

1997

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

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

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CKET NO. 970361

IN THE UTAH COURT OF APPEALS

JOHN D. O'CONNELL and ANN	:	
O'CONNELL,	:	
	:	
Plaintiffs and Appellees,	:	
	:	
vs.	:	
	:	Appeal No. 970361
BLUE CROSS/BLUE SHIELD OF UTAH,	:	
a Utah nonprofit healthcare	:	Priority No. 15
corporation,	:	
	:	
Defendant and Appellant.	:	

**REPLY BRIEF OF APPELLANT BLUE CROSS AND BLUE SHIELD OF UTAH
AND RESPONSE TO APPELLEES' CROSS-APPEAL**

**APPEAL FROM ORDER ENTERED BY THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE LESLIE LEWIS PRESIDING**

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Clerk of the Court

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ARGUMENT

The O'Connells raise three arguments in their response and cross-appeal: (1) that they only agreed to the narrow arbitration language in the 1993 Application; (2) that the trial court correctly excluded the O'Connells' claims based upon the conversion statute (the "'statutory' claim") from arbitration, but incorrectly included the O'Connells' remaining claims; and (3) this Court should not award Blue Cross its attorney fees.

I. THE O'CONNELLS AGREED TO THE BROAD ARBITRATION LANGUAGE OF THE SUBSCRIBER CERTIFICATE

A. The Trial Court Erred in Failing to Consider the Broad Language of the Subscriber Certificate

The trial court found in its initial ruling that the O'Connells agreed to certain language in the application for insurance coverage under the Rowland Hall-St. Mark's policy (the "Application"). Specifically, under the Application, the O'Connells agreed to "accept binding arbitration as a method of resolving any disputes . . . concerning the applicability of, or benefits payable under the Subscriber Agreement." (R. 79).

At that time, the trial court did "not reach the issue of whether the subscriber certificate also provided plaintiffs with additional notice of BCBSU's arbitration policy" (R. 187) because it found "the application constituted a valid agreement to arbitrate." (R. 187). The subscriber certificate, contained in the Rowland Hall-St. Mark's policy, the Rowland Hall-St. Mark's

Healthcare Agreement (the "Certificate"), arguably contains broader language than the Application. Specifically, under the Certificate, the O'Connells agreed that "In the event of any dispute or controversy concerning the construction, interpretation, performance or breach of the Agreement . . . whether involving a claim in tort, contract or otherwise, the same shall be submitted to arbitration" (R. 85).

Later, the trial court reversed, in part, its ruling that all of the O'Connells' claims were subject to arbitration under the Application, on the grounds that one of the O'Connells' claims was purportedly based upon statutory rights (the "'statutory' claim"), and because the trial court had "some reservations in leaving such issues of statutory interpretation to arbitration." (R. 206). This ruling was error because it did not even consider Blue Cross' argument that the Certificate encompassed all of the O'Connells' claims, including the so-called 'statutory' claim.

B. The O'Connells Agreed to the Terms of the Certificate

The O'Connells now assert that they are not bound by the broader language of the subscriber certificate. (O'Connells' Brief, pp. 18-22). This argument fails for a number of reasons.

First, the O'Connells' own complaint (the "Complaint") seeks to enforce rights under the very contract that contains the arbitration language the O'Connells now seek to avoid. For

example, the O'Connells allege in the First Cause of Action that "Defendant has breached its contract obligation under the terms of the subscriber certificate issued to members of the Rowland Hall group" Complaint, ¶ 21 (R. 5) (emphasis added). A number of similar allegations are made throughout the Complaint. See, e.g., Complaint ¶ 9 (alleging that "Defendant also agreed in the Subscriber Certificate, issued to Ann O'Connell as a member of the Rowland Hall group") (emphasis added); ¶ 13 (alleging that "Defendant agreed, in the Subscriber Certificate issued to members of the Rowland Hall group") (emphasis added). All of these allegations turn upon the "contract" that is the Certificate, containing the arbitration language the O'Connells now seek to avoid. Obviously, the O'Connells do not have the right to choose only those provisions of the contract they wish to enforce, while ignoring the others.

