

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION  
AT CINCINNATI

RONALD D. MELL, SR., *et al.*, )  
On Behalf of Themselves and )  
All Others Similarly Situated, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
ANTHEM, INC., *et al.*, )  
 )  
Defendants. )

CASE NO. 1:08-cv-00715-SAS-TSH

**PLAINTIFFS’ MEMORANDUM IN OPPOSITION TO THE ANTHEM  
DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT**

The Anthem Defendants are not entitled to summary judgment on Plaintiffs’ claims in this case for the following reasons: (i) the City was not allowed by Ohio law to receive demutualization proceeds, (ii) Plaintiffs and the Class of City workers and retirees were legally and contractually entitled to the demutualization compensation, and (iii) the various administrative agencies that approved Anthem’s demutualization never determined the rightful recipients of the proceeds. Each point is fully explained below.

**A. The City of Cincinnati Was Not Allowed by Ohio Law to Receive Any Proceeds or Compensation from the Demutualization of Anthem Insurance.**

For the group health insurance policies that the City maintained on its active and retired employees and their families at the beginning of the relevant period of time,<sup>1</sup> Community Mutual Insurance Company (“CMIC”), an Ohio mutual insurance company, considered the employer to be

---

<sup>1</sup> The relevant period of time for calculating the demutualization benefits was the 10-and-a-half-year period from January 1, 1990 through June 30, 2000, inclusive. The relevant period of time for determining eligibility for those benefits was June 18, 2001 through November 2, 2001, inclusive. The relevant group policies issued by CMIC providing full health insurance coverage and benefits to City workers and retirees include the 1989 Master Group Contract (PTX-6) and the 1994 City of Cincinnati Group Contract (PTX-9) (collectively the “Group Policy”). There were at least three kinds of fully-insured coverage under the Group Policy: (i) a Health Maintenance Plan (“HMP”) for active employees, (ii) an HMP for retired employees, and (iii) a dental plan for City firefighters.

its mutual member entitled to the rights of membership in a mutual company.<sup>2</sup> There is no dispute in this case that CMIC regarded the City, not the City's insured employees, as its mutual member:

In the case of a master contract for group insurance, *the member shall be the holder of the master policy*, and the holder of any certificate or contract issued subordinate to such master policy shall not be a member unless it makes specific provision for such membership.<sup>3</sup>

But CMIC's membership rules specifically incorporate Ohio law regarding who enjoys demutualization rights:

Each member shall have *such rights as are prescribed by law* for members of mutual insurance companies organized under the laws of Ohio ...<sup>4</sup>

Among all of the Ohio statutes prescribing all of the rights afforded to members of Ohio mutual insurance companies, R.C. 3913.22(A) provides who has demutualization rights under Ohio law in the event the mutual insurance company demutualizes. The mutual company's *members* are not entitled to receive demutualization proceeds – under Ohio law, it is the *policyholders* of the mutual company who have those rights:

In effecting a conversion of a mutual insurance company into a stock insurance corporation [under Ohio law], *each mutual policyholder is entitled to such shares of stock of the new corporation* as his equitable share of the value of the mutual company will purchase.<sup>5</sup>

R.C. 3913.20(B) defines “policyholder” for demutualization purposes *not* as the mutual company “member,” but rather as the person, group of persons or entity “named as the insured” under a mutual policy of insurance.<sup>6</sup>

---

<sup>2</sup> CMIC's By-Laws, art. I, §§ 1.01 and 1.02 (PTX-13A).

<sup>3</sup> CMIC's By-Laws (PTX-13A), art. I, § 1.01 (emphasis supplied).

<sup>4</sup> *Id.*, § 1.02 (emphasis supplied).

<sup>5</sup> R.C. 3913.22(A) (emphasis supplied).

<sup>6</sup> R.C. 3913.20(B).

While the City may have been CMIC's member, it was not the "policyholder" entitled to demutualization compensation because the City was not "named as the insured" under the Group Policy of health insurance. A municipality has no health of its own to insure; it is insuring the health of its active and retired employees and their dependents who are, thus, the persons "named as the insured" under the Group Policy. This logic is consistent with the relevant authorities in this field providing that, in the context of a group health insurance policy, the covered employee or retiree is the person or group of persons named as the insured:

Policies of medical insurance generally cover the named insured, and dependents of the named insured. Although [premiums] are primarily the responsibility of the employer or other entity which purchased the policy, the insured under such a policy is the employee or group member.<sup>7</sup>

The Ohio Department of Insurance has adopted this understanding in an official publication of the State of Ohio entitled *Health Insurance Guide: How to Get the Most Out of Your Health Coverage* that defines the term "certificate holder" as "[a]n employee or other insured named under a group health insurance policy."<sup>8</sup>

Even Anthem recognizes (while stubbornly refusing to concede the point in this litigation) that the "named insureds" are the covered employees and insured retirees of a group health policy taken out by their employer:

Any revised notice will be provided to you by one of the following means. (1) By mail to the *named insured* under the terms of your coverage. (2) By delivery of the notice by *the named insured's employer* if you are enrolled in employer-sponsored group insurance coverage.<sup>9</sup>

There can be no doubt that, with respect to the Group Policy of health insurance covering the

---

<sup>7</sup> 10A G. COUCH, INSURANCE § 144:26 (3<sup>rd</sup> ed. 1998).

<sup>8</sup> *Ohio Health Insurance Guide (PTX-99)* at 55.

<sup>9</sup> Anthem's *Notice of Privacy Practices* issued April 14, 2003 (PTX-7) (emphasis supplied).

