SUPREME COURT OF LOUISIANA

No. 98-C-3034

IN RE: THE MATTER OF LOUISIANA HEALTH SERVICE AND INDEMNITY COMPANY D/B/A BLUE CROSS BLUE SHIELD OF LOUISIANA

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST CIRCUIT, PARISH OF EAST BATON ROUGE

VICTORY, J., dissenting

I dissent from the majority opinion which holds that La. R.S. 22:215.12[1], which limits pre-existing condition clauses in health insurance policies issued after January 1, 1993 to a twelve month period, applies to new enrollees under group health insurance policies issued prior to January 1, 1993, whose effective dates of coverage, pursuant to their individual certificates of insurance, are subsequent to January 1, 1993. In reaching this decision, the majority has ignored the clear wording of the statute and has assumed the legislative prerogative in obtaining its desired result.

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[1]La. R.S. 22:215.12, which was adopted in 1992 and repealed in 1997, provides in pertinent part:

> Any hospital, health, or medical expense insurance policy, except specified disease, hospital indemnity or other limited, supplemental benefit insurance policies, hospital or medical service contract, employee welfare benefit plan, health and accident insurance policy, or any other insurance contract of this type, including a group insurance plan or self-insurance plan, which is delivered or issued for delivery in this state on or after January 1, 1993, shall not deny, exclude or limit benefits for a covered individual for losses due to a preexisting condition incurred more than twelve months following the effective date of the individual's coverage. Any policy, contract or plan subject to the provisions of this Section shall not contain a definition of a preexisting condition more restrictive than the following:
>
> (1) A condition that would have caused an ordinary prudent person to seek medical advice, diagnosis, care or treatment during the twelve months immediately preceding the effective date of coverage.
>
> (2) A condition for which medical advice, diagnosis, care or treatment was recommended or received during the twelve months immediately preceding the effective date of coverage.
>
> (3) A pregnancy existing on the effective date of coverage.

The "policy" referred to in La. R.S. 22:215.12 is the group policy issued to the employer, not the individual certificate issued to the employee, for several reasons. First, the term "policy" has a clearly defined meaning under the law. As recognized by the majority, La. R.S. 22:215, the general statute describing group health and accident insurance, provides that the "policy shall be issued to an employer or association, . . . , who shall be deemed the policy holder, covering one or more employees of such employer" and that further "[t]he insurer shall issue to the employer or association for delivery to each employee or member insured under such group policy, an individual certificate containing a statement as to the insurance protection to which he is entitled and to whom payable." La. R.S. 22:215A(1). Clearly, the employees are insured under the policy, which is issued to the employer, and the employees are issued an individual certificate, which is delivered to each employee by the employer. If the group policy and individual certificate were the same, the general statute describing group insurance would not have given them such clearly defined meanings.

Second, under general principles of insurance law, the group policy issued to the employer contains the benefits and exclusions available to the employees; the certificate merely describes the coverage in a general way and relieves the employer of the obligation of providing the entire policy to each employee. ***Leonard Tutrix of Bland v. Continental Assur. Co.***, 457 So. 2d 751, 754 (La. App. 1st Cir.), *writ denied*, 460 So. 2d 1047 (La. 1984); ***Austin v. Metropolitan Life Ins. Co.***, 142 So. 337 (La. App. 2 Cir. 1932) (holding that the term "policy" within statute providing that the policy along with the applications of the employer and the employee shall contain the entire contract, was the group policy, not the individual certificate of insurance). Accordingly, terms written into a certificate of insurance cannot modify the provisions of the master group policy as it is the terms of the policy that determine coverage.

Loubat v. Audobon Life Ins. Co., 248 La. 183, 177 So. 2d 281, 284 (La. 1965).

In spite of these clear principles, the majority states that "[n]evertheless, when interpreting provisions of our Insurance Code, Louisiana Courts have often construed the terms "policy" and "contract of insurance" to include the certificate of insurance issued to the individuals under a group policy." Slip Op. at p. 8 (citing ***Smith v. North Am. Co. For Life, Accident & Health Ins.***, 306 So. 2d 751, 755 (La. 1975), *overruled in part*, ***Borer's Estate v. Louisiana Health Serv. & Indem. Co.***, 398 So. 2d 1124 (La. 1981); ***Pugh v. Prudential Ins. Co. of Am.***, 546 So. 2d 335, 337 (La. App. 3 Cir. 1989); ***Casey v. Prudential Ins. Co. of Am.***, 360 So. 2d 1386, 1390 (La. App. 3 Cir. 1978); ***Johnson v. Nationwide Life Ins. Co.***, 388 So. 2d 464, 466 (La. App. 2 Cir. 1980); ***Velez v. Sentry Ins. Co.***, 446 So. 2d 408, 410-11 (La. App. 4 Cir. 1984); ***Shrader v. Life Gen. Sec. Ins. Co.***, 588 So. 2d 1309, 1313 (La. App. 2 Cir. 1991)).

