.D. Pa. 2004) ("[W]here less than all claims are arbitrable . . . 'the court may proceed with non-arbitrable claims, but is obliged to honor the arbitration clause agreed to by the parties and to lay aside arbitrable claims.'");Texas: In re Certain Underwriters at Lloyd's, 18 S.W.3d 867, 875 (Tex. App. 2000) ("Even when arbitrable and non-arbitrable claims are intertwined and arise out of the same transaction, the arbitrable claims are still subject to arbitration.").

trine had not existed in the federal system for more than twenty years.[87] However, the court continuously decided to do nothing. Until now.

A. Stare Decisis is Not Addressed

The court's opinion is clear, logical, and unequivocal. The intertwining doctrine is bad law based on outdated precedent. The court rejected the doctrine because the "highly persuasive" case law previously relied on had been "repudiated by the United States Supreme Court."[88] The court does not waiver in declaring change was a necessity; however, the court failed to address the timing of the policy shift.

Less than four months before *Ingold*, Liebman and his fellow practitioners wrote that the intertwining doctrine "will be before the Colorado Supreme Court again, and that the [c]ourt either will: (1) reject the Intertwining Doctrine altogether; or (2) re-affirm Colorado's Intertwining Doctrine, but set forth a framework for analysis that requires careful consideration of the interstate commerce/FAA issue."[89] Even those practicing within the state were unsure of how the court would rule and why the court had "chosen not to act" and not align itself with the majority of the jurisdictions.[90]

The Colorado Supreme Court claims it never had the opportunity to directly reconsider the intertwining doctrine; yet, the issue was frequently before the appellate courts.[91] The court could have sought to review any of the appeals from those decisions.[92] Further, the court should have been more forthright in its opinion. The court failed to address why the doctrine of stare decisis should not apply, and in doing so, was intellectually lazy.[93] The court had repeatedly upheld, by inaction, bad law for twenty years. It remains unclear why the court found it had to rule against the intertwining doctrine at such a junction. By not addressing its reasoning, the Court failed to satisfy its standard for overruling precedent. In 2003, the court reiterated that pre-existing rules cannot be abandoned unless the court is "clearly convinced that (1) the rule was originally erroneous or is no longer sound due to changing conditions and (2) more good than harm will come from

87. *See generally* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 216-17 (1985).

88. *Ingold*, 159 P.3d at 125.

89. Liebman & Riggs, *supra* note 33, at 21.

90. *Id.* ("It is somewhat unclear why the Intertwining Doctrine retains vitality in Colorado, given that the *Byrd* [c]ourt rejected it based on the stated policies underlying the FAA that are substantially similar to those underlying the CUAA.").

91. *Id.* at 15-16.

92. An example of such an instance was *Eagle Ridge Condominium Ass'n v. Metropolitan Builders, Inc.*, 98 P.3d 915 (Colo. Ct. App. 2004). The defendants appealed and asked "whether Colorado should follow the 1985 decision of the U.S. Supreme Court in *Byrd* and reject the Intertwining Doctrine." Liebman & Riggs, *supra* note 33, at 20 (citation omitted). Although the court had "the opportunity to address and clarify some of the complicated questions . . . that had plagued Colorado's lower courts for approximately two decades . . . the [court] dismissed its writ as improvidently granted . . . ." *Id.*

93. The court states, "The doctrine of stare decisis is a fundamental component of the rule of law, as it promotes stability, certainty, and uniformity of judicial decisions." *Ingold*, 159 P.3d at 125. Rejecting precedent should not be taken lightly.

departing from precedent."[94] Although not directly discussed in *Ingold*, the court addressed the first point. However, the court failed to address how and why more good than harm will derive from rejecting the intertwining doctrine.

