

1997

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

Utah Court of Appeals

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John D. O'Connell; Attorney for Appellees.

Andrew H. Stone; Jones, Waldo, Holbrook & McDonough; Attorneys for Appellant.

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 970361-CA

IN THE UTAH COURT OF APPEALS

JOHN D. O'CONNELL and ANN	:	BRIEF OF APPELLEES
O'CONNELL,	:	/CROSS-APPELLANTS
	:	
Plaintiffs and	:	
Appellees/Cross-Appellants,	:	
	:	
v.	:	Case No. 970361-CA
	:	
BLUE CROSS AND BLUE SHIELD	:	Priority No. 15
OF UTAH,	:	
Defendant and	:	
Appellant/Cross-Appellee.	:	

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

Andrew H. Stone
JONES, WALDO, HOLBROOK
Attorneys for Appellant
170 South Main Street
Salt Lake City, Utah 84145

JOHN D. O'CONNELL, Bar #2443
Attorney for Appellees and
Cross-Appellants
39 Exchange Place, #200
Salt Lake City, Utah 84111
Telephone: (801) 532-5835

FILED

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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Andrew H. Stone
JONES, WALDO, HOLBROOK
Attorneys for Appellant
170 South Main Street
Salt Lake City, Utah 84145

JOHN D. O'CONNELL, Bar #2443
Attorney for Appellees and
Cross-Appellants
39 Exchange Place, #200
Salt Lake City, Utah 84111
Telephone: (801) 532-5835

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Section 78-31a-4, Utah Code	7,9,20

IN THE UTAH COURT OF APPEALS

JOHN D. O'CONNELL and ANN O'CONNELL,	:	BRIEF OF APPELLEES /CROSS-APPELLANTS
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Plaintiffs and Appellees/Cross-Appellants,	:	
	:	
v.	:	Case No. 970361-CA
BLUE CROSS AND BLUE SHIELD OF UTAH,	:	Priority No. 15
	:	
Defendant and Appellant/Cross-Appellee.	:	

STATEMENT OF JURISDICTION

Appellees/cross-appellants, hereinafter "O'Connells", agree with the appellant's statement as to jurisdiction, Brief of Appellant at 1, with the addition that the August 8, 1997, Order of this Court also indicated that the O'Connells' cross-appeal was properly before this Court.

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

A. Issues on Appeal and Cross-Appeal

The issues involved in the appeal and the cross appeal are essentially the same and the discussion throughout this brief applies to both the appeal and cross-appeal except where noted in Subsections 2 and 3 of Point II and in Point III of the Details of the Argument. Those issues are:

1. To which arbitration language, contained in the various documents relied upon by Blue Cross/Blue Shield of

Utah ("BCBSU"), did the O'Connells agree in writing.

This issue was raised by the O'Connells throughout the exchange of memoranda below. See R-5-7, R-113-114, R-123-125, R-225-227.

2. Did the district court correctly interpret the language of the arbitration agreement in determining which disputes, if any, were subject to arbitration, and which disputes, if any, were not.

The issue as to the scope of the disputes covered by the arbitration agreement was raised by both parties throughout the exchange of memoranda below and was particularly addressed by the O'Connells at R-121-122, 124, R-194-195, R-229. The issue as to whether the O'Connells in that agreement unequivocally waived their constitutional rights to legal remedies and access to the courts was raised at R-46, 50-52, 115.

3. Should The District Court be Directed to Award a Reasonable Attorney's Fee for the District Court Proceedings and This Appeal.

This issue was not raised in the district court or in this Court until the Conclusion of BCBSU's Brief of Appellant.

B. Standards of Review

Factual findings underlying arbitration issues are

reviewed under a clearly erroneous standard, Buzas Baseball v. Salt Lake Trappers, 925 P.2d 941, 948 (Utah 1996), while interpretation of the arbitration agreement language is a legal conclusion which is reviewed without deference to the trial judge's interpretation. Ibid.; Docutel Olivetti Corporation v. Dick Brady Systems, Inc., 731 P.2d 475, 479 (Utah 1986).

DETERMINATIVE LAW

Article I of the Constitution of Utah provides in relevant part:

Sec. 11 [Courts open - Redress of injuries.]

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

The Utah Arbitration Act, as published in the Utah Code Annotated, provides in relevant parts:

78-31a-3.

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.

78-31a-4.

(1) The court, upon motion of any party showing the existence of an arbitration agreement, shall order the parties to arbitrate. If an issue is raised concerning the existence of an arbitration agreement or the scope of the matters covered by the agreement, the court shall determine those issues and order or deny arbitration accordingly.

(2) If an issue subject to arbitration under the alleged arbitration agreement is involved in an action or proceeding pending before a court having jurisdiction to hear motions to compel arbitration, the motion shall be made to that court. Otherwise, the motion shall be made to a court with proper venue.

(3) An order to submit an agreement to arbitration stays any action or proceeding involving an issue subject to arbitration under the agreement. However, if the issue is severable from the other issues in the action or proceeding, only the issue subject to arbitration is stayed. If a motion is made in an action or proceeding, the order for arbitration shall include a stay of the action or proceeding.

(4) Refusal to issue an order to arbitrate may not be grounded on a claim that an issue subject to arbitration lacks merit, or that fault or grounds for the claim have not been shown.

STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal and cross-appeal of a series of orders that ultimately granted in part and denied in part the defendant BCBSU's motion to compel arbitration of the issues raised by the O'Connells' Complaint. The O'Connells brought this legal action seeking equitable relief and damages because BCBSU canceled their long-standing group health

insurance for reasons of health. Their complaint alleged that BCBSU breached the applicable subscriber agreement and a another, separate and specific, oral and written agreement and violated a constructive duty of fair dealing. In the alternative, the O'Connells' complaint sought equitable relief and damages because the individual conversion policy, provided by BCBSU to the O'Connells upon termination of the group policy, failed to conform to the requirements of the terminated subscriber agreement and the premiums BCBSU demanded were based upon the O'Connells' health history in violation of the state insurance statutes. R-1-8.

B. Course of the Proceedings

The defendant, BCBSU, responded to the O'Connells' Summons and Complaint by bringing a motion to compel arbitration. R-9-11. During the protracted exchange of memoranda on the motion (R-12-180), BCBSU asserted that the O'Connells had agreed to arbitrate all their claims and at various stages proposed a number of different documents as evidence of that agreement, upon some of which BCBSU at this point no longer appears to be relying. The O'Connells in their memoranda, supported by affidavits, disputed that they had read or even received some of these documents or that BCBSU was bound by others and alleged that the arbitration agreement contained within the "Application" which Ann

O'Connell signed in 1993 should not be construed to cover the various causes of action asserted in their Complaint. R-46-61; 112-126; 127-134. BCBSU ultimately supported some of its factual claims with affidavits attached to Defendants Reply to Plaintiff's Supplemental Memorandum in Opposition. R-172-177.

After hearing the oral arguments of the parties, the district court entered the Court's Ruling of October 8, 1996, granting BCBSU's motion to compel arbitration. R-183-191. (Addendum A). The district court at that time found that the O'Connells were not bound by arbitration language that was contained within an endorsement, that BCBSU claimed it had sent to all subscribers in 1986, because there was nothing in the record showing that the O'Connell's had read or even received it and a unilateral pronouncement by one of the parties could not constitute an agreement to arbitrate. R-186. (Addendum, A-4). However, the district court did find that the O'Connells had agreed to arbitrate because of the "clearly worded and unambiguous" arbitration language contained within the "Application" signed by Ann O'Connell in September 1993. Ibid. (That "Application" is attached in Addendum D). The district court further found that, because BCBSU had rejected a later "Application" that was signed by John O'Connell, the arbitration language in that document

could not constitute a mutual agreement to arbitrate. R-187 (Addendum, A-5). The district court stated that it did not reach the issue of whether the Subscriber Certificate, that BCSCU claimed it sent to the O'Connells, "also provided plaintiffs with additional notice of BCSCU's arbitration policy." Ibid.

The O'Connells thereafter timely moved to amend or clarify the Court's Ruling of October 8, 1996. Following a further exchange of memoranda, the district court issued its Court's Ruling of December 18, 1997, in which it found that the arbitration language in the "Application", to which the court had found the O'Connells agreed, "does not extend to any existing controversy, it is specifically limited to matters 'concerning the applicability of, or benefits payable under the subscriber agreement.'" R-206 (Addendum, B-3). The court further found that one of the O'Connell's alternative claims--the claim that the individual conversion policy, that BCBSU furnished to the O'Connells upon termination of their group coverage, did not conform to the insurance statutes--was not within the scope of the terms of the agreement to arbitrate. Ibid. Therefore, the court, pursuant to the Utah Arbitration Act, Section 78-31a-4(3), severed the statutory compliance issue from those to be arbitrated. Ibid.