The language in ***Smith*** quoted by the majority that "the certificate of insurance issued and delivered to Smith is the 'policy' as that word as used in the statute (La. R.S. 22:618 subd. A)"**,** both explicitly and implicitly, does not apply to La. R.S. 22:215.12. *See also* ***Pugh***, *supra* (which involved the same factual and legal basis as ***Smith***). Because the only document the insured receives under a group policy is the individual certificate of insurance, in ***Smith*** we held that the individual's application must be attached to it, and if it is not, the application cannot be admitted into evidence. *See* ***Borer's Estate***, *supra* at 1126 (wherein we reaffirmed ***Smith*** to the extent that it held that false statements by the insured in the application cannot be used in evidence if the application is not made part of the contract but overruled ***Smith*** to the extent that it held that failure to attach the application affected the insurer's right to defend on the basis that coverage is excluded because of a preexisting condition). However, this case has no application to La. R.S. 22:215.12 which mandates the type of benefits that group

policies must provide. Because the policy, which is negotiated between the employer and the insurer, contains the benefits, limitations and exclusions applicable to the insureds, and the certificate of insurance merely describes these benefits and exclusions to the employee, the "policy" is not synonymous with the certificate when interpreting mandatory coverage provisions such as § 22:215.12. The other cases cited by the majority are likewise not dispositive of the issue[2] as even the majority concedes.[3] Because these cases have no application to La. R.S. 22:215.12, the majority's additional argument that the legislature had notice that courts in those cases had considered the certificate to be the policy when drafting La. R.S. 22:215.12 also fails.

Further, the majority's view that the legislative intent was that individuals issued certificates after January 1, 1993 under group policies in force prior to January 1, 1993, were to be covered by La. R.S. 22:215.12 is erroneous. For when compared to other sections of La. R.S. 22:215, it becomes clear that the legislature did not intend for § 22:215.12 to cover such individuals. Under these other sections, the legislature provided a specific time limit under which group policies issued prior to the effective date of the statute must comply with the terms of the particular statute. For

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[2]***Casey***, *supra*, ***Velez***, *supra* and ***Johnson***, *supra*, held only that Louisiana law applied where individual certificates of coverage were issued in Louisiana to Louisiana residents but the group policy was issued in another state. ***Shrader***, *supra* held that where plaintiff's employer was issued a group policy from one insurer but later joined a multiple employer trust insured by another insurer and was issued a certificate of coverage from the trust, the second policy was a "replacement policy" under La. R.S. 22:215.6, even though the first policy was issued to the employer and the second policy was issued to the trust.

[3]The majority states:

> Furthermore, we do not cite those cases for the broad proposition that the terms "policy" or "other contract of insurance," when used in our Insurance Code, always include a certificate of insurance issued under a group policy. Rather, ***Smith*** and the other cases demonstrate that, when interpreting statutes written to apply to both individual and group plans, terms such as "policy" and "contract of insurance" will sometimes be construed to include a certificate of insurance when to do otherwise would completely thwart the legislature's purpose in enacting the statute.

Slip. Op. at p. 10.