The court is not required to overrule precedent; in fact, the court favors adhering to the status quo.[95] The court could have agreed with the Ingolds and forced all claims to be litigated. Anyone reading that opinion would have realized that the court was maintaining the status quo and would have found the holding to be logically sound. The judiciary is a precedential system which "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individual[] [judges] . . . ."[96] By ruling based on precedent, the public does not perceive judicial decisions to be determined by the personal beliefs of the judges.

Although the court did not follow its own precedent and the tendencies of the inferior Colorado courts, the Colorado Supreme Court followed the precedent set forth by the United States Supreme Court.[97] The precedent established by the U.S. Supreme Court was not binding because *Byrd* involved the Federal Arbitration Act.[98] However, the Colorado Uniform Arbitration Act is based on, and is fundamentally the same as, the FAA.[99]

Since the two statutes are highly comparable, the court should not be shunned for overturning its own precedent to align itself with the federal system. Although not binding, state courts often look to federal courts for guidance.[100] In this case, the Colorado court did nothing out of the ordinary to reach its holding. Therefore, the *Ingold* ruling does not lead the public into thinking that the judiciary is based on something other than bedrock principles.

B. Holding Hinders Judicial Efficiency and Economy

The court not only failed to adhere to the bedrock principle of stare decisis, it also failed to adhere to its own basic principles of self-regulation: party fairness, efficiency, and judicial economy.[101] The court admitted as much when it stated, "We agree with the Supreme Court that the intertwining doctrine [is] motivated by reasonable considerations of judicial economy . . . ."[102] By not enforcing the intertwining doctrine, parties must arbitrate arbitrable claims and litigate nonarbitrable claims. In other words, at least two separate proceedings will occur. Both proceedings could involve the same facts and circumstances. One proceeding

94. Giampapa v. Am. Family Mut. Ins. Co., 64 P.3d 230, 239 (Colo. 2003) (citing People v. Blehm, 983 P.2d 779, 788 (Colo. 1999)).

95. In its decisions, the Colorado Supreme Court states that it will apply precedent unless there are compelling reasons not to apply it. Applying precedent is unequivocally favored. *See, e.g.*, Friedland v. Travelers Indem. Co., 105 P.3d 639, 644 (Colo. 2005).

96. *Ingold*, 159 P.3d at 125 (quoting Vasquez v. Hillery, 474 U.S. 254, 265 (1986)).

97. The Colorado Supreme Court uses the language: "We agree with the Supreme Court . . . ." *Id.*

98. As noted above, the Ingolds alleged all state, and no federal, claims.

99. With respect to the specific section under discussion, the language of the FAA "is identical to the language of the CUAA . . . ." *Id.*

100. *Id.*

101. Cogdell v. Hosp. Ctr. at Orange, 560 A.2d 1169, 1174 (N.J. 1989).

102. *Ingold*, 159 P.3d at 125.

may even rely on the outcome of the other.[103] Two proceedings lead to many drawbacks, for both the court and arbitration systems.

First, courts must address the issue of whether the nonarbitrable claims should be stayed pending the arbitration's outcome. The court, in *Ingold*, provided some guidance to assist the district courts in determining how to proceed. The trial court should consider:

> (1) whether piecemeal litigation of the nonarbitrable claims could result in inconsistent determinations of factual and legal issues to be determined by the arbitrator . . .
> (2) whether the piecemeal litigation will be inefficient because the factual issues to be resolved in litigation overlap with those to be decided by the arbitrator . . .
> (3) whether the arbitrable issues predominate the [Plaintiff's] lawsuit . . . and
> (4) whether the nonarbitrable claims are of questionable merit.[104]

In other words, a court must take into consideration the parties' arguments as well as explore possible outcomes. To answer each of the above questions, trial court judges would essentially require parties to brief and possibly argue their case as though it were a pretrial hearing. After doing so, a court would eventually oversee the ensuing trial in which it would be obligated to "retry" the case minus the arbitrable claims.