ok { This precise situation arose in Jeanes v. Arrow Insurance Company, 494 P.2d 1334 (Ariz. App. 1972), where a plaintiff brought a claim as a third party beneficiary to an uninsured motorist policy. Id. at 1334. In that case, the plaintiff argued that because she had not signed the contract containing the arbitration provision, she was not bound by its terms. Id. at 1337. The court rejected that argument, holding that there -- as here -- "[t]he rights here involved were created by that contract [containing the arbitration agreement], and in order to

accept benefits under that contract she must accept and abide by the terms of the contract." Id. (emphasis added). Accordingly, as alleged in the Complaint, the Certificate applies to all of the O'Connells' claims.¹

Second, Ann O'Connell does not deny receiving the Policy in her Affidavit submitted to the trial court, instead noting that she "does not know when she received a Subscriber Certificate." (R. 129, 133).² However, under Utah law, if Blue Cross sent the policy to the O'Connells, and it was not rejected in 30 days, its terms are binding. Specifically, the Insurance Code mandates that renewal of an insurance policy on different terms is effective upon mailing:

[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 policy holder notice of the new terms or rates at least 30 days prior to the expiration date of the prior policy.

} MAY EVEN APPLY
- POLICY NOT BEING RE-NEWED/CHANGED

¹ The trial court implicitly found this was the case when it found "that by signing the application the plaintiff assented to BCBSU's arbitration policy." (R. 186).

² What Ann O'Connell does admit, however, is finding a Blue Cross policy in her files that contains language substantively identical to the broad language of the Policy. (R. 129, 133). Accordingly, the fact that the O'Connells future disputes with Blue Cross might or would be subject to arbitration cannot be characterized as a surprise to the O'Connells.

Utah Code Ann. § 31A-21-303(5)(a) (1994) (emphasis added).³ In fact, the trial court specifically found that "after their application was accepted the plaintiffs were mailed a subscriber certificate containing more detailed information about BCBSU's arbitration policy." (R. 187). This finding was specifically supported by the Affidavit of Edwina H. Green and Karen Shields, and is not challenged by the O'Connells on appeal. (R. 172-178).

THIS WAS
THE
PURPOSE
OF
THE
CERTIFICATE

Furthermore, as demonstrated by the record, regardless of which policy the O'Connells seek to enforce through the Complaint, every insurance policy issued by Blue Cross to the O'Connells contained an arbitration provision. See Affidavit of Karen Shields; Affidavit of Edwina H. Green (R. 172-177; see also (R. 162) (Application for Rowland Hall Policy); (R. 44, 167) (Application for Bar Policy); (R. 30, 160) (Bar Policy; Subscriber Certificate to Bar Policy); (R. 84-85, 165-166) (Type 5E4 Policy); (R. 133) (Type 4M-4ML); (R 153) (Endorsement to Subscriber Certificate); (R. 156) (Type 4M-4MM). Therefore, the O'Connells are bound by the terms of the policy, including the

³ Numerous courts have enforced similar statutes, holding that actual receipt is not required under these circumstances. *See, e.g. Atlanta Cas. Co. v Sweeney*, 868 S.W.2d 501, 503 (Ark. 1994) ("Whether the notice was received by [the insured] is irrelevant according to the statute, as 'proof of mailing' is 'sufficient proof of notice.'"); *Isaacson v DeMartin Agency, Inc.*, 893 P.2d 1123, 1125 (Wash. App. 1995) ("Although [the insured] stated she did not receive a cancellation notice an insurer is not required to prove actual receipt if statutory mailing procedures are followed.").

arbitration provision, despite their contention that the terms of the policy do not apply to them because they either didn't read, or don't remember receiving, the policy.

Third, it is undisputed that after receiving the Certificate, and any other relevant policies, the O'Connells continued their insurance coverage with Blue Cross. Under these circumstances, it is clear that an insured's retention of an insurance policy for an extended period of time, without objection within a reasonable time, "constitutes an acceptance of the Policy, including the arbitration provision." Imperial Sav. Ass'n v. Lewis, 730 F. Supp. 1068, 1073 (D. Utah 1990); see also Western Farm Bureau Mut. Ins. Co. v. Barela, 441 P.2d 47, (N.M. 1968); Phillis Dev. Co. v. Commercial Standard Ins. Co., 457 P.2d 558 (Okla. 1969)). In this case, the Application was signed in 1993, and the trial court found the O'Connells had received the policy by mail. No objection was raised until approximately 1996, approximately three years after the Application was signed. Under Imperial, the O'Connells have waived any right to object to the terms of the Certificate.

