MODIFIED "CASE WITHIN A CASE" METHODOLOGY, CONT'D

tions should bind the jury to the prior result unless, assuming the attorney's error was eliminated, there should have been a better result. Under this limitation, the only evidence that should be added to or deleted from the original trial is that which should be attributed to the attorney's negligence. Thus, the transcript of the original proceeding would be admissible, as would any deposition testimony previously given in that action. The doctrines of *res judicata*, collateral estoppel and estoppel can avoid re-litigating legal and factual issues.

Damages Recoverable

The reason that the plaintiff is required to prove that a meritorious underlying claim was adversely impacted or lost due to the attorney's alleged negligence, is that if there was not a valid underlying claim the plaintiff has not suffered any actual damages. In addition to proving the malpractice, a plaintiff must also establish that a money loss resulted from the attorney's negligence. The purpose of a legal malpractice claim is to put the plaintiff in as good a position as he or she would have been had the attorney kept his or her contract. Thus, the measure of damages is ordinarily the amount that the client would have received or would not have had to pay but for his attorney's negligence. Specifically, in the context of legal malpractice based on the prosecution of a client's case, resulting in dismissal of the client's complaint, the measure of damages is ordinarily the amount that the client would have received but for the attorney's negligence, and is generally shown by evidence establishing liability and value of the claim that was lost. The measure of damages for legal malpractice in the defense of a client's cause is ordinarily fixed at the amount of the adverse judgment, or that portion thereof, that would not have been obtained against the client but for the attorney's negligence.

Economic damages may be recovered in all forms of legal malpractice cases. In litigation cases, economic damages may include any elements of damages that the client could have recovered in the underlying litigation, including out of pocket losses, mental anguish damages recoverable in the underlying litigation, lost pre-judgment and post-judgment interest, and lost court costs. In New Jersey emotional distress damages are generally not awarded in legal malpractice cases in the absence of egregious or extraordinary circumstances. However, New Jersey courts have allowed a claim for emotional distress damages in a case where a client brought a legal malpractice action against a former attorney when the client's relationship with the former attorney was predicated upon liberty interest (the client's interest in not being incarcerated for a crime), rather than purely economic interest. In one such case, the plaintiff did not retain counsel to prosecute a claim for economic loss. *See Lawson v. Nugent,* 702 F. Supp. 91 (D.N.J. 1988). Rather, counsel was retained to provide a defense to criminal prosecution. The loss that plaintiff complained of was not purely pecuniary. Plaintiff complained of a twenty-month loss of liberty in a maximum security penitentiary. The court held that the client could recover damages for emotional distress

If a legal malpractice plaintiff wins on a breach of fiduciary duty claim or negligence, the attorney may be required to disgorge any fees collected on the case. A plaintiff may not recover the amount of fees incurred to bring a claim against the first attorney except in some states the amount necessary to prove the underlying case in the legal malpractice action may be recoverable.

Conclusion

While the most common way to prove the harm inflicted by legal malpractice or other misconduct that adversely affected the outcome in the underlying action is the "case within a case" approach, the proper approach in each case will depend upon many variables. The legal malpractice practitioner must consider the position of the malpractice plaintiff in the underlying litigation (plaintiff or defendant), the presence of multiple defendants or third parties, the facts and legal theories of the underlying matter, and the other factors discussed above. Courts will not become involved in determining how a legal malpractice case is tried unless the parties disagree, in which case the final determination of the court is a discretionary judgment that is entitled to deference on appeal.

Endnotes

[1] John Leubsdorf, *Legal Malpractice and Professional Responsibility,* 48 Rutgers L. Rev. 101, 148 (1995).

[2] *Id.*

[3] *Garcia v. Kozlov, Seaton, Romanini & Brooks, P.C.,* 179 N.J. 343, 359, 845 A.2d 602 (2004), *citing Developments in the Law-Lawyers' Responsibilities and Lawyers' Responses,* 107 Harv. L. Rev. 1557, 1568-69 (1994).

[4] *Id., citing* Paul David Kerkorian, Comment, *Negligent Spoliation of Evidence: Skirting the "Suit Within A Suit" Requirement of Legal Malpractice Actions,* 41 Hastings L. J. 1077 (1990).

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VOLUME 4, ISSUE 2

PROFESSIONAL LIABILITY DEFENSE QUARTERLY

SPRING 2012

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- Malpractice Claim Arbitration
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D&O: IS LICENSURE OF CORPORATE OFFICERS AND DIRECTORS AS BROKER-DEALERS REQUIRED? CALIFORNIA'S SECURITIES EXPERIENCE

BY: CRAIG J. MARIAM, ESQ.

