



Sep 17 2012
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15 SUPERIOR COURT OF THE STATE OF CALIFORNIA

16 FOR THE COUNTY OF LOS ANGELES

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LAWYERS FOR INSURANCE POLICYHOLDERS



17 ERIC TAUB, individually, and on behalf of
18 others similarly situated,

19 Plaintiff,

20 vs.

21 BLUE CROSS OF CALIFORNIA, d/b/a
22 ANTHEM BLUE CROSS; and DOES 1 -
23 100, inclusive,

24 Defendants

Case No.: BC457809 consolidated with
Case No.: BC473408

[Hon. Jane L. Johnson Dept. 308]

**PLAINTIFFS' OPPOSITION TO
DEFENDANT'S PETITION TO COMPEL
ARBITRATION, STAY TRIAL COURT
PROCEEDINGS, AND DISMISS CLASS
ALLEGATIONS**

Date: October 24, 2012

Time: 10:00 a.m.

Place: Dept. 308

Date Action Filed: November 14, 2011

Trial Date: TBD

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JANET KASSOUF, ALISON HEATH, and
DAVID JACOBSON, individually, and on
behalf of others similarly situated,

Plaintiffs,

vs.

BLUE CROSS OF CALIFORNIA,
d/b/a ANTHEM BLUE CROSS; and DOES
1-100, inclusive,

Defendants

**SHERNOFF BIDART
ECHEVERRIA BENTLEY**
LAWYERS FOR INSURANCE POLICYHOLDERS


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1 health plan incorporates it. For example, the "PPO Share 1500" plan is so named
2 because of its \$1,500 "annual deductible."

3 In 2011, Blue Cross unilaterally:

- 4 • Increased "annual deductibles" and other "annual" and "yearly" out-of-pocket
5 costs in the middle of the year, including annual prescription drug deductibles,
6 and annual copayment/coinsurance maximums.
- 7 • Adopted changes to the EOCs purporting to allow Blue Cross to change "any
8 term and condition" of its individual contracts on just sixty days notice.
- 9 • Converted individual plan contracts to one month in duration. Thus the individual
10 plan contracts now terminate at the end of each month and "renew" upon
11 payment of the next month's premium.

12 Such unilateral changes severely degrade the level and quality of health services
13 that consumers will be able to access. Plaintiffs brought this class action lawsuit for
14 breach of the duty of good faith and fair dealing, breach of contract, violations of the
15 Consumer Legal Remedies Act, Civil Code section 1750 et seq. ("CLRA"), violations of
16 Unfair Competition Law, Business and Professions Code section 17200 et. seq.
17 ("UCL"), and for a declaratory judgment.

18 Plaintiffs' claims are based on changes made to multiple individual health plans
19 providing varying annual deductibles and other annual and yearly benefits as
20 enumerated in the chart accompanying Exhibit E of the Complaint filed on behalf of
21 Plaintiffs Kassouf, Heath and Jacobson. Annual losses resulting from Blue Cross's
22 unilateral changes to annual deductibles, for example, resulted in losses for consumers
23 ranging from fifty dollars to several hundred dollars.

24 **B. The Application Forms and Evidences of Coverage**

25 Furthermore, even if the EOC disclosures were found to be valid and to apply to
26 the class claims in this action, the arbitration provisions, including the class action
27 waiver they contain, would still be unenforceable due to the shortcomings of the Forms.

28 1363.1."



1 (Rodriguez v. Blue Cross of California (2008) 162 Cal App. 4th 330, 340-41 [“To comply
2 with section 1363.1, subdivision (b), the disclosure provision must be contained both in
3 the agreement and in the enrollment form.”].) Each plaintiff in this action applied for
4 coverage with Blue Cross by filing out and submitting an application form (“Forms”).
5 Though the Forms varied for each plaintiff, none of the Forms satisfy the arbitration
6 disclosure requirements of section 1363.1. For example, one of the requirements of the
7 statute is that the required arbitration disclosure must be “prominently displayed” on the
8 enrollment form that the enrollee signs. Here, the required disclosure is not
9 “prominently displayed” on the Forms, among other deficiencies discussed in section II
10 below. The failure to “prominently display” the disclosure alone is sufficient to bar Blue
11 Cross’s petition to compel arbitration and dismiss class allegations. The California Court
12 of Appeal has repeatedly found that such disclosures are unenforceable on these
13 grounds. Furthermore, the arbitration provisions of the enrollment applications for two
14 plaintiffs—Janet Kassouf and David Jacobson—do not contain class action bans.
15 (Declaration of Diane Williams, ¶¶ 5 and 7, Exhs. C and E, respectively.)

16 After submitting an application form, each plaintiff received an EOC. The EOCs
17 Plaintiffs received each state, “[t]his Binding Arbitration Provision **does not apply** to
18 class actions.” (Emphasis added.) The EOC is the complete agreement between
19 plaintiffs and Blue Cross and “contains the exact terms and conditions of coverage.”
20 (Declaration of Diane Williams, ¶ 4, Exhs. B, p 1.) However, because the disclosures
21 fail to meet the requirements of section 1363.1, the entire arbitration clause, which
22 includes the class action language is unenforceable. Thus, Plaintiffs’ class action must
23 proceed in this Court.

