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Towers v. Clarendon Nat. Ins. Co. Fla.App. 2 Dist., 2006.

District Court of Appeal of Florida, Second District.
 Terrie **TOWERS**, Appellant,

v.

CLARENDON NATIONAL INSURANCE
 COMPANY, Appellee.

No. 2D05-2620.

Jan. 4, 2006.

Rehearing Denied Jan. 26, 2006.

Background: Insured brought breach of contract action against health insurer that had rescinded policy and returned premium. The Circuit Court, Pinellas County, [Frank Quesada, J.](#), granted insurer's motion to compel arbitration. Insured appealed.

Holding: The District Court of Appeal, [Kelly, J.](#), held that the arbitration clause became unenforceable when the insurer rescinded the policy.

Reversed and remanded.

West Headnotes

[1] Alternative Dispute Resolution 25T 134(1)

[25T](#) Alternative Dispute Resolution

[25TII](#) Arbitration

[25TII\(B\)](#) Agreements to Arbitrate

[25Tk131](#) Requisites and Validity

[25Tk134](#) Validity

[25Tk134\(1\)](#) k. In General. [Most Cited](#)

[Cases](#)

(Formerly 33k6.2 Arbitration)

Alternative Dispute Resolution 25T 143

[25T](#) Alternative Dispute Resolution

[25TII](#) Arbitration

[25TII\(B\)](#) Agreements to Arbitrate

[25Tk142](#) Disputes and Matters Arbitrable

Under Agreement

[25Tk143](#) k. In General. [Most Cited](#)

[Cases](#)

(Formerly 33k7.5 Arbitration)

Alternative Dispute Resolution 25T 182(1)

[25T](#) Alternative Dispute Resolution

[25TII](#) Arbitration

[25TII\(D\)](#) Performance, Breach, Enforcement, and Contest

[25Tk177](#) Right to Enforcement and Defenses in General


[25Tk182](#) Waiver or Estoppel

[25Tk182\(1\)](#) k. In General. [Most Cited](#)

[Cases](#)

(Formerly 33k23.3(1) Arbitration)

When ruling on a motion to compel arbitration, courts must consider three elements: (1) whether a valid written agreement exists, (2) whether an arbitrable issue exists, and (3) whether the right to arbitration has been waived.

[2] Insurance 217 3274

[217](#) Insurance

[217XXVII](#) Claims and Settlement Practices

[217XXVII\(B\)](#) Claim Procedures

[217XXVII\(B\)7](#) Arbitration

[217k3271](#) Agreements to Arbitrate

[217k3274](#) k.

Modification or Termination. [Most Cited Cases](#)

All contractual provisions, including the arbitration clause, became unenforceable when health insurer voided the contract by rescinding coverage and returning premium; the insurer thus had no right to arbitration of insured's suit for breach of contract.

[3] Insurance 217 2955

[217](#) Insurance

[217XXIV](#) Avoidance

[217XXIV\(A\)](#) In General

[217k2953](#) Representations

[217k2955](#) k.

Nature and Effect in General. [Most Cited Cases](#)

An insurer has the right to unilaterally rescind an insurance policy on the basis of misrepresentation in the application for insurance; no consent by the opposing party is needed.

*913 [John V. Tucker](#) of Law Offices of Anderson & Tucker, St. Petersburg, for Appellant.

[Daniel D. Whitaker](#) and [E. Ashley McRae](#) of Carey, O'Malley, Whitaker & Manson, P.A., Tampa, for

Appellee.

KELLY, Judge.

Terrie **Towers** appeals the nonfinal order granting Clarendon National Insurance Company's motion to compel arbitration. Because we conclude that the trial court erred in finding that **Towers'** claim is subject to arbitration, we reverse.

Towers purchased a health insurance policy from Clarendon in October 2002. *914 She subsequently made a claim under the policy which was denied by Clarendon on the basis that the condition which formed the basis of her claim was preexisting. Clarendon thereafter sent **Towers** a letter, accompanied by her premium check, informing her that no benefits would be paid because of her preexisting condition which voided her coverage under the policy. In response to her verbal appeal, Clarendon sent **Towers** two more letters explaining the reason for rescission of her coverage and stating that her coverage was "null and void."

Towers then filed suit against Clarendon and Nicholas Insurance Group. Count I of the complaint is against Clarendon for breach of contract, and counts II through IV are against Nicholas for fraud in the inducement, negligent misrepresentation, and violations of the Florida Deceptive and Unfair Trade Practices Act. Approximately one month later, Clarendon filed a motion to dismiss or alternatively to stay litigation and compel arbitration. The trial court denied Clarendon's motion to dismiss but granted its motion to compel arbitration. This appeal ensued.

[1][2] When ruling on a motion to compel arbitration, courts must consider three elements: whether a valid written agreement exists, whether an arbitrable issue exists, and whether the right to arbitration has been waived. Stacy David, Inc. v. Consuegra, 845 So.2d 303 (Fla. 2d DCA 2003) (citing Seifert v. U.S. Home Corp., 750 So.2d 633, 636 (Fla.1999)). **Towers** does not dispute that the parties entered into a valid contract/agreement, nor does she challenge the arbitration provision which applies to "[a]ny disputes which You may have under the Group Policy or otherwise with Us or Our authorized Administrator.... The right of arbitration may be invoked by either You or Us or both." However, she contends that Clarendon voided the contract by rescinding her coverage and returning her premium, leaving nothing to arbitrate. We agree.

[3] Under Florida law, an insurer has the right to unilaterally rescind an insurance policy on the basis

of misrepresentation in the application for insurance. Fabric v. Provident Life & Accident Ins. Co., 115 F.3d 908 (11th Cir.1997) (citing Pino v. Union Bankers Ins. Co., 627 So.2d 535 (Fla. 3d DCA 1993)). No consent by the opposing party is needed. Id. at 913. By returning **Towers'** premium, Clarendon voided the contract between the parties rendering all of the contractual provisions, including the arbitration clause, unenforceable. The trial court therefore had no basis to order arbitration of this dispute. See Henderson v. Coral Springs Nissan, Inc., 757 So.2d 577 (Fla. 4th DCA 2000) (holding that an arbitration clause became unenforceable when an automobile dealership rescinded the contract containing the arbitration clause prior to the motion to compel arbitration). Accordingly, we reverse and remand for further proceedings.

Reversed and remanded.

SALCINES and LaROSE, JJ., Concur.

Fla.App. 2 Dist.,2006.

Towers v. Clarendon Nat. Ins. Co.

927 So.2d 913, 31 Fla. L. Weekly D131

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• [2D05-2620](#) (Docket) (May. 19, 2005)

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