Subject to certain statutory exemptions, California law generally requires licensure of all individuals or entities engaged in the business of selling securities. *See* Cal. Corp. Code §25200 *et seq*. Unlicensed individuals or entities that sell securities in California may be held both criminally and civilly liable. Cal. Corp. Code §25540(a)(criminal sanctions); Cal. Corp. Code § 25501.5 (civil liability).

One class of entities exempt from the broker-dealer licensure requirements is the issuer of the securities. However, there is no statutory exemption from licensure expressly applicable to a corporation's officers or directors who effect sales of their corporation's securities, and there is a dearth of published California authority discussing the circumstances under which officers and directors must be licensed. In *People v. Cole*, 156 Cal. App. 4th 452 (Cal. Ct. App. 2007), the California Court of Appeal held that the statutory exemption applicable to an issuer's "agents" was unavailable to a corporation's officers and directors under the facts presented, exacerbating the uncertainty surrounding whether officers and directors must be licensed in order to sell securities issued by their corporations. In response to *Cole,* California's Commissioner of Corporations promulgated a regulation establishing a safe-harbor provision modeled after Rule 3a4-1 of the United States Securities and

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CASE NOTE: EMOTIONAL DISTRESS RECOVERY EXPANDED AFTER BIRTH EXPERIENCE

BY: KARA C. WHITE, ESQ.

The Pennsylvania Supreme Court recently expanded liability for negligent infliction of emotional distress ("NIED") to support recovery when it is foreseeable that a breach of contractual or fiduciary duty will result in "emotional harm so extreme that a reasonable person should not be expected to endure the resulting distress." *Tooney v. Chester County Hospital,* 36 A.3d 83, 84 (Pa. 2011). The Court also concluded that the recovery for NIED did not require a physical impact.

The *Tooney* Court, in a plurality opinion, reviewed these issues, which had originated with preliminary objections filed at the trial court level seeking to dismiss plaintiff's complaint in the

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D&O BROKER-DEALER LIABILITY, CONT'D

Exchange Act. 10 Cal. Code. Reg. § 260.004.1; *see also* 17 C.F.R. 240.3a4-1.

The Commissioner also issued Release No. 119-C (November 2011) and a Final Statement of Reasons for the safe-harbor provision that provide guidance on the issue of licensure for officers and directors.

Notwithstanding the Commissioner's recent actions, unresolved issues remain that defense practitioners should be cognizant of in mounting defenses to claims arising out of alleged violations of California's licensure requirements.

<u>Statutory Framework</u>

California Corporations Code section 25210 makes it unlawful for any "broker-dealer" to sell securities in California without a license to do so. Section 25210(a) provides:

> "Unless exempted under the provisions of Chapter 1 (commencing with Section 25200) of this part, no broker-dealer shall effect any transaction in, or induce or attempt to induce the purchase or sale of, any security in this state unless the broker-dealer has first applied for and secured from the commissioner a certificate, then in effect, authorizing that person to act in that capacity."

Section 25004(a), in turn, defines "broker-dealer" as follows:

> "any person *engaged in the business* of effecting transactions in securities in this state for the account of others or for his own account. 'Broker-dealer' also includes a person engaged in the regular business of issuing or guaranteeing options with regard to securities not of his own issue. 'Broker-dealer' does not include any of the following:
> (1) Any other issuer.
> (2) An agent, when an employee of a broker-dealer or issuer.
> (3) A bank, trust company, or savings and loan association.
> (4) Any person insofar as he buys or sells securities for his own account, either individually or in some fiduciary capacity, but not as part of a regular business.
> (5) A person who has no place of business in this state if he effects transactions in this state exclusively with (A) the issuers of the securities involved in the transactions or (B) other broker-dealers."

Cal. Corp. Code § 25004(a) (emphasis added).

Section 25501.5 imposes civil liability for violations of section 25210. The statute of limitations for claims under section 25501.5 is either two or three years.[1]

The statutory scheme provides specific exemptions for broker-dealers registered under the Securities Exchange Act of 1934 (section 25200), qualified investment advisors (section 25202), persons whose only clients are insurance companies (section 25203), brokers licensed by the Real Estate Commissioner (section 25206), certain financial institutions (section 25207), certain capital access companies (section 25208), and persons engaged in certain exempt transactions (section 25209). Cal. Corp. Code §25200 *et seq.*

<u>*People v. Cole*</u>

In *People v. Cole*, certain officers and directors ("defendants") of a corporation were prosecuted for criminal violations of section 25210, among other violations of California's Corporate Securities Law. The defendants did not contest the State's assertion that their conduct was sufficient to establish their status as "broker-dealers" under section 25004. Instead, defendants claimed they were "agents" within the meaning of sections 25003 and 25004(a)(1). Pursuant to section 25503(d), an "officer or director of a broker-dealer or issuer…is an agent only if he… receives compensation specifically related to purchases or sales of securities."

