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Blue Cross and Blue Shield of Utah, a nonprofit corporation v. State of Utah, Utah State Tax commission, and Utah State Insurance Department : Response to Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF THE

STATE OF UTAH

BLUE CROSS AND BLUE SHIELD OF UTAH, a nonprofit corporation,	)	
Plaintiff/Appellant,	)	Case No. 19676
vs.	)	
STATE OF UTAH, UTAH STATE TAX COMMISSION, and UTAH STATE INSURANCE DEPARTMENT,	)	
Defendants/Respondents.	)	

REPLY TO PETITION FOR REHEARING OF RESPONDENTS/DEFENDANTS

Appeal from the Judgment of the Third Judicial District Court for Salt Lake County
Honorable J. Dennis Frederick

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Respondents/Defendants State of Utah, Utah State Insurance Department, and Utah State Tax Commission (referred to herein as "State") respectfully reply to the "Rehearing Petition of Appellant/Plaintiff Blue Cross and Blue Shield of Utah".

INTRODUCTION

This case originated with BCBS attacking the imposition of a 2.25 percent subscription income tax on health care providers under Chapter 37 of Title 31, Utah Code Ann., of which BCBS is one such organization. An identical 2.25 percent tax[1] was imposed upon the premiums received by insurers, which were entities organized under a number of other chapters in Title 31. However, in computing this tax, mutual benefit associations ("MBAs") were then allowed to deduct of the taxes paid on the premiums received by the MBAs, thus in effect "exempting" the MBAs from paying any tax on premiums the MBAs collected.

In its July 19, 1989 opinion, the Court gave an extensive analysis to the two main constitutional challenges brought by BCBS to the imposition on BCBS of the tax on premium income while excluding the MBAs.[2] After reviewing the history of insurers in the State, determinining the proper classes, and subjecting the State's taxing scheme to a rigorous three part

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[1] For convenience, both the subscription tax and the premium tax will be referred to herein as the "premium tax".

[2] In reality, under the Court's analysis, there was only one challenge, -- the "uniform operation of the laws" provision of the Utah Constitution, since the Court determined that a law passing muster under that provision would also pass muster under the "Equal Protection clause" of the United States Constitution, and the "private or special law" provision of the Utah constitution is just the flip side of the "uniform operation of the laws" provision.

test, the Court upheld the decision of the District Court granting summary judgment to the State.

BCBS claims that the Court has subjected BCBS to a test -- the showing of economic disadvantage -- which was not part of the law when this case originated, or was briefed, or argued. Thus, says BCBS, they never had notice that they had to show economic disadvantage. They then argue that despite their not being aware of the additional test, they did, in fact, "prove" economic disadvantage. Finally, BCBS pleads that if the Court rejects BCBS's first two mutually exclusive arguments, the appropriate remedy is for the matter to be remanded to the District Court to allow BCBS to present evidence of its economic disadvantage in having had to pay the premium tax.

The State will address each of BCBS's points, and then add some additional points.

II. BCBS'S CLAIM THAT THE COU5RT HAS ADDED A NEW ELEMENT TO BCBS'S BURDEN OF ATTACKING THE CONSTITUTIONALITY OF THE TAX

BCBS argues that the Court has imposed a new element to a party attacking the constitutionality of a tax -- that of showing economic disadvantage. BCBS further argues that because its "competitive position in its market is obviously different from that of Mountain Fuel's, the analysis used by the Court in Mountain Fuel should not be applied to BCBS's challenge.

What BCBS fails to recognize is that the Court has not mandated a showing of "economic disadvantage" to one challenging the constitutionality of a tax. In its opinion, the Court noted:

> There is nothing inherent in the article I, section 24 test as it was stated in Malan and our other decisions based on equal protection

> or uniform operation of the laws principles, [citations omitted] that expressly requires us, in determining the constitutionality of an enactment, to take into account the impact of the legislative classification under attack on those classified. However, it seems clear that the impact of a measure can be relevant to determining whether the legislative body has exceeded the bounds of the broad discretion it has in fashioning purely economic legislation.
> [Slip op. at 13.]