Finally, the O'Connells cannot escape the terms of the Certificate by reliance upon Ann O'Connells' assertion in her Affidavit that she "has not read either version" of the

Subscriber Certificates⁴ (R. 129). As the trial court noted, Utah "case law is clear that a party has a duty to read and understand the terms of a contract before signing it." (R. 186); Hottinger v. Jensen, 684 P.2d 1271, 1274 (Utah 1984) (holding that a party has a duty to read and understand the terms of a contract before signing it). Finally, this Court should reject the implication that the O'Connells, an experienced educator (R. 127) and an attorney, were somehow ambushed by Blue Cross, because they never bothered to read any of the many arbitration agreements in every single one of their policies.

II. **ALL OF THE O'CONNELLS' CLAIMS ARE SUBJECT TO ARBITRATION, UNDER EITHER THE APPLICATION OR THE CERTIFICATE**

A. The Arbitration Agreement(s) Are Unambiguous and Apply to the O'Connells' Claims

The O'Connells attempt to invoke principles of insurance contract interpretation to escape their obligation under the unambiguous terms of the arbitration agreement(s), arguing that the arbitration agreement(s) is/are contracts of "adhesion"⁵ and

⁴ Little weight should be given Ann O'Connell's recollection -- since Ann O'Connell "does not recall filling out or signing the application," yet admits "the hand writing [sic] and signature appear to be her's [sic]" (R. 2).

⁵ The mere fact that the Blue Cross contracts are "adhesion" contracts should not come as a surprise to the O'Connells, nor does the O'Connell's inference that something is somehow wrong with adhesion contracts in the insurance industry weigh against Blue Cross. The Utah Supreme Court has explicitly acknowledged,
(continued...)

invoking the principle that insurance policies "should be strictly construed against the insurer and in favor of the insured" O'Connells' Brief, p. 26 (quoting U.S. Fidelity and Guar. Co. v. Sandt, 854 P.2d 519, 521-23 (Utah 1993)).

First, the O'Connells fail to acknowledge that the rule of construction upon which they rely only applies in the face of an ambiguous term of the policy. See, e.g. Sandt, 854 P.2d at 523 ("If an ambiguity arises, the rules of construction outlined above must be employed to resolve the ambiguity."). A court will not construe an insurance policy against the insured, absent an ambiguity. Allen v. Prudential Property & Cas. Ins., 839 P.2d 798, 807 (Utah 1992) (holding the Court had "no occasion to consider" the "application of the canon of construction resolving ambiguities against the drafter," "because the disputed exclusion is not ambiguous.") Furthermore, Sandt and other cases construing insurance policies in favor of the insured apply this doctrine to determine the scope of insurance coverage, construing coverage broadly in favor of the insured. Sandt, 854 P.2d at 522 ("ambiguous or uncertain language in an insurance contract . . . should be construed in favor of coverage.").

The arbitration agreements at issue are not ambiguous.

⁵(...continued)
"that form contracts are essential to the economic viability of the insurance industry." Allen v. Prudential Property & Cas. Ins., 839 P.2d 798, 803 n.6 (Utah 1992).

Under Utah law, for contract language to be ambiguous it must be "capable or 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) (emphasis added). In deciding whether an insurance policy is ambiguous, the Court should apply a "reasonable purchaser" standard. Sandt, 854 P.2d at 523. In this case, the trial court specifically found that "the arbitration provision in the 1993 application was clearly worded, unambiguous, and not subject to more than one reasonable interpretation."⁶ (R. 188). A review of the arbitration agreement reveals the correctness of this ruling. See, supra, discussion of Application and Certificate. In this regard, the trial court noted "that a reasonable purchaser of insurance would be able to read the provision [of the Application] and understand that he/she was agreeing to submit any disputes to binding arbitration." (R. 188). Therefore, the rules of interpretation urged by the O'Connells do not apply.

Second, even if there were an ambiguity, the Supreme Court has been unequivocal about the broad construction of arbitration agreements, specifically holding that if the scope is ambiguous

⁶ It should be noted that the trial court relied upon Sandt, the same case cited by the O'Connells, in determining the Application was not ambiguous. (R. 188).

or debatable, construction is in favor of arbitration:

It is our policy to interpret arbitration clauses in a manner that favors arbitration. In *Lindon City v. Engineers Construction Co.*, we stated:

[Arbitration] 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

. . .