Second, the parties must prepare for two distinct proceedings. Although litigation is often cited to be the most costly resolution process, arbitration remains highly costly.[105] Depending on the issues, the parties must undergo discovery, hire arbitrators, and eventually arbitrate the issue.[106] Assuming that the trial court stays the other issues, the parties will be required to repeat the process. This would involve additional discovery which would lead to more billing hours, more discovery, and more expenses.

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103. It is unclear whether the preclusion doctrines would apply. Preclusion with regard to arbitration remains murky throughout the nation. However a favored position with regard to preclusion and the intertwining doctrine is: "In order for collateral estoppel or res judicata to apply . . . the parties must have either adjudicated or have had the opportunity to adjudicate the claim in the previous arbitration. If the claim was excluded, either by the parties themselves or by the state's arbitration act, the claim could not be adjudicated; therefore, collateral estoppel or res judicata should not apply." Buzbee, *supra* note 27 at 697 (citations omitted). *See also* PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR., 6 BRUNER & O'CONNOR CONSTR LAW § 20:58 (2007) ("In the first place, it is far from certain what collateral estoppel effect an arbitration award might have on a federal proceeding. Neither the full-faith-and-credit provision of 28 U.S.C.A. § 1738, nor a judicially fashioned rule of preclusion, permits a federal court to accord res judicata or collateral-estoppel effect to an nonappealed arbitration award.").

104. *Ingold*, 159 P.3d at 126 (citations and internal quotations omitted).

105. Julia Ann Gold, *ADR Through a Cultural Lens: How Cultural Values Shape Our Disputing Processes*, 2005 J. DISP. RESOL. 289, 308 (" In commercial arbitration, for example, as lawyers have become more involved, arbitration can be just as costly and time-consuming as the trial alternative. The bigger the case, and the higher the stakes, the more likely it is that arbitration will mirror the litigation alternative.").

106. Douglas Ayer, *Allocating the Costs of Determining "Just Compensation,"* 21 STAN. L. REV. 693, 717-718 (1969).

Third, there is a possibility that the trial court judge and the arbitrator will arrive at different and inconsistent conclusions. If this occurs, both the arbitration decision and the court decision may stand because "circumstances under which a court will review and vacate the [arbitration] award are extremely rare."[107] Although the courts have yet to concretely address if, to whom, or how parties may appeal inconsistent rulings, such result leads to negative, non-judicial ramifications. With the arbitrator and the judge arriving at different conclusions based on the same facts, the legal community and, more importantly, the public will become skeptical at either or both institutions. Since arbitration is relatively new and less known, the questioning and doubting will fall directly on the shoulders of the ADR community,[108] not the well-established, way-of-life judiciary.

Fourth, arbitration will become contentious. One of the advantages of arbitration and ADR as a whole is its ability to remain non-contentious.[109] The process is much less a battle to the death than litigation. However, by forcing both the litigation and arbitration of intertwined issues, trial courts will be forcing parties to hire attorneys to both litigate and arbitrate the cases. If the arbitration precedes the litigation, the lawyers will be less willing to assist one another. Discovery will not be as open and amicable. The proceeding will have more of a trial feel. The purpose and value of the arbitration will be diminished by the expectancy of litigation.

C. Holding Favors ADR Policy Considerations

With all the judicial drawbacks, the Colorado Supreme Court's rejection of the intertwining doctrine exemplifies and promotes three advantages to arbitration. First, removing these claims from the courts diminishes court's congestion. Although one aspect of the case remains on the docket, the court may only have to address one issue instead of six claims. Not only is arbitration "more efficient, more private, and less costly than litigation,"[110] it also prevents significant backlog in the courts.[111] The court system, as it is, is overburden and overtaxed.[112] Allow-

107. Karon A. Sasser, *Freedom to Contract for Expanded Judicial Review in Arbitration Agreements*, 31 CUMB. L. REV. 337, 342 (2001). "Limited judicial review . . . is set forth in sections 10 and 11 of the [Federal Arbitration] Act. Section 10 provides the following narrow grounds for vacating an arbitration award:

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

Id. at 341-42 (citations omitted).