City's employees and retirees, the City was clearly *not* the "named insured" entitled to demutualization compensation under Ohio law.

**B. Plaintiffs and the Class Members Were Entitled to Receive the Proceeds from Anthem Insurance's Demutualization.**

Effective October 1, 1995, CMIC merged into Associated Insurance Companies, an Indiana mutual insurance company later known as Anthem Insurance.<sup>10</sup> The 1995 merger contracts<sup>11</sup> established different rights depending on whether coverage was provided under old pre-merger health insurance (Group A) or under new post-merger health insurance (Group B). The pre-merger health insurance policies issued by CMIC before the merger would continue in effect with certain "grandfathered" rights preserved and guaranteed under Ohio law. Post-merger insurance involved new health insurance policies or coverage issued by Anthem/CIC after the merger for which Anthem's normal membership rules under Indiana law would apply.

**1. As the "Named Insureds" Under the Group Health Insurance Policy, the Class Members of Group A (the Former CMIC Insureds with Grandfathered Rights Under Ohio Law) Were the "Policyholders" Entitled to Demutualization Compensation Under Ohio Law.**

The 1995 merger contracts promised that the former CMIC policyholders and insureds would have equity rights in the event of Anthem Insurance's subsequent, post-merger demutualization that would "reflect and include in full" the grandfathered rights to demutualization compensation and the value of their interests in CMIC immediately prior to the merger. In other words, they would be entitled to the same demutualization rights and proceeds as if CMIC had demutualized under Ohio

---

<sup>10</sup> At the same time, a new stock insurance company, Community Insurance Company ("CIC"), was formed as an Anthem Insurance subsidiary to enable it to continue to do business with CMIC's former members in Ohio. *See* Merger Agreement, § 3.1.A (PTX-11).

<sup>11</sup> *See, e.g.*, Merger Agreement between CMIC and Associated dated March 13, 1995 (PTX-11); Associated's Second Amended and Restated Articles of Incorporation (PTX-14); Plan and Joint Agreement of Merger ("PJAM") dated September 29, 1995 (PTX-20); Group Guaranty Policy and Certificate of Membership for existing CMIC member groups (referred to as "Grandfathered Groups") (PTX-18); Group Guaranty Policy for future Anthem/CIC group contract holders (PTX-18A); Certificate of Membership and Summary of Benefits for Anthem/CIC members (PTX-18B).

law immediately prior to the merger.<sup>12</sup>

Since Group A of the Class has grandfathered rights to have Ohio law govern the determination of the value of their rights and interests in CMIC as promised by the 1995 merger contracts, they continued to enjoy rights with respect to the City's pre-merger Group Policy from CMIC (that Anthem Insurance/CIC continued in effect following the merger) at the time of the demutualization in 2001. These insured City employees and retirees, the persons "named as the insureds" under the pre-merger CMIC Group Policy, are the "policyholders" entitled by Ohio law to receive the demutualization compensation attributable to the pre-merger Group Policy.

The pre-merger CMIC Group Policy continued to provide fully-insured coverage for the Retirement HMP (GID H17955-010)<sup>13</sup> and the firefighters' Dental Plan (GID H25993-017) through the date of the demutualization, November 2, 2001. At that date, and continuously since June 18, 2001 when Anthem Insurance announced it was demutualizing, 950 City retirees were insured under the Retirement HMP and 85 City firefighters were insured under the Dental Plan (including Plaintiffs Espel and Matacia).<sup>14</sup>

With respect to Group A, Defendants breached the 1995 merger contracts, breached their fiduciary duties, committed conversion, and aided and abetted conversion by failing to pay demutualization compensation to approximately 1,035 City employees and retirees enrolled in GID H17955-010 and H25993-107 who were each entitled to receive the amount by which their respective insurance coverage actuarially contributed to the overall surplus of Anthem Insurance,

---

<sup>12</sup> See, e.g., Guaranty Policy for Current Groups (**PTX-18**); Associated's Second Amended and Restated Articles of Incorporation, § 8.3 (**PTX-14**); Merger Agreement, § 3.1.B (**PTX-11**); PJAM, § 3.1(B) (**PTX-20**).

<sup>13</sup> The City decided to self-insure the active employees who had been in the fully-insured HMP (*see* note 1 *supra*) effective as of 1/1/2000 in order to reduce costs, and the fully-insured HMP for active employees was discontinued after December 31, 1999. Transcript of Deposition of Charles F. Haas ("Haas Depo. Tr."), City risk manager, at 80:14-21; 133:18-22. However, notwithstanding the decision to self-insure the active employees enrolled in the HMP effective 1/1/2000 to save money, the City decided to keep the Retirement HMP fully insured because the City "needed to keep a fully-insured product with Anthem in order to qualify for the demutualization proceeds." Haas Depo. Tr. at 134:12-17.

<sup>14</sup> Anthem's Ggrep memo for City (**PTX-46**); Anthem listing of City GIDs (**PTX-76**).

and by wrongfully paying their demutualization compensation to the City instead.