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ARGUMENT

I.

**CALIFORNIA LAW, NOT THE FEDERAL ARBITRATION ACT, GOVERNS BLUE
CROSS'S ARBITRATION CLAUSES**

It is clearly established that the Federal Arbitration Act ("FAA") and recent Supreme Court jurisprudence interpreting the FAA—including *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740 and other case law relied upon by Blue Cross in the Petition—do *not* apply to the arbitration clauses and class action waivers within those clauses. As the United States Supreme Court explained, "[t]he McCarran-Ferguson Act . . . precludes application of a federal statute in the face of state law 'enacted for the purpose of regulating the business of insurance' if the federal measure does not 'specifically relate to the business of insurance,' and would 'invalidate, impair or supersede' the State's law." (*Humana Inc. v. Forsythe* (1999) 525 U.S. 299, 307; See also *Pagarigan v. Superior Court* (2002) 102 Cal.App.4th 1121, 1133-35.) Here, the FAA is a federal statute of general application and does not specifically regulate insurance. (*Humana Inc. v. Forsythe, supra*, 525 U.S. at 307; *Stephens v. American International Ins. Co.* (2d Cir. 1995) 66 F.3d 41, 43-44.) As conceded by Blue Cross, the California legislature has adopted a comprehensive statutory scheme regulating the business of insurance, including section 1363.1, regulating the use of arbitration provisions in health care service plan contracts such as those at issue here. (Blue Cross Petition, p.8).

Additionally, the California Health and Safety Code, which regulates the health care service plan, Blue Cross of California, incorporates common law contract law protections, including prohibitions against unconscionable contract terms. (Health & Saf. Code § 1367(h)(1) ["section 1367(h)(1)"] ["Contracts with subscribers and enrollees . . . shall be fair, reasonable, and consistent with the objectives of this chapter."].) If applied in the instant action, the FAA would have the effect of invalidating, impairing, and

1 superseding the operation of section 1363.1 and section 1367(h)(1). (See *Smith v.*
2 *PacifiCare Behavioral Health of Cal., Inc.* (2001) 93 Cal.App.4th 139, 149-62.)
3 Therefore, the FAA and corresponding case law do not apply, and instead the
4 arbitration clauses in the instant action are solely governed by California law.
5 (*Pagarigan, supra*, 102 Cal.App.4th at 1133-35; *Smith, supra*, 93 Cal.App.4th at 149-
6 162.)

7 Since the FAA does not apply to the arbitration provisions and class action bans
8 at issue, the following arguments made by Defendant in their Petition must fail:

- 9
- 10 • “[F]ederal policy favors arbitration.” (Blue Cross Petition, 6:9-12.)
 - 11 • “[T]he FAA applies to any contract that directly or indirectly affects commerce
12 between states.” (Blue Cross Petition, 6:19-21.)
 - 13 • “[T]he United States Supreme Court's decisions in *Stolt-Nielsen, S.A. v.*
14 *Animal/Feeds Int'l Corp.*, 130 S. Ct. 1758 (2010) and *AT&T Mobility LLC v.*
15 *Concepcion*, 131 S. Ct. 1740 (2011) . . . conclusively dispose of all doubts as to
16 the enforceability of class action waivers in arbitration provisions.” (Blue Cross
17 Petition, 16:3-6.)
 - 18 • The FAA applies to health plan arbitration provisions “involv[ing] interstate
19 commerce because they expressly provide coverage for out-of-state patient care
20 and/or for prescriptions filled out-of-state.” (Blue Cross Petition, 6:23-35.) [The
21 cases relied on by Defendants for this proposition, *Erickson v. Aetna Health*
22 *Plans of Cal, Inc.* (1999) 71 Cal. App. 4th 646 and *Warren-Guthrie v. Health Net*
23 (2000) 84 Cal App. 4th 804, 810, involved replacement coverage for the
24 Medicare program, a federal program which falls under the FAA unlike the
25 contracts at issue in the instant action.]
 - 26 • “[B]ecause the arbitration provisions are silent on the issue of class arbitration,
27 Kassouf and Jacobson are not entitled to arbitrate any disputes on a class-wide
28 basis.” (Blue Cross Petition, 17:13-14.) [The cases relied upon by Defendants
for this proposition, *Kinecta Alternative Financial Solutions, Inc. v. Superior Court*
(2012) 205 Cal.App.4th 506 and *Stolt-Nielsen S.A. v. AnimalFeeds International*
Corp. 130 S.Ct. 1758 (2010), are limited to claims that fall under the FAA.]



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II.

THE ARBITRATION CLAUSES FAIL THE STRICT REQUIREMENTS OF
CALIFORNIA LAW

A. Section 1363.1 Requires Strict Compliance

Section 1363.1 mandates that a health care service plan enrollment application and EOC containing a binding arbitration clause comply with specific requirements before it will be enforced. Section 1363.1 was enacted in 1994 and became effective on January 1, 1995. (*Malek v. Blue Cross* (2004) 121 Cal.App.4th 44, 51 n. 2.) It was, therefore, in force when plaintiffs became Blue Cross enrollees. Blue Cross admits that Section 1363.1 applies in this case. (Blue Cross Petition, p 10:7-22.)