BCBSU timely filed a motion to reconsider and a

supporting memorandum in which it once again invoked the broader arbitration language contained within the Subscriber Certificate, in addition to that within the "Application" signed by Ann O'Connell, and requested that the court order all issues in the litigation be arbitrated. R-210-211.

C. Disposition in the Court Below

In the Court's Ruling of April 8, 1997, the district court's ruling on BCBSU's motion to reconsider and its final ruling on the motion to compel arbitration, that court "once again" found "that the application signed by the plaintiff, Ann O'Connell, does not provide for arbitration of the plaintiff's independently arising statutory rights pursuant to Utah Code Section 31A-22-701-718." The court stated further:

Furthermore, the Court would clarify that its decision to sever the instant matter from arbitration does not stem from a lack of faith in the merits of arbitration, or any hesitancy to have an arbitrator hear matters involving statutory interpretation. Rather, the Court's decision is based on its belief that it is not appropriate to arbitrate an issue concerning an independently arising statutory right which was not addressed by the arbitration provision contained within the defendant's insurance application.

R-249 (Addendum C-2). The court ordered BCBSU to "file an Answer within ten (10) days addressing those issues in the plaintiff's Complaint concerning statutory claims they might have under Utah Code, Section 31A-22-701-718." The district

court, citing Section 78-31a-4(3) of the Utah Arbitration Act, stayed the arbitration, rather than the litigation, as to the other issues. Ibid..¹

D. Relevant Facts

In order to determine which of the disputes involved in this litigation, if any, the O'Connells agreed to arbitrate, it is necessary to understand the sequence of events, the nature of the O'Connells' claims and their factual and legal underpinnings, and the various documents claimed by BCBSU to constitute the "written agreement" by the O'Connells to arbitrate each of those claims.

The O'Connells have continuously carried health insurance provided by BCBSU for over twenty years and, perhaps, for as long as twenty-seven years, and paid many thousands of dollars in premiums to BCBSU.² R-1. A critical

¹The O'Connells had informed the trial court that the proper procedure under the statute, Sec. 78-31a-4(3), where issues have severed, is to stay the court proceedings as to the matters to be arbitrated and order the defendant to answer the complaint as to the other claims. R-230, 231. BCBSU, while opposing any severance of the issues, took no position regarding whether the arbitration or the litigation should be stayed if the issues were severed. Since the statute clearly provides for staying the litigation as to the issues to be arbitrated, the O'Connells believe that the trial court simply misspoke itself and inadvertently stayed the arbitration instead. BCBSU brought this appeal before the apparent mistake could be brought to the trial court's attention.

²The O'Connells alleged that they had carried the insurance with BCBSU for over twenty years and BCBSU does not appear to dispute that. See App. Br. at 3. The O'Connells

condition of that coverage, as it is with any health insurance coverage, was BCBSU's agreement not to terminate coverage by reason of any condition of the O'Connells' health. R-1. Ann O'Connell suffered a serious illness in 1989 and her medical bills for that year exceeded the deductible on the health policy and BCBSU had to actually pay money out.³

Prior to September 1993, the O'Connells had obtained their coverage from BCBSU through the Utah State Bar. In 1993, the O'Connells discussed with BCBSU changing their coverage from the Bar group to the Rowland Hall\St. Mark's School group because Ann O'Connell was then employed there on a year-to-year contract. Because of her 1989 illness, and the importance of maintaining continuity of coverage over the long-term, Ms. O'Connell sought and obtained oral and written assurances from BCBSU that transfers back and forth between

intended to explore the actual length of the relationship in discovery but believe it began in 1970 when John O'Connell went into private practice. The O'Connells seek to continue that relationship because, like most Americans who are past middle age and not employed by an economically powerful entity, they are without any other choice. R-129.

³The O'Connells alleged in their complaint that BCBSU effectively terminated their insurance for reasons of health in a 1995 letter in which BCBSU based its action upon "your claims history and/or your current health" (R-3) but, at that time the O'Connells were unaware of whether BCBSU was motivated by Ann O'Connell's health problems in the late 1980's or John O'Connell's health problems in 1994, that also cost BCBSU some money, or perhaps both. The O'Connells intended to explore this question in discovery but will accept BCBSU's representation in its brief that BCBSU rejected the O'Connells' resubscription in 1995 "based on Mrs. O'Connell's medical history." App. Br. at 5.

different BCBSU groups would not involve medical underwriting and that time in a previous BCBSU group would be credited to time in the new group. That is, BCBSU agreed that converting from one BCBSU group to another would not constitute becoming a new applicant and BCBSU would allow such transfers back and forth without regard to health history and without a period of exclusion for pre-existing conditions, conditions ordinarily imposed upon new applicants for BCBSU's insurance coverage. R-2, R-128. It is the violation of this specific oral and written agreement, separate and apart from any of BCBSU's printed subscriber certificates or health agreements,⁴ which constitutes the basis for the O'Connells' primary claim against BCBSU and which the O'Connells believe is the furthest outside the scope of any arbitration agreement.

Relying upon the aforementioned assurances by BCBSU and following the instructions of BCBSU's agent, Ann O'Connell signed and submitted the September 1993 "Application" and cancelled the Bar group coverage to effectuate the agreed-upon transfer of BCBSU's continuing health coverage from the Bar group to the Rowland Hall group. R-2, R-127. It is this application which contains the arbitration language, in the

⁴None of BCBSU's printed documents specifically address the question of whether or not subscribers can transfer BCBSU's health coverage between groups, or at least do not do so in any understandable form.

midst of the finely-printed boiler-plate above the signature, that the district court found to constitute the O'Connells' written agreement to arbitrate. R-186, R-205-206, R-248. (A copy of the "Application" appears in Addendum D.)

BCBSU claims that it sent to Ann O'Connell, at some unknown time after she submitted the 1973 "Application",⁵ a Subscriber Certificate that BCBSU calls the "Rowland Hall-St. Marks Health Agreement" throughout its Brief. ⁶ The

⁵The affidavit submitted by BCBSU does not say when the Type 5E4 certificate was sent--just that it "was sent to the subscriber after being enrolled for the policy issued through St. Mark's Rowland Hall"--and it does not say whether BCBSU has a specific record of it being sent to the O'Connells or whether the affiant based her conclusion on a general practice. R-174. The copy of the Type 5E4 certificate, that BCBSU submitted to the district court along with the affidavit, has "updated 6-94" hand-written on the cover (R-163) which would make it questionable that it was sent to the O'Connells, if it at all, much before Ann O'Connell's employment at Rowland Hall terminated in August, 1994. Ann O'Connell submitted an Affidavit in which she stated that the Subscriber Certificate that she had in her file was a Type 4M-ML rather than the Type 5E4. R-129. The O'Connells asserted that the introduction to the arbitration language in the Type 4M-ML was different from that in the Type 5E4 and more consistent with their interpretation of the arbitration language in the "Application." R-124-125, see "D Member Grievance Procedure", R-133.

⁶The document itself, which BCBSU introduced into the record at R-163 is entitled "Subscriber Certificate for Group Medical Benefits, Type 5E4." Considerable confusion is caused by BCBSU's habit of inconsistently interchanging the terms: "policy", "subscriber certificate", "health agreement" and "subscriber agreement." BCBSU's practice of not placing the date and using codes rather than group titles on its documents causes even more serious confusion. For example, even if BCBSU had sent the Type 5E4 certificate to the O'Connells, there would have been no way the O'Connells could tell by looking at the documents whether the Type 5E4 or 4M-4ML was the applicable document for a particular group or period. In the district court, BCBSU attempted to explain the system of identifying its documents in a employee's affidavit with questionable success. See R-172-175. This encrypted identification system of course is of no use to the subscribers.

O'Connells stated by Affidavit of Ann O'Connell that she had a different version of that subscriber certificate in her file and, in any event, had not read either version of the subscriber certificate.⁷ R-129. BCBSU never claimed that Ann O'Connell had a subscriber certificate for the Rowland Hall group in her possession at the time that she signed the "Application" in September 1993,⁸ and there is no evidence whatsoever in the record that either of the O'Connells ever indicated in writing that they agreed to the arbitration terms contained therein.

Ann O'Connell's employment at Rowland Hall terminated in August 1994, but the Rowland Hall group coverage continued for a period by operation of federal law. R-3. The O'Connells then requested a transfer of their BCBSU coverage back to the State Bar group. BCBSU had John O'Connell submit another "Application" which it subjected to medical underwriting and rejected for medical history reasons in breach of the specific promises it made when it induced the O'Connells to leave the Bar group in September 1993, and despite the fact that the medical history it found unacceptable apparently occurred while the O'Connells were

⁷See note 5, supra.