**2. The Class Members of Group B (Covered by New Group Insurance Issued After the Merger) Were Members of Anthem Insurance Under Its Membership Rules and Thus Entitled to Demutualization Compensation Indiana Law.**

The 1995 merger contracts also specified that group health insurance policies taken out by employers in Ohio after the merger would be uniformly treated by Anthem/CIC in the same way as Anthem Insurance treated similar group policies for its Indiana employer-customers – the insured employees would be Anthem Insurance members for all purposes, not the employer.<sup>15</sup> This is the diametric opposite of the way CMIC treated employers, and gave the insured active and retired employees equity rights in the event of Anthem Insurance’s subsequent demutualization under Indiana law (without applying or resorting to Ohio law). So, for any new group insurance coverage issued between October 1, 1995 and June 30, 2000, the employer’s insured employees and retirees would be entitled to receive the demutualization compensation attributable to such new insurance coverage, rather than the employer, in the event Anthem Insurance thereafter demutualized.<sup>16</sup>

Effective January 1, 1996 (following the 1995 merger), the City added a Community Preferred Health Plan (CPHP) that was self-insured by the City and administered by Anthem/CIC for several of its employee labor groups, including among others the firefighters, management and the AFSCME union.<sup>17</sup> Starting January 1, 1998, the City added a fully-insured Human Organ Transplant (HOT) rider to the Anthem/CIC group health coverage for the City employees enrolled in the:

- (i) firefighters’ CPHP (GID H25993-008);

---

<sup>15</sup> See, e.g., Guaranty Policy for Future Groups, articles I and IV (PTX-18A); Certificate of Membership (PTX-18B); Anthem’s By-Law’s § 1.1 (PTX-14A); Associated’s Second Amended and Restated Articles of Incorporation §§ 7.1, 7.5 (PTX-14); PJAM § 5.2 (PTX-20).

<sup>16</sup> Defendants do not dispute this fact. Rather, the Anthem Defendants erroneously claim there was no new, post-merger insurance coverage applicable to any Class member.

<sup>17</sup> City Memorandum of Fully Insured Premiums versus Self-Insured Costs (1981-2004) prepared by the City’s risk manager Charles Haas (PTX-73) at 4 (“The CPHP Plan was added in 1996 and was self-insured”).

- (ii) management CPHP (GID H25993-013); and
- (iii) AFSCME union CPHP (GID H25993-018).

The evidence that the fully-insured HOT rider coverage was added to the self-insured CPHP for these three different groups of City employees on or after January 1, 1998 comes from the City's risk manager who testified that the fully-insured HOT rider was added "a year or so" after "we first adopted" the self-insured Community Preferred PPO plan for active employees<sup>18</sup> and from a number of Defendants' documents, including a City memorandum of health plan changes prepared by its risk manager and an Anthem/CIC memorandum between the two Anthem employees most closely involved with the City account – Andrea Schell and Mary Sperber.

First, the City's memorandum prepared by Mr. Haas lists the dates of various changes to the City's health insurance plan and includes the following entry: "1/1/1998: added the Human Organ Transplant rider to CPHP Plan."<sup>19</sup> Second, the Anthem memorandum from Ms. Schell<sup>20</sup> to Ms. Sperber<sup>21</sup> dated May 15, 2001, contains a handwritten notation: "H29578 [and] H25993 – both have FI [fully insured] HOT, but it started 1/1/98 ..."<sup>22</sup>

The new, post-merger, fully-insured HOT rider coverage added to the three CPHP plans was terminated effective December 31, 2002,<sup>23</sup> and thus continued in effect through the date of the demutualization, November 2, 2001. At that date, and continuously since June 18, 2001 when Anthem Insurance announced it was demutualizing, 269 City firefighters were enrolled in the

---

<sup>18</sup> Haas Depo. Tr. at 78:10-79:7 ("It was not when we first adopted Community Preferred, but a year or so later we added to that plan a fully-insured human organ transplant rider even though that was a self-funded plan").

<sup>19</sup> City Memorandum (**PTX-78**).

<sup>20</sup> CMIC's senior underwriter for the City's account (January 1991-September 1994) and Anthem's director of underwriting for the City's account (April 1998-2005).

<sup>21</sup> Sperber was Anthem's underwriter handling the City of Cincinnati account. (Schell Depo. Tr. at 11:14-12:14.)

<sup>22</sup> Anthem memorandum (**PTX-99A**).

<sup>23</sup> City Memorandum (**PTX-73**) at 4 ("The CPHP Plan was terminated effective 12/31/02"); City Memorandum (**PTX-**

firefighters' CPHP and covered by the fully-insured HOT rider, 532 supervisory employees were enrolled in the management CPHP and covered by the fully-insured HOT rider, and 624 union employees were enrolled in the AFSCME CPHP and covered by the fully-insured HOT rider.<sup>24</sup>

Moreover, Frieda Wilmes received a document entitled "Certificate of Membership and Summary of Benefits" from Anthem and the City. It bears a revision date of "10/95" which means it was issued to Wilmes after October 1995 and therefore after the 1995 merger. The Certificate of Membership and Summary of Benefits specifies that Wilmes was a member of Associated (which shortly thereafter changed its name to Anthem Insurance):

*This Certificate of Membership and Summary of Benefits ("Certificate") is issued to you as the Associated Member identified in the application for insurance or health care benefits under a group policy or contract issued by Community Insurance Company ("Community").*<sup>25</sup> You have coverage for insurance or health care benefits under a group health care benefits contract issued by Community. Those insurance or health care benefits are guaranteed by a group guaranty health policy ("Guaranty Policy") that has been issued by Associated Insurance Companies, Inc. ("Associated") to the holder of the Community group insurance or health care benefits contract.

\* \* \*

*As long as the Guaranty Policy is in effect, you will be a member of Associated entitled to all rights of membership in Associated accorded to members of a mutual insurance company under the Indiana Insurance Law, including ... equity rights in the event of a liquidation, merger, consolidation or demutualization as provided in Associated's Articles of Incorporation from time to time in effect. Such equity rights are intended to be equivalent to the rights which you would have as a member under an Associated policy if Associated rather than Community had issued the Community contract.*<sup>26</sup>

---

78) ("12/31/2002 – All Groups – Community Preferred PPO Plan Eliminated").