Section 1363.1 requires health care service plans that intend to bind their enrollees to an arbitration agreement to provide certain specific disclosures, as follows:

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 jury trial**, shall include, in **clear and understandable** language, a disclosure that meets all of the following conditions:

(a) 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.**

(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 service plan and **immediately before the signature line provided for the individual enrolling in the health care service plan.**

(Emphasis added.)

1 A health care service plan's arbitration provision that does not comply with each
2 of the requirements of section 1363.1 is unenforceable. (See, e.g., *Robertson v. Health*
3 *Net of California, Inc.* (2005) 132 Cal.App.4th 1419; *Malek v. Blue Cross of California*
4 (2004) 121 Cal.App.4th 44, 50; *Imbler v. PacifiCare* (2002) 103 Cal.App.4th 567.) The
5 mandatory disclosure requirements of section 1363.1 reflect a legislative policy of
6 ensuring that an enrollee enters into an arbitration agreement knowingly, voluntarily,
7 and *only* after a proper disclosure. (See *Malek, supra*, 121 Cal.App.4th at p. 69 ["The
8 very purpose of the disclosure requirements of section 1363.1 is to ensure that *the*
9 *parties agree* to be bound to contractual arbitration."].)

10 **California appellate courts have repeatedly emphasized that even**
11 **"technical violations" of section 1363.1 render an arbitration provision in a health**
12 **care service plan contract unenforceable.** (*Madeiras v. Superior Court* (2007) 146
13 Cal.App.4th 1008, 1015, citing *Malek, supra*, 121 Cal.App.4th at p. 50.) Strict
14 compliance with the statute is required to enforce an arbitration provision. (*Robertson,*
15 *supra*, 132 Cal.App.4th at p. 1428; *Madeiras, supra*, 146 Cal.App.4th at p. 1015; *Malek,*
16 *supra*, 121 Cal.App.4th at p. 63.) "[A]bsent the arbitration disclosure requirements of
17 section 1363.1, the minimal requirements under state law contract principles have not
18 been met and there is no contract to arbitrate that can be enforced." (*Malek, supra*, 121
19 Cal.App.4th at p. 65.) "[B]ecause the disclosure requirements in section 1363.1 are
20 mandatory, they are necessary to create an enforceable arbitration provision in a health
21 service plan, regardless of whether the subscriber actually had notice of the term
22 requiring arbitration." (*Madeiras, supra*, 146 Cal.App.4th at p. 1019, citing *Malek, supra*,
23 121 Cal.App.4th at pp. 64, 67, 69, 72.) Accordingly, any violation of section 1363.1 in
24 the Plaintiffs' applications or EOCs renders the arbitration provisions unenforceable.

25 **B. The Arbitration Disclosures in Plaintiffs' Applications Violate Health**
26 **and Safety Code Section 1363.1**

27 California Health & Safety Code section 1363.1 states that the disclosure that the
28 health care service plan requires arbitration "shall be *prominently* displayed on the

1 enrollment form signed by each subscriber or employee,” and that the disclosure be
2 displayed immediately before the signature line for the person enrolling in the plan.
3 (Section 1363.1, subs. (b) and (d) emphasis added.)

4 The meaning of the word “prominent” with respect to an arbitration disclosure on
5 an enrollment form was examined in *Imbler v. PacifiCare of Cal.* (2002) 103 Cal.App.4th
6 567. There, the health care service plan argued that its arbitration disclosure could be
7 considered “prominent” because it was placed just above the signature line, its typeface
8 was no smaller than the majority of the text used on the page and was not appreciably
9 smaller than the headings on the page, and was neither buried nor hidden on the page.
(*Id.*, at 579.)

10 The *Imbler* court rejected this argument, noting that, “[p]rominent’ is defined as
11 ‘standing out or projecting beyond a surface or line,’ or ‘readily noticeable.’” (*Imbler*,
12 *supra*, 103 Cal.App.4th at p. 579, citation omitted.) The court held that a disclosure that
13 was in the same font as the rest of the paragraph, and was not bolded, underlined or
14 italicized, neither stood out nor was readily noticeable. (*Id.*) Accordingly, the court
15 concluded, “[w]e simply fail to see how this disclosure can be deemed as being
16 ‘prominently displayed.’” (*Id.*)

17 *Imbler’s* analysis of what constitutes a “prominent” arbitration disclosure on a
18 health plan’s enrollment form has been universally followed. (See e.g. *Robertson*,
19 *supra*, 132 Cal.App.4th at 1429; *Malek*, *supra*, 121 Cal.App.4th at 61, and *Zembsch*,
20 *supra*, 146 Cal.App.4th at 164, 165.) In each case the court refused to enforce an
21 arbitration provision in a health plan because the arbitration disclosure on the
22 enrollment form was not “prominent.” “[T]he word ‘prominent’ like its synonyms
23 ‘noticeable,’ ‘remarkable,’ ‘outstanding,’ ‘conspicuous,’ ‘salient,’ and ‘striking’—means
24 ‘attracting notice or attention.’ [Citation.] More specifically, ‘prominent’ ‘applies to
25 something commanding notice by standing out from its surroundings or background.’”
26 (*Burks v. Kaiser Foundation Health Plans, Inc.* (2008) 160 Cal.App.4th 1021, 1026,
27 citation omitted.) Accordingly, to satisfy the prominence requirement, the arbitration
28 disclosure must stand out and command notice. As discussed below, Blue Cross’s
disclosures do not meet this test.

