

1997

John D. O'Connell and Ann O'Connell v. Blue Cross/Blue Shield of Utah : Brief of Appellant

Utah Court of Appeals

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PARTIES TO THIS PROCEEDING

Appellant is unaware of any parties other than those disclosed in the caption.

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STATEMENT OF JURISDICTION

This is an appeal from an order denying in part a motion to compel arbitration and staying arbitration on other claims. Jurisdiction is therefore granted under Utah Code Annotated §§ 78-31a-19(1) and (2). The jurisdictional issues in this case have been fully briefed in response to the Court's sua sponte motion regarding jurisdiction; this Court concluded, in its Order dated August 8, 1997, that an immediate right of direct appeal exists.

STATEMENT OF ISSUE PRESENTED FOR REVIEW AND STANDARD OF REVIEW

1. Whether the trial court erred in concluding that plaintiffs have not agreed to arbitrate their claims that Blue Cross/Blue Shield of Utah ("BCBSU") failed to provide them with an appropriate conversion policy.

This issue was raised and argued at several different points in the case below, including in BCBSU's original Motion to Compel Arbitration and to Stay Proceedings Against Defendant Blue Cross Blue Shield of Utah (R. 9 *et seq.*), in the memorandum supporting that motion (R. 12 *et seq.*), in appellant's objection to Plaintiff's Motion to Amend or Clarify Ruling (R. 198 *et seq.*), in BCBSU's Memorandum of Points and Authorities in Support of BCBSU's Motion to Reconsider, (R. 209 *et seq.*) and in Defendant's Reply Memorandum in Support of Motion to Reconsider. (R 233 *et seq.*)

The Court reviews the trial court's legal conclusions interpreting the scope of the arbitration clause as an issue of law, without deferring to the trial judge's interpretation. *Docutel Olivetti v. Dick Brady Systems, Inc.*, 731 P.2d 475, 479 (Utah 1986).

RELEVANT STATUTES

1. Utah Code Ann. § 31A-22-703 (1997) reads in pertinent part as follows:

Conversion rights on termination of group disability insurance coverage

(1) Except as provided in subsections (2) through (5), all policies of disability insurance offered on a group basis under this title, or Title 49, Chapter 8, Group Insurance Program Act shall provide that a person whose insurance under the group policy has been terminated for any reason, and who has been continuously insured under the group policy or its predecessor for at least six months immediately prior to termination, is entitled to choose either a converted individual or group policy of disability insurance from the insurer which conforms to this part and other applicable versions of this title, or an extension of benefits under the group policy as provided in Section 31A-22-714.

In addition, Section 3 of the Utah Arbitration Act provides:

A written agreement to submit any existing or future controversy to arbitration is valid, enforceable, and irrevocable, except upon grounds existing at law or equity to set aside the agreement or when fraud is alleged as provided in the Utah Rules of Civil Procedure.

Utah Code Ann. § 78-31a-3 (1997).

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is an appeal from an order denying, in part, a motion to compel arbitration and staying arbitration as to those claims determined to be arbitrable.

Plaintiffs (the "O'Connells") have been and remain BCBSU subscribers under different healthcare agreements for over 20 years. R.1. From time to time, they obtained this coverage by virtue of their memberships in different groups. R.2. Mrs. O'Connell was an employee of Rowland Hall-St. Mark's, and the couple obtained coverage from BCBSU at times under that group policy. R.2-3. Mr. O'Connell is a member of the Utah State Bar. R.2. The couple have also obtained BCBSU coverage in the past under the State Bar group policy. R.2.

The latest instance of coverage under these two groups was obtained by the O'Connells in 1993. R.2. On September 30, 1993, Mrs. O'Connell completed an application for coverage through Rowland Hall-St. Mark's. R.79. In making that application, Mrs. O'Connell agreed to the following language:

I accept binding arbitration as a method of resolving any disputes arising between me or the covered family members in the Plan or participating provider

concerning the applicability of, or benefits payable under the Subscriber Agreement.