<sup>24</sup> Anthem Ggrep Memo for City (PTX-46); Anthem listing of City GIDs (PTX-76).

<sup>25</sup> CIC did not come into existence until immediately after the 1995 merger.

<sup>26</sup> DFX-18 (emphasis supplied); transcript of Deposition of Claudette Schenck ("Schenck Depo. Tr.") at 54:10-55:2.

The specimen form of the Certificate of Membership issued to Wilmes<sup>27</sup> was attached to the Guaranty Policy for Future Groups that only covered and applied to new insurance or new groups added after the 1995 merger.<sup>28</sup> Wilmes also received a Certificate of Coverage from Anthem with a revision date of “1/96” (*i.e.*, post-merger) that specifies she was considered the Anthem member under the City’s group health insurance policy.<sup>29</sup>

With respect to Group B, Defendants likewise breached the 1995 merger contracts, breached their fiduciary duties, committed conversion, and aided and abetted conversion by failing to pay demutualization compensation to these approximately 1,425 City employees enrolled in one of the three GIDs (GID H25993-008, H25993-013 and H25993-018) covered by the fully-insured HOT rider described above. Each Class member in Group B was entitled to receive the amount by which his respective insurance coverage actuarially contributed to the overall surplus of Anthem Insurance.

**C. The Indiana Insurance Commissioner’s Approval of the Demutualization Does Not Bar Plaintiffs’ Common Law Claims Seeking to Recover the Demutualization Compensation They Were Entitled to Receive.**

Anthem was twice unsuccessful in previously raising in the *Ormond* litigation before the Southern District of Indiana the exact same argument that it now wants this Court to accept in this case. Anthem had argued in *Ormond* that the Order of the Indiana Insurance Commissioner approving the demutualization precludes a claim that Anthem’s distribution of stock to Ohio employers wrongfully prevented their respective employees from receiving the stock. In making this same argument in *Ormond*, Anthem relied on the following finding set forth in the Insurance Commissioner’s Order:

Individual certificate holders under group Policies issued to groups

---

<sup>27</sup> Certificate of Membership and Summary of Benefits specimen form (**PTX-18B**).

<sup>28</sup> Group Policy Form for Future Community Contract Holders (**PTX-18A**).

<sup>29</sup> Certificate of Coverage – HMP Group Health Care Benefits CG006 Rev. 1/96 (**PTX-197**).

by Anthem Insurance's Kentucky, Ohio and Connecticut subsidiaries prior to its mergers with those former mutual companies are not Statutory members (the group policy holders are Statutory members).<sup>30</sup>

Anthem maintained that the Order "approved the very feature of the Anthem Insurance demutualization that forms the basis" of Plaintiffs' claim.<sup>31</sup>

However, Chief Judge Hamilton of the Southern District of Indiana correctly held that the Insurance Commissioner's Order "does not preclude ... the allegations based on distribution of stock to Connecticut and Ohio employers."<sup>32</sup> As the Court ruled:

This court's March 31, 2008 entry noted that the plaintiffs are not challenging the validity of the Commissioner's order. (Dkt. No. 79 at 53.) Rather, plaintiffs are asserting common law claims independent of the statutory scheme that gave rise to the order. (See *id.*) "Indiana courts have consistently held that they lack jurisdiction to hear claims that challenge the decisions of Commissioners of state agencies who have been delegated legislative authority, but those decisions do not bar these plaintiffs' common law claims." (*Id.* at 50.) The Commissioner's order does not bar the plaintiffs from ... adding allegations that [Anthem] wrongfully distributed stock to Connecticut and Ohio employers because these additions relate to common law claims.<sup>33</sup>

As in *Ormond*, Plaintiffs in this case are not challenging the demutualization itself or the validity of the Indiana Insurance Commissioner's Order approving it. Rather, Plaintiffs in this case bring Ohio common law claims for breach of contract, breach of fiduciary duty, conversion and fraudulent misrepresentation that are totally independent of the Indiana statutory scheme giving rise to the Commissioner's Order.

Nevertheless, Anthem now asserts again the same argument the Southern District of Indiana

---

<sup>30</sup> Indiana Insurance Commissioner's Findings of Fact, Conclusions of Law and Order Granting Application with Conditions (**PTX-110**), ¶ 26.

<sup>31</sup> See Entry on Pending Motions (Doc. 119), January 12, 2009, in *Ormond v. Anthem*, S.D. Indiana Case No. 05-1908, at 4, quoting the Anthem Defendants' brief in support of their motion for judgment on the pleadings at 6.

<sup>32</sup> Court's Entry (Doc. 119) at 4.

<sup>33</sup> *Id.* at 4-5.

overruled, that Plaintiffs' claims are barred by the Indiana regulator's approval of the demutualization plan that provided for stock distributions to Ohio employers like the City. It argues that Indiana law "does not permit this collateral attack on that approval or actions taken in conformity with it," principally citing *Ordower v. Office of Thrift Supervision*, 999 F.2d 1183 (7<sup>th</sup> Cir. 1993), and *Indianapolis Water Co. v. Boone Circuit Court*, 307 N.E.2d 870 (Ind. 1974).<sup>34</sup> The analysis of the federal court in Indianapolis is as instructive in this context for upholding the claims Plaintiffs assert in this case as it was for vindicating the different claims asserted by different plaintiffs against Anthem's identical challenge in *Ormond*:

[The Indiana court decisions on which Anthem relies] do not bar these plaintiffs' common law claims. In *Indianapolis Water Co. v. Boone Circuit Court*, the Indiana Supreme Court held that the courts did not have jurisdiction to hear claims by customers who alleged the Water Company had charged them excessive rates. ... Because the customers were challenging the [Public Service] Commission's decision [in setting the rates], their exclusive remedy was to seek judicial review of the decision as provided by [Indiana] statute. ...

