

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

**RONALD D. MELL, SR., et al,** : **Case No. 1:08-cv-00715**  
**Plaintiffs,** : **Judge Spiegel**  
**v.** :  
**CITY OF CINCINNATI., et al.,** : **RESPONSE OF CITY**  
**Defendants.** : **DEFENDANTS TO**  
**PLAINTIFFS' MOTION FOR**  
**SUMMARY JUDGMENT**

The City of Cincinnati and the individually named City officials (“the City”) file the attached response opposing the Plaintiffs’ Motion for Summary Judgment. The City incorporates its prior Motion for Summary Judgment (Doc. 37) and submits the attached additional memorandum opposing Plaintiffs’ Motion for Summary Judgment.

The parties agree that there is no genuine issue of material fact. The court should determine that the plaintiffs’ tort and contract claims merge, and that summary judgment should be granted in favor of the City.

The City’s opposing memorandum is attached, along with the Declaration of the City’s Risk Manager, Charles Haas.

Respectfully submitted,

/s/ Terrance A. Nestor

Terrance A. Nestor (0065840)  
Assistant City Solicitor  
801 Plum Street  
Cincinnati, Ohio 45202  
Phone: (513) 352-3327  
Fax: (513)352-1515  
Email: [terry.nestor@cincinnati-oh.gov](mailto:terry.nestor@cincinnati-oh.gov)  
Trial attorney for City Defendants

## MEMORANDUM

### **I. Introduction**

The Plaintiffs' theories in this case revolve around their interpretation of the various contracts and agreements entered into between Anthem and the City of Cincinnati. In this case, it is beyond dispute that the City and its taxpayers paid the premium for the purchase of the insurance provided to City employees. The plaintiffs and employees or retirees like them usually paid nothing for their health benefits. The plaintiffs seek to recover a windfall that properly went back to the City taxpayers who paid millions of dollars to provide health benefits for their municipal workers.

The plaintiffs' contract and tort claims are essentially the same and are derivative of the contracts between Anthem and the City. As such, the court should first determine whether this case sounds in contract or tort. If this is a contract case, well-established Ohio law precludes the tort claims. Under Ohio's application of third party beneficiary law, the plaintiffs (and anyone similarly situated) cannot collect from the City because their claim is barred by the contract between the City and Anthem. If the case is a tort case, then it is barred as set forth in the City's previous motion for summary judgment.

### **II. Facts**

The City's risk management files contain a copy of the applicable Group Guaranty Health Policy.<sup>1</sup> The Plaintiffs' claim the Group Guaranty Health Policy is the contract the City breached.<sup>2</sup> The Group Guaranty Health Policy was the only such policy in the City's risk management files.<sup>3</sup> Plaintiff's claim the City (or Anthem) breached either the

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<sup>1</sup> Declaration of Charles Haas, Attachment 1, ¶5. Complaint, Exhibit S.

<sup>2</sup> Doc. 36-1.

<sup>3</sup> Declaration of Charles Haas, ¶5,6.

Guaranty Policy for Future Groups or the Guaranty Policy for Current Groups.<sup>4</sup> Because the City only received the “Guaranty Policy for Current Groups,”<sup>5</sup> which specifically bars plaintiffs’ claims,<sup>6</sup> the City is entitled to summary judgment on the Plaintiff’s breach of contract claims.

### **III. Law and Argument**

#### **A. Plaintiffs contract and tort theories merge.**

From the onset, this Court should determine that the Plaintiffs’ contract and tort theories are one in the same. As such, well-established Ohio law bars either the contract or the tort counts. The City submits that if the Plaintiffs’ case sounds in contract the Court can determine the issues presented by the Plaintiffs as a matter of law. Likewise, if the case sounds in tort, the Court can dispose of the case because it is barred for all the reasons set forth in the City’s prior motion for summary judgment.

