Filed 3/1/07 Ogle v. Pacificare Life and Health Ins. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

GEORGE OGLE et al., Plaintiffs and Respondents, v. PACIFICARE LIFE AND HEALTH INSURANCE COMPANY etc., Defendant and Appellant.	G037319 (Super. Ct. No. 06CC02621) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Dennis S. Choate, Judge. Affirmed.

Sedgwick, Detert, Moran & Arnold, David M. Humiston, Douglas J. Collodel and Edward A. Stumpp, for Defendant and Appellant.

Pierce & Shearer, Andrew F. Pierce and Mary M. Leichliter, for Plaintiffs and Respondents.

PacifiCare Life and Health Insurance Company, and PacifiCare of California (collectively PacifiCare) appeals from an order denying their petition to compel arbitration of the lawsuit brought against them by George and Shirley Ogle. We affirm the order. The arbitration provision at issue in this case is found in PacifiCare's 2003 subscriber agreement, and is governed by the Knox-Keene Health Care Service Plan Act of 1975 (Health & Saf. Code, §§ 1340 et seq.)[1]. PacifiCare has waived any contention the trial court erred in applying the Knox-Keene Act, and has otherwise failed to persuade us the provision complies with the Act's requirements. Consequently, the provision is unenforceable.

* * *

In January of 2006, the Ogles filed their complaint against PacifiCare, accusing it of breaching their contract and engaging in bad faith insurance practices. They sought damages and declaratory relief.

PacifiCare answered the complaint on March 16, 2006, and two months later, in May of 2006, made its initial attempt to compel arbitration. Due to an attorney service error, the initial filing was incomplete, and the completed petition to compel was subsequently filed in June of 2006.

PacifiCare argued its right to compel arbitration was based upon two documents. First, the enrollment form signed by the Ogles in 2003, provided – in all capital letters, and just above the signature line – "I AGREE AND UNDERSTAND THAT ANY AND ALL DISPUTES, INCLUDING CLAIMS RELATING TO THE DELIVERY OF SERVICES UNDER THE PLAN AND CLAIMS OF MEDICAL MALPRACTICE (THAT IS AS TO WHETHER ANY MEDICAL SERVICES RENDERED UNDER THE HEALTH PLAN WERE UNNECESSARY OR UNAUTHORIZED, OR WERE IMPROPERLY, NEGLIGENTLY OR

[1] The Knox-Keene Healthcare Act is hereinafter referred to as the "Knox-Keene Act."

INCOMPETENTLY RENDERED) EXCEPT FOR CLAIMS SUBJECT TO ERISA, BETWEEN MYSELF . . . AND PACIFICARE OF [STATE, INC.][2] . . . SHALL BE DETERMINED BY SUBMISSION TO BINDING ARBITRATION. ANY SUCH DISPUTE WILL NOT BE RESOLVED BY A LAWSUIT OR RESORT TO COURT PROCESS, EXCEPT AS THE FEDERAL ARBITRATION ACT PROVIDES FOR JUDICIAL REVIEW OF ARBITRATION PROCEEDINGS. ALL PARTIES TO THIS AGREEMENT ARE GIVING UP THEIR CONSTITUTIONAL RIGHT TO HAVE ANY SUCH DISPUTE DECIDED IN A COURT OF LAW BEFORE A JURY, AND INSTEAD ARE ACCEPTING THE USE OF BINDING ARBITRATION."

However, that enrollment form also provided "*I understand this application is not a contract*. The contract consists of the PacifiCare Health Plan Individual Subscriber Agreement or Policy, including but not limited to all applications, health questionnaires and information submitted by the Subscriber or Insured and his or her Dependents in applying for coverage, appropriate attachments and addenda, and any amendments thereto. *Should my application be accepted, PacifiCare will send me a Subscriber Agreement or Policy which details the exact terms and conditions of coverage to which I will be legally bound.*" (Italics added.)

PacifiCare also relied upon the 2005 subscriber agreement, which provided on page 43, under the heading "BINDING ARBITRATION," that "[a]ny and all disputes of any kind whatsoever, including Claims . . . of medical malpractice . . . except for Claims subject to ERISA . . . shall be submitted to binding arbitration. . . ." That provision, other than the heading, was not printed in all capital letters, nor was it in any specially-sized font or colored ink designed to bring attention to it.

[2] The bracketed "State, Inc." is part of the text of the provision.

The Ogles opposed the petition, arguing that the only subscriber agreement they ever remember receiving was the 2003 booklet sent to them when they initially enrolled. They asserted that booklet contains no arbitration clause.