1 **1. The Heath disclosure**

2 The disclosure statement in the Heath enrollment application states:

3 Arbitration: I agree that any dispute between my or my extended family
4 members, and Blue Cross of California and/or its affiliates must be
5 resolved by binding arbitration if the amount in dispute exceeds the
6 jurisdictional limits of the Small Claims Court. Any such dispute will be
7 resolved not by lawsuit or resort to court process, except as California law
8 provides for judicial review of arbitration proceedings. Under this
9 coverage, both I and my extended family, and Blue Cross of California and
 its affiliates, are giving up the right to have any dispute decided in a court
 of law before a jury. Blue Cross and the Member also agree to give up
 any rights to pursue on a class basis any claim or controversy against the
 other.

10 This disclosure is in the same small font as the remainder of the application. It is
11 not in all capital letters, and no bold font, italic font, or underlining is used. There is
12 absolutely nothing within the arbitration provision that makes it “prominent.” It blends in
13 completely with the remainder of the application. Three other sections on the signature
14 page are marked “IMPORTANT” in all capital letters. The arbitration provision is *not*
15 marked “IMPORTANT.” Other notices on the signature page that are in all capital
16 letters include “REQUESTING AN EFFECTIVE DATE DOES NOT [ILLEGIBLE]
17 UNDERWRITING TO BE COMPLETED BEFORE THE DATE REQUESTED”
18 (underlining in original) and “HIV TESTING PROHIBITED.” (See Defendant’s Exhibit A,
19 p.6.) In contrast, nothing stands out about the arbitration disclosure in the Heath
20 application, and thus, it cannot be considered prominent.

21 As discussed above, the *Imbler* court held that a disclosure that was in the same
22 font as the rest of the paragraph, and was not bolded, underlined or italicized, neither
23 stood out nor was readily noticeable. (*Imbler, supra*, 103 Cal.App.4th at 579.) The
24 disclosure in the Heath application fails for the same reason that the disclosure in *Imbler*
25 *v. PacifiCare of Cal.* was rejected. It is the same font as the rest of the paragraph, is not
26 bolded, underlined or italicized, and it neither stands out nor is it readily noticeable.

27 Accordingly, the disclosure in the Heath application fails to comply with Health &
28 Safety Code section 1363.1. It is not prominently displayed on the application, nor does
 it contain the requisite disclosure necessary to inform the plaintiff that medical

1 malpractice claims are subject to the arbitration provision. Thus, the arbitration
2 provision in the Heath application is not enforceable.

3 **2. The Kassouf and Jacobson disclosures**

4 According to Blue Cross's Petition the disclosures in the Kassouf and Jacobson
5 applications state:

6 Any dispute between you and Blue Cross of California and/or its affiliates
7 must be resolved by binding arbitration, if the amount in dispute exceeds
8 the jurisdictional limit of the Small Claims Court. Any such dispute will be
9 resolved not by law or resort to court process, except as California law
10 provides for judicial review of arbitration proceedings. Under this
11 coverage both you and Blue Cross of California and its affiliates are giving
12 up the right to have any dispute decided in a court of law before a jury.

13 Moreover, Blue Cross claims that the Kassouf disclosure above is in bold.
14 However, in Exhibit C attached to the declaration of Diane Williams, the entire
15 "Authorization" section, though difficult to read, appears to be in the same typeface.
16 Therefore, either the entire "Authorization" is bold, or the arbitration disclosure is not in
17 fact in bold in the Kassouf declaration. Regardless, it is clear from Exhibit C that
18 arbitration disclosure does not stand out. The "Authorization" section includes far more
19 than the arbitration provision. It does not have its own heading, and there is nothing to
20 differentiate it in any manner from the text surrounding it. Other sections of the
21 application signature page are set apart in all capital letters, or in all capital letters and
22 italics. Although the copy of the page produced attached by Defendants in Exhibit C to
23 their petition is difficult to read, the following statements stand out: "PLEASE NOTE,"
24 "IMPORTANT – ALL SIGNATURES MUST INCLUDE TODAY'S DATE," "DO NOT
25 SUBMIT PREMIUM," and, at the very bottom of the page, "NOTE." None of these
26 statements refer to or are part of the arbitration disclosure, and in contrast to these
27 statements, nothing stands out about the arbitration disclosure in the Kassouf
28 application.

As to the Jacobson application, Blue Cross does not even claim that the
disclosure is in bold, but instead admits that it is in plain text. (Petition, p. 2, fn 2.)
Although Exhibit E, purportedly a copy of the Jacobson application, attached to the
Diane Williams declaration is essentially illegible, it is still obvious that the arbitration

1 disclosure does not stand out. As plain text, it completely blends into the surrounding
2 language that does not form a part of the disclosure.