Nowhere in its opinion does the Court hold that a party challenging the constitutionality of a tax must show the economic impact of the classification in order to challenge successfully the tax. The Court only says that such a showing would seem to be relevant to the question as to whether the legislature has exceeded the broad discretion it has in imposing taxes for revenue purposes.

The citation to Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884 (Utah 1988) was not for the purpose of imposing an ex post facto requirement upon BCBS. The Court in Mountain Fuel did not announce a new requirement to showing a classification for tax purposes is unconstitutional. The Court there applied the basics of earlier cases cited both in Mountain Fuel and in the instant case. It certainly doesn't appear from a reading of Mountain Fuel that Mountain Fuel thought it was being blindsided by the Court's opinion. Mountain Fuel had attempted to show it had suffered economic harm because of the tax imposed upon it but not on providers of certain other forms of fuel competing with natural gas. The Court applied the earlier cases and determined Mountain Fuel had not met its burden.

The same is true with respect to the Court's finding in the instant case that BCBS had simply not met its burden established by earlier cases enunciated by this Court. Furthermore, BCBS was certainly aware of this critical element when they originated this case and when they argued their motion for partial summary judgment. The gravamen of their case was that they had been economically disadvantaged by their having to pay the subscription tax. BCBS even admits in the third point of its rehearing petition that they attempted to make a case showing they had been economically disadvantaged in having to pay the premium tax vis-a-vis the MBAs which didn't have to pay that tax. Their motion for partial summary judgment contained ten pages of facts (R. 285-295), plus sixteen (16) exhibits of over 150 pages (R. 330-454). The District Court was simply not convinced BCBS had met their burden of proof, and neither was this Court.

BCBS also argues that its market position is "obviously different from that of Mountain Fuel's", and therefore Mountain Fuel cannot be applied. BCBS presents no facts or allegations to support why it believes this conclusion is so "obvious"; perhaps the reference is to Mountain Fuel's being a regulated monopoly, whereas BCBS is not. However, BCBS, as all insurers, is certainly heavily regulated by the Utah Insurance Department, and while it may not be a "state authorized monopoly", as Mountain Fuel is, BCBS is certainly one of the best known and largest health care insurers (using that term in the generic sense) in Utah. As for the dollar amounts involved, extrapolating from the information in Mountain Fuel (752 P.2d at 886), Mountain Fuel

paid taxes of $11 million over a five (5) year period. The rate varied from 6 percent to 4 percent. If the average of 5 percent is used, then the taxes paid of $11 million over a 5 year period were generated from $220 million in revenues. Extrapolating from BCBS's own "facts" (and as is more clearly illustrated in the next point), if the 2.25 percent premium tax paid by BCBS totalled $5 million from March 1982 through June 1987 (when the subscription tax and premium taxes were removed on health insurance and similar insurance like products), then BCBS had subscription income of over $222.2 million for that period of a little over five (5) years, which, to use BCBS's phrase, is "what most would consider to be a rather 'substantial' amount". (Reh. pet. at 7, fn. 2.)

The similarity between the income, taxes paid and period of years between Mountain Fuel and BCBS are startling, but probably irrelevant. The District Court, however, and this Court had the record available to determine whether based upon the facts presented BCBS had sustained an economic disadvantage because BCBS had to pay the premium tax and the MBAs did not. Based upon the evidence in the file, both Courts found BCBS had not met its burden of proof.

II. BCBS'S CLAIM THAT IT HAS DEMONSTRATED THAT IT HAS BEEN SUBSTANTIALLY COMPETITIVELY DISADVANTAGED IN COMPETITION WITH THE NON-TAXED MBAS

After BCBS has taken two (2) pages explaining that it was "surprised" by the Court's "requirement" that BCBS demonstrate that it has been economically disadvantaged by its having to pay the premium tax, BCBS spends three and a half pages

arguing that BCBS did, in fact, demonstrate that it had been economically disadvantaged. It is in this part that BCBS takes its greatest liberties with the facts.