Arbitration clauses should be liberally interpreted when the issue contested is the scope of the clause. If the scope of the clause is debatable or reasonably in doubt, the clause should be construed in favor of arbitration . . .

636 P.2d at 1073 (quoting *King County v. Boeing Co.*, 18 Wash.App. 5954, 602-03, 570 P.2d 713, 717 (1977)).

Our interpretation of the contract in favor of arbitration is therefore in keeping with our policy of encouraging extrajudicial resolution of disputes when the parties have agreed not to litigate.

Docutel Olivetti v. Dick Brady Systems, Inc., 731 P.2d 475, 479

(Utah 1986) (emphasis added); see also Lindon City v. Engineers

Constr. Co., 636 P.2d 1070, 1073 (Utah 1981). Because the scope of the insurance coverage is not at issue, the principle of construction urged by the O'Connells does not conflict with the rule that the arbitration agreement(s) must be construed in favor of arbitration.

The O'Connells also imply that arbitration is somehow an inadequate or unfavorable remedy. This position has been rejected by the Utah courts for many years, and the tradition of enforcing arbitration agreements is well founded in Utah. See, e.g. Buzas Baseball v. Salt Lake Trappers, 925 P.2d 941, 946

(Utah 1996) ("[T]he Utah Arbitration Act "'reflects long-standing public policy favoring speedy and inexpensive methods of adjudicating disputes.'" (citation omitted); Robinson & Wells, P.C. v. Warren, 669 P.2d 844, 846 (Utah 1983) ("The Territory and State of Utah have had statutory provisions for arbitration of disputes since 1884."); Giannopoulos v. Pappas, 80 Utah 442, 15 P.2d 353, 356 (Utah 1932) ("[A]rbitration is favored in the law"). In fact, to the average insured (who is not a trial lawyer), the prospect of arbitration is much cheaper and more efficient than a jury trial. Under the arbitration agreements, the insured can force Blue Cross to proceed to arbitration. If construction is to be made of this contract in favor of "the insured," it should be based upon the interest of the average insured, not the subjective desires of the O'Connells.

In sum, the fact that arbitration is favored renders the rule of construction in favor of the insured inapplicable to an arbitration provision in an insurance contract. In Imperial, Judge Winder considered and rejected the exact arguments made by the O'Connells:

Relying on *Metropolitan Property & Liability Ins. Co. v. Finlayson*, 751 P.2d 254 (Utah App. 1988), vacated, appeal dismissed, 766 P.2d 437 (Utah App. 1989), Imperial argues that this ambiguous provision in the insurance contract should be construed against Stewart as the drafter.

. . . . this court believes that an arbitration clause is distinguishable from other provisions in an insurance contract. Furthermore, the court is of the

opinion that an arbitration clause is not to be construed as favoring one party over the other. Hence, this court does not conclude that, even if this arbitration provision were considered ambiguous, the arbitration provision would be construed against Stewart and rendered ineffective.

730 F.Supp. at 1075 (emphasis added).⁷

The O'Connells cannot dispute Utah's long history of favoring arbitration, and simply citing to another doctrine of interpretation -- that insurance contracts are construed against the insured -- does not, and cannot, change over 100 years of Utah law favoring arbitration in all kinds of disputes. Under Utah law, this Court must construe the arbitration agreement(s) as broadly as possible, resolving all doubts in favor of arbitration, and holding that the O'Connells' entire Complaint is subject to arbitration.

⁷ Even the only legal authority cited by the O'Connells does not support their argument. The O'Connells cite only Wheeler v. St. Joseph's Hosp., 133 Cal. Rptr. 775 (1977), for the proposition that the arbitration agreement(s) is/are ambiguous. This authority is of no help to the O'Connells. First, as explained, regardless of the Wheeler court's opinion of the arbitration provision at issue in that case, the arbitration agreement(s) in this case are not ambiguous. Second, Wheeler, along with a number of other cases cited by the O'Connells at the trial court level, was specifically rejected by the trial court on the grounds that it "involve[d] a factual scenario where a patient was required to sign an arbitration agreement immediately prior to receiving medical treatment." (R. 189). Obviously, the facts of Wheeler are not analogous to those at hand -- where an attorney and educator purchased health insurance through their employment, with years to consider all their options prior to entering into any contract and continued coverage after receiving a copy of the policy.

