

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; FARMERS &)
MERCHANTS BANK, an Oklahoma)
Banking Entity; FARMERS &)
MERCHANTS BANCSHARES, INC., an)
Oklahoma Corporation;)
JOHN V. ANDERSON, Individually, and)
as an officer and director of Farmers &)
Merchants Bank, and as a shareholder of)
Farmers & Merchants Bancshares, Inc.; and)
JOHN TOM ANDERSON, Individually, and)
as an Officer and Director of Farmers &)
Merchants Bank and as a shareholder of)
Farmers & Merchants Bancshares, Inc.,)

Third Party Defendants.)

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

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

MAY 29 2007

PATRICIA PRESLEY, COURT CLERK
by _____ DEPUTY

**DEFENDANT POLLARDS' RESPONSE TO
AXA EQUITABLE LIFE INSURANCE COMPANY'S MOTION TO DISMISS BREACH
OF CONTRACT CLAIM AND REQUEST FOR RECONSIDERATION OF RE-NEWED
MOTION TO COMPEL ARBITRATION OF CLAIMS AGAINST AXA EQUITABLE**

COMES NOW the Defendants Barry and Roxanne Pollard by and through their attorneys of record, Richard Parrish and Carolie Rozell of Fulkerson & Fulkerson, P.C., for their Response to AXA Equitable Life Insurance Company's Motion to Dismiss Breach of Contract Claim and Request for Reconsideration of Renewed Motion to Compel Arbitration of Claims Against AXA Equitable, and in further support thereof, state:

ARGUMENTS AND AUTHORITIES

I. The Pollard's Breach of Contract Claim is valid and exists because:

a. A contract was entered between the Pollards and Equitable.

The AXA Equitable Life Insurance Company (hereinafter "Equitable,") policy applications clearly reflect that the insurance policies issued by Equitable and purchased by the Pollards are contracts. They are signed by both Equitable's Senior Vice President, Secretary and Associate General Counsel as well as by its Chairman, President and Chief Executive Officer. (Ex. 1, Policy #43 238 937; Ex. 2, Policy #43 257 265; Ex. 3, Policy #44 230 443; Exhibit 4, Policy #48 253 032 .) The facts, as set forth in the Pollards' Amended Third Party Petition and as applied to the elements of breach of contract, establish the Pollards' cause of action for breach of contract against Equitable.

b. The Pollards paid the premiums in exchange for life insurance coverage.

There has not been any dispute as to whether premium payments for the insurance policies were paid as they were in fact paid. In other words, the basis of Equitable's dispute of

the Pollards' claims against it are not that the Pollards failed to pay the insurance premiums. Additionally, the records produced by Equitable reflect that payment of the premiums were made.

c. Equitable knew or should have known that the Pollards' expected that the value of their insurance policies would be reasonably protected.

It was reasonable for the Pollards to expect nothing less than for Equitable and its agent and representative Marsha Schubert to monitor the performance of the insurance policies. It was further a reasonable expectation for the Pollards to rely upon Equitable's representation that its agent and representative Schubert was a qualified and trustworthy financial advisor working in the best financial interest of the Pollards. Obviously, the Pollards would not have invested so much money through the purchase of life insurance policies from Equitable nor would they have made significant premium payments for over eleven years if they were not confident in Equitable's performance.

d. Equitable owed a duty to the Pollards to ensure that the value of the Pollards' insurance policies were monitored and reasonably protected in the Pollards' best interest.

Equitable owed a duty to the Pollards to ensure not only that the value of the life insurance policies owned by the Pollards' were properly managed, but to ensure that the performance of Schubert as Equitable's agent and representative was forthright. Schubert was the Pollards' only personal contact and direct link to Equitable. Equitable placed Schubert in the field to deal directly with the local investors, including the Pollards. Equitable authorized Schubert to act as the voice for Equitable as an Equitable financial advisor upon whom the Pollards relied in investing their life earnings and in planning for the care of their loved ones for

the future.

- e. **It is unreasonable for Equitable to claim that it cannot be responsible for the devaluation and mismanagement of the life insurance policies when Equitable placed these policies into the hands of Schubert to promote and manage.**

Equitable represented to the whole world that Schubert was its agent and representative and that all who were doing business with Schubert as an agent of Equitable could rely upon the honesty and integrity of Schubert as she was backed by Equitable's name. Although Equitable may not condone Schubert's conduct, it is responsible for her actions as an agent and representative of Equitable. This can be similarly compared to the relationship existing between a parent and child. The parent is ultimately responsible for the actions of their child. Equitable cannot represent that it has authority over Schubert without taking the responsibility for her actions.

- f. **Equitable breached its duty by grossly ignoring and/or failing to monitor the conduct, actions and representations of its agent and representative, Schubert.**

In exchange for the consideration paid to Equitable by the Pollards, they relied upon Equitable to provide a service that protected the value of their investments to the extent that Equitable could actually control the environment and elements affecting the value of the policies. Despite the Pollards satisfying the requirements on their end of the bargain, Equitable grossly failed in its obligation to monitor its agent and representative Schubert. A clear and obvious duty exists on behalf of Equitable to monitor the activities of its agent Schubert - the person Equitable sent into the local community to serve as a representative and voice of Equitable.

g. As a result of Equitable's breach of the contract, the Pollards have been damaged.