⁸BCBSU claims that the Type 5E4 Subscriber Certificate (the Rowland Hall Subscriber Agreement) "was sent to the subscriber after being enrolled for the policy issued through St Mark's Rowland Hall." R-174.

members of the Bar group a number of years before.⁹ Thus, BCBSU effectively cancelled the O'Connells long-standing, continuous health insurance coverage because of a change in condition of health which occurred while the O'Connells were covered by BCBSU's non-cancelable insurance.

Because the O'Connells were terminated from the Rowland Hall group and BCBSU reneged on its promise to allow them to transfer back to the Bar group, and because it is virtually impossible to obtain health insurance elsewhere after one has been refused coverage for health reasons (R-129), the O'Connells were forced, after the filing of this action and under protest, to convert their coverage to a BCBSU individual policy. In their Complaint, the O'Connells alleged that BCBSU agreed, in the Subscriber Certificate for the Rowland Hall group, to provide individual coverage upon termination of the group coverage without evidence of insurability or without conditions pertaining to health at

⁹See note 3, supra. BCBSU represents, in the Brief of Appellant at note 2, that due to a change in federal law, the O'Connells can now obtain coverage through the Bar group without respect to health condition. BCBSU made this same representation to the O'Connells in a letter, but when the O'Connells made further inquiry, BCSU's attorney of record replied in a letter, dated September 30, 1997: "However the Bar policy now has annual enrollment periods, so absent a special enrollment period, you would not be able to obtain Bar coverage until May 16, 1998." (Emphasis added). Even if BCBSU does not change its policy between now and May, and the O'Connells do obtain coverage through the Bar, that would not moot the cause of action for breach of the agreement to allow the O'Connells to transfer back to the Bar group because the O'Connells' claim for foreseeable, consequential damages (R-5, 8), would remain.

rates reasonably related to age or class of risk other than risk due to health condition. R-3-4. The Complaint also alleges that the Utah Insurance Code, Sections 31A-22-704 through 717, mandated such an individual conversion policy and prohibited basing the premium of a conversion policy upon conditions related to health. Ibid. The O'Connells alleged that the conversion policy offered to them (and since provided) failed to conform to the subscriber certificate and also violated the Utah Insurance Code. The O'Connells sought relief for these causes of action in the alternative to the relief sought for the refusal to allow the O'Connells to transfer back to the Bar group. R-3-4, 6-7.

SUMMARY OF THE ARGUMENT

The district court found that the O'Connells agreed to the narrow arbitration language contained within the "Application" signed by Ann O'Connell in September 1993. BCBSU argues that the O'Connells should also be bound by the broader language appearing in the Type 5E4 (Rowland Hall) Subscriber Certificate. However, there is no indication whatsoever in the record that the O'Connells had read that document prior to this dispute arising or had ever agreed to its contents.

Utah law favors enforcing arbitration agreements, but

only where the party moving to compel arbitration can show that the other party unequivocally waived the constitutional rights to legal remedies and access to the courts and agreed in writing to arbitrate the dispute in question. BCBSU failed to prove that the O'Connells agreed in writing to any arbitration language other than the narrow language in the "Application" and the district court's finding on this underlying factual issue should not be disturbed.

The arbitration language in the "Application" was contained within an adhesion contract and therefore should be interpreted against the insurance company that drafted it and as an ordinary purchaser might reasonably understand it. The district court correctly interpreted that language to not require arbitration of the O'Connells' claim that BCBSU's conversion policy failed to conform to the State Insurance Code.

The district court incorrectly interpreted the arbitration language, which by its terms applied only to disputes between the insureds and the carrier or medical providers "concerning the applicability of, or benefits payable under the Subscriber Agreement," to cover all the rest of the O'Connells claims. That language in context might reasonably be understood by an ordinary purchaser of insurance to refer to disputes regarding what medical procedures are covered by the insurance and the extent to

which medical provider's fees would be paid.

The O'Connells' causes of action that BCBSU breached a specific promise, made separately from the subscriber agreement, to allow them to transfer between BCBSU groups, and violated the long standing guarantee against cancelling the insurance for health reasons and the constructive duty of fair dealing which arose out of the long-term relationship, do not raise disputes "concerning the applicability of, or benefits payable under the Subscriber Agreement." The O'Connells' claims, that BCBSU breached the subscriber agreement itself by cancelling their long-standing health insurance and failing to provide a comparable individual conversion policy at reasonable rates, are not claims that an ordinary purchaser might reasonably understand as being disputes between the purchaser or medical providers and the carrier concerning "the applicability of or benefits payable under the Subscriber Agreement." Furthermore, as to all of their claims, the arbitration language in the "Application" does not unequivocally show that Ann O'Connell waived the O'Connells' constitutional rights to their legal remedies and access to the courts.

BCBSU failed to raise its request for attorney's fees below. Attorney's fees are discretionary and should not be awarded to BCBSU in this instance.

DETAILS OF THE ARGUMENT

Point I: The Only Arbitration Language That The O'Connells Could Have Agreed to Was That Contained in The 1993 "Application."

The district court found that the O'Connells were bound by the relatively narrow arbitration language contained within the "Application" signed by Ann O'Connell in September 1993. However, BCBSU continues to assert that the O'Connells are also bound by the broader arbitration clause contained within the Type 5E4 Subscriber Certificate (R-162, 165) which BCBSU calls the "Rowland Hall-St. Mark's Health Agreement."¹⁰ The O'Connells disputed that they had read this document and questioned that they had even received a copy before this dispute arose. R-129, 225-226; See note 5, supra. More importantly, there is no indication whatsoever in the record that the O'Connells ever agreed to the arbitration language within this document or had a copy of it in their possession at the time Ann O'Connell signed the "Application" in September 1993.

The district court stated, at one point, that it did not

¹⁰See note 6, supra. BCBSU does not challenge, in the Brief of Appellant, the district court's rejection of BCBSU's attempts below to rely upon the arbitration language contained in other documents as constituting the O'Connells' agreement to arbitrate.

reach the issue of whether the Subscriber Certificate also provided the O'Connells with additional notice of BCBSU's arbitration policy. R-187. However, the district court went on to make it clear that it was holding the O'Connells only to the more limited language of the "Application." R-187-188, 206, 248-249 (Addenda A, B & C). The district court did so despite BCBSU's repeated invocation of the broader language in the Type 5E4 Certificate. R-139, 143, 210-211.

The district court did not find that the O'Connells had actually received the Type 5E4 Subscriber Certificate; nor could it have done so based upon the affidavits in the record.¹¹ However, even if there were some evidence that the O'Connells had received a Type 5E4 Subscriber Certificate while they were enrolled in the Rowland Hall group, that evidence would not compel a factual finding that the O'Connells had agreed in writing to the broad arbitration language within that document. As the district court correctly stated with regard to the language within another document that BCBSU claimed it sent to its subscribers in

¹¹ The district court at one point stated that the O'Connells were mailed a subscriber certificate (R-184), but that court did not make a finding as to what version was sent or when it was sent or that it was received by the O'Connells who raised questions as to all those matters. See note 5, supra. The O'Connells continued to dispute the fact that they had received the Type 5E4 certificate (R-225-226), relying upon Ann O'Connells' previously filed Affidavit. R-127, 129.

1986:

Because the record does not reflect whether plaintiffs read or even received the 1986 Endorsement, the Court cannot find that it bound them to arbitration. At the very least, some written agreement or document of understanding must exist between two parties in order to compel arbitration. Utah Code Ann. 78-31a-3 (1992). This Court finds that the unilateral proclamation or amendment mailed by one party to the other in this case did not constitute an agreement to arbitrate.

R-186.

The Utah 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 making a motion to compel arbitration must show the existence of that written agreement. Section 78-31a-4(1), Utah Code. The Arbitration Act also provides a mechanism for determining the scope of the issues covered by the arbitration agreement and for severing those so covered from the ones not covered. Section 78-31a-4, Utah Code.

There is no question but that BCBSU is correct that Utah law favors arbitration and provides for enforcement of arbitration agreements. Lindon City v. Engineers Const. Co., 636 P.2d 1070 (Utah 1981). However, it is written agreements to arbitrate which are freely and mutually entered into between the parties, and not unilateral pronouncements of just one of the parties, that Utah law enforces. In Lindon City, supra at 1073, the Utah Supreme Court quoted with a

approval the Washington appellate court in King County v. Boeing Co, 570 P.2d 713 (Wash. App. 1977), to the effect that arbitration clauses should be construed liberally. BCBSU cited to that quotation in its Brief of Appellant at p. 15. However, it must be noted that that quotation contains an important qualification:

Arbitration is a contractual remedy for the settlement of disputes by extrajudicial means. It is a remedy freely bargained for by the parties, and "provides a means of giving effect to the intention of the parties, easing court congestion, and providing a method more expeditious and less expensive for the resolution of disputes." There is a strong public policy in favor of such a remedy, but it should not be invoked to resolve disputes that the parties have not agreed to arbitrate.