BCBS asserts that "[i]t was not seriously disputed by the State . . . that [BCBS] competes directly with two MBAs for insurance business". (Reh. pet. at 6-7.) In fact, the State argued strenuously throughout that BCBS doesn't really compete with any of the MBAs. The State filed a 45 page memorandum in opposition to BCBS's motion for partial summary judgment, including three and one-half pages of facts plus eleven pages of legislative history. As noted above, four of the MBAs are captives, or provide insurance to employees of only one company. Of the other two, one doesn't even write health insurance. The sixth, Gem State, markets only to smaller companies, a market which BCBS tended to ignore until recently.

BCBS then cites the "evidence" of economic disadvantage it presented to the District Court. This consisted of two affidavits -- one from a senior BCBS officer, and the other from a senior BCBS actuary. The Court, in its opinion, cited only the former, twice correctly terming it a "conclusory affidavit" (slip op. at 9 and 16). BCBS suggests the Court "overlooked" the second, which BCBS deems to be "a critical piece of evidence". In fact, the second only states that when setting rates, BCBS must factor in the cost of the subscription taxes it must pay. This rather unstartling revelation is somewhat akin to a store stating it must take into account the cost of the goods it sells when it prices them for sale to customers. There is little wonder the Court made no mention of this second affidavit.

As for the former memo, BCBS opines that "[t]he State made no meaningful challenge to the adequacy of [that] affidavit but rather filed a brief counteraffidavit alleging that at least one small business had purchased its policy of insurance from an MBA rather than [BCBS] because of a family connection with the MBA, and not a difference in rates." (Reh. pet. at 8.) In fact, the State countered virtually every assertion made in the first affidavit. That affidavit stated that without the premium tax, BCBS believed it could successfully compete for the business of several school districts, several subsidiaries of the Church of Jesus Christ of Latter-day Saints, and a subsidiary of Utah Power & Light Co. To counter those allegations, the State responded that since each of those entities owns its own MBA, it was highly unlikely they would steer their business to BCBS even if BCBS offered the same or even (up to a point) lower rates. The affidavit then alleges that without the subscription tax, BCBS believed it could have obtained the business of a number of other entities that were insured by Gem State, and named eight (8) of those entities. The State refuted that claim through the affidavit of the owner of one of the named entities, who said he went with Gem State for reasons other than the "price of insurance". The State didn't believe it was necessary to counter the claim of BCBS with respect to each of the companies named by BCBS -- the one affidavit was enough to discredit the entire claim of BCBS in that affidavit, because it refuted the assertion made by BCBS that but for the premium tax, BCBS would have had the business of all those named companies.

BCBS asserts that the characterization of the first affidavit as "conclusory" indicates an obvious "misapprehension of important facts" by the Court, and that it further indicates the Court "failed to consider the additional affidavits submitted by BCBS". (Reh. pet at 9.) In truth, the Court correctly identified the first affidavit as being conclusory. It was also self-serving, and was rightly disregarded by the Court as having little merit. As for "other" affidavits, besides the second affidavit from the BCBS actuary, the only other affidavit submitted by BCBS was from one of the counsel for BCBS, which stated an article had appeared in a local newspaper, and the article was attached to the affidavit. (Ex. 13, R. 412.) The Court, which correctly gave little mention and little weight to the first affidavit, rightly ignored and gave no weight to these latter two affidavits.

Lastly on this point, BCBS gratuitously alleges that "the State (to its credit) never challenged [BCBS's] evidence in the record below in support of the patently obvious proposition that paying several million dollars not paid by one's competitors in a fiercely competitive market constitutes significant harm." However, while the State would like to accept this "compliment", the facts prevent it from doing so. The State did concede, of course, that BCBS had paid the premium tax, as required by law. The State, though, not only never conceded, but in fact strenuously rejected, the notion that by paying the premium tax, BCBS was at a significant disadvantage with its competitors. The State presented the findings of the Legislature in 1969, that by

not subjecting BCBS to the premium tax being paid by virtually all other insurers, BCBS was enjoying a significant advantage over those other insurers. The State argued that the captive nature of virtually all of the MBAs, plus the restrictive nature of their marketing, plus the small size of the MBAs, especially when compared with a market giant such as BCBS, did not put BCBS at a disadvantage at all.