108. *See generally* Edward Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 TUL. L. REV. 1 (1987).

109. Sasser, *supra* note 107, at 337 ("Arbitration often reduces hostility between the parties, thereby increasing the probability of present and future dealings between the parties.").

110. *Id.*

111. *Id.* at 365-66.

112. Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy And the Court's Role In Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 810-11 (1989) (citations omitted).

ing the arbitrations to proceed alleviates judges and their staffs from hearing and deciding claims that should be arbitrated.

Second, *Ingold* recognizes the importance of contracting and the judiciary's role in enforcing private contracts.[113] The court found that the intertwining doctrine provides parties with a loophole to avoid arbitration. The court explained, "[T]he intertwining doctrine allows a plaintiff or counter claimant to avoid its agreement to arbitrate simply by bringing a single non-arbitrable claim."[114] The theory and practice of arbitration relies on a party's ability to contract[115] and the court's ability to enforce the contract; if that ability is easily negated, parties will be less willing to enter into arbitration agreements. Similarly, the Colorado Supreme Court adhered to its analysis in *City and County of Denver v. District Court.*[116] In that case, the court stated, "Alternative dispute resolution mechanisms are favored in Colorado as a convenient, efficient alternative to litigation."[117] Moreover the parties have a right to contract for specific ADR procedures.[118] The failure of a court to rule in favor of a "valid ADR clause contravenes Colorado's public policy of supporting ADR as well as frustrates the intent of the parties who originally agreed to an alternative remedy to resolve their disputes."[119]

Third, forcing two separate proceedings may incline parties to reach settlement on either the arbitrable, nonarbitrable, or all claims. Parties will see the potential time and monetary commitments and determine settlement to be a better option.[120] If the case only proceeded to arbitration, one party may be less willing

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Most observers agree that there is too much litigation. Backlogs are epidemic, and we have seen the rise of bureaucratic justice to help handle the deluge. Despite the unprecedented recent increase in the number of federal judgeships, judges represent barely five percent of the federal judiciary's payroll. They are supported by an increasingly large phalanx of assistants-magistrates, law clerks, law student 'interns'-to whom they are forced to delegate greater responsibilities. Still, even with all this help, the federal courts seem in danger of losing control of their dockets.

Id.

113. Ingold v. AIMCO/Bluffs, L.L.C. Apartments, 159 P.3d 116, 124-25 (Colo. 2007) (citations and internal quotations omitted).

The right of the parties to contract freely is well developed in our jurisprudence. This right encompasses the correlative power to agree to a specific ADR procedure for resolving disputes. Since parties, by agreement, may substitute a different method for adjudication of their disputes than those which would otherwise be available to them in public courts of law, the CUAA is written to interfere as little as possible with the freedom of consenting parties to achieve that objective.

Id.

114. *Id.* at 125.

115. Sasser, *supra* note 107, at 337-38.

The courts have regarded arbitration as a creature of contract. An arbitration agreement is a voluntary decision, and parties will not be required to arbitrate if they have not explicitly contracted to arbitrate. Parties who choose to include arbitration clauses in their contract may also contract for the details of the arbitration proceeding. The parties may include provisions in the contract stating exactly what issues the arbitrator may hear and decide, the types of damages the arbitrator may award, and the rules under which the arbitrator will operate.

Id. (citations omitted).

116. City & County of Denver v. Dist. Ct., 939 P.2d 1353 (Colo. 1997).

117. *Id.* at 1357.

118. *Id.*

119. *Id.*

120. Recently, scholars have analyzed the ethical concerns of a judge's role in settlement. The main issue is whether judges can and should force parties into settlement discussions prior to litigation. The dismissal of the intertwining doctrine does not force settlement, it only indirectly promotes it.

to settle because it may believe that it has the superior case. However, with two proceedings, regardless of the strength of the case, the parties will be burdened with extra obligations. Moreover with the potential for two conflicting decisions, settlement would avoid the confusion that may arise when a judge orders one action and the arbitrator orders another.