Under Ohio law, the existence of a contract action generally bars the same claim presented as a tort.<sup>7</sup> In this case, the issues set forth in the contract and tort claims all arise from the Plaintiffs’ interpretation of the Group Guaranty Contract.

In determining whether a cause of action lies in tort or contract, courts must look to “the nature of the grievance rather than the form of the pleading.”<sup>8</sup> If the basis of the complaint is breach of contract, there generally is no tort in Ohio.<sup>9</sup> In this case, the

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<sup>4</sup> Plaintiffs’ Motion for Summary Judgment, ¶99, 103, 104.

<sup>5</sup> Declaration of Charles Haas, ¶5,6.

<sup>6</sup> Id. See Article IV, “Membership Rights.”

<sup>7</sup> *Wolfe v. Continental Cas. Co.*, 647 F.2d 705, 710 (6th Cir.1981).

<sup>8</sup> *Meeker v. Shafranek*, 112 Ohio App. 320, 323, 176 N.E.2d 293 (1960).

<sup>9</sup> *Ketcham v. Miller*, 104 Ohio St. 372, 136 N.E. 145, syllabus (1922); *Meeker*, 112 Ohio App. at 323, 176 N.E.2d 293; *Schwartz v. Bank One, Portsmouth, N.A.*, 84 Ohio App.3d 806, 810, 619 N.E.2d 10 (1992); *Battista v. Lebanon Trotting Ass’n*, 538 F.2d 111, 118-19 (6th Cir.1976).

plaintiffs' claims all depend on the contract language. As such, this is a contract case, and the court should determine the contract issues as a matter of law.

B. Plaintiffs' Contract Claims are barred by the plain language of the contract.

The Plaintiffs' contract theory is that, while they were not parties to the Guaranty Policy, they are entitled to the Anthem proceeds because they are both members and intended third party beneficiaries of the Group Guaranty Health Policy.<sup>10</sup> But, the Group Guaranty Health Policy was issued to the City, and the plaintiffs accept that the City and Anthem were the contracting parties.<sup>11</sup>

In Ohio, an action for breach of contract can only be maintained by the parties to the contract or those deriving rights from the contracting parties, such as an intended third-party beneficiary.<sup>12</sup> A third-party beneficiary does not acquire any rights greater than those set forth in the contract by the parties.<sup>13</sup> The plaintiffs seek a benefit specifically contemplated and denied by the Group Guaranty Policy: equity rights in a demutualization. As third party beneficiaries, the plaintiffs are bound by the burdens of the contract as much as any benefit. In this case, a specific burden of the contract is that enrollees are not entitled to collect any equity share in a demutualization.

The plaintiffs in this case did not bargain for the receipt of the Anthem proceeds and seek only to benefit from the City's membership in the mutual insurance company. The plaintiffs were never intended to receive any equity rights in the mutual insurance

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<sup>10</sup> Plaintiffs' Motion for Summary Judgment, ¶101.

<sup>11</sup> Id. at ¶99.

<sup>12</sup> *Grant Thornton v. Windsor House, Inc.*, 57 Ohio St.3d 158, 161, 566 N.E.2d 1220 (1991); *American Rock Mechanics, Inc.*, 80 Ohio App.3d at 58, 608 N.E.2d 830.

<sup>13</sup> *Ohio Sav. Bank v. H.L. Vokes Co.*, 54 Ohio App.3d 68, 71, 560 N.E.2d 1328 (1989) (citing *Union Savings & Loan Co. v. Cook*, 127 Ohio St. 26, 186 N.E. 728,) paragraph one of the syllabus (1933).

company. The Guaranty Contract the plaintiffs claim under is explicit:

As long as this Policy is in effect, the Associated Member shall be entitled to all of the rights of membership in Associated accorded to members of a mutual insurance company under Indiana law, including . . . equity rights in the event of liquidation, merger, consolidation, or demutualization as provided in Associated's Articles of Incorporation from time to time in effect. Such equity rights . . . shall accrue solely to the Associated Member. ***No enrollee or dependent of an enrollee shall receive any equity rights by virtue of being an enrollee or dependent of an enrollee.***<sup>14</sup>