Indeed, among its 37 pages of small-print terms, the booklet contains a section entitled "Claims and Claims Procedures for Insurance;" that section, in turn, contains a provision entitled "LEGAL ACTIONS." And while one might logically assume that any arbitration clause would be found there, the provision says nothing about arbitration. It says only: "Any Person may not bring legal action for benefits against the Company; [¶] 1. Until at least sixty (60) days after proof of loss is sent to the Company as required; or [¶] 2. More than three (3) years after the time for submitting proof has ended."

However, 31 pages earlier, and located in the section entitled "General Provisions," is the following unnumbered paragraph : "ARBITRATION. If any Covered Person has a dispute, disagreement or Claim against the Company, which has not been resolved or settled after exhaustion of the Company's grievance procedures, then the dispute or disagreement shall be resolved by arbitration. The provision shall be applicable to claims or controversies arising under the Policy. Arbitration shall be conducted in accordance with the Commercial Rules of Arbitration of the American Arbitration Association. The decision of the arbitrator(s) shall be binding upon the parties for all purposes and judgment upon the award granted by the arbitrator(s) may be entered in any court having jurisdiction thereof."

The Ogles also argued that PacifiCare's enrollment form was not binding upon them; that PacifiCare's attempt to impose arbitration upon them was unconscionable because they lacked any meaningful choice; that PacifiCare had waived its right to compel arbitration by failing to fairly notify them of the asserted arbitration provision prior to the filing of their complaint; and that PacifiCare's purported arbitration clause fails, in any event, to comply with the requirements of the Knox-Keene Act.

In reply, PacifiCare noted that the 2003 subscriber agreement did include the arbitration provision among its "general provisions"; asserted that its agreement with the Ogles was not subject to the requirements of the Knox-Keene Act; and countered the Ogles waiver argument and their assertion they had no choice but to accept PacifiCare's agreement.

At oral argument in the trial court, PacifiCare explained its position that "all of the documents taken together, including the ones that have been presented by the plaintiff himself . . . show clearly that the parties did in fact enter an agreement to arbitrate disputes." The trial court noted that the enrollment form specified that it "is not a contract," but that even if it did consider that language, as well as the subscriber agreement, the purported agreement contained no provisions explaining the costs of arbitration, the location of the arbitration, or setting forth the procedures to be utilized. The court noted that a mere reference to the "commercial rules of the Triple A," contained in the subscriber agreement, would be unlikely to provide much information to a layperson. The court also noted that the arbitration language relied upon by PacifiCare failed to comply with the requirements of Health and Safety Code section 1373, subdivision (i). The court denied the petition.

I

PacifiCare first argues that "[t]aken together, the enrollment form and the [2003] Subscriber Agreement adequately informed plaintiffs that any and all disputes with PacifiCare over its services were to be arbitrated."[3] However, when the courts are asked to enforce an arbitration agreement, the issue is not what plaintiffs may have been "informed" about at some point; instead, we are empowered to enforce only a written arbitration agreement, and in accordance with its terms. (Code Civ. Proc., § 1281.2.)

[3] Although PacifiCare asserts the 2003 subscriber agreement should have been superseded by the 2005 agreement, it acknowledges the Ogles' assertion, supported by evidence in the court below, that they never received a copy of the 2005 document. Consequently, for purposes of this appeal, PacifiCare is relying on the content of that 2003 agreement.

Thus, our first obligation is to determine the parameters of the parties' written agreement, and then determine whether its terms require arbitration of this dispute. In the absence of extrinsic evidence, our interpretation of the written documents is de novo. (*Metalclad Corp. v. Ventana Environmental Organizational Partnership* (2003) 109 Cal.App.4th 1705; see also *Engineers & Architects Assn. v. Community Development Dept*. (1994) 30 Cal.App.4th 644, 653 [applying the substantial evidence test to disputed factual issues.].)

In this case, although there were some other disputed factual issues, PacifiCare nullified the only factual dispute regarding the documents when it conceded that the 2003 subscriber agreement, rather than the 2005 one (which the Ogles denied having received), was controlling. It is undisputed that the Ogles both signed the enrollment form, and received a copy of the 2003 subscriber agreement. The content of those two documents is likewise undisputed.