The majority of cases cited by Equitable in support of its argument do not parallel this case and they cannot be laterally compared to the Pollards' causes of action. For instance, the cause of action at issue in the case of *Tanner v. Western Publishing Co.*, 1984 OK Civ. App 22, 682 P.2d 239 was libel based on a newspaper advertisement. No facts were provided by the complainant to establish where the libel occurred and how it occurred to the complainant. In *McBride v. Deer*, 240 F.3d 1287 (10th Cir. 2001) the complainant was pro se and failed to identify what his damages were.

In this case however, the Pollards' damages have been determined to exceed \$800,000.00 by the District Court of Logan County, Case No. CJ-2005-71 *Barry Pollard v. Marsha Schubert*. Additionally, the Pollards are subject to additional damages in excess of those already identified in the event that the Department of Securities is successful in obtaining a judgment for disgorgement of over \$380,000.00. As the ball of mess is yet to be fully untangled, the ultimate amount of damages to the Pollards is yet to be determined.

II. This Court confidently ruled that the AXA arbitration clause did not reach to the Equitable insurance contracts.

The Pollards have attached hereto and hereby reassert and incorporate by reference their response and objection as were previously set forth in the Pollards' Response and Objection to Plaintiff AXA Equitable Life Insurance Company's Renewed Motion to Compel Arbitration and Brief in Support as if fully set forth herein. (Ex. 6, Pollards' Response to AXA Equitable Insurance Company's Renewed Motion to Compel Arbitration – without exhibits attached.)

This Court should uphold its prior decision whereby Equitable's Renewed Motion to Compel

Arbitration of the Pollards' claims against Equitable was denied because the arbitration clause that Equitable seeks to enforce does not relate back to the insurance contracts issued by Equitable ten years earlier. As a matter of fact, at the hearing when this Court denied Equitable's renewed motion to compel the Pollards' claims to arbitration, the Court stated that it reviewed the Equitable insurance contracts and found no reference therein to arbitration, much less any reference to the applicability of any future agreements entered with sister companies.

Within the purview of the Equitable Contracts, nothing refers to arbitration or remotely suggests that any future contract with Equitable or a sister company is binding, controlling, applicable and altering the initial contract issued. Within the confines of the policies issued, the language applicable to amending the policy specifically provides that amendments to the contract are to be made as follows:

“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.” (Ex. 1, Policy #43 238 937; Ex. 2, Policy #43 257 265; Ex. 3, Policy #44 230 443; Exhibit 4, Policy #48 253 032 - Page 16.) (Emphasis added.)

Equitable relies upon a 2000 *non-insurance* application from AXA Advisors, an entirely separate company from Equitable, to support its argument that issues arising from the Equitable insurance policies purchased by the Pollards nearly ten years earlier are to be arbitrated. (Ex. 5, AXA Advisors Application.) AXA Advisors' application does not place anybody on notice, nor

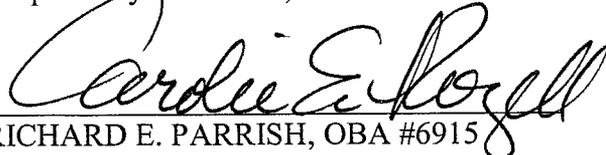
can Equitable realistically expect any person including this Court to assume that the terms of the AXA Advisors' Application actually apply to the Equitable transactions. AXA Advisors and Equitable may be sister companies, but they still remain separate entities in which the Pollards maintained separate accounts and separate investment transactions.

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, especially when there was no reference to passed agreements signed with other entities. Very clearly and simply, the application signed with AXA Advisors, LLC is not a contract of adhesion extending back in time to the contracts entered in the early 1990's with Equitable. (Ex. 5, AXA Advisors' Application.)

Hypothetically, if it were considered that the Pollards' claims against Equitable do not relate to the actual policies, rather they are limited merely to Equitable's conduct, arbitration is still not binding. The Pollards did not agree at any point in time to arbitrate any disputes, insurance related or otherwise, with Equitable. More specifically, there is no arbitration agreement for this Court to enforce concerning the Pollards' claims against Equitable.

WHEREFORE, the Defendant Pollards respectfully request that this Court deny Equitable's Motion to Dismiss the Pollards' Breach of Contract claim and deny Equitable's Motion for this Court to reconsider its renewed Motion to Compel the Pollards' claims against Equitable to Arbitration, and grant any further relief to which the Defendant Pollards may be entitled.

Respectfully Submitted,



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CERTIFICATE OF MAILING

I hereby certify that on May 29, 2007, a true and correct copy of the above and foregoing Pleading was placed in the U. S. Mail, postage prepaid, and addressed to the following:

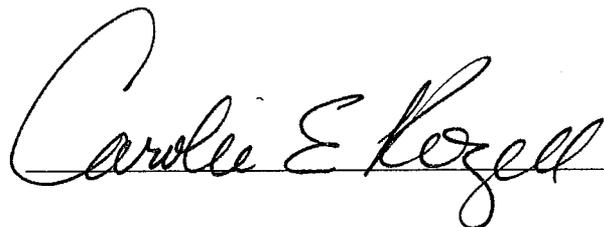
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A handwritten signature in cursive script, reading "Carol E. Kozell". The signature is written in black ink and is positioned in the lower right quadrant of the page.