R. 79.

The O'Connells were accepted onto the Rowland Hall-St. Mark's policy in 1993, and were given a healthcare agreement (the "Rowland Hall-St. Mark's Healthcare Agreement") reading in part as follows:

In the event of any dispute or controversy concerning the construction, interpretation, performance or breach of the Agreement arising between the Group, employer, or Subscriber, eligible Family Dependent, or the heir-at-law or personal representative of such person, and BCBSU, whether involving a claim in tort, contract or otherwise, the same shall be submitted to arbitration under the appropriate rules of the American Arbitration Association. Any arbitration shall be conducted in Salt Lake City, Utah, unless mutually agreed otherwise by the parties. All fees connected with initiating demand for arbitration shall be split between and advanced by the parties to the arbitration; subject, however, to final apportionment by the arbitrator in his or her award. The parties agree that the arbitrator's award shall be binding and may be enforced in any court having jurisdiction thereof by filing a petition for enforcement of said award.

R. 85.

In 1995, the O'Connells attempted to switch their coverage from Rowland Hall-St. Mark's to the Utah State Bar group. R. 44. The application for the Utah State Bar coverage contains language virtually identical to that quoted above for the application for the Rowland Hall-St. Mark's coverage, R. 44, and the Utah State Bar Healthcare Agreement contains language virtually identical to

that contained in the Healthcare Agreement issued to members of the Rowland Hall-St. Mark's group, including Mrs. O'Connell. R. 41. The O'Connells' application to resubscribe to the Utah State Bar group was rejected based on Mrs. O'Connells' medical history. R.3.

BCBSU, pursuant to the Rowland Hall-St. Mark's Healthcare Agreement, issued the O'Connells a conversion policy after her continuation coverage under the Rowland Hall-St. Mark's Health Care Agreement expired. R. 48.

II. COURSE OF PROCEEDINGS

The O'Connells sued BCBSU designating four causes of action. First, they claimed that the refusal to provide coverage under what they perceived as the more favorable Utah State Bar Healthcare Agreement breached the terms of the Rowland Hall-St. Mark's Agreement. R. 5. Second, they alleged that BCBSU had made oral promises that they could freely move back and forth between the Bar group and the Rowland Hall-St. Mark's group. R. 6. Third, they alleged that BCBSU "has breached its contract and statutory obligation to provide individual coverage to plaintiffs comparable to that provided through the Rowland Hall-St. Mark's group at a reasonable rate and not based upon condition of the plaintiff's health." R. 6. Finally, they alleged that BCBSU's refusal to accept them onto the Utah State Bar coverage violated

some "constructive duty to deal with plaintiffs fairly and in good faith" based allegedly upon the "long-standing relationship between plaintiffs and [BCBSU]." R. 8.

BCBSU moved to compel arbitration as to all of these claims. R. 9. After detailed briefing, the trial court granted the motion to compel arbitration on October 8, 1996. R. 183-190. On October 16, plaintiffs moved to amend or clarify that ruling. R. 192. The basis for this was plaintiffs' claim that a portion of their claims were based on a statutory right under Utah Code Annotated § 31A-22-701-718, which requires group healthcare insurance policies to provide for a conversion right. R.192-196. On December 18, 1996, the trial court modified its prior order, stating in pertinent part:

The Court finds the issue of whether defendant met its statutory obligation pursuant to the applicable sections of 31A-22-701(-)718 can be and is severed from the other issues in this case, and amends its judgment accordingly. The Court finds that the language of the arbitration provision signed by the plaintiff does not appear to address the issue of whether defendant has provided the plaintiffs with a conversion policy in accordance to the statute previously mentioned. Further, even if the arbitration provisions specifically provided for the matter of defendant's compliance with the statute, the Court has some reservations in leaving such issues of statutory interpretation to arbitration.

R. 206. The Court then went on to direct the parties to brief the issue of whether the conversion policy issued to the plaintiff complied with the conversion statute. R.206-207.

Rather than brief this issue, BCBSU requested that the trial court reconsider its ruling, arguing that the conversion rights were covered by the arbitration provisions at issue. R.209-220.

On April 8, 1997, the trial court denied this motion to reconsider, stayed arbitration and ordered BCBSU to file an answer concerning plaintiffs' so-called statutory claims. R. 248 and 249. BCBSU then took this appeal. R. 251.