3 Moreover, the text on the front of both the Jacobson and Kassouf disclosures is
4 so small that an individual would need a magnifying glass to read them. They cannot
5 reasonably be determined to be prominent. If anything, the arbitration disclosures are
6 hidden within the surrounding text. There are no headings and no emphasis to
7 separate these disclosures from the surrounding text. Just as the Heath disclosure fails
8 to satisfy the prominence requirement, so do the Kassouf and Jacobson disclosures,
9 making the arbitration agreements unenforceable. (*Burks v. Kaiser Foundation Health*
10 *Plans, Inc.* (2008) 160 Cal.App.4th 1021, 1028-1029 [arbitration clause unenforceable
11 for failure to satisfy "prominent disclosure" requirement of section 1363.1]; *Rodriguez,*
12 *supra*, 162 Cal.App.4th at pp. 338-340 [same]; *Madeiras, supra*, 146 Cal.App.4th at pp.
13 1016-1019 [same]; *Zembsch, supra*, 146 Cal.App.4th at pp. 164-168 [same]; *Robertson,*
14 *supra*, 132 Cal.App.4th at pp. 1428-1431 [same]; *Malek*, 121 Cal.App.4th at pp. 60-73
15 [same]; *Imbler, supra*, 103 Cal.App.4th at p. 579 [same].)

16 Furthermore, like the Heath application there is no reference whatsoever
17 regarding medical malpractice in the Jacobson and Kassouf applications' disclosures.
18 Therefore, the disclosures fail to comply with the section 1363.1 requirement that the
19 individual be advised if the arbitration provision applies to medical malpractice claims.
20 Finally, the Jacobson and Kassouf disclosures make no reference to any waiver of class
21 action rights. Accordingly, these two arbitration disclosures cannot support any claim by
22 Blue Cross that these plaintiffs knowingly gave up their ability to pursue the claims
23 brought here on a class action basis.

24 3. The Taub Disclosure

25 The Taub disclosure is effectively identical to the disclosure that the Court of
26 Appeal in *Rodriguez v. Blue Cross of California* (2008) 162 Cal App. 4th 330, 339 held to
27 be unenforceable for failure to comply with Section 1363.1. The disclosure in Taub
28 application states:

REQUIREMENT FOR BINDING ARBITRATION: If you are applying for
coverage, please note that Anthem Blue Cross requires binding arbitration
to settle all disputes against Anthem Blue Cross, including claims for

1 medical malpractice. California Health and Safety Code Section 1363.1
2 and Insurance Code Section 10123.19 require specified disclosures in this
3 regard, including the following notice: **"It is understood that any dispute
4 as to medical malpractice, that is as to whether any medical services
5 rendered under this contract were unnecessary or unauthorized or
6 were improperly, negligently or incompetently rendered, will be
7 determined by submission to arbitration as provided by California
8 law, and not by a lawsuit or resort to court process except as
9 California law provides for judicial review of arbitration proceedings.
Both parties to this contract by entered 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."**
Both parties agree to give up any right to pursue on a class basis any
claim or controversy against the other.

10 NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO
11 HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY A
12 NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO
A JURY OR COURT TRIAL.

13 The disclosure in *Rodriguez, supra*, 162 Cal App. 4th 330 that was held to be
14 insufficient under Section 1363.1 stated as follows:

15 ***Requirement for Binding Arbitration***

16 If you are applying for coverage, please note that Blue Cross requires
17 binding arbitration to settle all disputes against Blue Cross, including
18 claims of medical malpractice. California Health and Safety Code section
19 1363.1 and Insurance Code section 10123.19 require specified
20 disclosures in this regard, including the following notice: **'It is understood
21 that any dispute as to medical malpractice, that is as to whether any
22 medical services rendered under this contract were unnecessary or
23 unauthorized or were improperly, negligently or incompetently
24 rendered, will be determined by submission to arbitration as
25 provided by California law, and not by a lawsuit or resort to court
26 process except as California law provides for judicial review of
27 arbitration proceedings. Both parties to this contract, by entering
28 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.'** Both parties also agree to give up any
right to pursue on a class basis any claim or controversy against the other.

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. (*Id.* at 333.)

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The only difference in the two disclosures is that the heading in the Taub application is in all caps and includes the company name, "Anthem Blue Cross."

The California Court of Appeals held that the same language and emphasis scheme in Taub's arbitration disclosure "creates confusion" that "violates section 1363.1, subdivision (c), which requires a clear statement of the extent of the waiver." (*Rodriguez v. Blue Cross of California* (2008) 162 Cal App. 4th 330, 339.) The Court of Appeals explained that Blue Cross's "emphasis on the arbitration of disputes involving medical malpractice" intolerably overshadows the expansive, and more important, provision that requires arbitration for *all* disputes against Blue Cross. (*Id* at 339.)

