

1997

# John D. O'Connell v. Blue Cross/Blue Shield of Utah : Reply Brief

Utah Court of Appeals

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DOCKET NO. 970361-CA

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IN THE UTAH COURT OF APPEALS

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JOHN D. O'CONNELL and ANN  
O'CONNELL,

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REPLY BRIEF OF  
CROSS-APPELLANTS

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Plaintiffs and  
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v.

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BLUE CROSS AND BLUE SHIELD  
OF UTAH,

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Defendant and  
Appellant/Cross-Appellee.

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APPEAL FROM AN ORDER OF THE **THIRD JUDICIAL DISTRICT COURT**  
IN AND FOR SALT LAKE COUNTY  
THE HONORABLE LESLIE A. LEWIS

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**FILED**  
Court of Appeals

JUN - 8 1998

Julia D'Alessandro  
Clerk of the Court

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**ARGUMENT**

**I. This Court Has Jurisdiction Over The Cross-Appeal.**

The Appellant, Blue Cross/Blue Shield of Utah [Blue Cross]<sup>1</sup>, asks this Court to reconsider and reverse its prior ruling on its sua sponte motion to dismiss for lack of jurisdiction,

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<sup>1</sup>In its opening Brief of Appellant, appellant referred to itself as "BCBSU" and the O'Connell's followed suit in their responsive brief. In its Reply and Response Brief, appellant calls itself "Blue Cross" and the O'Connells will, again, follow that lead in their Reply Brief.

Order of August 8, 1997, wherein this Court concluded that “the cross-appeal should not be dismissed based upon Rule 4(d) of the Utah Rules of Appellate Procedure and considerations of judicial economy.” This Court should reject this attempt to revisit a matter already fully briefed by the parties and decided by this Court because that ruling is the law of the case and there has been no change in the circumstances or the law. See State v. O’Neil, 848 P.2d 694, 697, n. 2 (Utah App. 1993); Matter of Estate of Justheim, 824 P.2d 432, 439, n.6 (Utah App. 1991).<sup>2</sup>

However, in the event that this Court does revisit the question raised on its sua sponte motion, it should confirm its August 8, 1997, ruling because it is correct. Blue Cross argues that the Rules of Appellate Procedure cannot “extend . . . jurisdiction as established by law.” Appellant’s Reply and Response Brief at 18-19 and n.11. However this Court’s interpretation of the Rules does not in any way extend the jurisdiction of this Court that is “established by law” over this case by Section 78-2a-3(2), Utah Code. That statute states:

The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

. . . . .  
(j) cases transferred to the Court of Appeals from the Supreme Court.

(Emphasis added). This case was transferred from the Supreme Court. The Supreme Court is the exclusive judge of its own jurisdiction, National Bank v. Lewis, 13 Utah 507, 45 Pac. 890 (1896), but its jurisdiction over interlocutory appeals of an order of any court of record is clearly “established by law” by Section 78-2-2(3)(j), Utah Code. Therefore, this Court’s interpretation

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<sup>2</sup>While the doctrine of law of the case is not as inflexible as the doctrine of stare decisis, State v. O’Neil, supra at 697, it is certainly similar and protects similar values. The Supreme Court has repeatedly stressed the importance of observing stare decisis when one panel of a multi-panel appellate court is faced with a prior decision of a different panel. See, e.g., Renn v. Utah Bd. of Pardons, 904 P.2d 677, 681 (Utah 1995).

of the Rules of Appellate Procedure to allow the O'Connells to maintain an interlocutory cross-appeal does not "extend jurisdiction . . . as established by law" as Blue Cross argues.

The statutory jurisdiction over interlocutory appeals is general and unlimited in Utah. The federal system is different. In Section 1292 of Title 28 of the United States Code (Pocket Part), Congress specified in detail (using four pages of text) which interlocutory matters are appealable in the federal courts, providing in subsection (e) that the Supreme Court may prescribe rules allowing for other interlocutory appeals. Thus, permissible interlocutory appeals are specified in the federal statutes. (The Supreme Court has apparently not extended the matters to be appealed by Rule pursuant to 28 U.S.C. 1292(e).) Therefore, the federal cases<sup>3</sup> cited by Blue Cross, in its Response Brief at 19 as well as in its memorandum on the motion at 9, are not in point because, in Utah, it is not necessary to find a particular statute, for example the Arbitration Act, that provides for an interlocutory appeal because the Utah appellate jurisdiction statutes provide for interlocutory appeals generally without any limitation.

The state cases<sup>4</sup> cited in the Appellant's Response Brief at 20 merely stand for the proposition that an order directing arbitration or requiring exhaustion of an organization's internal remedies is not, by itself, a "final order" which is necessary for appellate jurisdiction under those states' statutes. Again, Utah's appellate jurisdiction statutes generally allow interlocutory appeals so those cases are not in point. Furthermore, those state cases, unlike this case, did not involve a cross-appeal where another party had filed an appeal of the same order as a matter of right.

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<sup>3</sup>Gooding v. Shearson Lehman Bros. Inc., 878 F.2d 281 (9th Cir. 1989); Jeske v. Brooks, 875 F.2d 71 (4th Cir. 1989).

<sup>4</sup>NEA-Topeka v. Unified School Dist., 925 P.2d 835 (Kan. 1996); Golden Lodge No. 13 v. Easley, 916 P.2d 666 (Colo. App. 1996).

There is simply no authority for Blue Cross' contention that, because the Arbitration Act itself does not extend a right to appeal an order directing arbitration, this Court lacks jurisdiction over such an interlocutory order in an appropriate case.