In interpreting an insurance policy, a court's role "is to give effect to the intent of the parties to the agreement."<sup>15</sup> A reviewing Court is to "presume that the intent of the parties is reflected in the language used in the policy. We look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy. When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties. As a matter of law, a contract is unambiguous if it can be given a definite legal meaning."<sup>16</sup> The meaning of the Group Policy is plain as day. The equity the plaintiffs seek is specifically denied to enrollees by the Group Policy. Demutualization proceeds were contemplated by the contract. The contract specifically denies the plaintiffs the membership benefits they seek.

Employees in the City were "enrollees" as defined by the contract.<sup>17</sup> Moreover, in the case of the firefighter plaintiffs (and all similarly situated firefighters), any claim for

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<sup>14</sup>Wellpoint Appx. Tab 1, (Umstead Decl.), Ex.B. Deposition of Charles Haas, p. 178-182, Exhibit 24.

<sup>15</sup> *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 11.

<sup>16</sup> *Id.*

<sup>17</sup> Article I, Definitions.

an employment related benefit was explicitly covered by their union contract. The firefighter union contract provides:

In the case of conflict between the terms and conditions herein and otherwise applicable State and local law or regulation, this Agreement shall prevail pursuant to Ohio Revised Code §4117.10(A).<sup>18</sup>

Under Ohio law, the union contract is the exclusive means to address a term or condition of employment of a union member.<sup>19</sup> The firefighter plaintiffs in this case claim class membership by virtue of their dental coverage.<sup>20</sup> The dental benefit was provided through the union contract.<sup>21</sup> Indeed, the collective bargaining agreement itself does not reference any particular insurance plan, but provides \$50.00/month per firefighter for dental benefits. That is, the firefighters' union itself did not even contemplate the particular form of coverage purchased by the City. The purchase of insurance by the City was funded not by firefighter premium payments or co-pays, but rather, exclusively by City taxpayers.<sup>22</sup> The plaintiff firefighters are precluded by their own collective bargaining agreement from claiming the proceeds of the Anthem demutualization.

C. The City was the "policyholder" under Ohio law.

The plaintiffs agree that the City was issued the Group Health Policy.<sup>23</sup> Plaintiffs' contention is that the Group Guaranty Policy conflicts with Ohio law because it specifically disclaims the employees' membership equity rights in a demutualization.<sup>24</sup>

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<sup>18</sup> Declaration of Charles Haas, Exhibit A, Article I, "Contract Supremacy."

<sup>19</sup>R.C. 4117.10.

<sup>20</sup> Plaintiffs' Motion for Summary Judgment, ¶ 42, 43.

<sup>21</sup> Declaration of Charles Haas, Exhibit A, Article XXXII, "Dental Plan."

<sup>22</sup> Id. at ¶3,4.

<sup>23</sup> Plaintiffs' Motion for Summary Judgment, ¶67. Declaration of Charles Haas, ¶5.

<sup>24</sup> Plaintiffs' Motion for Summary Judgment, ¶79, 80.

Plaintiffs' counsel's theory is that the employees are the policyholders because they are the "named insureds."<sup>25</sup>

The Ohio Supreme Court rejected a similar argument in the context of Ohio's uninsured motorists' law. In *Westfield Ins. Co. v. Galatis*<sup>26</sup> the Ohio Supreme Court rejected the extension of insurance benefits beyond the rights of the policyholder. The Court stated: "An insured can be the policyholder or another who is entitled to insurance coverage under the terms of the policy. When a court decides whether a claimant is insured under a policy, ambiguities are construed in favor of the *policyholder*, not the claimant."<sup>27</sup>

Plaintiffs' case seeks an absurd result that would penalize City taxpayers. Plaintiffs benefited from the City's purchase of health benefits to cover municipal workers. Like many fortunate government workers, the benefits were provided to municipal workers without cost. As set forth in the first Declaration of Charles Haas<sup>28</sup> City taxpayers funded the purchase of the employees' health benefits. The amount spent by City taxpayers exceeded \$111 million.<sup>29</sup> The Anthem proceeds returned a prorated portion of these millions to the City based on its premium payments. The plaintiffs seek this money because they claim to be the policyholders, despite the taxpayers' payment of premium.