Prior to *Ingold*, Leibman wrote:

> Although the state of the Intertwining Doctrine in Colorado may seem uncertain at first glance, the practitioner can glean enough from the applicable cases to properly analyze, brief, and argue a case that presents arbitrability and intertwining issues. The careful practitioner should be aware of the state of flux in this area of law, along with the concomitant opportunities and pitfalls. Finally, given the potential for a change in this area of law, attorneys should carefully preserve all applicable issues for appeal.[121]

Now, the law is clear, and attorneys know how to proceed. Arbitrable claims are to be arbitrated and nonarbitrable claims are to be litigated. With respect to any legal implications, *Ingold* simply changes the law. Prior case law is no longer valid, and any future cases will rely on *Ingold* as the standard. Practitioners familiar with the federal courts will not even miss a step in the Colorado state courts. Those lawyers that continue to plead nonarbitrable claims in the state courts will see those claims dismissed for lack of subject matter jurisdiction. The law is clear, and judges will no longer try nonarbitrable claims under the intertwining doctrine. Greater legal ramifications existed under the old law due to uncertainty and lack of clarity. As Leibman implied, the intertwining doctrine was primed to be tossed aside; it was only a matter of when.[122] Therefore, parties involved in such cases had additional maneuvering and positioning unsure how the court would decide.[123]

With respect to policy considerations, Colorado now adamantly adheres to promoting ADR and private contracting. Unfortunately it is unclear whether this is desirable public policy. Both the federal and state courts are struggling with joinder and the desire to package claims and parties into one trial.[124] Combining related litigations into one case instead of litigating independently "eliminates duplicative litigation, and thus generally is more efficient than repetitive litigation from a societal standpoint; scarce judicial resources need to be expended only once to unravel the facts of a dispute."[125] It appears that undoing the intertwining doctrine is no different than unpackaging.[126] Exactly how this will affect Colorado is yet to be seen. As to the federal courts, it is unclear whether *Byrd* has had

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Therefore, this casenote does not discuss this issue. However, a full analysis may be found in the following article: Sylvia Shaz Shweder, *Judicial Limitations in ADR: The Role and Ethics of Judges Encouraging Settlements*, 20 GEO. J. LEGAL ETHICS 51 (2007).

121. Liebman & Riggs, *supra* note 33, at 21.

122. *See generally* Liebman & Riggs, *supra* note 33.

123. *Id.*

124. Freer, *supra* note 112, at 813.

125. *Id.*

126. The more proper term would be "not packaging," which means not joining parties or claims with intertwined causes of actions.

any drastic affects besides promoting arbitration and enforcing private contracts. Nevertheless, a concern remains that duplicative resolutions could have significant effects on parties as well as the public's view of the legal community.

VI. CONCLUSION

In *Ingold v. AIMCO*, the Colorado Supreme Court aligned itself with the federal judiciary and rejected the intertwining doctrine. In doing so, the court favored private ADR contracting and failed to uphold the basic tenants of the judiciary.[127] With the advent of docket backlog and the growth of arbitration, the Colorado court and courts across the country continue to advocate alternative methods of resolving disputes. Litigation is not always the best way to solve controversies, and if parties have contracted to avoid it, the court should—and must—enforce their agreement. No matter how complicated the case or how many causes of action, claims that fall within the scope of the arbitration clause will be arbitrated.

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127. Although "having a court and arbitrators resolve the same factual issues is not a particularly efficient allocation of resources, may be somewhat impractical, and theoretically could lead to inconsistent result," the courts maintain that "[a]ny inefficiency or risk of inconsistent results is a consequence of the parties' bargaining" and that, in light of arbitration statutes, the courts "are required to enforce those bargains despite their potential shortcomings." Hallmark Indus., L.L.C. v. First Systech Int'l, Inc., 52 P.3d 812, 815 (Ariz. Ct. App. 2002).