III. DISPOSITION IN THE TRIAL COURT

In sum, the district court rejected plaintiffs' arguments that they had not agreed to arbitration, but later concluded that the statutory claim for a comparable conversion policy was not covered by the arbitration clauses at issue. R. 183-190; R. 206. This appeal concerns that interpretation of the breadth of those arbitration provisions, and the nature of the conversion right to which the O'Connells make claim.

SUMMARY OF ARGUMENT

The conversion right is a contractual right, provided in this case within the O'Connells' Rowland Hall-St. Mark's Healthcare Agreement. The Utah statutes governing conversion merely impose substantive requirements on that BCBSU contract.

The statute, by its unambiguous terms, does not create an independent cause of action.

Regardless, however, of whether the right to conversion is viewed as contractual or statutory, it cannot be maintained that "conversion" does not contemplate an existing healthcare agreement. Without such agreement, there is nothing from which to "convert." BCBSU's provision of a conversion policy, or failure to provide an appropriate one, is necessarily part of BCBSU's performance under its original healthcare agreement, in this case the Rowland Hall-St. Mark's Healthcare Agreement. The O'Connells' claim that Blue Cross has not provided an appropriate conversion policy is therefore plainly covered by the broad arbitration clause contained in that original Rowland Hall-St. Mark's Healthcare Agreement. This claim necessarily concerns the "construction, interpretation, performance or breach of" that original Agreement. Indeed, the plaintiffs' claim is founded on the notion the conversion policy is somehow not comparable to that original coverage. The trial court erred in severing out the conversion claim from the other claims raised in this case and in failing to compel arbitration with respect to all claims.

ARGUMENT

A conversion right is the right to convert insurance under a group policy to an individual policy. Appleman, *Insurance Law*

and Practice, § 126 (West 1981). The right sought by the O'Connells in this case is the right to obtain an individual policy following the termination of Mrs. O'Connells' eligibility for continuing coverage as a member of the Rowland Hall-St. Mark's group. More specifically, the O'Connells claim a right to a policy with premiums comparable to the former group policy. Blue Cross has issued the O'Connells a conversion policy, but maintains that it is not required to provide it at the same price as that of their former group policy.

That legal issue, however, is not before the Court. Instead, this appeal concerns whether this dispute is subject to an arbitration provision in the O'Connells' Healthcare Agreement with Blue Cross. The O'Connells' claim is based on a contractual right, and Blue Cross's provision of the conversion policy to the O'Connells necessarily arises out of its contractual relationship with them. As such, this dispute is subject to the mandatory arbitration provision contained in the Rowland Hall-St. Mark's Healthcare Agreement.

I. THE CONVERSION RIGHT IS CONTRACTUAL IN NATURE

The Rowland Hall-St. Mark's Healthcare Agreement addresses the right of conversion. It provides:

5. Group eligibility discontinued. In the event the Subscriber ceases to be eligible for group coverage in accordance with then effective rules and regulations of

BCBSU pertaining to enrollment, this Certificate and all coverage hereunder shall automatically terminate effective as of the first month's anniversary of the Effective Date following the date on which the Subscriber ceases to be eligible for group coverage. Any such Subscriber who has been covered under this Certificate for a period of at least six months may, within thirty (30) days after termination of this Certificate, apply for conversion of coverage in accordance with then effective rules and regulations of BCBSU pertaining to enrollment.

R. 244. It is this right to convert, provided under the contract, that the O'Connells seek to enforce.

The O'Connells have pointed to Utah's conversion statute as providing them a separate right. The unambiguous terms of that statute show that, rather than create an abstract right to conversion, the statute merely imposes substantive requirements on the underlying contracts. Specifically, the statute requires that

all policies of disability insurance¹ offered on a group basis under this title . . . shall provide that a person whose insurance under group policy has been terminated for any reason . . . is entitled to choose either a converted individual group policy of disability insurance from the insurer . . . or an extension of benefits under the group policy as provided in Section 31A-22-714.

Utah Code Ann. § 31A-22-703 (1997). Thus, the statute imposes a requirement on the contract terms, and the insured's underlying

¹ The term "disability insurance," as defined by the Utah Insurance Code, includes the health insurance provided by BCBSU to the O'Connells. Utah Code Ann. §§ 31A-1-301(26) and (35) (1997).

right to claim conversion thus arises out of that contractual relationship.