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<sup>25</sup> Id.

<sup>26</sup> 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 35.

<sup>27</sup> Id.

<sup>28</sup> Attachment 1 to the City's Opposition to Class Certification (Doc. 39-1).

<sup>29</sup> Id. at ¶4.

The Revised Code specifies that shares of the new insurance company are to be issued to the owner of the mutual policy.<sup>30</sup> The City was the owner and policyholder of the Group Guaranty Health Policy and Certificate of Membership. The City taxpayers rightly received the benefit of their premium payment investment in the old Anthem mutual insurance companies and should not be penalized by plaintiffs' construction of Ohio law that has already been rejected by Ohio courts.

In both *Greathouse v. E.Liverpool*<sup>31</sup> and *State of Ohio ex rel. Teamsters Local Union No. 637 v. City of Marietta*<sup>32</sup> Ohio Courts concluded that the City was the owner and policyholder. Plaintiffs' reliance on *Preferred Mutual Insurance Co. v. Butcher*<sup>33</sup> is misplaced. Ohio courts have determined that the issue of whether a person is a named insured is a question of law. In order to be a named insured a person must be listed as such on the declarations page of the policy.<sup>34</sup> In *Stacy*, the court stated, "It is undisputed that the term 'named insured' is not defined by statute or the terms of the insurance contract."<sup>35</sup> The same is true in this case. In *Hillyer v. State Farm Mut. Ins. Co.*<sup>36</sup> the decision the *Butcher* court relied on, the court concluded that the policy did not include the name of the claimant, and therefore individuals not listed on the policy were not named insureds. In this case, the Court should similarly conclude: the individuals were not "named as the insured." Rather, the City was the member as designated by the Group Guaranty Health Policy, and was the policyholder as defined by R.C. 3913.20(B).

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<sup>30</sup> R.C. 3913.22 (C).

<sup>31</sup> 159 Ohio App.3d 251, 823 N.E.2d 539

<sup>32</sup> 2005-Ohio-7108, 2005 WL 3642030

<sup>33</sup> 2006-Ohio-6884.

<sup>34</sup> *Stacy v. Nationwide Mut. Ins. Co.* (1998), 125 Ohio App.3d 658, 709 N.E.2d 519.

<sup>35</sup> *Id.*

<sup>36</sup> (1999), 131 Ohio App.3d 172, 722 N.E.2d 108.

The City taxpayers paid the premium for the benefits procured for municipal workers. City taxpayers, and not the city workers, should receive the return of surplus due to owners of mutual insurance companies in a demutualization.

D. Plaintiff's' Tort Claims are Time Barred if they exist at all.

As set forth above, the Plaintiffs' tort claims merge with the plaintiffs' contract claims. The Sixth Circuit has explained:

A tort exists only if a party breaches a duty which he owes to another independently of the contract, that is, a duty which would exist even if no contract existed. However, when the promisee's injury consists merely of the loss of his bargain, no tort claim arises because the duty of the promisor to fulfill the term of the bargain arises only from the contract. The tort liability of parties to a contract arises from the breach of some positive legal duty imposed by law because of the relationship of the parties, rather than from a mere omission to perform a contract obligation.<sup>37</sup>

The City submits that the plaintiffs' entire case rests on their lawyer's interpretation of the Group Guaranty Health Policy, and thus should be determined as a matter of law as a contract case. The plaintiffs' alternative tort theories are barred as set forth in the City's Motion for Summary Judgment.<sup>38</sup>

But it is worth noting what the tort claims might be if they "arise from the breach of some positive legal duty imposed by law because of the relationship of the parties. . . ." That is, if there is a tort claim in Ohio, it can only arise from Ohio's demutualization statute, R.C. 3913.11 *et seq.*

Ohio's demutualization law is not dependent on an individual's employment status. Rather, it depends on the determination of whether or not the person is the

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<sup>37</sup> *Battista v. Lebanon Trotting Assoc.* (6<sup>th</sup> Cir., 1976) 538 F.2d 111, 117.