In *Indiana Bell Telephone v. Friedland*, 373 N.E.2d 344, 345 (Ind. App. 1978), the plaintiff claimed that the telephone company assessed him a rate that included an inappropriate charge. The court stated that a claim attacking the validity and reasonableness of the rate itself was within the exclusive jurisdiction of the Public Service Commission. *Id.* at 347. The court also held it did not have jurisdiction to hear a claim attacking the application of the rate. *Id.* at 349. ...

More relevant here is the Seventh Circuit's decision in *Ordower v. Office of Thrift Supervision*, 999 F.2d 1183 (7<sup>th</sup> Cir. 1993). There the plaintiffs were account holders in a bank that had converted from a mutual to a stock form who alleged that the company had undervalued its net worth in its representations to the Office of Thrift Supervision and had misled the account holders. The Seventh Circuit held that it could not provide relief for claims challenging the valuation of the company by the Office of Thrift Supervision or seeking an injunction of the Office's approval of the conversion. However, the court found that a federal court could consider claims asserting breach of fiduciary duty by the

---

<sup>34</sup> Anthem's Motion for Summary Judgment (Doc. 32) at viii. *See also id.* at 15-18.

company in its interactions with account holders. *Id.* at 1188. ...

Here, unlike in *Indianapolis Water Co.* and *Ordower*, the plaintiffs are not challenging the validity of the Commissioner of Insurance's order approving the demutualization of Anthem. Unlike in *Indiana Bell Telephone*, there is also no statutory scheme through which people aggrieved by events that occur subsequent to the Commissioner's order can seek redress. The plaintiffs, like the plaintiffs in *Ordower*, allege that [the Anthem Defendants] breached their contractual and fiduciary duties to their policyholders and acted negligently both before *and after* the Commissioner had approved the demutualization. Thus, [Indiana law] does not bar these claims.<sup>35</sup>

The same observations apply to Plaintiffs' claims in this case. Plaintiffs and the *Mell* Class are not challenging the validity of the Indiana Insurance Commissioner's order approving the demutualization of Anthem Insurance. Indiana has no statutory scheme through which people aggrieved by events that occur subsequent to the Commissioner's order can seek redress.<sup>36</sup> As in *Ordower* and *Ormond*, Plaintiffs in this case allege that Anthem breached its contractual and fiduciary duties to its policyholders both before and after the Commissioner approved the demutualization.

Therefore, as the court held in *Ormond*, this case is not a collateral attack on the Insurance Commissioner's order approving the demutualization, and Indiana law does not bar Plaintiffs' claims against Anthem in this case.

---

<sup>35</sup> Entry on Pending Motions (Doc. 79), March 31, 2008, in *Ormond v. Anthem*, S.D. Indiana Case No. 05-1908, at 50-53 (some citations omitted) (emphasis in original).

<sup>36</sup> Ind. Code § 27-15-15-2 provides that any petition for judicial review or other challenge to the validity of any order or determination by the Insurance Commissioner must be filed within 30 days of the issuance of such order or determination. As Chief Judge Hamilton also found in *Ormond*, even if the statutory provision applied (which it does not because no challenge is being made to the validity of the Commissioner's order), it would not furnish a meaningful remedy. In this case, it would have been impossible for Plaintiffs to have asserted their claims within 30 days of the Commissioner's Order issued on October 25, 2001. Thirty days after October 25 was November 24, 2001. Anthem did not even deliver the stock to the City until late December 2001. The City did not complete its sale of the stock nor retain the proceeds instead of turning the money over to its employees until April 2002, long after the 30 days had elapsed. Thus, Plaintiffs could not possibly have known until more than 30 days after the Commissioner's order that they had been injured by Defendants' actions, an essential element of all of their claims. As the Southern District of Indiana held in *Ormond*, "the court construes the thirty-day limit in Indiana Code § 27-15-15-2 as not applying to claims for damages that could not have been known during or before the expiration of the thirty-day period." Entry (Doc. 79) at 50.

**D. The Ohio Demutualization Statutes, When Construed Consistently and in Harmony With One Another, Unambiguously Require Demutualization Compensation to be Paid to the Employee-Policyholders of Group Health Insurance Policies.**

Anthem fundamentally misapprehends the Ohio demutualization statutes. The City served as the fiduciary agent of its insured employees and retirees pursuant to (i) the Guaranty Policies for Current and Future Groups<sup>37</sup> and (ii) the provisions of Ohio law that, in the context of group insurance, an employer may act as agent for its employees.<sup>38</sup> Furthermore, the existence of an agency relationship between the City and Plaintiffs is consistent with the provisions of the Ohio demutualization statute.