636 P.2d at 1073. Furthermore, the Utah Supreme Court, in Lindon City, supra, also stated:

Under Article I, Section 11 [access to courts and remedy by law] 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 [Footnotes deleted, bracketed material and emphasis added].

Thus, it is not simply a question of whether or not BCBSU provided the O'Connells with some notice of BCBSU's arbitration policy. The party moving to compel arbitration must prove that the other party unequivocally waived her legal remedies and right to access to the courts and agreed

in writing to arbitrate the dispute in question. The district court found that the O'Connells agreed to the arbitration language in the "Application." However, BCBSU simply failed to prove in the district court that the O'Connells agreed to the broader arbitration language in the Type 5E4 Subscriber Certificate (the version of the "Rowland Hall-St. Marks Health Agreement" relied upon by BCSU in its Brief). This is an underlying factual matter rather than a question of interpretation. Surely, it was not clearly erroneous of the district court to decline to find on this record that the O'Connells had agreed to the writing in the latter document.

Point II: The District Court Correctly Interpreted the Arbitration Agreement to Not Apply to the Statutory Claim But Incorrectly Interpreted it to Apply to the Other Claims and to Constitute a Waiver of Legal Remedies and Access to the Courts.

The arbitration language in the "Application", to which the district court found the O'Connells agreed, 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.

R-162 (Addendum D). On its face, this language clearly does

not constitute an agreement to arbitrate any dispute between the parties, nor does it constitute an agreement to arbitrate any dispute touching upon or related in any way to the subscriber agreement. It is limited in scope to disputes between the O'Connells and the Plan (presumably BCBSU) or the medical providers "concerning the applicability of, or benefits payable under the Subscriber Agreement."

Ann O'Connell in her Affidavit, submitted below (R-127-128), stated that she would interpret the arbitration language in the "Application" to apply to disputes as to whether a particular medical bill would be paid and not that she would have no recourse to the courts and to a jury if BCBSU cancelled the insurance or refused transfer between groups for health reasons. She stated further that she would not have understood "binding arbitration" to mean that the decision of the arbitrator would be final and unreviewable by a court even if legally or factually wrong. It is submitted that Ann O'Connell's interpretation is the more correct interpretation or, at the least, is an interpretation that an ordinary purchaser of insurance could reasonably come to in the circumstances. It would not be unreasonable for such a person to believe that when the application for health care insurance spoke of disputes between the patient, the medical providers and the health insurance plan "concerning the applicability of, or benefits payable under the Subscriber

Agreement" it contemplated disputes about such questions as what medical procedures were covered by the health plan, what doctor's or hospital fees were reasonable, how much of those fees are payable by the patient and how to compute the deductibles.

1. Principles of Interpretation

In Lindon City v. Engineers Const. Co., 636 P.2d 1070 (1981), the Utah Supreme Court stated that doubts about whether a claim is arbitrable should be resolved in favor of the parties freedom to contract and quoted the Washington Supreme Court to the effect that there is a strong public policy in favor of arbitration. 636 P.2d at 1072-1073. However, as discussed more fully in Point I, at 20-22, supra, that quotation in Lindon City specifically made that policy in favor of arbitration applicable only to disputes that the parties had actually agreed to arbitrate. The Lindon City decision also stated that waiver of the constitutional rights to legal remedy and access to the courts "should be expressed in the most unequivocal terms." 636 P.2d at 1074.

It is significant that the arbitration language in Lindon City was contained within a contract that was drafted in its entirety by the City which then refused to arbitrate when a dispute arose with a contractor. That is the opposite to that which occurred here, where the rather murky

arbitration language was placed within the boiler-plate of a document that was drafted by BCBSU, the party that is now seeking an expansive interpretation of that language.

In Docutel Olivetti Corporation v. Dick Brady Systems, Inc., 731 P.2d 475, 479 (Utah 1986), the Supreme Court reiterated the policy in favor of arbitration, "when the parties have agreed not to litigate" citing and quoting Lindon City, supra. As in Lindon City, the arbitration language involved in Docutel was drafted by the party attempting to avoid arbitration and therefore it was a simple matter to determine that that party had agreed to resolve the dispute by arbitration and had waived access to the courts. Furthermore, the Docutel decision held that, even if there was ambiguity regarding the scope of disputes covered by the arbitration agreement, that ambiguity should be resolved against the drafter:

Docutel drafted the agreement, and we interpret ambiguities in it against the drafter. Park Enterprises v. New Century Realty, 652 P.2d 918, 920 (Utah 1982). This principle of interpretation is particularly appropriate when, as here, the ambiguity could have easily been avoided. If Docutel had intended to exclude any provision from the arbitration clause, it could have done so simply by adding the phrase "except as provided in paragraph 10" to the arbitration clause.

731 P.2d at 479. In the instant case, BCBSU drafted the arbitration agreement and, if it wanted the O'Connells to waive their legal remedies and recourse to the courts and

have any future dispute between them and BCBSU submitted to private arbitration, it could have simply had the O'Connells sign a statement which clearly and unequivocally so stated.

While the "Application" for coverage is not itself an insurance policy, it should be interpreted under the same rules applicable to insurance policies because it was drafted by an insurance carrier and was not subject to negotiation between the customer and the carrier. Utah law recognizes that an insurance contract is a "classic example of an adhesion contract" which is prepared by attorneys for the company. There is usually no discussion of the terms. The terms would not be fully understood by the insured even if they were read. And it is presented on a take-it-or-leave-it basis without any bargaining. Therefore, "that interpretation is to be placed upon the words of the policy which is most favorable to the insured" and they "should be strictly construed against the insurer and in favor of the insured because they are adhesion contracts drafted by the insurance companies. . . . Because insurance policies are intended for sale to the public, the language of an insurance contract must be interpreted and construed as an ordinary purchaser of insurance would understand it." U.S. Fidelity and Guar. Co. v. Sandt. 854 P.2d 519, 521-523 (Utah 1993)

(Citing and quoting a long line of Utah cases).¹²

In Wheeler v. St. Joseph's Hosp., 63 Cal. App. 3d 345, 133 Cal. Rptr. 775 (1977), the California Court of Appeals held, in the alternative to a finding of unenforceability under that state's rules concerning conscionability, that the arbitration language in an agreement between a patient and a hospital was ambiguous and therefore not applicable to a malpractice action. The arbitration language there specified that it applied to "any legal claim or civil action in connection with this hospitalization, by or against hospital or its employees or any doctor of medicine . . ." 133 Cal. Rptr. at 779, n.2. The court said:

While to one trained in the law the clause "any legal claim or civil action" may fairly and reasonably be seen as including medical malpractice claims, an ordinary person, even if he read the paragraph, might well assume that it only related to disputes over hospital bills.

Ibid. at 790. The court went on to conclude:

Resolving the ambiguities in favor of the patient, the "ARBITRATION OPTION" should not extend to malpractice claims against "any doctor of medicine" absent some explanation to the patient

¹²In Sandt the Utah Supreme Court held that the carrier of an underinsured motorist policy could not reduce the amount payable by the amount paid by the responsible party's liability insurance carrier in spite of a provision stating: "[T]he limit of liability shall be reduced by all sums paid . . . on behalf of persons . . . who may be legally responsible." The court found ambiguity was introduced by another provision that states: "[A]ny insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance." 854 P.2d at 521.

at the time he signed the admission form of the intended scope to the arbitration provision. The evidence is uncontradicted that no such explanation was given in the instant case.

Ibid. at 791. A patient signing an arbitration agreement upon entering a hospital might be thinking in terms of payment problems rather than a legal action against a doctor for negligence. Even more likely, one purchasing health insurance would be thinking about disputes about what medical expenses the insurance will cover rather than anticipating a termination of the health insurance, yet alone, a breach of a separate promise or a violation of the Insurance Code by the insurance carrier. The arbitration language in the BCBSU "Application" is far narrower than that in Wheeler because, by its terms, it does not apply to "any legal claim or civil action" but only to disputes "concerning the applicability of, or benefits payable under the Subscriber Agreement."¹³ It is far more reasonable to believe that the latter language applied just to disputes concerning what medical procedures and expenses were covered by the health policy and whether or not they were fully reimbursable than it would be to conclude that "any legal claim or civil action" did not include malpractice actions.

¹³It must be borne in mind that it is undisputed that the O'Connells did not have a copy of the Rowland Hall Subscriber Agreement in their possession at the time that Ann O'Connell signed the "Application" so that the contents of the subscriber agreement could only have been a matter of speculation for her at that time.

Turning now to whether the particular claims made by the O'Connells in this litigation raise disputes that are within the scope of the arbitration language in the "Application", it should be borne in mind that the substantive validity of those claims is not now before this Court. The issues here are whether Ann O'Connell, by signing that "Application," agreed to arbitrate each of those claims and unequivocally waived the O'Connells' constitutional rights to their legal remedies and access to the courts.