Our de novo review of those two documents leads us to the conclusion that the arbitration language of the enrollment form constitutes no part of the parties' written arbitration agreement. Our conclusion, of course, is based upon the clause of the enrollment form which begins "I understand that this application is not a contract." And while that one sentence might be seen as disposing of the issue summarily, the analysis is not quite that easy. The "not a contract" language is immediately followed by the rather confusing explanation that "[t]he contract consists of the PacifiCare Health Plan Individual Subscriber Agreement or Policy, *including but not limited to all applications, health questionnaires and information submitted by the Subscriber* or Insured and his or her Dependents *in applying for coverage*, appropriate attachments and addenda, and any amendments thereto." (Italics added.)

We characterize this language as "confusing," because the "Subscriber Agreement" before us does not state that it "includes" any of those things. And while that language might be argued as providing support for PacifiCare's contention that the

arbitration language in the enrollment form should be construed as *included* in the operative "agreement," the argument would not hold water. We conclude that what this language was intended to convey is that any policy ultimately issued by PacifiCare would be subject to the accuracy of any information, including applications, health questionnaires, information *submitted by the subscriber in applying for coverage*.

We cannot construe it as incorporating the contractual language otherwise contained in the enrollment form, because the very next sentence of that clause forecloses such an interpretation: "Should my application be accepted, PacifiCare will send me a subscriber agreement or Policy *which details the exact terms and conditions of coverage to which I will be legally bound.*" The use of the phrase "exact terms and conditions of coverage" precludes any determination that the enrollment form was intended (or should have been understood by the Ogles) as legally altering the "exact terms and conditions" of that Subscriber Agreement.

Our conclusion that the arbitration language in the enrollment form was not intended to comprise any part of the final agreement between the parties is reinforced by the fact that the provision itself is phrased in generic terms. PacifiCare is identified as "PacifiCare of [State, Inc.]" rather than specifically as any particular PacifiCare entity, and the provision for judicial review reflects that will occur as provided for in the "Federal Arbitration Act." This generic language is consistent with the conclusion (and PacifiCare's initial argument) that the arbitration language in the enrollment form was merely intended to "inform" the Ogles that their policy would likely include an arbitration provision, and what that might entail – a "heads up" so to speak. However, the language of the enrollment form, taken as a whole, compels the conclusion that this language was not intended (nor should it have been expected by the Ogles) to constitute part of that later, "legally binding," agreement.

Of course, even if we construed the language of the enrollment form as merely "ambiguous," we would have to construe it against PacifiCare, the party that

drafted it and caused the ambiguity. (Civ. Code, § 1654.) Consequently, in determining the enforceability of the arbitration provision between these parties, we will consider only the "exact terms and conditions" contained in the 2003 subscriber agreement as comprising that provision.

II

In footnote 2 of its opening brief, PacifiCare states: "Below, PacifiCare disputed the application of the Knox-Keene Act to its contract with plaintiffs. . . . Although it does not waive this position, the point is mooted by PacifiCare's compliance with the Act's requirements." Au contraire. The issue is waived. The record makes clear the trial court found against PacifiCare regarding the application of the Knox-Keene Act, and PacifiCare has the burden of affirmatively demonstrating on appeal that the court erred in doing so. (*1119 Delaware v. Continental Land Title Co.* (1993) 16 Cal.App.4th 992, 1004; *In re Marriage of Schroeder* (1987) 192 Cal.App.3d 1154, 1164.) It made no attempt to satisfy that burden.[4]

We thus turn to the argument PacifiCare does make on appeal; i.e., that its arbitration agreement actually complies with the requirements of Knox-Keene. We find the contention unpersuasive.

Health and Safety Code section 1363.1 provides: "Any health care service plan that includes terms that require binding arbitration to settle disputes and that restrict, or provide for a waiver of, the right to a jury trial shall include, in clear and understandable language, a disclosure that meets all of the following conditions: [¶] (a)

[4] PacifiCare appears to be assuming we will consider whatever argument is contained in the briefs it filed below. That belief is mistaken. "[I]t is not appropriate to incorporate by reference, into a brief, points and authorities contained in trial court papers, even if such papers are made a part of the appellate record. [Citation.] The dearth of true legal analysis in . . . appellate briefs amounts to a waiver . . . ." (*Colores v. Board of Trustees* (2003) 105 Cal.App.4th 1293, 1301, fn. 2.) In any event, even if we did consider it, we would conclude it was likewise inadequate to demonstrate trial court error. The entire argument below is as follows: "Plaintiffs cite to Health and Safety Code section 1363[, subdivision] (a)(10), which is inapplicable to this case. The Ogles purchased an individual health insurance policy (See Exhibit 'B' to Mr. Ogle's Declaration) and not a managed care product. The Knox-Keene Act . . . does not apply to insurance products." The point includes neither analysis of why the policy issued to the Ogles must be considered an "insurance product" rather than a "managed care" product, nor any authority for the legal conclusion posited.

