

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKLAHOMA DEPARTMENT OF)
SECURITIES ex. rel. IRVING L.)
FAUGHT, ADMINISTRATOR;)

Plaintiffs,)

vs.)

BARRY POLLARD AND)
ROXANNE POLLARD,)
Defendants and Third Party)
Plaintiffs)

vs.)

AXA ADVISORS LLC, a Delaware)
Limited Liability Company; and AXA)
EQUITABLE LIFE INSURANCE)
COMPANY, f/k/a EQUITABLE LIFE)
ASSURANCE SOCIETY OF THE)
UNITED STATES,)

Third Party Defendants.)

Case No.: CJ-2005-3799
Judge Vicki Robertson

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

MAR - 7 2007

PATRICIA PRESLEY, COURT CLERK
by _____
Deputy

**DEFENDANTS' RESPONSE AND OBJECTION TO PLAINTIFF AXA EQUITABLE
LIFE INSURANCE COMPANY'S RENEWED MOTION TO COMPEL ARBITRATION
AND BRIEF IN SUPPORT**

COME NOW Defendants and Third Party Plaintiffs, Barry Pollard and Roxanne Pollard ("Pollards") and for their Response and Objection to the Third Party Defendant AXA Equitable Life Insurance Company's ("Equitable") Motion to Compel Arbitration and Brief in Support. The Third Party Defendant's Renewed Motion to Compel Arbitration cannot be granted because:

- (a) The application date, or register date, of the Insurance Policies was 1993 for two of the policies, 1994 for one policy and 1999 for one policy, yet the application relied upon by Equitable in attempting to compel arbitration is dated in 2000;

(b) There has not been produced any document compelling the parties to arbitration;

(c) The variable life insurance policies relied upon by Equitable only identifies Equitable as a party to the contract and in no way associates AXA Advisors or AXA Financial with Equitable; and

(d) Insurance contracts, variable or otherwise, are exempt from arbitration.

RESPONSE AND OBJECTION

Equitable goes to great efforts to show this Court why the parties and their claims on the insurance policies ought to be compelled to arbitration. Equitable's lengthy discussion on sister, subsidiary, and parent company relationships is irrelevant. The facts show that the relevant insurance policies were applied for and obtained in the 1990's and contain no arbitration provisions. As a matter of fact, the insurance policies state that the insurance policy is the *entire contract* between the Pollard's and Equitable. Equitable requests that this Court order the parties to mediate the issues concerning the insurance policies based on a *non-insurance* application signed in the year 2000 with companies that were only tangentially related. The case law cited by Equitable in support of its argument that the 1990's insurance policies are subject to the 2000 arbitration agreement pertain to situations wherein the issues occurred from events that arose out of or at the same time as when the arbitration agreement was entered.

Unless of course the parties specifically intend for an arbitration agreement to apply to past agreements, it is not logical to conclude that an arbitration agreement signed in a future document reaches back in time to past agreements. The Court should look to the four corners of the insurance applications and the insurance contracts, for the procedures for resolving any disputes. A careful reading of the insurance contracts and applications do not provide for

arbitration of the issues. If Equitable intended for the provisions in any of its sister or parent companies' applications to apply to the insurance contracts, then it should have set this forth in its applications and policies.

INSURANCE POLICIES

EXHIBIT	POLICY NUMBER & VALUE	DATE ISSUED	INITIAL PREMIUM	PERIODIC PREMIUM
1	43 238 937 \$1,750,000.00	1993	\$30,000.00	\$30,000.00/year
2	43 257 265 \$2,000,000.00	1993	\$2,208.00	\$2,208.00 (23 yrs) \$6,197.34 (35 yrs)
3	44 230 443 \$500,000.00	1994	\$5,000.00	\$2,500.00/month
4	48 253 032 \$570,000.00	1999	\$767.09	\$1,100.00/month

I. THE INSURANCE POLICIES WERE OBTAINED IN THE 1990's, WHEREAS THE APPLICATION EXECUTED WITH AXA ADVISORS WAS ENTERED INTO IN THE YEAR 2000.

Equitable attempts to enforce the arbitration provision set forth in the AXA Advisors Application signed by Barry Pollard in 2000. Although Equitable has gone to great efforts to give this Court a reason to compel the issues surrounding the insurance policies to arbitration, it is undeniable that the executed applications for the insurance policies were all executed in 1993, 1994, and 1999. It is irrational to subject the Pollards to an arbitration agreement set forth in a

future document and which was not considered to be a term on which the Pollards gave consideration in exchange for their insurance policies.