<sup>38</sup> Plaintiffs' Claims are barred by the statute of limitations, political subdivision immunity, and the doctrine of exhaustion of administrative remedies.

“policyholder”<sup>39</sup> entitled to a *pro rata* ownership share in a newly constituted stock corporation after demutualization. If plaintiffs contend that the source of the legal duty is the Ohio demutualization statute, then such a claim is not dependent on the plaintiffs’ employment with the City. Rather, plaintiffs are contesting the legislative decision made by Cincinnati City Council in late 2001 and early 2002 that the Anthem proceeds should be distributed back to Cincinnati taxpayers and neighborhoods as opposed to City employees or retirees.

The Ohio Revised Code specifically immunizes the City and its legislators from liability for legislative decisions. Revised Code Chapter 2744 designates legislative actions as governmental functions entitled to immunity.<sup>40</sup> Under Ohio’s version of immunity, there are only limited exceptions to the broad grant of immunity.<sup>41</sup> In this case, the wrong the plaintiffs complain of and the injury they have allegedly suffered does not arise out of their employment relationship with the City but out of Ohio’s demutualization law. This is clear in the case of named plaintiff Cluadette Schenck, who was neither an employee nor the spouse of an employee. But, it is also clear in the case of any class member who was not an employee, that is, everyone in the potential class similarly situated as Ms. Schenck’s deceased mother, Frieda Wilmes.

Under the plaintiffs’ theory of the case, not only deceased spouses, but all dependents covered under a parent or spouse’s insurance benefits (“enrollees”) would be a “named insured.” Obviously, the spouses and children did not suffer any loss that

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<sup>39</sup> R.C. 3913.20(B).

<sup>40</sup> R.C. 2744.01(C)(2)(f)&(i).

<sup>41</sup> R.C. 2744.02

“arises out of the employment relationship.”<sup>42</sup> Rather, any injury or loss is the result of the plaintiffs’ idiosyncratic interpretation of Ohio demutualization law. Because the demutualization law does not depend on a member’s employment status, the exceptions to immunity did not apply. Accordingly, the City is entitled to immunity for the plaintiff’s tort claims because the source of the injury arises neither from the plaintiffs’ employment status nor from any contract with the City.

#### **IV. Conclusion**

The Plaintiffs’ tort and contract claims merge. The Court should determine this case is a contract case and that the plain language of the Group Guaranty Health Policy bars the plaintiffs’ contract claims against the City. If the Court determines that Ohio’s demutualization law provides an independent tort cause of action, then the City is entitled to protection under Ohio’s political subdivision immunity law, R.C. 2744, *et seq.* The City incorporates its prior Motion for Summary Judgment on the issues of the statute of limitations and the exhaustion of administrative remedies.

Respectfully Submitted,

/s/ Terrance A. Nestor  
Terrance A. Nestor (0065840)  
Assistant City Solicitor  
Room 214, City Hall  
801 Plum Street  
Cincinnati, Ohio 45202  
(513) 352-3329  
(513) 352-1515 FAX  
[Terry.nestor@cincinnati-oh.gov](mailto:Terry.nestor@cincinnati-oh.gov)  
Trial counsel for City

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<sup>42</sup> R.C. 2744.09.

**CERTIFICATE OF SERVICE**

I hereby certify that on the 19<sup>th</sup> day of October 2009, a copy of the foregoing was filed in the Court's CM/ECF system, which will serve notification on all counsel of record.

/s/ Terrance A. Nestor

Terrance A. Nestor