2. The Statutory Claim Involved in The Appeal

The district court was correct in finding that the O'Connells did not agree to arbitrate their claim that the conversion policy, furnished to the O'Connells after the termination of the Rowland Hall group policy, failed to meet the standards required by the Utah Insurance Code. Since that claim clearly does not come within the scope of the relatively narrower arbitration language within the "Application" because it does not directly concern "the applicability of, or benefits payable under the [Rowland Hall group] Subscriber Agreement", BCBSU must rely upon the broader arbitration language within the terminated Subscriber Agreement itself. BCBSU then strains to make the O'Connells' statutory claim one concerning the construction, interpretation, performance or breach of the Subscriber

Agreement in order to bring that claim within the scope of the that broader language. BCBSU attempts to do so by arguing that, because the Insurance Code requires that group insurance policies conform to the code and BCBSU puts the terms of its policy in its "Subscriber Agreement," any attempt to enforce the Code must be an attempt to enforce the "Subscriber Agreement."¹⁴

BCBSU's argument fails for two reasons. First, as shown in Point I of this brief, the district court did not find that the O'Connells had agreed to the broader arbitration language in the Subscriber Agreement. Second, it fails because the Code imposes a duty to provide a conversion policy that meets the Code whether or not the language in BCBSU's document describing the policy complies with the Code. Surely BCBSU cannot avoid its responsibility under the Code by ignoring the Code in drafting its documents. The duty to provide a conversion policy that meets the Code requirements arises by statute and arises independently of the language contained in the Subscriber Agreement itself. The O'Connells' right to a conversion policy that conforms to the Insurance Code would exist even if BCBSU had put nothing

¹⁴For this rather convoluted argument, BCBSU relies upon Sec. 31A-22-703, reprinted in Br. App. at 2, which requires that group insurance policies conform to the requirements of the rest of the Insurance Code. The right to a conversion policy at premiums set without regard to conditions of health is guaranteed in Sec. 31A-22-704 which in turn was relied upon by the O'Connells in their Complaint. R-3.

in its Subscriber Agreement concerning a conversion policy.

Furthermore, the fact that the Rowland Hall Subscriber Agreement may also impose a similar duty to provide a conversion policy does not make the O'Connells' separate claim, that the conversion policy provided by BCBSU does not conform to the Code, one for breach of that Subscriber Agreement, yet alone a claim concerning "the applicability of, or benefits payable under the Subscriber Agreement."

BCBSU also argues that because the O'Connells would not be entitled to a conversion policy under the Insurance Code had they not been previously covered by a group policy, their claim "necessarily presupposes" and "contemplates" the existence of a group policy and, therefore a "Subscriber Agreement". However, the O'Connells did not agree, by signing the "Application", to arbitrate any issue touching upon the Subscriber Agreement.¹⁵ BCBSU must do more than establish some remote nexus between the O'Connells' claim and the terminated Subscriber Agreement to remove the claim from the purview of the courts. Again, if BCBSU wanted the O'Connells to agree to arbitrate any dispute touching upon, or which "contemplates" the prior existence of, the

¹⁵Again the test is how an ordinary purchaser of insurance would interpret the arbitration language in the "Application" and such a purchaser would be unlikely to be contemplating the Insurance Code itself, yet alone, to be compelled to connect that Code to the terminated subscriber agreement by the logic of the "ERISA analogy" as suggested by BCBSU. See App. Br. at 14.

Subscriber Agreement, it could have had the O'Connells subscribe to language that clearly so stated.

3. The Claims Involved in the Cross-Appeal

The O'Connells, by way of their cross-appeal, assert that the district court erred in interpreting the arbitration language of the "Application" to apply to the rest of their claims. The O'Connells' primary claim, that BCBSU breached its separate oral and written promise to allow the O'Connells to transfer back and forth between groups, is clearly not a dispute "concerning the applicability of, or benefits payable under the Subscriber Agreement." That claim does not even touch upon the Rowland Hall Subscriber Agreement. It is based upon BCBSU's separate promises, made in telephone conversations and confirmed in writing, upon which the O'Connells relied when they transferred to the Rowland Hall group. Patently, neither the O'Connells request for equitable relief nor their claim for consequential damages for the anxiety foreseeably induced by BCSU's breach of this separate agreement are disputes "concerning the applicability of, or benefits payments under the Subscriber Agreement."¹⁶

¹⁶It is not at all clear whether BCBSU would agree that an arbitrator could award consequential damages for breach of an agreement separate from the Subscriber Agreement or whether BCBSU would contend that the arbitrator is limited to enforcing the Subscriber

Likewise, the O'Connell's claims, that BCBSU breached its long-standing promise to not terminate the coverage for health reasons and the constructive duty of fair dealing which arose out of the long term relationship, are not disputes "concerning the applicability of, or benefits payable under the [Rowland Hall] Subscriber Agreement." While it could argued that those claims might "touch upon" the Rowland Hall Subscriber Agreement because that agreement evidences a small portion of the long-term relationship and because that Subscriber Agreement also contained a similar guarantee against termination because of health condition, those claims nonetheless are not literally claims concerning the "applicability of, or benefits payable under the Subscriber Agreement." At the very least, those claims are not within the interpretation that an ordinary purchaser could reasonably place on that arbitration language, that is, that it applied only to disputes as to whether particular medical procedures are covered and the extent to which payments would be made to medical providers.

More problematic, perhaps, are the O'Connells' claims that BCBSU breached the Rowland Hall Subscriber Agreement by refusing to allow the transfer, by cancelling the group

Agreement itself and could only require payment of "benefits payable under the Subscriber Agreement" since that is the language used in the arbitration clause in the "Application".

coverage for health reasons and by failing to provide a reasonably comparable conversion policy, because those claims are based directly upon a breach of the terms of the Subscriber Agreement itself. Nonetheless, those claims are again not disputes that an ordinary purchaser would necessarily understand as falling within the arbitration language in the "Application", that is, disputes between the patient and the plan or the medical providers "concerning the applicability of, or benefits payable under the Subscriber Agreement."

4. Waiver of Constitution Rights as to All Claims

It is not clear whether BCBSU is claiming that the O'Connells have waived altogether any remedy not specifically provided in the Subscriber Certificate, such as their claim for consequential damages for breach of BCBSU's separate promise to allow the O'Connells to transfer back to the Bar group (R-5, 8), or whether BCBSU is merely arguing that all such claims should be decided by a private arbitrator.¹⁷ In either event, a waiver of the constitutional rights to legal remedies, access to the courts and jury trial would be involved. However, the arbitration language in the

¹⁷See note 16, supra.

"Application" utterly fails to meet the separate constitutional test of expressing "in the most unequivocal terms" that the O'Connells were waiving their rights to access to the courts and remedy by law guaranteed by Article I, Sections 7 and 11, Constitution of Utah. See, Lindon City v. Engineers Const. Co., 636 P.2d 1070, 1074 (Utah 1981). The arbitration language, quoted infra at 22, says not one word about giving up rights to legal remedies and access to court and jury, yet alone expressing that waiver "in the most unequivocal terms." It is instructive to compare this complete absence of any waiver notice in the fine print arbitration language of BCBSU's "Application" with the waiver notice which appeared in the very detailed and clear arbitration agreement in Sosa v. Paulos, 299 Utah Adv. Rep. 26, 27 (Sup. Ct. 1996)¹⁸:

**NOTICE: BY SIGNING THIS CONTRACT YOU ARE
AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE
DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING
UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE
ARTICLE 1 OF THIS CONTRACT.**

¹⁸In Sosa, the Utah Supreme Court adopted the two-stage test for finding an arbitration clause unenforceable because of unconscionability. The O'Connells are not now claiming that the arbitration agreement is unenforceable because it is unconscionable. They are saying that the language under which Ann O'Connell's signature appears did not contain a waiver of rights to legal remedies, access to the courts and jury trial and are suggesting how such a waiver might appear in order to be unequivocal.

It is respectfully submitted that the district court should have denied BCBSU's motion to compel arbitration with regard to all of the claims stated in the O'Connells complaint because those claims do not fall within the scope of the arbitration language to which the court found the O'Connells agreed and, further, because there was no clear and unequivocal waiver by the O'Connells of their constitution rights to legal remedy and access to the courts.

Point III: This Court Should Not Direct the District Court to Enter an Award for BCBSU's Attorney's Fee.

BCBSU asks this Court to direct the trial court to enter an award to it for reasonable attorneys' fees for the proceedings in the district court and for this appeal. BCBSU makes that request for the first time in the Conclusion of its Brief of Appellant and does so without citation to the record or argument other than a passing citation to Section 78-31-16 (1997). Since BCBSU did not make a request in the district court for attorney's fees in connection with the proceedings there, it is precluded from raising that matter for the first time on appeal. See, e.g., Sukin v. Sukin, 842 P.2d 922, 926 (Utah App. 1992).