The cross-appellants [O'Connells] conceded in their memorandum on the Court's *sua sponte* motion that they did not have an independent right to appeal the order directing arbitration and asserted that they were cross-appealing that issue under Rule 4(d), Utah Rules of Appellate Procedure, pendant to the appeal by Blue Cross of the other side of that issue. Blue Cross argues in its Reply Brief at 25, n.11, that the O'Connells' cross-appeal, as a procedural matter, is not properly before this Court as an interlocutory appeal because they did not comply with Rule 5. In answer, the O'Connells will set out hereafter the same argument they made on the Court's *sua sponte* motion. However, it should also be noted that the briefing to date has further demonstrated how interwoven the issues raised by the appeal and cross-appeal are. In fact, for the most part, they are merely different sides of the same issues.

Rule 4(d), Utah Rules of Appellate Procedure, appears to allow an appeal by "any other party" where another party, having an appeal as a matter of right, has timely filed a notice of appeal. While subsection (a) of Rule 4, setting the requirements for the timely filing of an appeal, is limited to "a case in which an appeal is permitted as a matter of right," subsection (d), pertaining to a cross-appeal, is not so limited. It is submitted therefore, that if Blue Cross had an appeal "as a matter of right" and timely filed its notice of appeal under Rule 4(a), the O'Connells as "any other party" could file notice, cross-appealing the same order, without establishing an independent grounds for an appeal as a matter of right or petitioning for permission to maintain an interlocutory appeal. This interpretation is in keeping with the purpose

as well as the language of the Rules of Appellate Procedure, since the concerns regarding interruption of ongoing litigation which are ordinarily raised when a party seeks to appeal an interlocutory order are simply not involved when another party has, as a matter of right, already interrupted the litigation and appealed that same order. Surely it makes no sense to appeal the issue of whether or not the district court's interpretation of the scope of the arbitration agreement was too narrow at this stage, and then, after the completion of the arbitration and the litigation, conduct another appeal to argue and determine whether the same interpretation of the same agreement was too broad.

## **II. Controlling Authority of the Insurance Code and Administrative Rule Precludes Compelling Arbitration in This Case.**

Blue Cross argues in its Response Brief at 4-5, for the first time in the course of this case<sup>5</sup>, that Utah law and "specifically the Insurance Code" allow it to bind consumers with arbitration language which is not contained in its applications but does appear in its subscriber's

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<sup>5</sup>In the District Court neither party referred the court to that chapter of the Insurance Code or to the particular provisions which, as will be demonstrated *infra* in the text, pertain directly to arbitration clauses in insurance applications and contracts, Section 31A-21-314(2), Utah Code, and the Administrative Rule implementing that provision. This was in spite of the fact that Blue Cross was there represented by its general counsel who, as counsel for the largest insurer in the state, must have been familiar with the Insurance Code and regulations and been aware that they constituted controlling authority directly in point. The O'Connells did argue unsuccessfully against enforcing the fine-print arbitration clause. R-187-188.

In their opening brief in this Court, the O'Connells made reference to the fact that the arbitration clause in the "Application" was placed "in the midst of the finely-printed boiler-plate," Brief of Appellees at 11-12, complained that it did not state that all disputes would be subject to arbitration and did not explain that an arbitrator's decision would be final and unreviewable in the courts (*Ibid.* at 22-24), and argued that because of this it did not meet the standard for an unequivocal waiver of right to access to the courts, *Ibid.* at 35, but at that time, the O'Connells were unaware of the specific requirements of Utah insurance law requiring prominent display and notification of all those matters and Blue Cross was maintaining its silence on the subject.

certificates, regardless of whether the insured read the certificate or even received a copy. (Blue Cross applies the broader language of the subscriber certificate to the O'Connells' cross-appeal as well as to its own appeal. Response Brief at 22.) As will be shown, the Insurance Code does not support this proposition. To the direct contrary, that Code, and the Administrative Rule that implements it, prohibit imposing arbitration upon the insured in the manner that Blue Cross has attempted to do.

Blue Cross quotes a subsection of a provision of the Utah Code, Section 31A-21-303(5)(a), that pertains to the termination of insurance by insurers and provides:

[I]f the insurer offers or purports to renew the policy, but on less favorable terms or at higher rates, the new terms or rates take effect on the renewal date if the insurer delivered or sent by first class mail to the policyholder notice of the new terms or rates at least 30 days prior to the expiration date of the prior policy.

Blue Cross asks this Court to apply this subsection to govern, not a question of when a change of rates or terms of a renewed policy takes effect, but the unrelated question of whether an insured is bound by arbitration terms he has not only not agreed to in writing, as the Arbitration Act requires,<sup>6</sup> but has not even received or read. That is an absurd stretch of the language of that subsection out of its context. Another subsection of that section provides:

The rights provided by this section are in addition to and do not prejudice any other rights the insureds may have at common law or under other statutes.

Section 31A-21-303(1)(d). Even more importantly and, in fact, dispositively in this case, another section of that part and chapter of the Utah Insurance Code applies directly and

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<sup>6</sup>The Arbitration Act requires the enforcement of a "written agreement to submit any existing or future controversy to arbitration." Section 78-31A-3, Utah Code. The party seeking to compel arbitration must show the existence of that written agreement. Section 78-31A-4(1), Utah Code.

specifically to arbitration provisions in insurance documents and states:

31A-21-314. **Prohibited provisions.**

No insurance policy subject to this chapter may contain any provision:

.....  
(2) depriving Utah courts of jurisdiction over an action against the insurer,  
except as provided in permissible arbitration provisions;  
.....

Section 31A-21-314 Utah Code. This section clearly prohibits language in insurance documents that denies insureds access to judicial remedies except for "permissible arbitration provisions."

