

(Cite as: 1988 WL 79195 (Bankr.D.Vt.))

In re VERMONT KNITTING COMPANY, INC., Debtor.

Bankruptcy No. 87-274.

United States Bankruptcy Court, D. Vermont.

June 30, 1988.

M. Kirkpatrick, Lisman and Lisman, Burlington, Vt., for Vermont Knitting Company, Inc., Debtor-in-Possession (Knitting).

J. Vitt, Paterson, Walke and Pratt, P.C., Montpelier, Vt., for Blue Cross/Blue Shield of Vermont (Blue Cross).

MEMORANDUM DECISION DENYING MOTION FOR SANCTIONS UNDER 11 USC § 362

FRANCIS G. CONRAD, Bankruptcy Judge.

*1 The matter before us is whether Blue Cross violated the automatic stay provision of 11 USC § 362(a) [FN1] by terminating a group insurance contract which benefitted the employees of Knitting. Because we find that Blue Cross had a contract with Knitting's employees, not Knitting itself, and that Knitting is a remitting agent only, we deny Knitting's motion for damages under § 362(h).

Knitting is a Chapter 11 debtor-in-possession doing business in Vermont. Blue Cross is a Vermont Health Service Corporation, a not-for-profit corporation operating under 8 Vt.Stat. Ann. § 4511.

On November 24, 1987 Knitting filed a petition for relief in bankruptcy under Chapter 11 of Title 11 of the Bankruptcy Code, 11 USC §§ 101, et seq. Knitting claims that after November 24, 1987 coverage for Knitting's employees was cancelled by Blue Cross for non-payment of premiums. On March 29, 1988 Knitting filed a motion for damages under § 362(h) contending that as debtor-in-possession, Knitting had policies in effect with Blue Cross covering its employees and executives on the date of its bankruptcy filing. Knitting claims that Blue Cross agreed to postpone a threatened cancellation/termination action on November 19, 1987 until November 25, 1987 and that coverage had in fact not been terminated as of the date of filing for bankruptcy. Hence, Knitting deduces, insurance coverage was cancelled notwithstanding the fact that Blue Cross had notice of the bankruptcy.

Blue Cross argues that any contractual interest in insurance contracts exists between the employees of Knitting, as subscribers to the plan, and that there is no interest held by Knitting that can be considered part of its bankruptcy estate. Blue Cross asserts that it is limited to entering into insurance contracts with individual subscribers by statute. [FN2] As further argument, it claims that the insurance contract was not postponed beyond November 19, 1987, and accordingly, was terminated five days prior to Knitting's bankruptcy filing. Ergo, termination of the insurance contract is not prohibited by the provisions of 11 USC § 362. Finally, Blue Cross asserts that even if Knitting has a contractual interest in the insurance contract, Knitting has failed to comply with the provisions of 11 USC § 365 which apply to executory contracts.

A status conference was held in this matter on May 11, 1988. The parties were directed to submit supplemental documentation and, upon our receipt of such, the matter was taken under advisement. The validity of the documents is not disputed.

Medical insurance coverage to Knitting's employees is provided under two undated documents entitled "Group Subscriber Certificate" and "Group Comprehensive Certificate," both with addendum, and signed by Charles H. McHugh, Chairman of the Board of Blue Cross. [FN3] Knitting has not signed either certificate.

Article I of each certificate contains definitions of terms used in each certificate. Both certificates describe the health insurance contract as consisting of the respective certificate, the "Outline of Coverage, Your Membership Application, Your Identification Card and Endorsements and/or Riders." Article I, Section 2 of each certificate. The term "your" is defined as referring to the subscriber and those members covered under the subscriber's contract. Article I, Section 6 of each certificate. "Subscriber" is defined as the person with whom Blue Cross has entered into the contract and whose name appears on the Identification Card and Outline of Coverage. Also defined in Article I of each certificate is the term "remitting agent." The remitting agent is "[a]ny individual, firm, association or corporation that (sic) has agreed to forward to the Plan, on behalf of the Group Subscriber, any charges payable under the Contract. The Remitting Agent is the agent of the Subscriber and has no authority to act on behalf of the Plan and is not: (a) an employee of the Plan; or, (b) and agent of the Plan." Group Subscriber Certificate, Article I, Section 8; Group Comprehensive Certificate, Article I, Section 15.