Equitable argues that the arbitration provision set forth in the 2000 contract blanket covers for all dealings between the Pollards and AXA Advisors, Equitable and any other associated entities. However, the arbitration provision does not state that it covers *prior* agreements with Equitable or any other entity. At the time that Barry Pollard executed the AXA Advisors Application in 2000, he was not renegotiating his prior agreements, namely the insurance policies. Clearly, the application signed in 2000 with AXA Advisors is not so broad as to reach the insurance policies purchased in the 1990's. Additionally, the application signed in 2000 with AXA specifically states that the agreement is being entered with AXA Advisors, LLC. (Exhibit 5, AXA Application P. 2, ¶ 1.) It is absurd to suggest that this Court consider the AXA application, which is a contract of adhesion and the arbitration provisions contained therein applicable to the Equitable insurance contracts when there does not exist any language or any other indication of any such relationship.

II. THE INSURANCE POLICY IS THE ENTIRE CONTRACT BETWEEN EQUITABLE AND THE POLLARDS.

Equitable has not attached to its Motion to Compel Arbitration any exhibit containing an arbitration provision. It is assumed that Equitable is relying upon the arbitration provision set forth in the AXA Advisors 2000 application to support its motion on behalf of Equitable. It is simply argued that the parties should be compelled to arbitration, but Equitable cites to no document establishing that the parties are bound to arbitrate.

The insurance policies attached as exhibits and referred to as the applications executed by the Pollards specifically set forth the following:

“OTHER IMPORTANT INFORMATION

Your Contract with Us. This policy is issued in consideration of payment of the initial premium payment shown in the Policy Information section.

This policy, and the attached copy of the initial application and all subsequent applications to change this policy, and all additional Policy Information sections added to this policy, **make up the entire contract.** The rights conferred by this policy are in addition to those provided by applicable Federal and State laws and regulations.

Only our Chairman of the Board, our President or one of our Vice Presidents can modify this contract or waive any of our rights or requirements under it. The person making these changes must put them in writing and sign them.” (Emphasis added) (Exhibits 1, 2, 3, & 4, Insurance Policies, P. 16.)

Obviously, the insurance policies within themselves are the entire contracts as they do not refer to or incorporate any other applications or contracts, such as the AXA Advisors application. The application with AXA Advisors that is relied upon by Equitable was executed after all of the insurance policies (insurance contracts) were in place. There is no arbitration provision provided in the insurance policies and the insurance contracts have not been amended to include such a provision. In fact, the insurance policy contracts, which were drafted by Equitable specifically provide that “Only our Chairman of the Board, our President or one of our Vice Presidents can modify this contract or waive any of our rights or requirements under it. The person making these changes must put them in writing and sign them.” Equitable has not produced to this Court any amendment in writing signed by Equitable’s Chairman of the Board, President, or a Vice President. Certainly, the Pollard’s have not signed any such amendment or modification to the insurance policies binding them to arbitrate any issues arising under the insurance policies.

The AXA application that Equitable seeks to enforce provides that no changes are to be made to the agreement unless they are "...in writing signed by an officer of AXA Advisors, LLC..." (Exhibit 5, AXA Application P. 2, ¶18.) The AXA application is signed by Marsha Schubert as an agent of AXA. Surely Equitable is not suggesting that Marsha Schubert held such a position of authority such as that of Chairman of the Board, President, or Vice President of Equitable. If so, we are anxiously awaiting evidence establishing Marsha Schubert's authority which would have empowered her to amend the applicable insurance applications and policies. Such information would certainly shed a new light on this subject! After all she has been accused of operating a "ponzi" scheme and defrauding investors of millions of dollars.

It is disingenuous for Equitable to now argue that an arbitration provision in an application for a stock investment account, signed with some affiliated company that had vague language as to its applicability, amends the insurance policy contracts at issue. Equitable's argument is contrary to the specific terms of the insurance policy contracts wherein they provide that only officers of the highest level at Equitable could modify the terms of the insurance policy contracts. One can only imagine what Equitable's response would be if the Pollard's were to suggest that the terms of these insurance policy contracts had been modified by a lower level employee or agent of an affiliated company, such as Marsha Schubert. Apparently Equitable believes that it can reach across time and space to incorporate into its insurance policy contracts any documents signed between the Pollard's and an employee of an affiliated company when they believe it benefits them. It is seriously doubted that Equitable would extend the same courtesy to the Pollard's if the tables were turned.

Furthermore, one element of a valid contract between two parties is that there exists some exchange of value between the parties as consideration. In this instance, the initial premium payment is recognized as the consideration. The consideration given by the Pollards in exchange for their investment with AXA Advisors was a check in the amount of \$20,000.00 made out to "AXA Advisors." Such consideration is clearly distinguishable from the Pollards' initial premium payments given to Equitable in exchange for four life insurance policies. Such initial premiums total to over \$37,000.00.