The Court of Appeal held that defendants did not qualify as "agents" because they did not receive commissions in connection with their securities sales. The Court concluded that "[a]s broker-dealers, [defendants] were required to obtain a license to sell securities, and their failure to do so was in violation of section 25210." *Cole*, 156 Cal. App. 4th at 480. In addressing defendants' contention that licensure was not required because defendants were selling shares on behalf of their issuer, the Court reasoned:

> "We reject [defendant's] convoluted interpretation that officers and/or directors who do not receive sales commissions should be excluded as well. [Defendant] claims there is no logical reason to differentiate between officers and/or directors who receive sales commissions and those who do not. [Defendant] argues: 'The only logical way to read the statutes is to identify section 25004, subdivision (a)(1)'s exemption [exclusion] of 'any other issuer' as extending to officers of corporate issuers when those officers are not receiving commissions.' According to [defendant], '[t]his makes sense because … the officer is not receiving special compensation for selling his corporation's securities, the seller of the securities is in effect the corporation, the issuer, and the issuer does not need a broker-dealer license.'

> "[Defendant] claims there is no logical reason to differentiate between officers and/or directors who receive sales commissions and those who do not."

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MODIFIED "CASE WITHIN A CASE" METHODOLOGY, CONT'D

case may proceed utilizing approaches other than the pure "case within a case" approach. One such methodology is the modified "case within a case" approach which employs expert testimony as to what, as a matter of reasonable probability, would have transpired at the original trial. The modified "case within a case" approach, also referred to as the flexible approach, is particularly warranted in cases where the aggrieved plaintiff in the malpractice action was the defendant in the original underlying action. In such instances, it is likely to be impracticable for the plaintiff to proceed with direct proofs as though he or she was the original claimant.

The New Jersey Supreme Court opened the door in *Lieberman v. Employers Insurance of Wausau,* 84 N.J. 325, 419 A.2d 417 (1980) to such alternative approaches when in the interest of justice proving a legal malpractice claim through the conventional mode of trying a "case within a case" is not be feasible. There, in finding the approach improper, the court relied primarily on the reversed roles of the parties in the malpractice and underlying actions: the plaintiff in the malpractice case had been the defendant in the underlying suit. The court identified the presence in that case of three extraordinary factors which warranted a departure from the conventional mode. *Id.,* at 342-43, 419 A.2d 417. First, the plaintiff there proceeded against dual defendants on different theories; one was a malpractice claim against an attorney, and the other was a breach of contract claim against an insurer. Second, as stated earlier, there was a reversal of roles in which the plaintiff in the malpractice action was a defendant in the underlying negligence action so that a "case within a case" framework would be "awkward and impracticable" and "could well skew the proofs." The third factor was the passage of time.

With factors such as these present there is the potential that the legal malpractice trial would not really mirror the earlier suit and thus a jury in the legal malpractice case would not obtain an accurate evidential reflection of the original action, a facsimile which the "suit within a suit" approach is designed to present. Some of the alternatives presented by the court included a modified version of the "case within a case" approach, using expert testimony as to what as a matter of reasonable probability would have transpired at the original trial. Ultimately it is within the discretion of the trial judge as to the manner in which the plaintiff may proceed to prove his claim for damages.

New Jersey later expanded on this flexible approach and permitted a hybrid approach in which a full "suit within a suit" providing evidence to support the jury verdict was produced and expert testimony was offered as an adjunct to address a different issue, the effect of the earlier settlement. In addition, some jurisdictions, such as New Jersey, permit a party to show that the underlying suit had settlement value and to use that value as a measure of damages. In this case, the feasibility of the "case within a case" approach to the trial of plaintiff's damages claims has not been sufficiently explored. Where the injury claimed is not dependent on the merits of the underlying action, the "case within a case" method is not applicable. As such, several decisions involving a breach of the duty of loyalty, and alleged misappropriation or misallocation of settlement proceeds, did not require examination of the merits of the underlying actions.