One paragraph of the Ohio demutualization statute (R.C. 3913.22(C)) provides for delivery of the stock of the converting mutual company to the “owner of the policy” (in the case of a group policy, the owner is the employer), while two other paragraphs of the statute (R.C. 3913.22(A) and 3913.20(B)) specify that the “policyholders” (defined as the “named insureds” under the policy) are the persons entitled to the stock compensation. In the context of a group health insurance policy, the “named insureds” are the covered employees and retirees. A fourth paragraph (R.C. 3913.22(D)) describes the policyholders (*i.e.*, the employees under a group health policy) as having ownership interests in the converting mutual insurance company.<sup>39</sup>

---

<sup>37</sup> See Guaranty Policy for Current Groups (**PTX-18** in specimen form and **PTX-22**) at 9; Guaranty Policy for Future Groups (**PTX-18A** in specimen form and **PTX-23**) at 10. Under Ohio law, when a fiduciary duty is memorialized in a written contract, the breach of the fiduciary duty also constitutes a breach of the written contract. See *Creaturo v. Duko*, 2005-Ohio-1342, ¶ 39 (7<sup>th</sup> Dist.), citing *Crosby v. Beam* (6<sup>th</sup> Dist. 1992), 83 Ohio App.3d 501, 509 (“[b]oth a **fiduciary duty** and a duty of good faith and fair dealing are common law duties. Nevertheless, these duties may also be **memorialized in a written contract**. If this is the case, then **the breach of those duties will also be a breach of the contract**”) (citations omitted and emphasis supplied).

<sup>38</sup> See, e.g., *Hroblak v. Metro. Life Ins. Co.*, 79 N.E.2d 360, 364 (Ohio App. 1947); *Kilbourn v. Henderson* (8<sup>th</sup> Dist. 1989), 63 Ohio App.2d 38, 45.

<sup>39</sup> R.C. 3913.22(A) provides, in pertinent part:

In effecting a conversion of a mutual insurance company into a stock insurance corporation pursuant to [the Ohio demutualization statutes], each mutual **policyholder** is entitled to such shares of stock of the new corporation as his equitable share of the value of the mutual company will purchase. ... If the initial issue of stock to the new corporation exceeds the number of shares to which the mutual policyholders are entitled in the aggregate, each mutual policyholder is also

Anthem erroneously asks the Court to treat the provisions of R.C. 3913.22(C) as somehow superseding or “trumping” the provisions of R.C. 3913.22(A).<sup>40</sup> Such a construction would do violence to the legislative intent behind enacting a comprehensive and interdependent demutualization statute containing multiple paragraphs. Indeed, under Anthem’s analysis, it could be argued that the provisions of R.C. 3913.22(C) (“[s]hares shall be issued to the owner or owners of a mutual policy”) are starkly inconsistent with the provisions of the very next paragraph, R.C. 3913.22(D) (“after the date of issuance of shares to a policyholder”). Under Anthem’s approach of emphasizing inconsistencies, nothing prohibits giving R.C. 3913.22(A) and 3913.22(D) primacy over R.C. 3913.22(C) instead of the reverse reading Anthem advocates.

Instead, the correct understanding is to read R.C. 3913.22(C) *in pari materia* with R.C. 3913.22(A) and 3913.22(D). Under the statutory framework intended by the General Assembly, an employer (like the City), as the owner of a group policy, takes receipt of the stock as agent for the employees (pursuant to R.C. 3913.22(C)) under a duty then to distribute the stock to its insured employees who are the “policyholders” entitled to it (pursuant to R.C. 3913.22(A) and 3913.22(D)).

Indeed, R.C. 3913.22(C) is unique among all the paragraphs of the Ohio demutualization

---

entitled to preemptive rights in subscribing to his proportionate number of shares of such excess.

R.C. 3913.20(B) defines “policyholder” in connection with the Ohio demutualization statutes as:

the person, group of persons, association, corporation, partnership, or other entity *named as the insured* under a mutual policy of insurance other than life ...

R.C. 3913.22(C) provides, in pertinent part:

Shares shall be *issued to the owner or owners of a mutual policy* ... as such owner or owners appear on the face of the policy.

R.C. 3913.22(D) provides, in pertinent part:

From and after the date of *issuance of shares to a policyholder* pursuant to [the Ohio demutualization statutes], his ownership interest in the company as a mutual policyholder terminates ...

(Emphases supplied.)

<sup>40</sup> Anthem’s memorandum in support of summary judgment (Doc. 32) at 29.

statutes in using the term “owner of the policy” because, in most cases, the named insured also owns the mutual insurance policy. However, in the context of a *group health* insurance policy, the owner of the policy (the employer) is not the named insured – the employees are the named insureds under such a policy. Thus, the shares are issued to the employer as the agent for its employees who are the “policyholders” because they are the persons “named as the insureds” under the policy.

The City breached its contractual obligation as Plaintiffs’ agent by assuming ownership of their shares of Anthem stock, selling the shares, and retaining all of the sales proceeds for the City’s own use and benefit.

**E. The Rest of the Anthem Defendants’ Claimed Defenses Do Not Merit Granting Summary Judgment in Their Favor.**

Anthem claims that Plaintiffs lack standing to assert the claims of Group B employees and retirees supposedly because none of the Named Plaintiffs was covered by new insurance that began after the 1995 merger.<sup>41</sup> Anthem’s argument is untrue as a matter of fact. While Espel and Matacia are members of Group A because they had the fully-insured firefighters’ dental coverage from before the 1995 merger, that does not preclude their membership in Group B as well. In addition to fully-insured dental coverage, Espel and Matacia had health and hospitalization coverage that the City self-insured. If their self-insured health coverage was part of the firefighters’ CPHP that replaced the Blue Cross indemnity plan in 1996,<sup>42</sup> then Espel and Matacia were covered by the fully-insured HOT rider that was added to the firefighters’ CPHP effective January 1, 1998.<sup>43</sup> At the very least, this is an issue of disputed fact that precludes entering summary judgment in Anthem’s favor.