B. The Trial Court Incorrectly Excluded the 'Statutory' Claim From Arbitration

Blue Cross specifically appeals the trial court's finding that the O'Connells' Third Cause of Action, the so-called 'statutory' claim, falls outside the scope of the arbitration agreement(s).

1. The O'Connells Cannot Plead Around Arbitration

The interpretation urged by the O'Connells, if accepted, would only encourage plaintiffs to file claims asserting a multitude of legal theories in an effort to keep at least some of them in litigation. Again, the well-established rule that all doubts are resolved in favor of arbitration governs this issue. In Docutel, the Utah Supreme Court explicitly rejected the type of argument raised by the O'Connell's. In that case, a federal trial court did exactly what the trial court has done here - granted arbitration as to some claims, but not others. 731 P.2d at 477. The Utah Supreme Court unequivocally rejected this approach, for two reasons - the possibility of inconsistent results, and public policy against allowing clever plaintiffs to plead around arbitration. The Docutel court reasoned:

By allocating the claim in part to litigation and in part to arbitration based only upon the language of the complaint, the federal court has created an entirely avoidable set of problems. For example, if simultaneous judicial and arbitration proceedings render inconsistent results, the parties could be faced with a situation in which a court had reviewed the evidence and determined Brady and Systems were not

liable, and an arbitrator whose decision could be enforced as a judgment, had reviewed the same evidence and determined that Brady and Systems should pay the same debt.

Id. at 477 n.3. The court went on to address a plaintiff's inability to escape arbitration by artful pleading:

Further, we do not think that an agreement to arbitrate should be interpreted so narrowly that its application may be avoided by choosing to plead one legal theory instead of another. Such narrow interpretation is inconsistent with the strong state and federal policies favoring arbitration and indeed invites potential litigants to attempt to escape arbitration by clothing their disputes in different legal theories.

Id. at 477 n.3 (emphasis added).

Here, the trial court did exactly what the Docutel court has prohibited - it split a claim originally asserted as a violation of a statute and a contract (the Certificate) into a wholly 'statutory' claim. The O'Connells' argument that their 'statutory' claim is somehow different from any other contractual claim is nothing more than a belated and convenient attempt to plead around the arbitration clause. Under Docutel, this Court must reject such an attempt, construe the arbitration agreement(s) broadly, and enforce arbitration.

2. By the Terms of the O'Connells' Complaint, the Statutory Claim is Contractual - and Arbitrable

The O'Connells' own Complaint characterizes the 'statutory'

claim as contractual.⁸ Upon reconsideration, the trial court incorrectly characterized the Third Cause of Action as solely statutory and indicated it had "some reservations in leaving such issues of statutory interpretation to arbitration."⁹ (R. 206). This ruling is in error for a number of reasons.

Only after Blue Cross moved to compel arbitration did the O'Connells' change this characterization in an obvious attempt to plead around the arbitration agreement(s). The O'Connells' pleading reflects this simple fact. In pleading this claim to the district court, the O'Connells alleged:

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

R. 6 (emphasis added); see also Complaint ¶ 9 (alleging that "Defendant also agreed in the Subscriber Certificate, issued to Ann O'Connell as a member of the Rowland Hall group"), ¶ 13 (alleging that "Defendant agreed, in the Subscriber

⁸ As noted, the contract the O'Connells base their claims upon is the exact same contract containing the Certificate's arbitration agreement.

⁹ The trial court's "reservations" over the arbitrator's skills or abilities is exactly the kind of bias against arbitration that has been disfavored for decades by the appellate courts of this state. In short, "Utah law presumes that an arbiter appointed and authorized by the parties is capable of examining legal documents and statutes to determine questions of construction or validity." Allred v. Educators Mur. Ins. Ass'n, 909 P.2d 1263, 1266 (Utah 1996) (emphasis added).

Certificate issued to members of the Rowland Hall group . . .
.").