In non-litigation cases, some courts will employ variations on the "case within a case" method. For example, in utilizing the test in a transactional legal malpractice matter, a plaintiff has the burden of proving by a preponderance of the evidence what is often referred to as the "better deal." Essentially, the plaintiff has to demonstrate that the attorney was the but for cause of the purported injury and that the plaintiff would have received a better deal in the underlying transaction or business deal but for the aforementioned negligence of the attorney.

Courts have also been flexible in criminal actions as well. Recently a New Jersey court concluded that a plaintiff need not prove actual innocence of criminal charges as a prerequisite to pursue legal malpractice claims against his former criminal defense counsel and that his guilt may be considered relevant to the attorneys' defense. *See Marrero v. Feintuch,* 418 N.J. Super. 48, 11 A.3d 891 (A.D. 2011). A criminal defense lawyer sued for malpractice should have been allowed to pursue evidence to bolster his claim that the ex-client was convicted because he was guilty. The court ruled that whether the ex-client committed the crime was relevant to whether he was harmed by the attorney's alleged negligence, and that whether the case within a case format was to be used should be decided at the end of discovery.

Furthermore, an alternative procedure is appropriate where the error concerns a matter that was already tried. If the underlying action was fully tried, then it may not be necessary to retry the entire case. If the alleged error presents only a narrow issue, then the "different result" should be determined similarly and with the identical evidence as was admitted in the underlying action. The issues in the retrial of a case should be limited only to those errors that were the alleged consequence of the attorney's negligence. The objective is not to retry the underlying case but to decide whether the attorney's error prevented the proper result. Thus, the judge's instruc-

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> "The modified [approach] … is particularly warranted in cases where the aggrieved plaintiff in the malpractice action was the defendant in the original underlying action."

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A MODIFIED APPROACH TO THE "CASE WITHIN A CASE" METHODOLOGY IN LEGAL MALPRACTICE CASES

BY: KELLY A. LAVELLE, ESQ.

In the area of litigation-related legal malpractice, the method by which a plaintiff must establish a claim against an attorney turns on the element of causation. To establish causation, the plaintiff must prove that the underlying case would have been successful absent the alleged malpractice. Evaluation of a legal malpractice claim against a defendant requires the court to determine the value of the plaintiff's claim against the defendant in the underlying action. Traditionally, the most common way to prove the harm inflicted by legal malpractice is to proceed by way of a "case within a case" in which a plaintiff presents the evidence that would have been submitted at trial had no malpractice occurred. In short, a plaintiff in a legal malpractice action must prove two cases: the legal malpractice case against the attorney defendant and the underlying action in which the alleged malpractice occurred. This approach known as the "case within a case" method avoids speculation by requiring the plaintiff to bear the burden of producing evidence that would have been required in the underlying action.

The "Case Within A Case" Method

The burden of proof is directly on the plaintiff when employing the "case within a case" method. In construing the element of causation, a court is not forced to examine what happened, rather, the court must analyze how the effect happened. The plaintiff must prove that the former attorney was the proximate cause of the alleged injuries. In a litigation legal malpractice case, it is well settled that a plaintiff must show that he or she had a meritorious claim or defense that was lost as a result of the former attorney's negligence in order to show causation. The most widely accepted test to ascertain causation is the "but for" test, and the method by which the value of the lost underlying claim is proven is the "case within a case" approach. *See, e.g., Conklin v. Hannoch Weisman,* 145 N.J. 395, 678 A.2d 1060 (1996).

The "but for" test and the "case within a case" approach are the most common methods to demonstrate the elements of causation and damages in legal malpractice actions. The "but for" test is the only approach that goes through all of the possible causes of an injury to reveal the actual cause. Further, the "case within a case" approach is the most consistent method by which a plaintiff demonstrates the purported actual damages.

Plaintiff's burden is to prove by a preponderance of the evidence that but for the malpractice or other misconduct he would have recovered a judgment in the action against the main defendant, the amount of that judgment and the degree of collectability of such judgment. *See, e.g., Hoppe v. Ranzini,* 158 N.J. Super. 158, 165, 385 A.2d 913 (A.D. 1978). If the third element, the degree of collectability, is at issue, the case should be bifurcated, and the questions of malpractice and the amount of the judgment that would have been recoverable in the underlying action are tried first. *Id.,* at 170, 385 A.2d 913. If plaintiff obtains a favorable verdict, the defendants may move for a trial as to the collectability of the judgment. In that proceeding, the burden of proof of non-collectability is on defendants. *Id.,* at 170-71, 385 A.2d 913.