The disclosure shall clearly state whether the plan uses binding arbitration to settle disputes, *including specifically whether the plan uses binding arbitration to settle claims of medical malpractice*. [¶] (b) The disclosure shall appear as *a separate article* in the agreement issued to the employer group or individual subscriber and shall be prominently displayed on the enrollment form signed by each subscriber or enrollee. [¶] (c) The disclosure *shall clearly state* whether the subscriber or enrollee *is waiving his or her right to a jury trial* for medical malpractice, other disputes relating to the delivery of service under the plan, or both, *and shall be substantially expressed in the wording provided in subdivision (a) of Section 1295 of the Code of Civil Procedure*.[5] [¶] (d) In any contract or enrollment agreement for a health care service plan, the disclosure required by this section shall be displayed immediately before the signature line provided for the representative of the group contracting with a health care service plan and immediately before the signature line provided for the individual enrolling in the health care service plan." (Italics added.)

Health and Safety Code section 1373, subdivision (i), provides: "If the plan utilizes arbitration to settle disputes, the plan contracts shall set forth the type of disputes subject to arbitration, *the process to be utilized, and how it is to be initiated*." (Italics added.)

The language in the 2003 subscriber agreement fails to comply with any of the statutory requirements italicized above. It makes no "specific" reference to medical

---

[5] Code of Civil Procedure section 1295 provides in pertinent part: "(a) Any contract for medical services which contains a provision for arbitration of any dispute as to professional negligence of a health care provider shall have such provision as the first article of the contract and shall be expressed in the following language: 'It is understood that any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process except as California law provides for judicial review of arbitration proceedings. Both parties to this contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration.' [¶] (b) Immediately before the signature line provided for the individual contracting for the medical services must appear the following in at least 10-point bold red type: [¶] '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.'"

malpractice claims, and does not "clearly state" that the Ogles are waiving their right to a jury trial. It is not "substantially expressed in the wording provided in subdivision (a) of Section 1295 of the Code of Civil Procedure." Indeed, PacifiCare's contention is that it is *the language of the enrollment form* which complies with that requirement.

Additionally, the language of the subscriber agreement does not "set forth" the "process to be utilized and how it is to be initiated," as required by Health and Safety Code section 1373, subdivision (i). At most, it implies that the Ogles might be able to ascertain that information if they knew how to contact the American Arbitration Association – and there was no evidence that they did. Providing a clue as to how one might ascertain the required terms of the agreement is not the same thing as "setting them forth."

As explained in *Wolschlager v. Fidelity National Title Ins. Co.* (2003) 111 Cal.App.4th 784, 790, an enforceable arbitration provision may be incorporated by reference into the parties' agreement only where the reference is "'"'clear and unequivocal, the reference [is] called to the attention of the other party and he . . . consent[s] thereto, and the terms of the incorporated document [are] known or easily available to the contracting parties.'" [Citations.]'" In *Wolschlager*, the disputed arbitration provision was contained within the terms of the parties' title insurance policy, but not in the preliminary report actually given to plaintiff prior to the close of escrow. The court concluded that was nonetheless sufficient to bind plaintiff, because while the plaintiff did not specifically know of the arbitration provision, "[t]he preliminary report identified the Policy by name and *directed the plaintiff to where he could inspect it.*" (*Id.* at p. 791, italics added.)

In this case, by contrast, there was no evidence that would have compelled the trial court to conclude either that the Ogles' knew the content of the AAA rules, or that those rules were "easily available" to them. As to the first issue, the court expressly

concluded the opposite: "I can't expect a lay person to know [the rules.] I don't know them and I don't think you know them." Amen.

And as to the second, the Subscription Agreement's reference to "the Commercial Rules of the American Arbitration Association" was unaccompanied by any information as to where or how the Ogles might inspect those rules. We conclude the reference was consequently insufficient to qualify as "setting forth' those rules in the agreement.

Failure to comply with the requirements of the Knox-Keene Act renders an arbitration provision unenforceable. (*Malek v. Blue Cross of California* (2004) 121 Cal.App.4th 44.) Such is the case here. In light of our analysis of this issue, we need not reach the other arguments put forth by the Ogles below.

The order is affirmed. The Ogles are to recover their costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

O'LEARY, J.

FYBEL, J.