This allegation is clearly covered by the terms of the Application, providing for arbitration of "any disputes arising between me or the covered family members in the Plan or participating provider concerning the applicability of, or benefits payable under the Subscriber Agreement." (R. 79)

(emphasis added). The gist of this claim is that the conversion policy provided to the O'Connells does not provide comparable benefits to those offered in the first policy -- the Certificate. This dispute therefore plainly concerns those "benefits," because it contemplates comparing the "benefits payable" under the two policies. In addition, the allegation of this claim plainly seeks conversion "benefits" under the Blue Cross policy -- and the conversion right is a benefit that arises only because of the original policy. That policy, of course, is governed by the Application and Certificate.

For the same reasons, the purported 'statutory' claim is even more clearly covered by the terms of the Certificate, providing for arbitration of "any dispute or controversy concerning the construction, interpretation, performance or breach of the Agreement arising between the Group, employer, or Subscriber, eligible Family Dependent, or the heir-at-law or personal representative of such person, and BCBSU, whether

involving a claim in tort, contract or otherwise, . . ." (R. 85) (emphasis added). Accordingly, the trial court erred in excluding the O'Connells' Third Cause of Action from the order compelling arbitration.

3. The O'Connells' Supposed Statutory Claim
Necessarily Arises Out of the Contractual
Relationship

As explained in the opening brief, and as never refuted by the O'Connells, a conversion right arises out of, and is related to, the original policy that gave right to the claim to conversion coverage. See *Greany v. Western Farm Bureau Life Ins. Co.*, 973 F.2d 812, 817 (9th Cir. 1992). See also *Tingey v. Picksley-Richards West, Inc.*, 953 F.2d 1124 (9th Cir. 1992); *Qualls v. Blue Cross of California*, 22 F.3d 839 (9th Cir. 1994) (all three holding that conversion policy arises out of original ERISA coverage, and therefore claim for benefits is preempted).

Similarly, any claim the O'Connells might raise concerning their conversion coverage, or Blue Cross' alleged failure to provide appropriate conversion coverage, necessarily presupposes a pre-existing contractual relationship with Blue Cross. In fact, the O'Connells allege precisely the existence of a preexisting contractual relationship under the Certificate. They recognized this when they plead their 'statutory' claim as based on statute and contract. It was only after Blue Cross attempted to invoke the arbitration clause that the O'Connells converted

their claim into one purportedly based upon statute only. However, without an existing contractual relationship, there is no right to conversion. Accordingly, all of the O'Connells' potential claims concerning their conversion rights necessarily arise out of the performance by Blue Cross of its original contractual obligations.

C. The Trial Court Correctly Ruled the O'Connells' Remaining Claims Were Subject to Arbitration

The O'Connells challenge trial court's ruling that the O'Connells' First, Second, and Fourth Causes of Action were all subject to arbitration. (R.183-191). The trial court's ruling was correct.

1. This Court Does Not Have Jurisdiction to Review the Trial Court's Ruling Granting Arbitration

This Court ruled on August 8, 1997 that the O'Connells could appeal the trial court's ruling granting arbitration based upon "Rule 4(d) of the Utah Rules of Appellate Procedure and considerations of judicial economy." Order, August 8, 1997. Blue Cross respectfully request reconsideration of this decision as contrary to the Rules of Appellate Procedure, the intent of the Utah Arbitration Act, and the policy favoring arbitration.

In short, Rule 4(a) of the Utah Rules of Appellate

Procedure¹⁰ does not confer jurisdiction¹¹ because an order compelling arbitration is conspicuously absent from the list of orders respecting arbitration made appealable in Utah Code Ann. § 78-31a-19. Utah Code Ann. § 78-31a-19 (1996). Notably, there is no provision allowing immediate appeal from an order compelling arbitration.

The authority is unequivocal in accepting this position. For example, the court in Gooding v. Shearson Lehman Bros. Inc., 878 F.2d 281 (9th Cir. 1989), addressed the identical issue under the Federal Arbitration Act,¹² dismissing an appeal from an order compelling arbitration for lack of jurisdiction. Id. at 283; see also, Jeske v. Brooks, 875 F.2d 71 (4th Cir. 1989) (acknowledging jurisdiction over an order denying a motion to

¹⁰ In addition, as a procedural matter, it should be noted that the O'Connells did not pursue appeal of the trial court's ruling as an interlocutory appeal. (R. 260); see Utah R. App. P. 5(a) (requiring that "[a]n appeal from an interlocutory order . . . be sought by any party by filing a petition for permission to appeal from the interlocutory order with the clerk of the appellate court with jurisdiction . . ."). Accordingly, the O'Connells' appeal is not before the Court as an interlocutory appeal.