In some states, it may be possible to claim the attorney's error caused the settlement value of the case to decrease, without showing that the case could have been won. This is most likely to be allowed in a situation where the underlying case had been settled. When plaintiff has settled the underlying action, the measure of damages is the difference between the settlement and the amount of money that would have been obtained by judgment. *See, e.g., Kranz v. Tiger,* 390 N.J. Super. 135, 146, 914 A.2d 854 (A.D. 2007).

Criticisms of the "Case Within A Case" Approach

The "case within a case" approach has been subjected to several criticisms. First, much of the expense of legal malpractice litigation results from the "case within a case" doctrine since the parties are essentially required to re-litigate the other action to prove that the client would have prevailed but for the lawyer's malpractice.[1] The "case within a case" approach creates needless duplication of effort, time, and expense. Aside from its expense, the doctrine has been criticized for being unfair to plaintiffs who must litigate a former case against the client's own former lawyer, who knows the strengths and weaknesses of the case.[2] In addition, litigating a malpractice action at the same time as the underlying action may result in the client waiving the attorney-client privilege, resulting in the exposure of confidential communications. Furthermore, the doctrine puts a lawyer in the position of arguing that a case he or she had taken on to prosecute is now a hopeless case with little value.

The approach is also found to be flawed because it is often difficult for the parties to present an accurate evidential reflection or semblance of the original action. In some situations, a "case within a case" cannot accurately reconstruct the underlying action.[3] Often, parties must deal with the disadvantage of not having the same access to evidence or of having evidence grow stale with the passage of time.[4] These and other shortcomings have created the need for alternative approaches and a measure of willingness to accept such alternatives when the situation demands.

A Modified Approach

Depending on the circumstances, a legal malpractice

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"[T]he ['case within a case'] doctrine puts a lawyer in the position of arguing that a case he or she had taken on to prosecute is now a hopeless case with little value."

D&O BROKER-DEALER LIABILITY, CONT'D

> As an appellate court, we must presume the Legislature meant what it said in section 25003, subdivision (d)—namely, corporate officers or directors are agents only when they receive a sales commission." *Cole*, 156 Cal. App. 4th at 481.

The reasoning expressed in *Cole* exacerbated uncertainty regarding the application of section 25210 to officers and directors.

The Commission's Response

In response to *Cole*, the Commissioner promulgated 10 Cal. Code. Reg. § 260.004.1. In its Final Statement of Reasons for section 260.004.1, the Commissioner noted that officers and directors of California corporations may generally engage in limited capital raising activities incidental to their core business without having to obtain a broker-dealer license.

The Commissioner noted that *Cole* could potentially produce anomalous results antithetical to the policy rationale underling California's licensure requirements:

> "*Cole* could result in practitioners providing advice to clients fundamentally at odds with the policy aims of state and federal securities laws…Directors and officers could, paradoxically, elect to receive commissions…in order to become an agent and thereby avoid broker-dealer licensure requirements…[but] the receipt of commissions can induce high pressure sales tactics and other problems of investor protection which require application of broker-dealer regulation."

Final Statement of Reasons For 10 Cal. Code. Reg. § 260.004.1 (2011) p. 2.

Section 260.004.1, Title 10 of the California Code of Regulations became effective on June 6, 2011. Section 260.004.1 provides:

> "The term 'broker-dealer,' as defined in section 25004 of the Corporate Securities Law of 1968, does not include an associated person of an issuer who is deemed not to be a broker pursuant to Rule 3a4-1 under the Securities Exchange Act of 1934 as amended (17 C.F.R. 240.3a4-1) ('Rule 3a4-1')(50 FR 27946, July 9, 1985). For purposes of this rule, (i) 'associated person of an issuer' will have the same meaning as is given such term in Rule 3a4-1; provided, however, than an associated person will not be entitled to rely on this section 260.004.1 if the associated person has done any of the acts, satisfies any of the circumstances, or is subject to any order specified in section 25212, subdivisions (a) through (i) of the Corporate Securities Law of 1968. No presumption will arise that an associated person of an issuer is a 'broker-dealer' solely by reason of his or her participation in the offer and sale of securities of the issuer if he or she does not meet the conditions specified in Rule 3a4-1."

As of May 1, 2012, no published California state or federal authority had applied or construed section 260.004.1. It should also be noted that the force of section 260.004.1 with respect to transactions before its effective date is unknown.