The Defendant's feeble attempts to distinguish the Taub application from *Rodriguez* fail. (Petition, p. 13 – 15.) Though the wording of the Taub disclosure (Blue Cross Petition, 3:11-21), is essentially identical to that litigated in *Rodriguez*, Defendants attempt to salvage the Taub disclosure on the grounds that the heading above the Taub disclosure is now bold and uppercase unlike that of *Rodriguez*. (Blue Cross Petition, 14:13-15.) However, the addition of the bold header actually further deemphasizes the requirement, presented in plain text, that all disputes must be arbitrated, which now lies in between two prominent and bolded clauses, the second of which emphasizes medical malpractice claims. Additionally, the header itself is ambiguous as to what "binding arbitration" means. The *Rodriguez* Court specifically explained that the exact disclosure on Taub's application confuses its reader because it emphasizes arbitration for medical malpractice suits. (*Id.* at 339.) Here, the emphasis and language of the header does not remedy that ambiguity.

Furthermore, Defendant's assertion that "the additional arbitration notice above the signature is in pink font, a distinction which calls the applicant's attention to the fact that he or she is agreeing to binding arbitration," (Blue Cross Petition, 14:19-21), also fails. The Court of Appeals already addressed the exact same "additional notice" in *Rodriguez*, and held, "the language immediately above the signature line in capital

1 letters refers only to 'any issue of medical malpractice' and tracks Code of Civil
2 Procedure section 1295, which applies to arbitration of medical malpractice disputes."
3 The use of pink font further deemphasizes the plain text arbitration disclosure and
4 makes the Court of Appeal's observation that "when the emphasis of the other
5 sentences is considered, the first sentence recedes from the forefront because it is in
6 plain text," (*Id.* at 338), even more sharp. Thus, the "additional notice" does not make
7 the disclosure any less vague as to the types of claims that must be arbitrated.

8 Finally, the defendant argues that Taub's application contains additional notices
9 of binding arbitration, but that does not mitigate the violations. As discussed in
10 *Rodriguez*, scattered language in a multi-paged application that abstractly discusses
11 "the arbitration clause in the Anthem Blue Cross contract" (William Decl., Exh. A at pp.
12 2,7), or "the binding arbitration as described above" (William Decl., Exh. A at p. 8), does
13 not make the Defendant's failure to proper disclose the arbitration requirement any less
14 misleading.

15 Accordingly, the petition to compel arbitration and dismiss class allegations must
16 be denied.

17 III.

18 **BLUE CROSS'S CLASS ACTION BAN IS UNENFORCEABLE**
19 **UNDER CALIFORNIA LAW**

20 Section 1367(h)(1) requires health plan contracts to be fair and reasonable.
21 (*Kaiser Foundation Health Plan, Inc. v. Zingale* (2002) 99 Cal.App.4th 1018, 1021.)
22 Under California contract law, arbitration clauses whose express terms are particularly
23 unfair or one-sided are unconscionable and thus unenforceable. (*E.g., Armendariz v.*
24 *Foundation Health Psychare Services, Inc.* (2000) 24 Cal. 4th 83 (striking down as
25 unconscionable an arbitration clause whose "express terms" were one-sided and
26 imposed excessive costs on an employee); *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.
27 3d 807.)

28 The doctrine of unconscionability has both procedural and substantive elements,

1 the former focusing on the “oppression and surprise” due to “unequal bargaining power”
2 and the latter focusing on “overly harsh” or “one-sided” results. (*A & M Produce Co. v.*
3 *FMC Corp.* (1982) 135 Cal.App.3d 473, 486-489.)

4 Although both procedural and substantive elements must be present to establish
5 unconscionability, they need not be present in the same degree.

6 [T]he more substantively oppressive the contract term, the less evidence
7 of procedural unconscionability is required to come to the conclusion that
8 the term is unenforceable, and vice versa.

(*Armendariz, supra*, 24 Cal.4th at 114, internal citations omitted.)

9
10 **A. Blue Cross’s Class Action Ban Is Procedurally Unconscionable.**

11 There is no question that Blue Cross’s arbitration provision is procedurally
12 unconscionable. “**The procedural element of an unconscionable contract generally**
13 **takes the form of a contract of adhesion**, ‘which, imposed and drafted by the party of
14 superior bargaining strength, relegates to the subscribing party only the opportunity to
15 adhere to the contract or reject it.’” (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064,
16 1071, emphasis added [quoting *Armendariz, supra*, 24 Cal.4th at p. 113]; see also
17 *Circuit City v. Adams* (2002) 279 F.3d 889 [a contract “is procedurally unconscionable
18 [if] it is a contract of adhesion: a standard-form contract, drafted by the party with
19 superior bargaining power”]; *Flores v. Transamerica Homefirst, Inc.* (2001) 93
20 Cal.App.4th 846, 853 [same]; *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167
21 [“procedural unconscionability focuses on the oppressiveness of the stronger party’s
22 conduct”]; *A & M Produce Co., supra*, 135 Cal.App.3d at 486.)