Administrative Rule 590-122, **Permissible Arbitration Provisions**, [reproduced in its entirety in the Addendum hereto] defines "permissible arbitration provision" and provides "guidelines upon which disclosure of a contract arbitration provision is to be made." Subsection 590-122-2.

Subsection 590-122-4(5) provides:

[E]ach application or binder pertaining to an insurance policy which contains a permissible arbitration provision must include or have attached a prominent statement substantially as follows:

ANY MATTER IN DISPUTE BETWEEN YOU AND THE COMPANY MAY BE SUBJECT TO ARBITRATION AS AN ALTERNATIVE TO COURT ACTION PURSUANT TO THE RULES OF (THE AMERICAN ARBITRATION ASSOCIATION OR OTHER RECOGNIZED ARBITRATOR), A COPY OF WHICH IS AVAILABLE ON REQUEST FROM THE COMPANY. ANY DECISION REACHED BY ARBITRATION SHALL BE BINDING UPON BOTH YOU AND THE COMPANY. THE ARBITRATION AWARD MAY INCLUDE ATTORNEY'S FEES IF ALLOWED BY STATE LAW AND MAY BE ENTERED AS A JUDGEMENT IN ANY COURT OF PROPER JURISDICTION.

Such statement must be disclosed prior to the execution of the insurance contract between the insurer and the policy holder and, in the case of group insurance, shall be contained in the certificate of insurance or other disclosure of benefits.

(Underlining added; uppercase lettering in the original).

Blue Cross failed to comply with this Rule which mandates that "each application" must prominently display the designated language. The arbitration language, buried in the fine-print

boiler-plate of the "Application" that the district court found to constitute the written agreement to arbitrate in this case, utterly fails to meet the requirements of the Rule in both form and content. That language states:

I accept Binding Arbitration as the method of resolving any disputes arising between me or the covered family members and the Plan or a participating provider concerning the applicability of, or benefits payable under the Subscriber Agreement.

(The "Application" is reproduced in Addendum "D" to Appellees/Cross Appellants' opening brief and at R-162.)

While the Rule requires the disclosure language to be contained in the "certificate of insurance" also, the mere fact that Blue Cross inserted similar language in the Subscriber Certificate that was sent at some unknown time "after being enrolled for the policy,"<sup>7</sup> would not rectify the failure to include it, and do so prominently, in the "Application" as the Rule mandates it "must." Furthermore, the arbitration language in the Type 5E4 Subscriber Certificate (R-163-166) is not a "prominent statement" as required by the Rule--it is not in capital letters, as the use of such type face in the Rule suggests it must be, or emphasized or otherwise set off from the rest of the text in any other manner.

The Rule also provides, Subsection 590-122-4(7) [Addendum], that arbitration provisions in insurance policies shall be in compliance with the Utah Arbitration Act. Thus, the Insurance Code provides protection to insurance consumers in addition to that which is contained within the Arbitration Act. Therefore, while Blue Cross argues that Utah insurance law somehow

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<sup>7</sup>The Affidavit of the Blue Cross employee did not state when (other than after enrollment) how or by whom the certificate was "sent." R-172 The copy of the Type 5E4 Subscriber Certificate which was submitted by Blue Cross to the court below has "updated 6-94" hand-written on the cover. R-163. The effective date of the O'Connell's coverage was October 1, 1993, (R-174) that is, nine months before that version of the certificate was apparently updated yet alone sent.

lessens the Arbitration Act's requirement of a written agreement to arbitrate and that that requirement may be satisfied by a unilateral statement sent by the insurer, the opposite is actually true. Under Utah law, the arbitration language must be prominently displayed in the application, the document which is signed by the subscriber before she is bound to anything, and the disclosure language must be substantially similar in content to that set out in the Rule. Blue Cross' failure to comply with the Rule implementing the statute providing for "permissible arbitration clauses" in insurance contracts precludes the enforcement of any of the purported agreements to arbitrate any of the O'Connells' claims.<sup>8</sup>

### **III. Blue Cross Failed to Prove That the O'Connells Agreed to the Arbitration Language in the Subscriber Certificate.**

#### **A. There is No Undisputed Evidence That Would Require a Finding That the O'Connells Agreed to the Arbitration Language in the Subscriber Certificate**

Even if the Insurance Code did not preclude binding the O'Connells to the broader arbitration language in the Type 5E4 Subscriber Certificate (upon which Blue Cross relies in arguing against the Cross-appeal in its Response at 22), Blue Cross simply failed to prove that the O'Connells agreed to that language as the Arbitration Act requires.<sup>9</sup> In this regard, it must

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<sup>8</sup>In Imperial Savings Ass'n v. Lewis, 730 F. Supp. 1068 (D. Utah 1990), a case cited by Blue Cross in its Responsive Brief on other points, the court found a failure to comply with the Administrative Rule did not constitute a statutory impediment to an arbitration provision but that was because the Rule was not promulgated until nine months after the policy in that case was issued and the court found it had no retroactive effect. 730 F. Supp. at 1075. The Administrative Rule was clearly in effect in 1993 when Ann O'Connell signed the "Application" because subsection 4(5) is quoted in its current form in the 1990 decision in Imperial Savings, supra, at 1074.

<sup>9</sup>The Arbitration Act requires the enforcement of a "written agreement to submit any existing or future controversy to arbitration." Section 78-31A-3, Utah Code. The party

be kept in mind that an evidentiary hearing was neither requested nor held below and the district court's rulings were based upon the arguments and affidavits submitted by the parties. In this context, it is inappropriate for Blue Cross to complain that the district court did not find in its favor on the underlying factual issue of whether the O'Connells agreed to the language in the Type 5E4 Subscriber Certificate. Surely, such a ruling was not compelled by undisputed evidence.