Safe Harbor Under Rule 3a4-1

The SEC has also recognized that it is impractical for all officers, directors and employees of an issuer to completely refrain from any involvement in the offer or sale of an issuer's securities in a public or private offering. For instance, certain executive officers may be useful in speaking to prospective investors about the business strategy or financial condition of the company. Similarly, the company might find it more efficient to utilize in-house staff in the processing of sales to employees or other related persons. Regardless, the officer's, director's or employee's involvement necessarily brings into question his or her potential role as a broker-dealer. The SEC recognized this gray area, and therefore promulgated Rule 3a4-1 to provide "guidance concerning the applicability of the broker-dealer registration requirement in situations where an issuer chooses to sell its securities through its associated persons." 50 F.R. 27940

Rule 3a4-1 provides a safe harbor from broker-dealers registration for associated persons of an issuer. The term "associated person of an issuer" is defined in paragraph (c)(1) of the Rule as any natural person who is a partner, officer, director or employee of the issuer, of a corporate general partner of a limited partnership that is the issuer, or of a company or partnership that controls, is controlled by or under common control with the issuer. *Id.*

However, in order for the safe harbor to apply, each of three preliminary requirements and one of three alternative sets of conditions must be satisfied. First, the associated person must not be subject to a statutory disqualification, as defined in Section 3(a)(39) of the Exchange Act, at the time of his or her participation in the sale of the issuer's securities. C.F.R 240.3a4-1(a)(1). Second, the associated person must not be compensated in connection with the sale of the issuer's securities by the payment of commissions or other remuneration based either directly or indirectly on transactions in securities.[2] Determining

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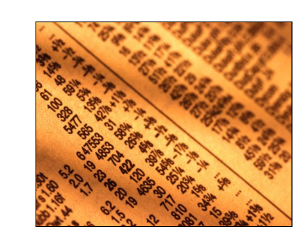
"The SEC has also recognized that it is impractical for all officers [and directors] … to completely refrain from any involvement in the offer or sale of the issuer's securities."



D&O BROKER-DEALER LIABILITY, CONT'D

whether the associated person was specially compensated in connection with the sale of the securities – as opposed to simply receiving his or her salary and/or a standard bonus – is highly fact specific. However, examples of relevant factors include the timing of the employee's bonus as compared to when the offering commences and concludes, and whether any bonus paid varies with the success in selling the securities. Third, the associated person must not be an associated person of a broker or dealer at the time of the sale. 17 C.F.R. 240.3a4-1(a)(3).

In addition, one of three sets of conditions must be satisfied in order for the safe harbor to apply: (1) the sale must be restricted to certain classes of purchasers or certain transactions, such as a financial institution, exempt exchanges, or employee compensation plans;[3] (2) the sales duties are limited and the individual does not participate in other offerings within twelve months and was not associated with a broker dealer within the last twelve months[4]; or (3) the sales duties are passive or the work is more clerical in nature.[5]

Who Is "Engaged In The Business?"

Even where an officer or director cannot avail herself of California's safe-harbor provision, it may be possible to establish a defense based on the limited nature of the sales activity at issue; i.e., by establishing that the officer or director was not "engaged in the business" of selling securities. On page three of the Commissioner's Final Statement of Reasons for section 260.004.1, the Commissioner refers to the safe-harbor provision as "non-exclusive," leaving the door open for such a defense.

In *Cole,* the Court of Appeal had no occasion to determine whether defendants' conduct was sufficient to establish that defendants were "engaged in the business" of selling securities because defendants made the strategic litigation choice to stipulate they were broker-dealers, and attempt to rely on the "agent" exemption. In the authors' view, defendants' extensive conduct in *Cole* was likely sufficient to render defendants "broker-dealers," as defendants engaged in numerous transactions continuously over the course of a three-year period. There are no hard and fast rules guiding the applicable analysis, however. No published authority has construed the phrase "engaged in the business" in the context of the California Corporations Code.

The Commissioner has taken the position that "engaged in the business," as used in section 25004 describes business activity of a frequent or continuous nature.[6] The Department's construction of section 25004 is entitled to great weight, and courts should not depart from its construction unless it is clearly erroneous or unauthorized. *See, e.g., People ex rel. Lungren v. Superior Court*, 14 Cal. 4th 294, 309 (1996) (stating general rule that courts defer to agency's construction). Moreover, the Commissioner's position is consistent with the plain meaning of the language of section 25004, as well as with case law construing analogous statutes.[7]

Notwithstanding the existence of generally favorable persuasive authorities construing the phrase "engaged in the business," counsel should be mindful of the fact that the language employed in California's safe-harbor provision militates against the notion that extensive sales activities are required to bring an officer or director within the ambit of the licensure requirement. The last sentence of California's safe-harbor provision provides: "[n]o presumption will arise that an associated person of an issuer is a "broker-dealer" *solely* by reason of his or her participation in the offer and sale of securities of the issuer *if* he or she does not meet the conditions specified in Rule 3a4-1." 10 Cal. Code Reg. § 260.004.1 (emphasis added).