23 **An insurance contract is the quintessential contract of adhesion.** (*City of*
24 *Hope Nat. Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 397; *City of*
25 *Watsonville v. Corrigan* (2007) 149 Cal.App.4th 1542, 1549.) In the case before this
26 court, there is no dispute that the Blue Cross class action ban (1) was drafted in full by
27 Blue Cross, (2) could not be amended or negotiated by Plaintiffs or any other plan
28 members, and (3) was an all or nothing proposition. Because of unequal bargaining



1 power between the parties, there was *zero opportunity to negotiate terms*. Thus, the
2 element of “oppression” in procedural unconscionability is pervasive here. (*A & M*
3 *Produce Co.*, *supra*, 135 Cal.App.3d at 486; *Flores v. Transamerica Homefirst, Inc.*
4 (2001) 93 Cal.App.4th 846, 853 [the oppression element includes “an absence of
5 meaningful choice”].)

6 “Surprise” refers to the extent to which supposedly agreed-upon terms are buried
7 in an overly complex printed form. (*A & M Produce Co. v. FMC Corp.*, *supra*, 135
8 Cal.App.3d at 486.) The Blue Cross’s class action ban is located on page 44 of the
9 EOCs of Heath, Kassouf, and Taub (Exhibit B, D, and H, respectively to Declaration of
10 Diane Williams) and page 45 of EOC of Jacobson (Exhibit E to Declaration of Diane
11 Williams). For this reason, the “surprise” element is also met.

12 Thus, Blue Cross’s class action ban is part of a quintessential contract of
13 adhesion, and is procedurally unconscionable.

14 **B. Blue Cross’s Class Action Ban is Substantively Unconscionable**

15 The Court in *Armendariz v. Foundation Health Psychcare Services* (2000) 24
16 Cal.4th 83 held that substantive unconscionability “focuses on . . . ‘overly harsh’ or ‘one-
17 sided’ results.” (*Id.* at 114.) ***Class action bans found in contracts of adhesion are***
18 ***substantively unconscionable when they operate as exculpatory clauses.***

19 [T]he prohibition against exculpatory contracts contrary to public policy is
20 generally invoked in the context of contracts of adhesion.

21 (*Little, supra*, 29 Cal.4th at 1078 n. 2; *Armendariz, supra*, 24 Cal.4th at 101.)

22 Similarly, contracts that have the effect of exempting defendants from
23 responsibility for their own fraud or intentional injury of another are one-sided and
24 against public policy. (Cal. Civ. Code § 1668; *Armendariz, supra*, 24 Cal.4th at 101
25 [imposition of exculpatory clause in adhesion contract would be “contrary to public
26 policy and unlawful.”].) Because damages in consumer cases are typically small for
27 individuals, and the company with millions of customers can reap huge profits by

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1 exacting small amounts wrongfully, the class action is the only effective way to curb
2 such conduct.

3 The potential for millions of customers to be overcharged small amounts
4 without an effective method of redress cannot be ignored. Therefore, the
5 provision violates fundamental notions of fairness. . . . This is not only
6 substantively unconscionable, it violates public policy by granting Discover
7 a 'get out of jail free' card while compromising important consumer rights.

8 (*Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, 1101; see also *Ting v. AT & T*
9 (2003) 319 F.3d 1126, 1151 [class action waivers in CLRA claim violated California
10 law]; *Ingle v. Circuit City Stores, Inc.* (2003) 328 F.3d 1165, 1176 [same].) "If the right to
11 a classwide proceeding could be automatically eliminated in relationships governed by
12 adhesion contracts through the inclusion of a provision for arbitration, the potential for .
13 . chilling the effective protection of interests common to a group, would be substantial."
14 (*Keating v. Superior Court* (1982) 31 Cal.3d 584.)

15 Here, the class action ban is completely one-sided because Blue Cross, a single
16 entity, could never pursue a class action against its individual members. Blue Cross's
17 customers give up the right to bring class actions, but Blue Cross gives up nothing.
18 Since the Blue Cross actions challenged by Plaintiffs have resulted in relatively small
19 individual losses, the class action is the only effective way to curb the conduct, and
20 barring class actions would exculpate Blue Cross.

21 Blue Cross's class action ban is substantively unconscionable because it is
22 completely and unfairly one-sided and acts as an exculpatory clause in violation of
23 public policy.

24 IV.

25 THE ARBITRATION CLAUSES DO NOT APPLY TO CLASS ACTIONS

26 In addition to failing the strict requirements of section 1363.1, the arbitration
27 clauses at issue do not apply to class actions. The terms of Plaintiffs' EOCs are clear:
28 "This Binding Arbitration Provision does not apply to class actions." (Declaration of
Diane Williams, ¶¶ 4, 6, 8, 10, Exhs. B, D, F, H, respectively.)