The O'Connells had questioned whether they had even received the Type 5E4 Subscriber Certificate upon which Blue Cross relies. (R-124) In an undisputed affidavit, Ann O'Connell denied reading either that certificate, or the Type 4M-4ML Certificate that she did receive.<sup>10</sup> (R-129) More importantly, there is no evidence whatsoever that the O'Connells agreed to the arbitration language in either version of the subscriber certificate. As argued in Section II of this brief, the Insurance Code does not diminish the requirement of the Arbitration Act and allow an insurance company to bind insureds with an unilateral document sent to the subscriber after the fact without also including the entire suggested language prominently in the application which the subscriber signs.

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seeking to compel arbitration must show the existence of that written agreement. Section 78-31A-4(1), Utah Code.

<sup>10</sup>The O'Connells asserted below that the introduction to the arbitration language in the Type 4M-ML Certificate was different from that in the Type 5E4 and was more consistent with their interpretation of the language in the "Application," that is, that it pertained to disputes concerning payment of medical bills. R-124-125. See Type 4M-ML Certificate, "D" Member Grievance Procedure and Step One. R-133. These provisions appear to apply to disputes concerning the administration, as opposed to the termination, of coverage, and to "claim processing" rather than the breach of other provisions of the plan, yet alone separate promises concerning switching groups.

B. The Fact That Some of the O'Connells Claims Are Based Upon the Subscriber Certificate is Not a Substitute for the Written Agreement Required by the Arbitration Act

Blue Cross argues that, because the O'Connells assert provisions in the Subscriber Certificate as the basis for some of their claims in their Complaint, the O'Connells are bound by the arbitration language in that certificate regardless of whether they agreed to it or read it. That is, Blue Cross claims that the O'Connells' reliance upon Blue Cross' promises made in the Subscriber Certificate acts as a substitute for The O'Connells' written agreement to arbitration which is required by the Arbitration Act<sup>11</sup>. The sole authority Blue Cross cites for this proposition is Jeanes v. Arrow Insurance Company, 494 P.2d 1334 (Ariz. Ct. App. 1972). However, in that case a third-party beneficiary seeking to enforce a contract attempted to avoid arbitration language therein on the grounds that she personally did not sign the contract. The Arizona Court of Appeals held that: "Compliance with the Uniform Arbitration Act was satisfied by the voluntary agreement between Arrow and its insureds." 494 P.2d at 1337 (emphasis added). In the instant case, there was no "voluntary agreement" to the arbitration language in the Subscriber Certificate by either of the insureds which is necessary to comply with the Arbitration Act. The O'Connells do not dispute that John O'Connell, as a third party beneficiary, could be bound to the "Application" signed by Ann O'Connell even though he did not sign it personally. That however is a far different proposition from that now asserted by Blue Cross that the O'Connells are bound by the language in the subscriber certificate that neither of them even saw yet alone agreed to.

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<sup>11</sup>See note 6, supra.

C. Utah Law Does Not Bind Insureds to Arbitration Language in a Document That They Have Not Read or Signed.

Blue Cross also argues that the O'Connells are bound by the language of the Subscriber Certificate if that document was sent to them and they did not raise objections, even if they did not read the certificate or even receive it. Response Brief at 6. Blue Cross mistakenly relies upon Imperial Savings Ass'n v. Lewis, 730 F. Supp. 1068 (D. Utah 1990), for this erroneous statement of law. In that case the attorney for Imperial, the lending institution that was seeking to avoid arbitration, requested a copy of the title insurance policy containing the arbitration provision. "Imperial failed to object [to the arbitration provisions] upon review of the Policy to determine its rights . . ." 730 F. Supp. at 1073 (Emphasis added). Instead Imperial's attorney had discussions with the insurer about the insurer's defense of a suit against Imperial, including the insurer's disclaimer of coverage of any liability, and did not object to arbitration as a means of resolving that dispute until many months after his review of the policy which contained the arbitration language. The federal district court stated that it was guided by 1 COUCH ON INSURANCE 2d, Sec. 12:10 (1984), which that court quoted, 730 F. Supp. at 1073:

An applicant who is advised of a ground upon which he is entitled to reject a policy tendered to him by the insurer should notify the insurer of his refusal to accept the policy as written; the notice should be given promptly, that is, at once, or at least within a reasonable time after the cause of rejection was, or should have been, discovered. A rejection cannot be made by a secret unexpressed intention. An applicant is regarded as having accepted the policy as written, if he reads it, or has it read to him, and does not notify the company of his rejection thereof.

(Emphasis added). The federal district court in Imperial followed this reasoning and concluded that, in the "particular circumstances" of that case, Imperial would be deemed to have accepted the arbitration terms in the policy that its attorney had reviewed and discussed with the insurer

without objecting to the arbitration clause. That holding has no application to the instant case where it was undisputed that the subscriber certificate was not read even if it were received.

Blue Cross also asserts that "the O'Connells cannot escape the terms of the Certificate by reliance upon Ann O'Connell's assertion in her Affidavit that she "has not read either version of the Subscriber Certificates (R-129)," citing the district court's comment below that "case law is clear that a party has a duty to read and understand the terms of a contract before signing it." Blue Cross' Reply and Response Brief at 6-7. The obvious answer to this argument is that the O'Connells did not sign the subscriber certificate nor is it contended that they had the certificate in their possession at the time that Ann O'Connell signed the "Application." The lead-in sentences to the language of the district court which was quoted by Blue Cross were:

Plaintiffs [O'Connells] have argued that they should not be subject to the arbitration because they did not read the subscriber certificates or the applications they signed, and thus did not have notice of the arbitration provisions. The Court is not compelled by this argument as it relates to the application.