Furthermore, Wilmes clearly has standing to assert the claims on behalf of all Group B

---

<sup>41</sup> *Id.* at 30-31.

<sup>42</sup> Anthem has refused to provide a list of the persons covered by the firefighters’ CPHP, or any other GID, to Plaintiffs in discovery in this case. Thus, Plaintiffs must draw reasonable inferences regarding such facts, and asks the Court to do likewise.

<sup>43</sup> *See* City memorandum listing health plan changes and effective dates (**PTX-78**).

employees and retirees because she had in her possession a Certificate of Membership issued only to persons covered by new insurance begun after the 1995 merger.<sup>44</sup> The undisputed fact that the Certificate of Membership was in Wilmes' possession constitutes strong proof both that the Certificate was issued to her and that new insurance coverage was implemented after the 1995 merger.<sup>45</sup>

The idea that persons insured under contracts of insurance supposedly have no third-party rights to enforce their claims is absurd. In fact, this case presents a classic third-party enforcement situation and such rights in favor of third-party beneficiaries of contracts are recognized and routinely enforced unless expressly disclaimed in the contract itself. Thus, Plaintiffs and the City's other insured employees and retirees have standing as *intended third-party beneficiaries* to assert valid claims for breaches of the insurance contracts and group policies,<sup>46</sup> and for breach of the Plan of Conversion under Indiana and Ohio law,<sup>47</sup> against the Anthem Defendants.

Plaintiffs' tort claims are not time barred. This argument, too, is fact-dependent. Plaintiffs

---

<sup>44</sup> See Wilmes' Certificate of Membership and Summary of Benefits (**DFX-18**).

<sup>45</sup> Anthem counters both factual conclusions by speculatively implying, without a shred of evidence, that Wilmes' certificate somehow did not belong to her. See Anthem's memorandum in support of summary judgment (Doc. 32) at 35. Irrespective of such speculation, Anthem's argument merely raises additional disputed issues of material facts that preclude the entry of summary judgment in its favor.

<sup>46</sup> Under Ohio law, insured employees and retirees are recognized as intended third-party beneficiaries of group insurance contracts. See *Staff Builders, Inc. v. Armstrong*, (1988), 37 Ohio St.3d 298, 302 ("The most cursory review of the insurance agreement discloses that the appellant is identified as the insurance company and Ohio Retirement Systems is identified as the policyholder. The members of ORS are consequently third-party beneficiaries of the group policy"). Other jurisdictions similarly recognize insured employees as third-party beneficiaries of the group insurance contracts between their employer and the insurer. See, e.g., *Roworth v. Minnesota Mut. Life Ins. Co.*, 674 F.2d 756, 757 (8<sup>th</sup> Cir. 1982); *Finstad v. Steiger Tractor, Inc.*, 301 N.W. 2d 392, 394 (N.D. 1981); *Goot v. Metro Government of Nashville and Davidson*, 2005 WL 3031638 at \*14 (Tenn. Ct. App. 2005).

<sup>47</sup> See *Hale v. R.R. Donnelley and Sons*, 729 N.E.2d 1025, 1029 (Ind. App. 2000) (A third-party beneficiary contract exists when (i) the parties intend to benefit the third-party, (ii) the contract imposes a duty on one of the parties in favor of the third-party, and (iii) the performance of the contract renders a direct benefit to the third-party intended by the parties to the contract.) The requirements to qualify as a third-party beneficiary of a contract under Ohio law are set forth in *Perrysburg v. Toledo Edison Co.*, 6<sup>th</sup> Dist. No. WD-06-035, 2007-Ohio-1327, ¶¶ 20-26, citing *Hill v. Sonitrol of Southwestern Ohio, Inc.* (1988), 36 Ohio St.3d 36, 40. Whether this Court applies Indiana law as set forth in *Hale*, or the substantially identical Ohio law as set forth in *Perrysburg*, it is clear Plaintiffs qualify as intended third-party beneficiaries. Moreover, Plaintiffs fall within the category of "creditor beneficiary" and have standing to sue for breach of contract. See *B. & V. Distributing Co., Inc. v. Dottore Companies, LLC*, 2006 WL 1134225 at \*3 (N.D. Ohio 2006),

have demonstrated that the tort claims were in fact timely because they were filed within four years of Plaintiffs' discovery of their claims. Wilmes discovered her claims between Christmas 2007 (when her daughter learned from Dennis Barron of the existence of the claims and told her about them) and February 2008 when she joined the existing prior state court action against Defendants.<sup>48</sup> Espel and Matacia discovered their claims when they each received a letter from Mr. Barron on or about April 3, 2008.<sup>49</sup> Plaintiffs filed this action on October 15, 2008, within four years of discovering<sup>50</sup> their injuries arising from the Anthem Defendants' misconduct. Therefore, Plaintiffs' claims were timely-filed against the Anthem Defendants.

Anthem also argues the tort claims have no merit. Anthem is wrong. The same facts supporting Plaintiffs' breach of contract claims also support their tort claims. The source of Anthem's fiduciary duty to Plaintiffs as policyholders of the mutual insurance company is clear and direct. Mutual insurers, like Anthem Insurance, owe a fiduciary duty to their members when dealing with them as owners (as opposed to as insureds).<sup>51</sup> Anthem's tort liability is joint and several.