IV. BCBS'S CLAIM THAT THE MATTER SHOULD BE REMANDED TO THE DISTRICT COURT

BCBS asserts in two places (Reh. pet. at 2, fn. 1 and at 10) that in reality, all the District Court did was deny BCBS's motion for summary judgment, and therefore, the matter should be remanded to the District Court so BCBS can "put on its evidence" to show that BCBS has suffered economic harm by having to pay the subscription tax. BCBS suggests that the granting of the motion for summary judgment in favor of the State was "merely a procedural aid to this appeal".

Of all the misstatements of facts made by BCBS throughout these proceedings, the misstatements of fact in this section are the most egregious. From the beginning, it was BCBS who pushed these proceedings along. The record shows the original complaint was filed September 24, 1982 (R. 2). On October 25, 1982, before the State had even filed its answer, BCBS filed its first set of interrogatories and requests for admissions (R. 21, 18), and on November 9, 1982, filed its first request for production of documents (R. 26).

The State filed its answers to the interrogatories on November 24, 1982, (R. 36), and two weeks later BCBS filed its

motion to compel and set the hearing on that motion for the following week. The hearing was held on December 16, 1982 (R. 68), and the next day, BCBS filed its second set of interrogatories and second set of requests for admissions (R. 69). Both were answered on January 14, 1983 (R. 268, 272), and six (6) days later, BCBS filed its third set of interrogatories.

On February 22, 1983, the State answered BCBS's third set of interrogatories (R. 278), and one week later, on March 1, 1983, BCBS filed its motion for partial summary judgment (R. 281) and set the hearing for March 14, 1983 (R. 457). The matter was heard on March 22 and 23, 1983 (R. 546).

The District Court delivered its memorandum decision on September 13, 1983 (R. 744) and the Order was entered on October 3, 1983 (R. 748). On November 10, 1983, the State filed its motion for summary judgment (R. 768), and the matter was heard and the Court granted the State's motion on November 14, 1983 (R. 771). The Order was entered December 6, 1983 (R. 788), and the notice of appeal was filed December 9, 1983 (R. 794).

There is certainly nothing wrong with a party moving litigation along; in fact, it is to be encouraged, rather than discouraged. However, as illustrated in point II above, BCBS knew it had to show some economic harm. It certainly wasn't enough to show that BCBS and the other hospital and medical providers organized and regulated under Chapter 37 of Title 31, Utah Code Ann. were regulated under a different chapter of Title 31 than the MBAs. BCBS knew it had to show economic harm, and it thought it had done so (Point III of Reh. Pet.). BCBS had all

the time it needed to discover facts to present in a motion for summary judgment or at trial. The State, while not dragging its feet, constantly responded to the discovery requests from BCBS. With the situation the way it was, the State never did conduct any discovery, and its statement of points in opposition to BCBS's motion for partial summary judgment was the first and only attempt by the State to present any evidence or argument. Yet on March 1, 1983, only six months after this action was commenced, BCBS believed it had conducted all the discovery necessary and had all the facts it needed to proceed with its motion. BCBS presented ten (10) pages of facts in its memorandum in support of its motion (R. 285 to 295), plus nearly 150 pages of exhibits (R. 330-454). On the second page of its motion, BCBS admitted, as it had to, there was "no genuine issue as to any material fact" so that BCBS "is entitled to judgment as a matter of law" (R. 282).

If the record could be supplemented here with affidavits from counsel for the State as to the role of BCBS in having the State's motion for summary judgment filed, heard and granted, it would clarify some points. Since that is not possible, the State points out that only a month after the Order denying BCBS's motion for partial summary judgment was entered, the State filed its motion for summary judgment. Not only was the State's motion filed on November 10 (a Wednesday) and heard only four (4) days later on November 14 (a Monday), but the motion and the notice of hearing were only mailed to BCBS on November 10 (R. 767, 770). The motion itself is less than a page long in substance, and merely says that all pertinent facts are before the Court from the BCBS motion for summary judgment.

Although no new facts or argument were presented in the State's motion for summary judgment, BCBS did not object to the lack of notice of the hearing, or lack of time to object to the State's motion. BCBS also did not produce any more facts for the Court to consider. BCBS was represented by counsel at the hearing, and there is nothing to indicate that BCBS objected to the entry of the State's motion for summary judgment.