R-186. The "Application" was signed by Ann O'Connell; the subscriber certificates were not. It is disingenuous for Blue Cross to cite the district court and that court's reliance upon the holding of Hottinger v. Jensen, 684 P.2d 1271, 1274 (Utah 1984), that a party is bound by contracts she has signed, as support for Blue Cross' assertion that the O'Connells are bound by the subscriber certificate that they undisputedly did not read or sign and may not have received.

Blue Cross implies that the district court, in repeatedly holding the O'Connells to only the limited language in the "Application," inadvertently overlooked Blue Cross' evidence and arguments regarding the broader arbitration language in the subscriber certificate. However, it is clear from a review of the district court's decisions below that that court was simply not persuaded by Blue Cross that the O'Connells agreed to the language in the subscriber certificate.

See R-186-188, 206, 248-249 (Addenda A, B & C to Brief of Appellees). The district court arrived at that decision despite Blue Cross' repeated invocation of the language in the subscriber certificates. R-139, 143, 210-211. The rejection of Blue Cross' contentions in this regard was not erroneous, yet alone, clearly so.

#### **IV. The Arbitration Language in the Application, as it Would be Understood by a Reasonable Purchaser, Would Not Require Arbitration of the O'Connells Claims.**

##### **A. Principles of Interpretation**

The O'Connells contend that the arbitration clause in the "Application" that Ann O'Connell signed is unenforceable in any event because it does not comply with the requirements of the Insurance Code and Administrative Rule as argued in Section II of this brief. However, regardless of the Insurance Code, the district court erred in interpreting the arbitration language in that "Application" to cover all the O'Connells claims involved in this cross-appeal.

Blue Cross argues that the language of the "Application," as well as that of the subscriber certificate discussed in Section III, *supra*, is unambiguous and therefore should not be construed against the insurer. Response Brief at 8-9. Notably, Blue Cross does not quote that arbitration language in making that analysis. The language in the "Application" states:

I accept Binding Arbitration as the method of resolving any disputes arising between me or the covered family members and the Plan or a participating provider concerning the applicability of, or benefits payable under the Subscriber Certificate.

R-79, 162. The O'Connells assert that the reasonable interpretation of that clause, the one that an ordinary purchaser would be likely to come to, is that it would apply to disputes between the insured or physicians and the insurance company about whether the insurance covered certain procedures or the extent to which the insurance company would pay medical bills. The

O'Connells contend that it is not reasonable to interpret that language, as Blue Cross does to cover any dispute "touching upon" or "contemplating the existence of" any of the matters covered in the certificate. Blue Cross asserts, correctly, that the "reasonable purchaser standard" should be used in determining if language is ambiguous, that is, "capable of more than one reasonable interpretation." Response Brief at 9. It is submitted that most people, including "reasonable" ones would be likely to think that such language in an insurance application pertained to disputes about "claims" for coverage rather than about a wrongful termination or a breach of a separate agreement to allow transfers between groups. At the very least, the language is "capable" of being given such an interpretation by a reasonable person, and therefore should be given the interpretation least favorable to the insurance company that drafted it.<sup>12</sup>

The further arguments made and cases cited by Blue Cross in its Response Brief pertaining to principles of interpretation are adequately addressed in the O'Connells' opening brief at 24-25. The O'Connells will not argue them further here except to note that those cases

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<sup>12</sup>Blue Cross also argues that an interpretation against the insurer would not necessarily be against arbitration which it describes (without supporting evidence) as much cheaper for the average insured who is not a lawyer. While the "speedy and inexpensive remedy" dictum is concededly often repeated in the case law, it is of doubtful current validity. The legal action in this case cost \$170 to file which includes all court personnel including a jury. The American Arbitration Association would charge in excess of \$5,000 for administrative costs alone (because the upper limit of the policy the O'Connells are seeking is \$1,000,000). Additionally the arbitrator, or arbitrators, would charge \$150 to \$200 per hour. More importantly, arbitration in a case like this is "favorable" to Blue Cross because the result will not be public and no binding precedent would be set which would preclude, or make very expensive, similar practices by Blue Cross in the future. Clearly Blue Cross would prefer to discuss its dubious practices privately and compel each of its 600,000 members to arbitrate their complaints separately. It is one thing to arbitrate whether a doctor's bill should be paid, it is another to arbitrate such matters as whether Blue Cross wrongfully terminated insurance, made promises upon which the O'Connells relied and followed the Insurance Code in its conversion practices.

all involved instances where the parties were on equal footing and, for the most part, the arbitration language was drafted by the party seeking to evade arbitration. The uncertainty regarding the scope of the language in the "Application" drafted by Blue Cross could have been easily avoided by simply stating that "all disputes" were subject to arbitration or by simply following the mandates of the Administrative Rule discussed in Section II, supra.

**B. Blue Cross Misconstrues the O'Connells' Claims and Misstates the Record Concerning Those Claims.**

Blue Cross misconstrues the O'Connells' claims involved in the cross-appeal to be all based upon the subscriber certificate.<sup>13</sup> Blue Cross even goes so far as to outrageously assert that the O'Connells' use of the word "contract" in the Second Cause of Action of their Complaint (R-6) means they were alleging a "breach of the insurance contract that is subject to (and in fact contains) the arbitration agreement(s) to which the O'Connells object." Response Brief at 21. This is simply not true. The word "contract" in paragraph 24 of the Complaint very clearly is used to refer to Blue Cross' legal obligation "to fulfill its promise, made orally and by letter to convert their coverage back to the Bar group . . . upon which promise [the O'Connells] reasonably and foreseeably relied in cancelling their membership in that group." R-6. The promise sought to be enforced in the Second Cause of action was unambiguously alleged in that

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<sup>13</sup>Of course the O'Connells do not concede that those of their claims that are directly based upon Blue Cross' obligations set out in the Subscriber Certificate are covered by the language of the "Application" because a reasonable purchaser would not necessarily reasonably understand that language to cover more than disputes about the extent of coverage and payment of benefits, that is, payment of medical expenses. See Brief of Appellees at 33-34. The O'Connells have answered Blue Cross' argument that the making of a claim based upon the certificate constitutes an agreement to the arbitration language in the certificate, supra at p. 11.

cause of action to have been made by Blue Cross "orally and by letter," ibid., and not in the Subscriber Certificate as Blue Cross claims.