***2** Premium payments must be paid by the group on or before the due date. Blue Cross may change the rate for the plan when written notice is given to the group through which a subscriber is enrolled and when approved by the Vermont Insurance Department. Group Subscriber Certificate, Article VII, p. 10; Group Comprehensive Certificate, Article VI, p. 13.

The plan contract may be cancelled by the group, the subscriber, or the plan for any cause

by giving notice. Id. at 10 and 13. The plan defines "group" as the individual, firm, association, or corporation who has agreed to forward to Blue Cross, directly or indirectly, or through a remitting agent, all premiums due under the contract. Group Subscriber Certificate, Article I, Section 23.

Knitting submitted various invoices for our review. They include a "group memo", notice of membership changes, annual group recertification form, and letters sent to Knitting by Blue Cross. These documents are advanced as evidence of the actuality of a contract between Knitting and Blue Cross. All documents are addressed to Knitting except the letters, which are form letters without an address block. Other documents submitted show that the plan was not terminated prior to Knitting's bankruptcy filing. See, Blue Cross letter from C.P. Lea, dated November 20, 1988.

Property interests are created and defined by State law unless some Federal interest requires a different result. *Butner v. United States*, 440 US 48, 55, 99 S.Ct. 914, 918, 59 L.Ed.2d 136, 141-42 (1979) citing, *Lewis v. Manufactures National Bank*, 363 US 603, 609, 81 S.Ct. 347, 350, 5 L.Ed.2d 323, 327 (1961)). The parties are Vermont corporations. All correspondence and exchanges between the parties subject to inquiry was transacted between the parties in Vermont. There is no indication of any Federal interest that requires Federal law to apply. [FN4] Therefore any determination of the existence of a contract shall be made under the applicable Vermont law.

As a general rule an insurance contract shall be construed according to its terms and the evident intent of the parties as demonstrated by the language in the contract. *Simpson v. State Mutual Life Assurance*, 135 Vt. 554, 382 A.2d 198. The insurance contract is to be construed against the insurer, and, if clear and unambiguous, the provisions of the contract must be given force and effect and taken in their plain, ordinary, and popular sense. *Rassmon v. American Fidelity Co.*, 142 Vt. 623, 460 A.2d 466; *Kusserou v. Blue Cross-Blue Shield Plan of New Hampshire and Vermont*, 140 Vt. 328 (1981).

***3** A health service organization is required by statute to incorporate certain elements into any contract for insurance to which it becomes a party. 8 Vt.Stat. Ann. § 4065. The parties to the group certificates, which constitute a part of the documents which make up the entire contract, are defined clearly in Article I, Section 4 of the certificates as those subscribers whose names are on the Identification Card and the Outline of Coverage. There are no such documents submitted to us as evidence that Knitting is a party to the insurance contract as defined in the group certificates. There are no provisions in the certificates that indicate there are any other parties to the contract other than the subscribers and Blue Cross.

Some intimation that Knitting may be a party to the contract for insurance arises from the invoices which were sent to Knitting to collect funds required to maintain individual employees coverage. These invoices are addressed to Knitting, marked "paid" with a check

number indicated, and are paid presumably by a Knitting check. Some evidence that Knitting is making, or made, payments to Blue Cross is not by itself sufficient to prove the existence of a contract between the parties. None of the documents submitted by the parties show a contract in writing containing the amount payable, times of payment, statements of the nature of coverage or other elements as required by 8 Vt.Stat. Ann. § 4514. A court cannot "make a contract where none is shown to have been made by the parties." Vermont Electric Supply Co. v. Andrus, 135 Vt. 190, 192 373 A.2d 531 (1977). There is no indication that Knitting paid for coverage from its own funds or collected funds from the employees and remitted them to Blue Cross. In either case the result would be the same. Knitting does not gain any interest in the contract merely because it makes the payments. Knitting's action on behalf of its employees does not create a contractual relationship with Blue Cross. In fact, the group certificates provide for the arrangement we see before us, namely Knitting as a remitting agent.