III. THE INSURANCE POLICIES WERE ONLY ISSUED BY EQUITABLE LIFE INSURANCE COMPANY WHICH IS THE ONLY PARTY TO THE CONTRACT WITH THE POLLARDS.

Neither AXA Advisors, LLC nor AXA Financial, Inc. are parties to the insurance policies issued by Equitable to the Pollards. Equitable relies solely upon these insurance policies, and as a matter of fact identifies them as "executed applications" in support of its argument that the existing issues are to be arbitrated. (Equitable's Mtn to Compel Arb., P. 2, ¶1.) The insurance policies attached as exhibits to Equitable's Motion and to Pollards' Response specifically provide as follows: "In this policy: 'We,' 'our,' and 'us' mean AXA Equitable Life Insurance Company." (Exhibits 1, 2, 3, & 4, Insurance Policies P. 2.) No where in the insurance policies are AXA Advisors or AXA Financial identified as parties to the insurance contracts. Additionally, the insurance policies and applications specifically direct all correspondence to the Administrative Office as follows: Equitable Variable Life Insurance Company in Fresno, California, with the exception of the 1999 policy which directs all communications to North Carolina. (Exhibits 1, 2, 3, & 4, Insurance Policies, P. 3.) However, on the application that the Pollards executed with AXA Advisors, the address provided for communications is in New

York. (Exhibit 5, AXA Advisors Application, P. 1.) Further, the AXA application states that the Application exists as between Barry Pollard and AXA Advisors, LLC. (Exhibit 5, AXA Advisors Application, P. 2, ¶1.) The AXA application does not state or identify any other entities affiliated with or associated with or related to AXA. In no place does the application state that it is applicable to Equitable or that Equitable is a party.

At the outset, it is evident that AXA Advisors and AXA Equitable are distinctly different entities whose relationship is not identified nor expressed to the contracting party, in this instance, the Pollards. It is irrelevant that they are sister companies because nothing suggests that the terms and provisions of one company will affect and govern the other company.

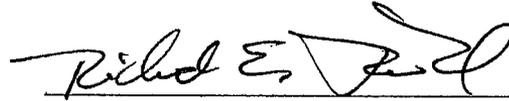
IV. INSURANCE CONTRACTS ARE NOT ARBITRABLE.

Title 12 O.S. §1855 (D) sets forth that the Oklahoma Uniform Arbitration Act (“OUAA”) does not apply to contracts that reference insurance. Pursuant to Towe, Hester & Erwin, Inc. v. Kansas City Fire & Marine Insurance Co., 947 P.2d 594, 1997 OK CIV APP 58, the Court stated that contracts with reference to insurance are not arbitrable. Similarly, Cannon v. Lane, 867 P.2d 1235, 1993 OK 40, involved an HMO and an employee. The HMO did not want to pay for medical procedures rendered to the employee and there resulted a legal dispute that the HMO sought to enforce arbitration. The Court identified the phrase “with reference to” as the state of being related or referred. Cannon at 1237. The Court cited to Boughton v. Farmers Ins. Exch., 354 P.2d 1085 (Okla., 1960), in support of its determination that a contract with reference to insurance falls within the exemption of the OUAA and thusly rejected the applicants motion to compel arbitration. Cannon at 1238 and 1239.

Much of the money at issue in this case consists of insurance premiums paid and loans against the value of these policies, both of which are matters directly provided for in and related to the insurance policies. Summarily, all issues involving the insurance policies held by the Pollards are not subject to arbitration. Equitable fails to cite to any case law wherein contracts referencing insurance are not exempt from arbitration.

WHEREFORE, the Defendants Pollards respectfully request this Court find that the Third Party Defendant's Renewed Motion to Compel Arbitration is not proper and thusly deny the same. The Pollards further request any further and additional relief to which they are entitled.

Respectfully submitted,



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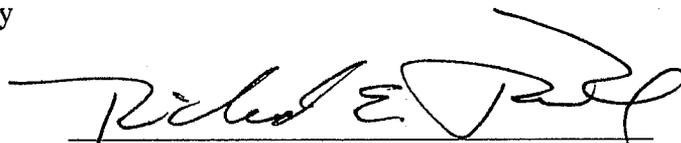
CERTIFICATE OF SERVICE

This is to certify that on the 7th day of March, 2007, true and correct copies of the above and foregoing were mailed by first class mail, postage prepaid, to the following:

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