Blue Cross also asserts that the O'Connells alleged for the first time on appeal the existence of a "separate promise to allow the O'Connells to transfer back and forth between groups." Blue Cross contends that there is nothing in the record to support that the O'Connells were raising a "separate oral or written promise other than those made in the various insurance policies purchased by the O'Connells." Responsive Brief at 22. These statements are also untrue. As has just been demonstrated, the O'Connells alleged such a promise by Blue Cross "made orally and by letter" in paragraph 24 of the Second Cause of Action of the Complaint. R-6. The same allegations were made in paragraph 7 of the factual allegations of the O'Connells' complaint. R-2. It would seem obvious to any fair reader that a statement "made orally and by letter" was not a statement in a printed "insurance policy."

C. Blue Cross Inappropriately Complains of the Lack of Evidence Supporting and the Merits of the O'Connells Substantive Claims Made in the Litigation.

Blue Cross inappropriately complains of a lack of evidentiary support for the O'Connells' allegations concerning the promises Blue Cross made which induced the O'Connells to give up their long term coverage with the Bar group. Responsive Brief at 22-23. Blue Cross, at this point, has not answered the O'Connells' Complaint, made any effort to refute the O'Connells' allegations in the Complaint, nor conducted any discovery and is in no position to complain about the lack of "evidence in the record." Blue Cross has made no general motion for summary judgment. The Rules of Civil Procedure do not require that the allegations of a complaint be supported with evidence upon filing. However, Blue Cross' statement that there is no evidence

in the record of a written or oral promise other than those made in the various insurance policies is also simply untrue. The facts supporting the allegations concerning Blue Cross' assurances concerning transfers between groups are contained in Ann O'Connell's unchallenged Affidavit in Opposition to Motion to Arbitrate. R-127, 128. It is also clear in that affidavit that those assurances were made in writing outside of Blue Cross' "policies" or "subscriber certificates."

Blue Cross also inappropriately argues the merits of the O'Connells' claim of a contract, based upon the promises Blue Cross' made and the O'Connells' reliance thereon in giving up their membership in the Bar group, by arguing that the O'Connells have shown no consideration for Blue Cross' promises. Responsive Brief at 23. The issue before this Court is what disputes, if any, the O'Connells agreed to arbitrate. The merits of the parties positions in those disputes are not now before the Court. At the appropriate time, the O'Connells will explain the doctrine of promissory reliance and other points of contract law and produce their supporting evidence.

**V. Blue Cross Fails to Show That the O'Connells Have Waived Their Constitutional Right to Access to the Courts as to the Claims Involved in the Cross-appeal.**

Blue Cross' only response to the O'Connells' argument, that the arbitration language in the "Application" failed to express "in the most unequivocal terms" that the O'Connells were waiving their rights to access to the courts and remedy by law as required by Article I, Sections 7 and 11, Constitution of Utah, is to claim that the Supreme Court in Lindon City v. Engineers Constr. Co., 636 P.2d 1070, 1073-74 (Utah 1981), "specifically rejected exactly these arguments." Response Brief at 23-24. To the contrary, while the Court in Lindon City found no constitutional violation in the circumstances of that case, the Court stated:

Under Article I, Section 11, [Constitution of Utah] a party may intentionally and deliberately waive the ordinary and usual remedy to which a party is entitled for the redress of a wrong, but such waiver should be expressed in the most unequivocal terms.

636 P.2d at 1074 (Emphasis added). In Lindon City, it was not difficult to find a waiver of the right to access to the courts because the party that was seeking to avoid arbitration was the party that drafted the agreement to arbitrate. In this case, on the otherhand, the arbitration agreement was buried in the fine print of an "Application" drafted by Blue Cross and signed by the O'Connells as an adhesion contract and that language did not say one word about waiving access to the courts, yet do so in "the most unequivocal terms" as the Lindon City dictum requires. (A copy of the "Application" appears in Addendum "D" to Appellees Brief.)

The O'Connells suggested in their opening brief, at 35, that, to comply with the dictum of Lindon City, the language should appear in capital letters and be similar to that enforced in Sosa v. Paulos, 299 Utah Adv. Rep. 26, 27 (Sup. Ct. 1996). At the very minimum, the language should be in capital letters and otherwise comply with the Administrative Rule as argued in Section II of this brief at p.p. 5-9. That rule was adopted to define "permissible arbitration provisions" as used in the statute which prohibited clauses in insurance policies "depriving Utah courts of jurisdiction over an action against an insurer, except as provided in permissible arbitration provisions." Section 31A-21-314, Utah Code. It would, therefore, set the minimum standards for finding a waiver by an insured of the constitutional right of access to the courts.