example, La. R.S. 22:215.2, which provides for mandatory coverage and continued coverage of physically or mentally handicapped children of the insured for policies issued more than ninety days after July 2, 1973, also provides that policies issued or delivered on or prior to ninety days after July 2, 1973 must be endorsed to include such coverage. La. R.S. 22:215.3, which provides for coverage of vocational technical students under all policies issued more than 90 days following July 31, 1974, and La. R.S. 22:215.4, which provides for coverage of unmarried students under all policies issued more than 90 days following July 31, 1974, also provide that any insurer who has policies in force as of July 31, 1974 has until July 21, 1995 to convert these existing policies to conform to the provisions of those sections. La. R.S. 22:215.11, which provides coverage for mammograms and pap smears, applies to any new policy, contract, program, or health coverage plan issued on or after January 1, 1992 and provides that all such policies in effect prior to that date shall convert to conform on or before the renewal date thereof but in no event later than January 1, 1993. La. R.S. 22:215.11A. Likewise, the provisions of that statute providing coverage for prostate cancer testing apply to all policies issued on and after January 1, 1998, and mandate that all policies in effect prior to that date must convert to conform on or before the renewal date, but no later than January 1, 1998. La. R.S. 22:215.11B. *See also* La. R.S. 22:215.14(immunizations), 22:215.15 (ADD and hyperactivity disorders), and 22:215.22 (reconstructive surgery), which provide effective dates by which existing policies must convert to the provisions of these statutes. La. R.S. 22:215.5, which provides for optional coverage for alcoholism and drug abuse, provides that any insurer who has group policies in force as of October 1, 1982 shall convert such existing policies to conform to the provisions of that section on or before the renewal dates of those policies. La. R.S. 22:215.7, containing continuation of coverage options,

specifically applies to policies issued or renewed on or after September 9, 1983. La. R. S. 22:215.8 mandates that any policy which provides medical and surgical benefits and which is delivered, issued or renewed on or after January 1, 1998 must include coverage for treatment of cleft lip and cleft palate. *See also* 22:215.20 (coverage for diabetic supplies, equipment and self-management training and education for policies issued or renewed after 1/1/98).[4]

Had the legislature intended for La. R.S. 22:215.12 to apply to group policies in force prior to January 1, 1993, it would have, as it has in the sections cited above, added a provision to say so. The fact that it did not strongly indicates that it did not have such intent.

Further, the legislature could have included the phrase "individual certificates of insurance" in the list of items that are subject to the provisions of § 22:215.12, but it did not.[5] It is a settled rule of statutory construction that when the legislature specifically enumerates a series of things, the legislature's omission of other items, which could have easily been included in the statute, is deemed intentional. ***State Through Dept. Of Public Safety and Corrections, Office of State Police, Riverboat Gaming Div. v. Louisiana Gaming Com'n and Horseshoe Entertainment***, 94-1872 (La. 5/22/95), 655 So. 2d 292, 302.

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[4]Similarly, Acts 1997, No. 1138, which enacted La. R.S. 22:250.1 to 22:250.16 and repealed La. R.S. 22:215.12, specifically provides that the "provisions of this Act shall become effective with respect to health insurance coverage offered, sold, issued, renewed, in effect, or operated in the individual or group market for plan years beginning on or after July 1, 1997 . . . ."

[5]The legislature specifically enumerated the types of contracts delivered after January 1, 1993 which would trigger the newly mandated provisions of § 22:215.12 as follows: hospital, health or medical expense insurance policy; hospital or medical service contract; health and accident insurance policy; employee welfare benefit plan; or any other insurance contract of this type, including a group insurance plan and a self-insurance plan. *But see* § 22:215.13 and 22:216 (repealed by Acts 1997, No. 1138, § 2, eff. July 14, 1997) (defining a "group policy" as a "group accident and health insurance policy or group certificate").

Finally, the majority's holding results in a possible violation of the Insurance Code's anti-discrimination provisions[6] as it subjects some employees covered under a group insurance policy to more restrictive pre-existing condition time limits that other employees covered under the same group policy. For example, it appears that an employee issued a certificate of insurance in December of 1992 will not be covered for a medical condition in existence for more than one year, while an employee issued a certificate of insurance in January of 1993 will be covered for a condition in existence for more than one year, even though the two employees are insured under the same group insurance policy.

For the foregoing reasons, the provisions of La. R.S. 22:215.12 do not apply to new enrollees under Blue Cross group policies issued prior to January 1, 1993 whose effective dates of coverage, pursuant to their individual certificates of

insurance, are between January 1, 1993 and March 9, 1995.[7] Accordingly, I respectfully dissent.

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[6]La. R.S. 22:652 provides:

> No insurer shall make or permit any unfair discrimination in favor of particular individuals or persons, or between insureds or subjects of insurance having substantially like insuring risk, and exposure factors, or expense elements, in the terms or conditions of any insurance contract, or in the rate or amount of premium charged therefor, or in the benefits payable or in any other rights or privileges accruing thereunder. This provision shall not prohibit fair discrimination by a life insurer as between individuals having unequal life expectancies.

[7]Blue Cross acknowledged at oral argument that the statutory requirements of La. R.S. 22:215.12 would apply to enrollees of group master policies on the first renewal date of the policies after January 1, 1993.