Knitting offers two form letters prepared by Blue Cross and addressed respectively to "group customer" and group administrator." Both letters concern changes in coverage available to subscribers of the plan. The letter to the group customer states that there is a great deal of information concerning extended health care which will have to be considered by the group customer. The letter indicates that for extended coverage "the employees would pay the appropriate premiums to you [group customer] and you [group customer] would maintain their coverage on your group plan." The second letter to the group administrator conveys information about endorsements to the group certificates and makes a similar reference to "your group contract." The language in these letters may demonstrate that the recipient (Knitting) has a group plan or a group contract, but these unclear references to a plan or contract do not by themselves constitute a contract under the law.

We can also shift to the other foot in holding that the contract is not property of the estate. At 8 Vt.Stat. Ann. § 4079 there is a statutory provision entitled "Group insurance policies." It provides in part:

***4** Group health insurance is hereby declared to be that form of health insurance covering groups of persons, with or without their dependents, and issued upon the following basis:

(1) Under a policy issued to an employer, who shall be deemed the policyholder, insuring at least five employees of such employer, for the benefit of persons other than the employer ...

8 Vt.Stat. Ann. § 4079. (Emphasis ours).

This statute shows a clear legislative interest to allow group policies in which an employer has an interest. Reviewing the evidence before us, we find fewer than five Knitting employees were insured through the plan, further confirmation this is not a group employer plan.

The plan certificates prepared by Blue Cross are not models of clarity. They don't clearly define the word "group," yet this entity may cancel or renew the plan contract. Although it is clear a subscriber is within the group and may cancel a contract individually, we are not so sure how the group interacts. What is clear, however, is that Knitting itself is not the group.

We do not address the § 365 argument raised by Blue Cross. With our holding that the contract is not property of the estate there is nothing for Knitting to assume.

For the foregoing reasons Vermont Knitting Company, Inc.'s motion for damages for violation of the automatic stay under 11 USC § 362 is denied. A separate Order will issue.

FN1. 11 USC § 362(a) provides in pertinent part:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title ... operates as a stay, applicable to all entities, of--

(1) the commencement or continuation, including the issuance or employment or process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

FN2. All insurance contracts entered into by hospital service corporations are governed by the provisions of Chapter 123 of Title 8 of Vermont Statutes.

8 Vt.Stat.Ann. § 4513(b), Permit to engage in business; foreign corporations, provides in pertinent part:

(b) A hospital service corporation shall not enter into a contract with a subscriber until it has obtained from the commissioner of banking and insurance a permit to do so ...

8 Vt.Stat.Ann. § 4514, Required contract provisions, provides:

A contract entered into by a hospital service corporation shall be in writing, one copy of which shall be furnished to the subscriber, and shall contain the following provisions:

(1) A statement of the amount payable to the corporation by the subscriber and the times at which and manner in which such amount is to be paid;

(2) A statement of the nature of the services to be furnished and the period during which they will be furnished; and if there are any services to be excepted, a detailed statement of such exceptions printed as hereinafter specified;

(3) A statement of the terms and conditions, if any, upon which the contract may be canceled or otherwise terminated at the option of either party;

(4) A statement that the contract includes the endorsements thereon and attached papers, if any, and contains the entire contract for services;

(5) A statement that no representation by the subscriber is his application for a contract shall avoid the contract or be used in any legal proceeding thereunder, unless such application or an exact copy thereof is included in or attached to such contract, and that no agent or representative of such corporation, other than an officer designated therein, is authorized to change the contract or waive any of its provisions;

(6) A statement that if the subscriber defaults in making any payment under the contract, the subsequent acceptance of a payment by the corporation or by any of its duly authorized agents shall reinstate the contract, but, with respect to sickness and injury, only to cover such sickness as may be first manifested more than ten days after the date of such acceptance; and

(7) A statement of the period of grace which will be allowed the subscriber for making any payment due under the contract. Such period shall not be less than ten days.

The statute only mentions subscribers as parties with whom a hospital service corporation may enter into a contract. The implication is that any contract to provide insurance entered into with non-subscribers would be void ultra vires.

FN3. The certificates are similar in many respects but do contain some subtle and material differences, none of which are relevant to this matter. It appears to us by the date information on the certificates, indicating when the forms were in use, that the Group Subscriber Certificate is an updated version of the Group Comprehensive Certificate.

FN4. We are aware of the provision of the Comprehensive Omnibus Budget Reconciliation Act of 1986, which effects termination of individual plans, but that issue is not before us.

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