## **VI. Blue Cross Seriously Misstates the O'Connells' Argument Regarding Attorney Fees**

Blue Cross states that "The only argument the O'Connells make on the attorney fee issue is that Blue Cross waived its right to request attorney fees because the request was not made to

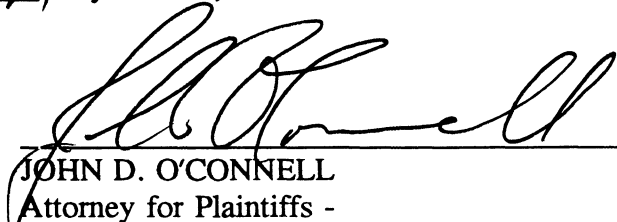
the trial court." Response Brief at 24 (Emphasis added). This is untrue. The O'Connells also argued in their opening brief, at 36-37, that the awarding of attorney fees is discretionary by statute.<sup>14</sup> (Blue Cross' claim that it is "entitled to" attorney fees under law is simply incorrect.)

The O'Connells also complained (ibid.) that Blue Cross gave no reasons for its request for attorney fees, even for fees in this court, so it was difficult to argue against it. Nonetheless, the O'Connells there set out reasons why Blue Cross should not be awarded attorneys fees for this appeal and cross-appeal. Ibid.

### CONCLUSION

The district court erred in ordering arbitration of the claims in the O'Connells complaint, other than the statutory claim, because Blue Cross failed to disclose the arbitration agreement as required by the Insurance Code and Regulations, because the O'Connells did not agree to arbitrate those claims, and because the O'Connells did not unequivocally waive their constitutional right to access to the courts.

RESPECTFULLY submitted this 8th day of June, 1998.

  
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JOHN D. O'CONNELL  
Attorney for Plaintiffs -  
Appellees/Cross-Appellants

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<sup>14</sup>Section 78-31a-16 states:

An award which is confirmed, modified, or corrected by the court shall be treated and enforced in all respects as a judgment. Costs incurred incident to any motion authorized by this chapter, including a reasonable attorney's fee, unless precluded by the arbitration agreement, may be awarded by the court. (Emphasis added).

CERTIFICATE OF MAILING

I hereby certify that on this 24 day of June, 1998, I mailed two true and correct copies of the foregoing REPLY BRIEF OF CROSS-APPELLANTS, by United States first class mail, postage prepaid, to Andrew Stone at Jones, Waldo, Holbrook & McDonough, 170 South Main, #1500, Salt Lake City, Utah 84101.



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A handwritten signature in dark ink, appearing to be "R. O. Stone", is written over a horizontal line.

## **ADDENDUM**

**Administrative Rule 590 – 122  
Permissible Arbitration Provisions**

and the application of such provision shall not be affected thereby

#### **R590-121-8. Dissemination.**

Each insurer or rate service organization is instructed to distribute a copy of this rule to all personnel engaged in activities requiring knowledge of this rule, and to instruct them as to its scope and operation

#### **References:** 31A-2-201

**History:** 9062, PRO, 03/01/88, 11853, AMD, see CPR, 11853, CPR, 10/01/91, 12466, AMD, 03/12/92, 15517, AMD, 04/06/94, 16307, AMD, 12/30/94

#### **R590-122. Permissible Arbitration Provisions.**

- R590-122-1 Authority
- R590-122-2 Purpose and Scope
- R590-122-3 Definitions
- R590-122-4 Rule

##### **R590-122-1. Authority.**

This Rule is promulgated by the commissioner of Insurance under the general authority granted under Section 31A-2-201(3), Utah Code Annotated, to adopt rules for the implementation of the Utah Insurance Code, and under Section 31A-21-201(2)(a)(iv) thereof, specifically authorizing the commissioner to disapprove insurance contract forms filed contrary to law

##### **R590-122-2. Purpose and Scope.**

This Rule recognizes the emergence of arbitration as a speedy and inexpensive method of alternative dispute resolution. The Rule is NOT intended to create procedural guidelines for the administration of arbitration proceedings once commenced. This rule is intended to

1 define the term "permissible arbitration provision" as set forth in Sections 31A-21-313(3)(c) and 31A-21-314(2), Utah Code Annotated,

2 provide guidelines upon which disclosure of a contract arbitration provision is to be made. This Rule is applicable to both individual and group contracts and to all classifications or lines of insurance

##### **R590-122-3. Definitions.**

For the purpose of this rule, the commissioner adopts the definitions as particularly set forth in Section 31A-1-301, Utah Code Annotated, and in addition thereto the following

1 Those certain definitions set forth in Section 78-31a-2, Utah Code Annotated of the "Utah Arbitration Act"

2 "Compulsory non-binding arbitration" means a contract provision requiring an insured to exhaust a procedure of extra-judicial arbitration as a condition precedent to the pursuit of an otherwise available judicial remedy

3 "Compulsory binding arbitration" means a contract provision requiring arbitration as an auto-

matic and exclusive remedy for any dispute involving a contract of insurance to the exclusion of any otherwise available judicial remedy provided that the claim or controversy exceeds the jurisdictional limit of the small claims court of the state where the action would be brought

4 "Optional binding arbitration" means a contract provision requiring any party to an insurance contract to submit to arbitration as set forth in such contract at the election of any contracting party, provided that the claim or controversy exceeds the jurisdictional limit of the small claims court of the state where the action would be brought

##### **R590-122-4. Rule.**

1 Compulsory non-binding arbitration is contrary to the public interest and is not a "permissible arbitration provision"

2 Optional binding arbitration at the exclusive election of an insured party is a "permissible arbitration provision," in which case the disclosure provisions in paragraph 5 below shall not be applicable

3 Both compulsory and optional binding arbitration at the election of either the insured or the insurer are "permissible arbitration provisions"

4 Policy forms containing optional binding arbitration provisions for the exclusive election of an insurer will be disapproved under Section 31A-21-201(2)(a)(iv). Such provisions in previously approved forms are declared not enforceable. They will be construed under Section 31A-21-107 and applied as if in compliance with the Insurance Code