Furthermore the statute relied upon by BCBSU makes the

matter discretionary with the court and the district court should have the option of deciding that the equities militate against awarding any attorneys' fees to BCBSU.¹⁹ Therefore even if the matter were timely and properly before this Court, the Court should not preclude the district court from exercising its discretion in the matter.


Since BCBSU fails to give any reasons for its requests, even for attorneys' fees in this Court, it is difficult for the O'Connells to provide counter-arguments. However, it should be noted that the O'Connells did not initiate the appellate process and that they believe that their arguments are sound and, even if they do not prevail, the issues are at the least close ones. The question of whether an Insurance Carrier may, in the manner that BCBSU has attempted to do so, unilaterally exempt itself from having important issues, including its statutory obligations, decided publicly in the courts is one of first impression in this jurisdiction. Awarding attorneys' fees to BCBSU in these circumstances will have a chilling effect and discourage consumers from attempting to settle legal questions of import to the public.

¹⁹The district court might conclude, for example, that an award for attorneys fees is inappropriate because BCBSU did not even raise the agreement and argument upon which it initially prevailed until its reply memorandum below and made a number of meritless arguments and confused the record with irrelevant documents.

CONCLUSION

BCBSU failed to establish that the O'Connells agreed in writing to any arbitration language other than the narrow language contained in the "Application." The district court correctly interpreted that language to exclude the O'Connells' statutory claim but incorrectly interpreted it to include the other claims made in the Complaint and to constitute a waiver of the O'Connells Constitutional rights to legal remedies and access to the courts. Accordingly, this Court should reverse the trial court's order granting the motion to compel arbitration as to any of the claims. In the alternative, this Court should remand with instructions to sever the issues that this Court finds should be arbitrated from those that it finds should not.²⁰

RESPECTFULLY submitted this 5th day of February, 1998.

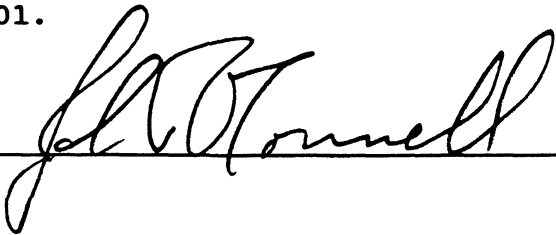


JOHN D. O'CONNELL
Attorney for Appellees/Cross-Appellants

²⁰If severance is ordered, the litigation should be stayed as to the matters to be arbitrated and arbitration and litigation should both go forward. See note 1, supra.

CERTIFICATE OF MAILING

I hereby certify that on this 5th day of February, 1998, I mailed two true and correct copies of the foregoing BRIEF OF APPELLEES/CROSS-APPELLANTS to Andrew H. Stone, Jones, Waldo & Holbrook, 170 South Main, Suite 1500, Salt Lake City, Utah 84101.



ADDENDA

Addendum A: Court's Ruling, October 8, 1996. R-183.

Addendum B: Court's Ruling, December 18, 1996. R-206.

Addendum C: Court's Ruling, April 8, 1997. R-248.

Addendum D; "Application", September 1993. R-162.

ADDENDUM A

Court's Ruling, October 8, 1996. R-183

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

JOHN D. O'CONNELL AND ANN O'CONNELL	:	COURT'S RULING
	:	
Plaintiffs,	:	Civil No. 960901038CV
	:	
BLUE CROSS AND BLUE SHIELD OF UTAH, a Utah corporation	:	Honorable Leslie A. Lewis
	:	
Defendant.	:	

This case concerns the plaintiffs' right to rejoin a medical insurance group policy. The matter came before the court for hearing on June 13, 1996, on defendant's Motion to Compel Arbitration. The Court heard argument on that date and took the matter under advisement. After a careful review of the pleadings, facts, law, and consideration of the oral argument, the Court grants the defendant's motion to compel arbitration.

FACTUAL AND PROCEDURAL HISTORY

The uncontroverted facts set forth in plaintiffs' and defendant's memoranda reflect that approximately fifteen years ago, Plaintiff, John O'Connell, began receiving health insurance coverage from Blue Cross Blue Shield of Utah ("BCBSU") through a group policy issued to members of the Utah State Bar ("USB"). Neither the Plaintiffs nor the Defendant have asserted that the initial health care policy include any provision requiring binding arbitration of disputes between BCBSU and its subscribers. However, in January of 1986, BCBSU modified its health care agreements by mailing its customers an endorsement

requiring future disputes between BCBSU and its subscribers to be settled through binding arbitration. (Defendant's Reply to Plaintiffs' Supplemental Memorandum, at 2).

In the late Summer of 1993, plaintiff, Ann O'Connell, contacted BCBSU and inquired about the possibility of changing from the USB group policy to the Rowland Hall St. Mark's ("RHSM") BCBSU group policy. Based upon a BCBSU's representative's assurances that changing group policies within the BCBSU system would not subject the plaintiffs to medical underwriting and that they would be credited for their enrollment time under the prior policy, plaintiffs cancelled the USB policy and switched to the RHSM group policy. (Complaint, at 2).

In order to make the switch to the RHSM group policy, plaintiff, Ann O'Connell, was required to fill out an application for membership. While plaintiff, Ann O'Connell, does not specifically remember reading nor filling out the application, she does recognize the signature on the application as her own. (Plaintiffs' Supplemental Memorandum in Opposition, at 2). After filling out the application, the plaintiffs were mailed a subscription certificate containing details of the RHSM policy. Plaintiffs coverage under the RHSM group policy started on October 1, 1993, and continues today under an individual conversion policy issued by BCBSU. (Defendant's Reply to Plaintiffs' Supplemental Memorandum, at 4).

In May of 1995, plaintiff, John O'Connell, attempted to switch coverage from the RHSM policy back to the USB policy. Plaintiff filled out a new Utah Bar BCBSU application but was subsequently denied coverage. Plaintiffs initiated legal action against the Defendant on February 12, 1996, alleging a breach of contract and statutory obligations to the plaintiffs. On March 4, 1996, defendant filed a motion to compel arbitration with the

Court. After receiving several memoranda regarding the motion to compel arbitration, the Court set the matter for a hearing on June 13, 1996. At the June 13 hearing the Court heard oral arguments from counsel and took the matter under advisement.

ISSUES

- I. Whether the plaintiffs assented to BCBSU's arbitration policy?
- II. Whether the BCBSU arbitration provision is valid?

LEGAL ANALYSIS

I. PLAINTIFFS ASSENTED TO BCBSU'S ARBITRATION POLICY.

The plaintiffs contend they never agreed to submit to BCBSU's arbitration policy. On the other hand, BCBSU asserts the plaintiffs either clearly assented, or are deemed to have assented, to arbitration and are estopped from arguing otherwise. In finding the plaintiffs did assent to binding arbitration, the Court has carefully examined each of the following documents or transaction between plaintiffs and defendants:

Plaintiff's Pre-1986 BCBSU Health Care Agreement

The facts of this case show that between the time plaintiffs first joined the BCBSU Bar Group Policy until the January 1986 Endorsement, plaintiffs were not aware of any agreement to arbitrate disputes with BCBSU. This is supported by all of the uncontroverted facts provided to the Court.

The January 1986 Endorsement to BCBSU Health Care Agreements

The Court finds the 1986 Endorsement to BCBSU Health Care Agreements did not constitute plaintiffs' agreement to arbitration. Because the record does not reflect whether plaintiffs read or even received the 1986 Endorsement, the Court cannot find that it bound them to arbitration. At the very least, some written agreement or document of understanding, must exist between two parties in order to compel arbitration. Utah Code Ann. 78-31a-3 (1992). This Court finds that the unilateral proclamation or amendment mailed by one party to the other in this case did not constitute an agreement to arbitrate.

The September 1993, RHSM Group Application and Subscriber Certificate

THE APPLICATION {
The Court next examines the September 1993, RHSM group application. This one-page application contains a standard arbitration provision placed directly over the area bearing the plaintiff, Ann O'Connell's signature. The Court finds the arbitration provision to be clear, plainly worded, and unambiguous. The Court also finds that by signing the application the plaintiff assented to BCBSU's arbitration policy.