This language suggests that, at least in the Commissioner's view, an officer or director who does not meet the conditions set forth in Rule 3a4-1, as discussed above, may be a presumptive "broker-dealer."

Conclusion

The safe-harbor provision provided in 10 Cal. Code Reg. § 260.004.1 is a significant development that helps provide clarity regarding the licensure requirement as applied to officers and directors. Officers and directors should be careful to comply with 10 Cal. Code Reg. § 260.004.1, which expressly incorporates the requirements under Rule 3a4-1, in order to avoid potential liability for unlicensed securities sales.

From a litigation perspective, 10 Cal. Code Reg. § 260.004.1 and the Commissioner's position regarding licensure requirements may be significant even where the safe-harbor provision is not directly applicable to a claim. At the pleading phase, defense counsel should carefully scrutinize the complaint's allegations in order to ascertain whether sufficient facts are alleged to establish the type of continuous activity needed to establish that an officer or director was "engaged in the business" of selling securities. Counsel should also propound appropriate discovery in anticipation of potential dispositive motions on the issue.

Endnotes

[1] *See Salameh v. Tarsadia Hotels*, 2011 U.S. Dist. LEXIS 30375, *35-36 (S.D. Cal. Mar. 22, 2011) (applying three-year limitations period set forth in Cal. Code Civ. Proc. §338); *see also* Cal. Code Civ. Proc. § 359 (two-year limitations period for "actions against directors, shareholders, or members of a corporation,

Continued on next page

"[C]ounsel should carefully scrutinize the complaint's allegations … to ascertain whether … an officer or director was 'engaged in the business' of selling securities."

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ARBITRATING PROFESSIONAL NEGLIGENCE CLAIMS, CONT'D

as well as money in fees and judgments. But has this expectation actually panned out?

Should Malpractice Claims Be Arbitrated?

Attorneys who have had the opportunity to arbitrate professional liability claims seem to have a lukewarm impression of whether arbitration achieves its intended purpose. The most positive benefit of arbitration appears to be the avoidance of excessive verdicts, although some outlier awards certainly have occurred in the arbitration context. Also touted as a positive characteristic of arbitration is the fact that more sophisticated individuals, and in some circumstances individuals in the same profession as the defendant, will be deciding the case. That should certainly prove to be an advantage in cases with complicated liability or causation issues. Be cautioned, however, professionals can sometimes be harder on their peers than a jury.

Another plus seems to be that cases often resolve, prior to a full arbitration hearing, with more favorable defense settlements than might occur in the usual course. This may be due to plaintiff counsel's lack of comfort with the arbitration process, or reticence in having an arbitrator, rather than a jury, decide their case. As the plaintiffs' bar becomes more and more familiar with the process, however, this dynamic could certainly change and reduce or eliminate this perceived advantage.

Whether arbitration is a fast track to resolution appears debatable. In fact, in some circumstances (and in some jurisdictions) it appears that it can take longer to get to an arbitration hearing than to a jury trial. This is often due to the heavily burdened schedules of arbitrators. Even the simple process of assigning arbitrators to a dispute can occasionally take an inordinate amount of time, delaying the very initiation of the arbitration process.

The availability of arbitrators to rule on discovery disputes may prove to be an advantage because the process is generally more efficient than traditional motion practice in the courts. That said; the general perception is that arbitrators tend to be very liberal when it comes to discovery. As a consequence, defendants may face having to produce documents or information in arbitration that might have avoided disclosure in the setting of a traditional litigation.

It also appears that the intended goal of creating a cheaper dispute resolution process through arbitration has not necessarily been borne out. Savings are reported as being minimal, at best. In some instances the costs attendant to arbitration may even be more costly than litigation - particularly when a panel of multiple arbitrators is involved.

As far as actual arbitration awards go, it is probably true that runaway damages awards are few and far between and that, generally speaking, verdicts are more reasonable. This should not be ignored because it is an important and laudable result. Nevertheless, that benefit must be weighed against the fact that there is at least the perception that outright defense verdicts are less achievable in arbitration and that compromise decisions are often rendered.