5 Except as excluded in paragraph 2 above, each application or binder pertaining to an insurance policy which contains a permissible arbitration provision must include or have attached a prominent statement substantially as follows

ANY MATTER IN DISPUTE BETWEEN YOU AND THE COMPANY MAY BE SUBJECT TO ARBITRATION AS AN ALTERNATIVE TO COURT ACTION PURSUANT TO THE RULES OF (THE AMERICAN ARBITRATION ASSOCIATION OR OTHER RECOGNIZED ARBITRATOR), A COPY OF WHICH IS AVAILABLE ON REQUEST FROM THE COMPANY. ANY DECISION REACHED BY ARBITRATION SHALL BE BINDING UPON BOTH YOU AND THE COMPANY. THE ARBITRATION AWARD MAY INCLUDE ATTORNEY'S FEES IF ALLOWED BY STATE LAW AND MAY BE ENTERED AS A JUDGEMENT IN ANY COURT OF PROPER JURISDICTION

Such statement must be disclosed prior to the execution of the insurance contract between the insurer and the policy holder and, in the case of group insurance, shall be contained in the certificate of insurance or other disclosure of benefits

6 Both compulsory binding arbitration provisions and optional binding arbitration provisions shall not be construed to preclude any dispute resolution by any small claims court having jurisdiction

7 All arbitration provisions contained in insurance policies shall be in compliance with the "UTAH

ARBITRATION ACT" (Title 78, Chapter 31a, Utah Code Annotated).

8. Any such agreement for arbitration shall not obligate any insured to pay more than 50% of the advance payments required to begin the arbitration process.

This rule supersedes Bulletin 87-2.

**References:** 31A-21-201.

**History:** 14875, AMD, 12/23/93.

#### NOTES TO DECISIONS

##### **Effectiveness.**

Although § 31A-21-314 was amended in 1987 to allow insurance policies to contain permissible arbitration provisions, these provisions were not defined in the rules until 1988; however, this gap between the amendment and the rules did not mean that a binding arbitration provision could not be included in an insurance policy. (Former R540-122.) *Imperial Sav. Ass'n v. Lewis*, 730 F. Supp. 1068 (D. Utah 1990).

#### **R590-123. Additions and Deletions of Designees by Organizations.**

R590-123-1. Authority.

R590-123-2. Purpose.

R590-123-3. Rule.

R590-123-4. Penalties.

R590-123-5. Separability.

##### **R590-123-1. Authority.**

This rule is promulgated by the insurance commissioner under Sections 31A-2-201(3) and 31A-2-211(2), Utah Code Annotated (U.C.A.), to adopt rules to implement the provisions of the Utah Insurance Code, and specifically Sections 31A-23-215(2), U.C.A., authorizing the commissioner to establish by rule the form to be utilized by an organization when promptly reporting every change in the list of natural persons authorized to conduct business on behalf of the organization in this state.

##### **R590-123-2. Purpose.**

A. Organizations who conduct insurance transactions through natural persons in this state shall be licensed. The organization license shall identify the names of natural persons, also known as designees, authorized to act for the organization. Organizations are required to promptly report to the commissioner, *in detail and form prescribed by rule, every change* in their list of natural persons.

B. This rule is adopted for the purpose of stating the detail, form, and time by which an organization will either add or delete any natural person from their list of authorized designees who conduct business on behalf of the organization in this state.

##### **R590-123-3. Rule.**

A. Notice of addition or deletion of designees. All organizations shall file with the commissioner an Application For Amendment to Organization License which includes a section for changing the list

of natural persons authorized to conduct business on behalf of the organization in this state. The forms necessary to effectuate such changes are available through the Insurance Department.

1. Procedure for amending an organization license:

a. Complete the application for amendment to organization license and include the information concerning designees to be added or deleted.

b. The date entered on the form will be the effective date of the change.

c. File the completed form with the department within five working days from the effective date. If the form is not filed within the five day period, the effective date of the amendment will be the date the form is received by the insurance department.

B. Fees. The organization shall pay the statutory filing fees for all Organization License applications and amendments submitted to the department.

##### **R590-123-4. Penalties.**

Any organization that fails to comply with this rule will be subject to the forfeiture provisions set forth in Sections 31A-2-308 and 31A-23-216, U.C.A.

##### **R590-123-5. Separability.**

If any provision of this rule or the application of it to any person is for any reason held to be invalid, the remainder of the rule and the application of any provision to other persons or circumstances shall not be affected.

**References:** 31A-2-211, 31A-23-215.

**History:** 9276, NEW, 05/01/88; 14876, AMD, 12/23/93.

#### **R590-124. Loss Information Rule.**

R590-124-1. Authority.

R590-124-2. Purpose and Scope.

R590-124-3. Definitions.

R590-124-4. Rule.

R590-124-5. Penalties.

R590-124-6. Separability.

R590-124-7. Effective Date.

##### **R590-124-1. Authority.**

This rule is promulgated by the Insurance Commissioner pursuant to the general authority granted under Subsection 31A-2-201(3), Utah Code Annotated, to adopt rules for the implementation of the Utah Insurance Code and under Subsection 31A-23-302(8), U.C.A., authorizing the commissioner to define unfair methods of competition.

##### **R590-124-2. Purpose and Scope.**

(1) Accurate loss information is necessary in underwriting and rating insurance policies. The purpose of this rule is to provide for the prompt dissemination of loss information between insurers and their insureds.

(2) This rule applies to every authorized property and liability insurer licensed to do business in Utah writing those lines of insurance commonly identified as commercial property and commercial liability,