Plaintiffs have argued that they should not be subject to 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. The case law is clear that a party has a duty to read and understand the terms of a contract before signing it. Hottinger v. Jensen, 684 P.2d 1271, 1274 (Utah 1984). In the instant case, the arbitration provision was contained within a one-page application and printed directly above the space bearing plaintiff Ann O'Connell's signature. The provision should have been read by the plaintiff and constituted a valid

- COURT FINDS THE
CERTIFICATE WAS IN
FACT MAILED

FACT of
law > agreement to arbitrate. After their application was accepted the plaintiffs were mailed a
subscriber certificate containing more detailed information about BCBSU's arbitration policy. } CERTIFICATE

Because we find the application constituted a valid agreement to arbitrate, the Court does not reach the issue of whether the subscriber certificate also provided plaintiffs with additional notice of BCBSU's arbitration policy

The May 1995, BCBSU Bar Group Application

The Court finds the May 1995, BCBSU Bar Group Application bearing plaintiff, John O'Connell's, signature did not constitute plaintiff's consent to submit to arbitration. Once again, the Utah Arbitration Act clearly states that a written agreement must exist in order to compel a party to arbitration. Utah Code Ann. 78-31a-3 (1992). Because BCBSU rejected the 1995 application which was submitted by the plaintiff there was no mutual assent, and thus no agreement to arbitrate. The Court finds that BCBSU is precluded from using the provisions of a rejected application as a means of compelling the plaintiffs to binding arbitration.

II. THE ARBITRATION PROVISION IN THE 1993 RHSM GROUP POLICY APPLICATION IS CLEARLY WORDED, UNAMBIGUOUS, AND THUS VALID.

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 . . .

Utah Code Ann. 78-31a-3 (1992).

Plaintiffs contend that because the arbitration provision in the 1993 RHSM application is inconspicuously positioned in fine print and contained within an adhesion contract, it ought

not be enforced. However, the determinative issue in this case is not whether the arbitration provision was contained in an adhesion contract or written in fine print, but whether the provision itself existed and is valid. For example, if an insurance contract's language is uncertain, ambiguous, or otherwise invalid, it will be construed in favor of the insured. American Casualty Co. v. Eagle Star Ins. Co., 568 P.2d 731, 734 (Utah 1977).

For contract language to be considered ambiguous it must be "capable of more than one reasonable interpretation because of 'uncertain meanings of terms, missing terms, or other facial deficiencies'." Wiengar v. Froerer Corp., 813 P.2d 104, 108 (Utah 1991). Furthermore, the court in United States Fidelity and Guarantee v. Sandt, 854 P.2d 519 (Utah 1993), determined that a "reasonable purchaser" of insurance standard should be used in determining whether an insurance policy provision is ambiguous. 854 P.2d 519, 523 (Utah 1993).

The arbitration provision in the 1993 RHSM group policy application was located directly above the line bearing plaintiff, Ann O'Connell's, signature, and 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 Court finds that the arbitration provision in the 1993 application was clearly worded, unambiguous, and not subject to more than one reasonable interpretation. The Court believes that a reasonable purchaser of insurance would be able to read the provision and easily understand that he/she was agreeing to submit any disputes to binding arbitration.

Plaintiffs have cited several cases from other jurisdictions where arbitration provisions contained within adhesion contracts were found to be ambiguous and thus unenforceable.

See Wheeler v. St. Joseph Hosp., 63 Cal. App. 3d 345, 133 Cal. Rptr. 775 (1976); Obstetrics and Gyns. v. Pepper, 693 P.2d 1259 (Nev. 1985); and Broemer v. Abortion Servs. of Phoenix, 840 P.2d 1013 (Ariz. 1992). Each of these cases involves a factual scenario where a patient was required to sign an arbitration agreement immediately prior to receiving medical treatment. A similar case was recently heard by the Utah Supreme Court in Sosa v. Paulos, 299 Utah Adv. Rep. 26 (1996).

In Sosa, the court refused to uphold an arbitration agreement which was signed by the plaintiff just one hour before she was operated on by the defendant. The plaintiff, who had already been undressed and was waiting in her surgical clothing, was handed three different forms, one of which was the agreement to submit any medical malpractice claim to arbitration. Id. at 26. The court found the arbitration agreement to be both procedurally and substantially unconscionable.

The Court, while carefully considering the reasoning set forth in the four cases cited above, finds the facts of the instant case to be significantly different. The common link between the above cases is that they involved the signing of an agreement to arbitrate which:

- was entered into immediately prior to receiving medical treatment,
- provided the patient with little or no time to reflect upon the terms and conditions of the agreement,
- involved plaintiffs who were in pain, or at least in a more vulnerable or susceptible mental state.

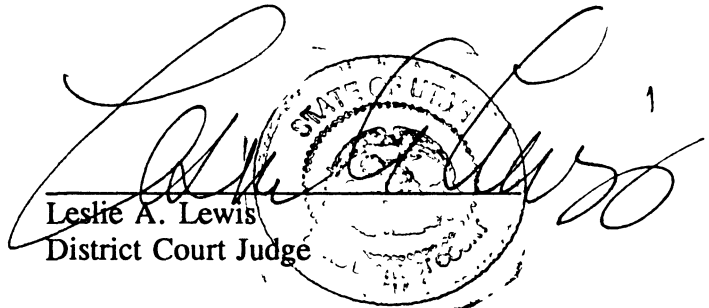
In contrast, the plaintiffs in the instant case were in a much different situation. They were not required to sign the arbitration provision as a prerequisite to receiving immediate care. In fact, plaintiffs themselves initiated the change from one medical plan to another.

There are no exigent circumstances of any type alluded to by the plaintiffs to justify or explain their present reading of the application. Additionally, in the instant case the plaintiffs were free to take as much time as was needed to examine and reflect upon the terms of the contract. The plaintiffs here were not forced to make a decision when they were in pain or a more vulnerable mental state commensurate with the plaintiffs in the cases cited above.

The Court finds the plaintiffs agreed to settle their claims with BCBSU through binding arbitration. The Court also rules that the arbitration provisions contained in the 1993 BCBSU application is valid and worded in a way a reasonable purchaser of insurance would comprehend. Furthermore, the Court also finds that no public policy grounds exist which would prohibit the resolution of this matter through binding arbitration. Therefore, defendant's motion to compel arbitration is granted.

Counsel for the defendant is to prepare Findings and an Order consistent with, but not limited to, this Ruling within ten days.

Dated this 8th day of October, 1996.

The signature of Leslie A. Lewis is written in cursive over a circular seal. The seal contains the text "STATE OF TEXAS" and "DISTRICT COURT". Below the signature, the text "Leslie A. Lewis" and "District Court Judge" is printed.

Leslie A. Lewis
District Court Judge

ADDENDUM B

Court's Ruling, December 18, 1996. R-206

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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JOHN D. O'CONNELL and,	:	COURT'S RULING
ANN O'CONNELL,	:	
Plaintiffs	:	
	:	Case No. 960901038
vs.	:	
	:	
BLUE CROSS AND BLUE SHIELD OF	:	Honorable Leslie A. Lewis
UTAH,	:	
Defendant.	:	
	:	
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This case concerns the Plaintiffs right to rejoin a medical insurance group policy. This case is before the Court on Plaintiff's Motion to Amend or Clarify the Court's October 8, 1996, *Ruling*. Having carefully considered the relevant facts, pleadings, and law, the Court grants Plaintiff's Motion to Amend or Clarify and modifies its judgment accordingly.

FACTUAL BACKGROUND

On October 8, 1996, this Court granted the defendant's Motion to Compel Arbitration in this case. The Court found that by signing the Rowland Hall Blue Cross application, the plaintiffs were bound by the arbitration clause contained within that application. On October 16, 1996, plaintiff moved to Amend or Clarify the Court's Ruling, asserting that plaintiffs' independent statutory right to appropriate medical coverage pursuant to Section 31A-22-707 is not subject to the arbitration clause in this case. Defendant filed a timely objection to the Motion, arguing that all the issues in this

case, including the statutory rights asserted by the plaintiff, are appropriate for arbitration. Plaintiff did not reply and submitted the matter for decision on October 28, 1996.

LEGAL ANALYSIS

The Utah Arbitration Act provides:

The court, upon motion of any party showing the existence of an arbitration agreement, shall order the parties to arbitrate. If an issue is raised concerning the existence of an arbitration agreement *or the scope of the matters covered* by the agreement, the court shall determine those issues and order or deny arbitration accordingly. (emphasis added)

Utah Code 78-31a-4(1).

The plaintiffs in this case assert that Utah Code Section 31A-22-707 requires the defendant to provide them with an individual insurance policy upon termination from their group policy. Plaintiffs argue that determining whether defendants have met this independent statutory obligation is not an appropriate issue for arbitration, rather it should be decided by this Court. Plaintiffs set forth two arguments in support of their contention: (1) they argue the language of the governing arbitration clause in this case does not provide for arbitration of their statutory claim, and (2) they contend that issues of statutory interpretation are best left to the Court and not to an arbitrator on public policy grounds.

Defendant argues that the plaintiffs statutory claim is appropriate for determination by an arbitrator. Defendant contends the Utah Arbitration Act gives broad authority for arbitrators to decide "any existing or future controversy."