What BCBS is urging the Court to do is to allow it a second bite at the apple to present more evidence, now that two courts have ruled it didn't meet its burden of proof. BCBS could have conducted additional discovery and presented additional evidence before it filed its motion for partial summary judgment. When that motion was denied, BCBS could have at that point conducted additional discovery and presented any additional evidence at trial. BCBS chose not to do so, confident that this Court would reverse the District Court. BCBS had its chance to build and present its case six (6) years ago, and chose not to do so. BCBS cannot now be allowed to go back and do what it had the opportunity then to do but chose not to do.

V. IF THE MATTER IS REMANDED TO THE DISTRICT COURT TO PRESENT EVIDENCE, BOTH PARTIES WILL BE DISADVANTAGED BECAUSE OF THE PASSING OF TIME

This matter began in October 1982, and was based upon subscription taxes paid under protest by BCBS for the period April 1, 1982 through September 30, 1982. The last such taxes were paid for the period ending June 30, 1987, when the premium tax was removed from all insurance and insurance-like products.

In the affidavit which the Court rejected as conclusory, and BCBS believes contained virtually all the facts BCBS needed to prove its case, assertions are made that BCBS could have won the business of several companies were it not for the premium tax. That affidavit was filed over six (6) years ago. Since the premium tax was removed effective July 1, 1987, at best, information on what companies were contacted by BCBS, during the time BCBS had to pay the premium tax, and what companies went with an MBA and why, is over two (2) years old. As stated above, the main target of BCBS, and the entity whose operation understandably gave this Court the most trouble, was Gem State, who marketed basically only to smaller companies. Because they were smaller companies, it is likely that many of are no longer in existence, and even more likely that many of the people who would have made the decisions as to which insurer the company chose to provide its employees with coverage are no longer with the companies, and perhaps no longer even in Utah. To impose such a burden upon the State, and upon BCBS at this point, would be most cumbersome, unfair, and perhaps impossible.

VI. IF THE CLASSIFICATION EXEMPTING THE MBAS FROM TAXATION IS CONSTITUTIONALLY IMPAIRED, THE PROPER REMEDY IS FOR THE COURT TO STRIKE DOWN THE EXEMPTION

The Court noted that the "deduction" for MBA premiums under Utah Code Ann. § 31-14-1(1) (Supp. 1981) was technically a deduction, but that since the deduction effectively eliminated the premium tax for MBAs, it is a de facto exemption.

It is well settled that in tax law, if a classification providing an exemption or deduction to a group is found to be

constitutionally defective, the proper remedy is to strike down the exemption or deduction, rather than expanding the exemption or deduction to include persons the legislative branch did not intend to be covered by the exemption or deduction. (See Brief of the State at 40-41).

VII. CONCLUSION

BCBS knew it had to show substantial economic harm to have the Court grant its motion for partial summary judgment. This Court did not impose a new standard from the Mountain Fuel case upon BCBS -- Mountain Fuel is only an application of the same standards this Court has been applying for a number of years. Furthermore, BCBS did attempt to show by facts that it had suffered substantial economic disadvantage by having to pay the subscription tax while the MBAs did not have to pay the tax. BCBS simply failed to provide enough evidence to persuade either the District Court or this Court. BCBS also had plenty of opportunities in the District Court to conduct discovery and present all the evidence it could. BCBS should not be given an opportunity now to go back and do what it chose not to do. It would also be most unfair to remand this matter to the District Court to allow the presentation of further facts now, given the amount of time that has passed since this action began. Finally, if this Court should be persuaded that the classification of the MBAs for the purposes of exempting them from a tax similarly to the subscription tax is unconstitutional, the proper remedy is to strike down the exemption or deduction for the MBAs.

The opinion of the Court should be reaffirmed without rehearing.

Respectfully submitted this 6th day of September, 1989.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of September, 1989, I caused to be hand-delivered four true and correct copies of the foregoing REPLY TO PETITION FOR REHEARING OF RESPONDENTS/ DEFENDANTS to the following:

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