Finally, Plaintiffs' fraud claim against Anthem is supported by facts in the evidentiary record

---

*citing Mark-It Place Foods, Inc. v. New Plan Excel Realty Trust, Inc* (4<sup>th</sup> Dist.), 156 Ohio App.3d 65, 2004-Ohio-411.

<sup>48</sup> Schenck Depo. Tr. at 18:10-12; 22:8-23:24.

<sup>49</sup> Espel Depo. Tr. at 66:19-67:4; Matacia Depo. Tr. at 74:21-24.

<sup>50</sup> The Ohio General Assembly has not enacted a specific statute of limitations for breach-of-fiduciary-duty claims. Therefore, a court must look among the four subsections of R.C. 2305.09 for the cause of action that most resembles the "nature" or "character" of the breach of fiduciary duty alleged. See *Hambleton v. R.G. Barry Corporation* (1984), 12 Ohio St.3d 179, 183. Plaintiffs' breach of fiduciary duty and aiding and abetting claims against the Anthem Defendants are founded on conversion and breach of trust. Therefore, subsections (B) and (C) of R.C. 2305.09 are the most applicable and the **discovery rule** tolls the running of the limitations period. See *Investors REIT One v. Jacobs* (1989), 46 Ohio St.3d 176, 182; *Orvets v. National City Bank, Northeast* (9<sup>th</sup> Dist. 1999), 131 Ohio App.3d 180, 189 n.3; *In re National Century Fin. Enter., Inc.*, 2006 WL 469468 at \*10 n.2 (S.D. Ohio 2006); and *Investors REIT One v. Jacobs*, 1988 WL 37538 at \*4 (Ohio App. 10<sup>th</sup> Dist. 1988), *aff'd.*, 46 Ohio St.3d 176 (1989).

<sup>51</sup> See, e.g., *Ormond*, 2008 WL 906157 at \*1 ("The claims that survive the motion to dismiss are the following: breach of fiduciary duty by Anthem Insurance"); *Reiff v. Evans*, 630 N.W.2d 278, 291 (Iowa 2001) (in the context of a *de facto* demutualization); *Noonan v. Northwestern Mut. Life*, 687 N.W.2d 254, 261 (Wisc. App. 2004), *cert. denied*, 689 N.W.2d 56 (Wisc. 2004); *Heritage Healthcare Service, Inc. v. The Beacon Mutual Ins. Co.*, 2004 WL 253547 at \*4-5 (R.I. Super. 2004); *Silverman v. Liberty Mutual Ins. Co.*, 2001 WL 810157 at \*6 (Mass. Super. 2001) (in the context of the conversion of a mutual insurer into a stock corporation).

and summary judgment in favor of Anthem should be denied. Disregarding its manifest duty to disclose the truth in connection with the 2001 demutualization, Anthem fraudulently concealed from Plaintiffs both their memberships in Anthem Insurance and their entitlements to demutualization compensation. The fraud claim has merit, and thus Plaintiffs' aiding and abetting claim also should be allowed to proceed.

CONCLUSION

Accordingly, and for the foregoing reasons, Anthem's motion for summary judgment is not well-taken and should be overruled in its entirety.

Respectfully submitted,

*/s/ Eric H. Zagrans*

---

Eric H. Zagrans (0013108)  
ZAGRANS LAW FIRM LLC  
474 Overbrook Road  
Elyria, Ohio 44035  
(440) 452-7100 (telephone)  
[eric@zagrans.com](mailto:eric@zagrans.com) (e-mail)

Dennis P. Barron (0030568)  
582 Torrence Lane  
Cincinnati, Ohio 45208  
(513) 871-2369 (telephone)  
[DennisPBarron@aol.com](mailto:DennisPBarron@aol.com) (e-mail)

Michael F. Becker (0008294)  
BECKER & MISHKIND CO., L.P.A.  
1660 West 2<sup>nd</sup> Street, Suite 660  
Cleveland, Ohio 44114  
(216) 241-2600 (telephone)  
[mbecker@beckermishkind.com](mailto:mbecker@beckermishkind.com) (e-mail)

Alphonse A. Gerhardstein (0032053)  
GERHARDSTEIN & BRANCH CO., L.P.A.  
432 Walnut Street, Suite 400  
Cincinnati, Ohio 45202  
(513) 621-9100 (telephone)  
(513) 345-5543 (facsimile)  
[agerhardstein@gbfirm.com](mailto:agerhardstein@gbfirm.com) (e-mail)

*Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Plaintiffs' Memorandum in Opposition to the Anthem Defendants' Motion for Summary Judgment was filed with the Court electronically on October 19, 2009, and that notice of this action will be sent by operation of the Court's electronic filing system to Terrance A. Nestor, [terry.nestor@cincinnati-oh.gov](mailto:terry.nestor@cincinnati-oh.gov), Assistant City Solicitor, City of Cincinnati Solicitor's Office, City Hall – Room 214, 801 Plum Street, Cincinnati, Ohio 45202, Attorney for Defendant, City of Cincinnati, Ohio, and to Christopher G. Scanlon [chris.scanlon@bakerd.com](mailto:chris.scanlon@bakerd.com), and Paul A. Wolfla [paul.wolfla@bakerd.com](mailto:paul.wolfla@bakerd.com), BAKER & DANIELS LLP, 300 N. Meridian Street, Suite 2700, Indianapolis, Indiana 46204, Attorneys for Defendants, Anthem, Inc., Anthem Insurance Companies, Inc. and Community Insurance Company, who are registered with the Court's electronic filing system and who may access this document through the Court's system.

*/s/ Eric H. Zagrans* \_\_\_\_\_

Eric H. Zagrans