¹¹ Rule 1(d) specifically states that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the Supreme Court or Court of Appeals as established by law." Utah R. App. P. (1(d). Nor is there any provision that Blue Cross can locate allowing jurisdiction based upon judicial economy.

¹² Utah looks "to the law of other states and to federal case law for guidance" to interpret similar provisions in the Utah Arbitration Act. Buzas Baseball, Inc. v. Salt Lake Trappers, Inc., 925 P.2d 941, 947 (Utah 1996).

compel arbitration as to certain claims, while dismissing cross-appeals of orders compelling arbitration as to the remaining claims for lack of jurisdiction); NEA-Topeka v. Unified School Dist., 925 P.2d 835, 838 (Kan. 1996) ("Orders directing, or refusing to stay, arbitration are not appealable.") (quoting Kansas Gas & Electric Co. v. Kansas Power & Light Co., 751 P.2d 146, rev. denied, 243 Kan. 779 (1988)); see also, Golden Lodge No. 13 v. Easley, 916 P.2d 666, 667 (Colo. App. 1996) ("[A]n order directing arbitration . . . is not appealable until the arbitration has been completed."). Therefore, as a threshold issue, this Court lacks jurisdiction to even consider the O'Connells' cross-appeal of the trial court's order compelling arbitration.

2. The Trial Court Correctly Ruled the O'Connells' Remaining Claims Were Subject to Arbitration

Even if this Court decides to address the O'Connells' cross-appeal of the trial court's order compelling arbitration, that ruling must be upheld because the O'Connells' claims are clearly within the scope of the arbitration agreement(s). As noted, supra, it is well-established in Utah that arbitration agreements are to be construed broadly with all doubts resolved in favor of arbitration, and the trial court found that the language of the Application was unambiguous, and included the O'Connells' other claims.

The First, Second, and Fourth Causes of Action all allege breach of the insurance contract that is subject to (and in fact contains) the arbitration agreement(s) to which the O'Connells object. The First Cause of Action alleges that "Defendant has breached its contract obligation under the terms of the subscriber certificate" (R. 5) (emphasis added). The Second Cause of Action alleges that "Defendant has breached its contract obligation to fulfill its promise, made orally and by letter," (R. 6) (emphasis added). The Fourth Cause of Action alleges that "Defendant has, pursuant to the contracts alleged supra and the long standing relationship between plaintiffs and defendant, a constructive duty to deal with plaintiffs fairly and in good faith and breached that duty" (R. 7) (emphasis added). In addition, counts common to all these claims specifically reference the Certificate. See Complaint ¶ 9 (alleging that "Defendant also agreed in the Subscriber Certificate, issued to Ann O'Connell as a member of the Rowland Hall group"), ¶ 13 (alleging that "Defendant agreed, in the Subscriber Certificate issued to members of the Rowland Hall group").

All three of these claims allege breach of a contract between the parties, and dispute the health insurance benefits the O'Connells are entitled to. These allegation are clearly covered by the terms of the Application, providing for

arbitration of "any disputes arising between me or the covered family members in the Plan or participating provider concerning the applicability of, or benefits payable under the Subscriber Agreement." (R. 79) (emphasis added). The allegations of the First, Second, and Fourth Causes of Action are even more clearly covered by the terms of the Certificate, providing for arbitration of "any dispute or controversy concerning the construction, interpretation, performance or breach of the Agreement arising between the Group, employer, or Subscriber, eligible Family Dependent, or the heir-at-law or personal representative of such person, and BCBSU, whether involving a claim in tort, contract or otherwise" (R. 85).