1 "Absent a factual dispute as to the meaning of policy language, the interpretation,
2 construction and application of an insurance contract is a question of law." (*Century*
3 *Transit Systems, Inc. v. American Surplus Lines Ins. Co.* (1996) 42 Cal.App.4th 121,
4 125; *Waller v. Truck Ins. Exch., Inc.* (1995) 11 Cal.4th 1, 18.) "It is the court's function
5 to interpret policy language as a matter of law where . . . there is no dispute as to the
6 words used in the policy. In making such an interpretation, the court is required to do so
7 through the eyes of a reasonable lay person and not those of a lawyer or an insurance
8 specialist or an expert." (*Jordan v. Allstate ins. Co.* (2004) 116 Cal.App.4th 1206,
9 1218; *see also Montrose Chemical Corp v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 666-
10 667; *Crane v. State Farm Fire & Cas. Co.* (1971) 5 Cal.3d 112, 115; *Belz v. Clarendon*
11 *America Ins. Co.* (2007) 158 Cal.App.4th 615, 625 [The words in a policy are interpreted
12 in their ordinary sense, according to the plain meaning a layperson would give them.]
13 Thus, it is the court's responsibility to determine coverage issues. It is error to leave
14 policy interpretation to the jury. (*Parsons v. Bristol Develop. Co.* (1965) 62 Cal.2d 861,
15 865; *California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 35.)

16 Here, the first sentence of the arbitration clause contained in the EOCs states,
17 "This Binding Arbitration Provision does not apply to class actions." This leaves no
18 room for interpretation. The arbitration provision does not apply to class actions, and
19 therefore, the class actions must proceed in court. Additionally, since the EOC is
20 delivered to the consumer *after* the application for insurance is submitted, and is often
21 updated in the form of policy endorsements mailed to consumers, a consumer would
22 reasonably conclude that the arbitration provisions and class action waiver contained in
23 the application form were over-ridden by the later in time EOC.

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V.

THE ARBITRATION CLAUSES DO NOT APPLY BECAUSE BLUE CROSS HAS NOT ESTABLISHED THAT THE AMOUNTS IN CONTROVERSY EXCEEDED \$5,000

The arbitration provisions of the EOCs contain the following language that requires disputes to be arbitrated *only* if the amount of an individual's claim exceeds the jurisdictional limit of Small Claims Court:

"ALL DISPUTES . . . MUST BE RESOLVED BY BINDING ARBITRATION, IF THE AMOUNT IN DISPUTE EXCEEDS THE JURISDICTIONAL LIMIT OF SMALL CLAIMS COURT. (Emphasis added.)

California Code of Civil Procedure section 116.220 provides that the jurisdictional limit of Small Claims Courts is \$5,000. Therefore, it was Blue Cross's burden in bringing its petition to prove that Plaintiffs are seeking individual claims that exceed \$5,000 each. Blue Cross has presented no evidence that Plaintiffs' individual claims exceed \$5,000.

While the aggregate amount sought by the Plaintiffs' class certainly exceeds \$5,000, that is not the issue before this court. Moreover, the United States Supreme Court has stated that the purposes of class actions are (1) to avoid multiplicity of actions and (2) to enable persons to assert *small claims* that could not be litigated individually because the costs would far outweigh any recovery. (*Crown, Cork Seal Co. v. Parker* (1983) 462 U.S. 345, 349.) In California state class actions, "*small claims* can be aggregated to invoke superior court jurisdiction." (Schwarzer, Tashima & Wagstaffe, Cal. Prac. Guide: Federal Civil Procedure Before Trial (The Rutter Group 2001), § 1:294.) The purpose of class actions is to hold defendants accountable for widespread tortious conduct that affects many in only *a relatively small amount*, to defendant's ill-gotten gain. (Weil & Brown, Cal. Prac. Guide: Civil Procedure Before Trial (The Rutter Group 2001), § 14:26, citing to *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 715, emphasis added [Class action allowed to recover taxicab fare overcharges averaging no more than a few dollars per customer].)

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CONCLUSION

For all the foregoing reasons, the petition to compel arbitration and dismiss class allegations should be denied.

Date: September 17, 2012

SHERNOFF BIDART
ECHEVERRIA BENTLEY LLP

By 

MICHAEL J. BIDART
RICARDO ECHEVERRIA
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Attorneys for Plaintiffs



Re: *Taub v. Blue Cross*
Case No. BC457809

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 600 South Indian Hill Boulevard, Claremont, California 91711.

On **September 17, 2012**, I served the foregoing documents described as **PLAINTIFFS' OPPOSITION TO DEFENDANTS' PETITION TO COMPEL ARBITRATION, STAY TRIAL COURT PROCEEDINGS, AND DISMISS CLASS ALLEGATIONS** on the interested parties in this action by placing the original XX a true copy thereof enclosed in sealed envelopes addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

BY MAIL I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Claremont, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

BY FACSIMILE ("FAX") In addition to the manner of service indicated above, a copy was sent by FAX to the parties indicated on the service List.

BY OVERNIGHT MAIL/COURIER To expedite service, copies were sent via FEDERAL EXPRESS.

VIA ELECTRONIC SERVICE VIA LEXIS-NEXIS FILE & SERVE through electronic transmission to all parties appearing on the electronic service list. Upon completion of said transmission of said document, a certified receipt is issued to the filing party acknowledging receipt by Lexis-Nexis system. Once Lexis-Nexis has served all designated recipients, proof of electronic service/confirmation will be maintained with the original document in this office.

BY PERSONAL SERVICE I caused to be delivered such envelope by hand to the individual(s) indicated on the service list.

(State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **September 17, 2012**, at Claremont, California.


DEBBIE HUNTER

Re: *Taub v. Blue Cross*
Case No BC457809

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