This obvious proposition is supported by more than the literal terms of the statute. There is no free-floating right to be accepted onto an individual policy available to the public at large. At the time the O'Connells obtained their conversion policy², their right to do so depended on prior enrollment in a group policy. Thus, the issuance of the conversion policy is part and parcel of the insurer's performance of its obligations under that prior group policy relationship. Absent that prior relationship under the group policy of Rowland Hall-St. Mark's, Blue Cross had no obligation whatsoever to issue any sort of policy to the O'Connells.

II. THE O'CONNELLS' ASSERTED RIGHT TO CONVERSION FALLS WITHIN THE CONTRACTUAL ARBITRATION CLAUSE

The clause in the O'Connells' Rowland Hall-St. Mark's Healthcare Agreement requiring arbitration is broad. It reads:

² The O'Connells' ability to obtain replacement coverage has changed significantly since their earlier application that generated this lawsuit. With the passage and implementation of the federal Health Insurance Portability and Accountability Act ("HIPAA"), P.L. 104-191, 110 Stat. 1936 (1996), they can now obtain the State Bar coverage without respect to any pre-existing medical condition, so long as they remain eligible and possess sufficiently continuous creditable coverage, which they presently do. That change in law, however, did not impact BCBSU's denial of enrollment on the State Bar plan in 1995.

LANGUAGE
SUBSCRIBER
CERTIFICATE
(TYPE 5E4) } 6F

In the event of any dispute or controversy concerning the construction, interpretation, performance or breach of this Agreement arising between the Employer, Subscriber, Eligible Family Member, and the Heir-at-Law or Personal Representative of such person and BCBSU, whether involving a claim in tort, contract or otherwise, the same shall be submitted to arbitration under the appropriate rules of the American Arbitration Association.

R. 166 (emphasis added).

In addition, when applying for this group policy, Ann O'Connell signed directly below the following language:

LANGUAGE
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APPLICATION } 6F

I accept Binding Arbitration as the method of resolving any disputes arising between me or the covered family members and the Plan [defined as Blue Cross and Blue Shield of Utah, ValueCare and/or HealthWise] or a participating provider concerning the applicability of, or benefits payable under the Subscriber Agreement.

R. 162 (emphasis added). Finally, the Certificate given to the O'Connells provides in addition as follows, under the heading "Claims Appeal Procedure":

LANGUAGE
OF THE
SUBSCRIBER
CERT. (TYPE 5E4) }

STEP FOUR - Binding Arbitration

Binding arbitration is the final step for the resolution of any dispute a member has with BCBSU. Steps One, Two and Three of this appeals procedure must be exhausted before arbitration is available. [Steps One, Two and Three involve bringing claims to the customer service department, the claims appeal committee and BCBSU's legal counsel, respectively.] When one enrolls with BCBSU, he or she agrees that any dispute will be resolved by binding arbitration, and agrees to give up the right to a jury or a court trial for the settlement of such disputes.

R. 165 (emphasis added).

The O'Connells now claim that BCBSU has failed to issue an appropriate conversion policy from this original group policy. This claim constitutes a dispute with BCBSU. It involves the construction and interpretation of the Rowland Hall-St. Mark's group policy. As discussed above, the right to conversion, as well as BCBSU's provision of the conversion policy involves the performance and alleged breach of the original Rowland Hall-St. Mark's policy. Even the O'Connells' pleading reflects this simple fact. In pleading this claim to the district court, the O'Connells alleged:

Defendant has breached its contract and statutory obligation to provide individual coverage to plaintiffs comparable to that provided through the Rowland Hall group at a reasonable rate and not based upon condition of the plaintiff's health.

R. 6 (emphasis added).

These claims plainly fall within the scope of the multiple arbitration provisions applicable to the O'Connells' Rowland Hall-St. Mark's policy. First, the right to conversion is provided within the same contract containing the arbitration clause requiring all disputes "concerning the construction, interpretation, performance or breach of" that contract. R.166. Plaintiffs have plead a breach of that right. Second, even if a parallel statutory claim existed, it still constitutes, by

definition, a claim concerning the performance or breach of the original agreement.