One additional argument must be addressed. For the first time on appeal, the O'Connells allege the existence of a "separate oral and written promise to allow the O'Connells to transfer back and forth between groups." O'Connells' Brief, p. 32 (emphasis added). There is no evidence in the record of a separate written or oral promise other than those made in the various insurance policies purchased by the O'Connells. To this end, and as has been repeated numerous times already, every claim raised by the O'Connells' Complaint is based in contract, specifically the Certificate. (R. 3-8). Even if this were not the case, there is no showing of a separate contract in the record, nor can the O'Connells show any consideration for such a

contract.¹³ To argue that Blue Cross somehow issued a wholly individual and separate insurance policy to the O'Connells -- different from every other policy issued to an insured -- and perhaps did so over the telephone -- is completely lacking in evidentiary support. Because all the O'Connells' claims necessarily arise out of one of the contracts containing an arbitration clause, this belated attempt by the O'Connells to re-characterize their pleadings must be rejected. See also, Docutel, 731 P.2d at 477 n.3. ("[A]n agreement to arbitrate should [not] be interpreted so narrowly that its application may be avoided by choosing to plead one legal theory instead of another.").

Accordingly, the trial court correctly ordered that the O'Connells' First, Second, and Fourth Causes of Action were subject to arbitration.

D. Enforcement of Arbitration Agreements Does Not Violate the Utah Constitution

The O'Connells' final argument is that enforcement of an arbitration agreement somehow deprives them of basic rights under

¹³ The only consideration the O'Connells could arguably have conveyed to Blue Cross is the premiums paid for the policy governed by the Application and Certificate. If the O'Connells contend this was the consideration for their claim of a separate agreement, then they are necessarily arguing the policy was somehow orally or otherwise modified. The arbitration agreement(s) obviously apply to any modification of the original contract.

Article I, Section 7 (the Due Process Clause) and Article I, Section 11 (the Open Courts Provision) of the Utah Constitution. The Utah Supreme Court specifically rejected exactly these arguments in Lindon City v. Engineers Constr. Co., 636 P.2d 1070, 1073-74 (Utah 1981).

III. BLUE CROSS IS ENTITLED TO ITS ATTORNEY FEES ON APPEAL

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. However, Blue Cross has never waived its right to recover fees on appeal. See Utah Code Ann. § 78-31a-16, -19 (1996). Under Utah law, Blue Cross is entitled to attorney fees incurred in seeking this appeal, separate and apart from any fee award by the trial court. Under these circumstances, the fact that Blue Cross has not yet sought attorney fees from the trial court is irrelevant - Blue Cross has an independent right to recover its attorney fees on appeal under Section 78-31a-16 because the appeal right is separate and independent from any ruling made by the trial court.¹⁴ Because Blue Cross is entitled to an Order compelling

¹⁴ The only authority cited by the O'Connells, Sukin v. Sukin, 842 P.2d 922, 926 (Utah App. 1992) is inapplicable to this case. First, Sukin does not address a situation where the right to attorney fees arises directly and independently from the appeal, and does not involve the Utah Arbitration Act. In fact, Sukin doesn't even address the issue of attorney fees. See id. at 926 (discussing allegation of bias against trial court, noting (continued...))

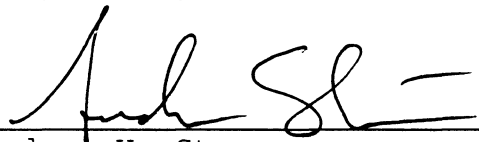
arbitration of all the O'Connells' claims, Blue Cross is entitled to an award of attorney fees under Utah Code Ann. §§ 78-31a-16 & -19 (1996).

CONCLUSION

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

RESPECTFULLY SUBMITTED this 13th day of April, 1998.

JONES, WALDO, HOLBROOK & McDONOUGH

By 

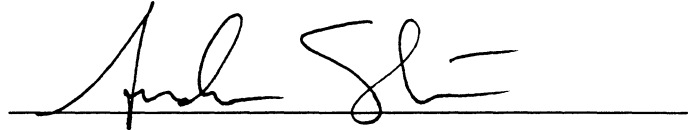
Andrew H. Stone
James E. Magleby
Attorneys for Defendant
and Appellant

¹⁴(...continued)
"we do not address the issue of bias or prejudice because it has been raised for the first time on appeal.").

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of April, 1998, I caused to be hand delivered two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT BLUE CROSS AND BLUE SHIELD OF UTAH AND RESPONSE TO APPELLEES' CROSS-APPEAL** to the following:

John D. O'Connell
39 Exchange Place, #200
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read "John D. O'Connell", is written over a horizontal line.