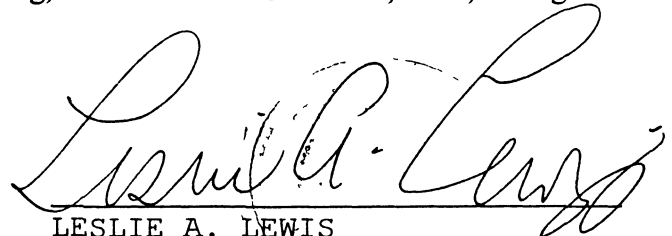
This Court notes that the arbitration clause in this case does not extend to *any* existing or future controversy, it is specifically limited to matters "concerning the applicability of, or benefits payable under the subscriber agreement." Despite defendant's argument that the conversion policy was "specifically referred to" in the subscriber agreement, the Court finds that the plaintiffs statutory right arises independently and is not covered by the arbitration clause.

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 judgement 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 provision 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.

In order to appropriately assess and determine whether defendant has met the obligations of sections 31A-22-701(-)718, the Court orders each counsel to prepare a supplemental memoranda addressing the issue of whether the conversion policy issued to the plaintiff, satisfies the requirements

of the statute. Plaintiff has 10 days from the receipt of this order to file a memorandum. Defendant has an additional 10 days to respond after receipt of plaintiffs' memorandum. Plaintiff is also to prepare a modified Order consistent with this Ruling, and the Court's October 8, 1996, Ruling.

Dated this 18th day of December, 1996.



LESLIE A. LEWIS
DISTRICT COURT JUDGE

ADDENDUM C

Court's Ruling, April 8, 1997. R-248

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JOHN D. O'CONNELL and	:	COURT'S RULING
ANN O'CONNELL,	:	
Plaintiffs,	:	CASE NO. 960901038
vs.	:	
BLUE CROSS AND BLUE SHIELD	:	
OF UTAH,	:	
Defendant.	:	

This case is before the Court on defendant's Motion to Reconsider this Court's December 18, 1997, Ruling. Having carefully considered the applicable law, facts, and counsels' Memoranda, the defendant's Motion is denied.

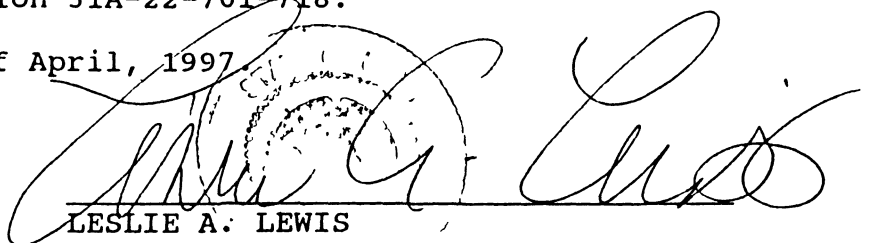
Once again, the Court finds that the language of the arbitration provision contained in the application signed by the plaintiff, Ann O'Connell, does not provide for arbitration of the plaintiffs' independently arising statutory rights pursuant to Utah Code Section 31A-22-701-718. Clearly, the Utah Arbitration Act authorizes this Court to examine the scope of the matters covered by an arbitration agreement, and to sever from arbitration any matters not within the scope of the agreement. See, Utah Code Section 78-31a-4(1). The Court also finds that the issue in the instant case is distinguished from those addressed in Buzas

Baseball v. Salt Lake Trappers, 925 P.2d 941 (Utah 1996) (examining the role of the courts in reviewing arbitration awards under the Utah Arbitration Act), and Shearson/American Express, Inc. v. McMahon, 42 U.S. 220 (1987) (discussing the applicability of the Federal Arbitration Act).

Furthermore, the Court would clarify that its decision to sever the instant matter from arbitration does not stem from a lack of faith in the merits of arbitration, or any hesitancy to have an arbitrator hear matters involving statutory interpretation. Rather, the Court's decision is based on its belief that it is not appropriate to arbitrate an issue concerning an independently arising statutory right which was not addressed by the arbitration provision contained within the defendant's insurance application.

Pursuant to Section 78-31a-4(3) of the Utah Arbitration Act, the Court stays arbitration and orders the defendants to file an Answer within ten (10) days addressing those issues in the plaintiffs' Complaint concerning any statutory claims they might have under Utah Code, Section 31A-22-701-718.

Dated this 8th day of April, 1997


LESLIE A. LEWIS
DISTRICT COURT JUDGE

ADDENDUM D

"Application," September 1993. R-162

HealthWise

Blue Cross
Blue Shield

VALUEcare

open enrollment
10/11/93
☐ New Enrollment 532-26-7601 - 65802
☒ Transfer from Blue Cross Blue Shield
☐ Re-enrollment Bar Association

(Please Print)

APPLICATION FOR MEMBERSHIP

(Do Not Write in Shaded Areas)

 Application for: Blue Cross and Blue Shield: ☒ Health Dental ☐ Health ValueCare: ☐ Health Dental ☐ Health Point: ☐ Health Life: ☐

Applicant's Name (Last) <u>O'Connell</u> (First) <u>Ann</u> (Initial) <u>A</u>	Social Security Number <u>535-34-9802</u>	Home Telephone Number <u>277-9046</u>	Group Number <u>00367</u>
Mailing Address <u>2727 Kentucky Avenue</u>	Employer <u>Rowland Hall - St. Marks</u>	Work Telephone Number <u>352-7444</u>	
City <u>Salt Lake City</u> State <u>Utah</u> Zip Code <u>84117</u>	Work Location (City/State) <u>Salt Lake City, Utah</u>	Occupation <u>Teacher</u>	Monthly Salary <u></u>
Family Status (check all applicable): <input type="checkbox"/> Single <input type="checkbox"/> Head of Household <input type="checkbox"/> Married <input type="checkbox"/> Total Number of Dependents <u></u>	Applying for <input type="checkbox"/> myself only <input checked="" type="checkbox"/> myself and dependents		

Hire Date <u>9/1/89</u> Hours Per Week <u>8</u> If seasonal, Months per Year <u>9</u> Other <u></u>	Owner <input type="checkbox"/> Officer <input type="checkbox"/> Salaried Hourly <input type="checkbox"/> Commission Only Non-employee <input type="checkbox"/> Retired <input type="checkbox"/> Union <input type="checkbox"/>
Effective Date <u>10/19/93</u> Membership Status <u>Transfer</u> Adult Code <u>02</u> Family Members <u>02</u> Special Code <u>5</u> Medical Underwriting <u></u>	

Relationship to Applicant	Name(s) of Member(s) to be Covered (include last name if different from Applicant; no nicknames please)	Birthdate Mo/Day/Yr	Primary Care Physician Selected	PCP Code	Please Complete if Covered by Other Insurance (including BCBS Coverage)	
					Medical	Dental
Self	Ann O'Connell	6/17/37			Yes	No
Spouse	John O'Connell	12/2/37			Yes	No
Son		/ /			Yes	No
Daughter		/ /			Yes	No
Son		/ /			Yes	No
Daughter		/ /			Yes	No
Son		/ /			Yes	No
Daughter		/ /			Yes	No

LIFE	If your employer offers Group Life, please complete the following information. I request the group life insurance to which I am entitled or to which I may become entitled under the provisions of the group policy or policies.				NOTE: A health questionnaire may be required if you choose to participate at a later date.		
	Beneficiary's Name (Last) (First) (Initial)		Relationship				
	Contingent Beneficiary (Last) (First) (Initial)		Relationship				
	Supplemental Group Life (if applicable): Amount		Annual Salary				
Dependent Life: <input type="checkbox"/> Yes <input type="checkbox"/> No				Short Term Disability: <input type="checkbox"/> Yes <input type="checkbox"/> No		Life Carrier: <input type="checkbox"/> Yes <input type="checkbox"/> No	
				Long Term Disability: <input type="checkbox"/> Yes <input type="checkbox"/> No		Class: <input type="checkbox"/> Life Amount: <input type="checkbox"/>	

I authorize any source to release to Blue Cross and Blue Shield of Utah, ValueCare and/or HealthWise (hereinafter referred to as "the Plan") any medical, health, employment and/or insurance information requested on any enrolled member. I authorize payroll deduction of premiums as required. I agree to abide by the Plan's enrollment provisions. I understand that coverage cannot start until after I have served the waiting period agreed to by the employer as recorded on the Plan's records. I authorize my employer to act as my agent in all matters of administration of the group program, and acknowledge that my employer is in no way acting as agent for the Plan.

If applying for HealthWise or HealthPoint benefits, I understand that each covered family member must select a participating Primary Care Physician (PCP). The selected PCP and HealthWise or HealthPoint must provide or direct all medical care.

I understand there may not be participating physicians available in all specialty fields.

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.

I further certify that all information completed on this form is true and correct and acknowledge my coverage is subject to cancellation if any completed information is found to be false or incorrect.

Ann O'Connell
Applicant's Signature

9/30/93
Date Signed

Form No. E-3 (7-92)

Copy Distribution:

Original & Yellow: Blue Cross and Blue Shield of Utah

Pink: Employer

(Instructions on Reverse Side)