An analogous circumstance exists when a claim for benefits is brought under a conversion policy issued obtained through conversion from an ERISA-covered plan. In such case, the plaintiff seeking benefits typically wishes to avoid the preemptive scope of the ERISA statute. Because the converted policy is an individual policy, the argument goes, preemption applicable to claims under the group policy does not affect the claim for benefits under the conversion policy. Several courts have rejected this argument, recognizing that the claim for benefits under the conversion policy arises out of the original group benefits provided under the ERISA plan. The United States Court of Appeals for the Ninth Circuit, for example, has reasoned:

The opportunity to convert the group plan to an individual policy is a benefit provided pursuant to the group plan . . . the predicate to the conversion right, under both ERISA and Montana law, is qualification as a beneficiary under a group health or disability plan. . . . No conversion benefits would be available unless the party seeking the conversion policy was an eligible insured beneficiary of a group plan.

The group plan within this case, which the [plaintiffs] admit is an ERISA plan, provides for the conversion benefit. Because the [plaintiffs] would not be eligible for a conversion policy without first belonging to the class of beneficiaries covered by the ERISA group plan, we conclude that the individual

conversion benefits are part of the ERISA plan and are thus governed by ERISA. Had the [plaintiffs] not received health benefits pursuant to the ERISA group plan, they would not have been eligible to receive' conversion benefits and would have no cause of action arising from the conversion policy.

Greany v. Western Farm Bureau Life Ins. Co., 973 F.2d 812, 817 (9th Cir. 1992). See also *Tingey v. Picksley-Richards West, Inc.*, 953 F.2d 1124 (9th Cir. 1992); *Qualls v. Blue Cross of California*, 22 F.3d 839 (9th Cir. 1994) (both holding that conversion policy arises out of original ERISA coverage, and therefore claim for benefits is preempted). Similarly, any claim the O'Connells might raise concerning their conversion coverage, or BCBSU's alleged failure to provide appropriate conversion coverage, necessarily presupposes a pre-existing contractual relationship with BCBSU. Without such a relationship, there is no right to conversion. Accordingly, all of the O'Connells' potential claims concerning their conversion rights necessarily arise out of the performance by BCBSU of its original contractual obligations. Without that original contract, there is no claim.

It need hardly be said that Utah law requires arbitration provisions to be construed broadly, in favor of arbitration. *Docutel Olivetti v. Dick Brady Systems, Inc.*, 731 P.2d 475, 479 (Utah 1986); *Lindon City v. Engineers Constr. Co.*, 636 P.2d 1070, 1073 (Utah 1981) (quoting *King County v. Boeing Co.*, 18 Wash.

App. 595, 570 P.2d 713, 717 (1977). Any doubts concerning the applicability of arbitration are likewise to be resolved in favor of arbitration. *Id.* The O'Connells' claim that the conversion policy issued to them pursuant to their Rowland Hall-St. Mark's Healthcare Agreement is not comparable to their coverage under the original Rowland Hall-St. Mark's Healthcare Agreement falls unambiguously within the broad language of the arbitration provisions of that group policy. Utah law requires that all of the O'Connells' claims be arbitrated, and the district court erred in severing this claim from the O'Connells' other claims.

CONCLUSION


The district court erred in refusing to compel arbitration as to all of the O'Connells' claims against BCBSU in this matter. Each such claim is plainly subject to the broad arbitration clauses agreed to by the O'Connells. The Court should reverse the district court's order severing out the conversion claim and remand for entry of an order compelling arbitration as to all claims. In addition, the remand order should direct the entry of a reasonable attorneys' fee for BCBSU in connection with the district court proceedings and this appeal, pursuant to Utah Code Ann. § 78-31a-16 (1997).

STATEMENT REGARDING ADDENDUM

The relevant statutes and portions of the Record (including the relevant contractual provisions) are quoted in the brief. Appellant believes an Addendum is unnecessary.

RESPECTFULLY SUBMITTED this 4th day of December, 1997.

JONES, WALDO, HOLBROOK & McDONOUGH

By 

Andrew H. Stone
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of December, 1997,
I caused to be mailed, postage prepaid, two true and correct
copies of the foregoing APPELLANT'S OPENING BRIEF to the
following:

John D. O'Connell
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