On a positive note, the informality of an arbitration hearing can make for a less stressful and more pleasant setting to present your case. However, be warned that controlling the evidence may be difficult. Arbitrators tend to let most evidence in, despite fundamental issues such as relevance and privilege. Moreover, arbitrators are more likely to permit the introduction of net opinions or testimony from unqualified experts. The informality of the process can also impact defense counsel's ability to conduct aggressive cross-examination, as certain arbitrators seem inclined to interject themselves to "tone things down" when the cross gets rough. You might also find an arbitration proceeding rushed, due to the busy schedule of the arbitrators. Finally, and not insignificantly, with appeal typically not an option, arbitration is in most instances a "one-shot deal."

Conclusion

In closing, we are pleased to report that positive strides have been made towards ensuring the enforcement of reasonable arbitration agreements in the context of professional liability claims. Unfortunately, however, the jury is still out on whether the fight is one worth fighting.

(*The authors extend special thanks to Nancy M. Reimer, Esq. of LeclairRyan; Joel I. Fishbein, Esq. of McCumber Daniels, and Thomas M. Rockwell, Esq. of Rockwell & Kaufman, LLC for sharing their collective insight and experience in the arbitration of professional liability claims.*)

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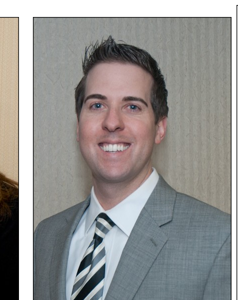
"It also appears that the intended goal of creating a cheaper dispute resolution process through arbitration has not necessarily been borne out."



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ARBITRATING PROFESSIONAL NEGLIGENCE CLAIMS, CONT'D

tracts are unenforceable under state law for reasons apart from the issue of arbitration.

Unconscionability Doctrine

Therein lies the rub. Rather than admit they are rejecting arbitration outright, state courts often purport to invoke the concept of unconscionability to declare arbitration provisions invalid. These decisions are often thinly veiled efforts to circumvent the FAA. In fact, it was recently acknowledged by the United States Supreme Court in *AT&T Mobility LLC v. Concepcion, supra*, that California courts are "more likely to hold contracts to arbitrate unconscionable than other contracts." *Id.* at 1746 (citations omitted). Despite being clearly impermissible under the FAA, this judicial mindset appears to persist, making enforcement of arbitration agreements a continued upward battle.

In an opinion issued soon after the Supreme Court's decision in *Marmet,* the District of New Jersey noted, in the context of a customer's agreement with her bank that included an arbitration clause, that while categorical state law bans against arbitration are impermissible, common-law unconscionability challenges remain viable challenges to the enforceability of contracts with arbitration clauses. *Coiro v. Wachovia Bank, N.A.,* 2012 U.S. Dist. LEXIS 24508 (February 27, 2012). The court in *Coiro* explored the doctrines of procedural and substantive unconscionability which are often cited in efforts to invalidate arbitration provisions.

The court explained that procedural unconscionability concerns the manner in which a contract is entered into, with considerations such as, "age, literacy, lack of sophistication, hidden or unduly complex contract terms, bargaining tactics, and the particular setting existing during the contract formation process." *Id.* at 12 (citations omitted). Substantive unconscionability, on the other hand, includes situations where the "terms of an agreement are so one-sided that they 'shock the court's conscience.'" *Id.* Fraud and duress may also be employed as means to invalidate agreements to arbitrate. *See, e.g., Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

Defending against claims of unconscionability will require exposing those situations where the side opposing arbitration is, in reality, attempting to create a higher standard for an arbitration contract than exists for contracts generally. For example, a party may argue that a provision to arbitrate in a contract or retainer agreement is unconscionable because the client or patient did not have a full opportunity to understand what he or she was signing when it was presented to them. It may also be argued that the party was in an unequal bargaining position when the contract was executed. Indeed, a state court might be tempted to buy into these kinds of arguments, perceiving its role as a protector of the right to a jury trial. However, contractual provisions are routinely enforced, in other contexts, on the principle that one is presumed to have read and understood a contract he or she signs. It is also well settled that unequal bargaining position alone does not render a contract unenforceable. Accordingly, achieving enforcement of an arbitration agreement will often necessitate reminding the court of general contract principles and precedent and bringing home the FAA mandate that it cannot require more of a contract to arbitrate than it would for any other contract.

Professional Liability Arbitration Examples

Despite the apparent persistence of judicial hostility to arbitration agreements, predispute agreements to arbitrate have nevertheless been upheld in numerous professional liability contexts. In *Kamaratos v. Palias*, 360 N.J. Super. 76 (App. Div. 2003), the Court reviewed an arbitration clause in a retainer agreement between an attorney and his client. While observing that the professional relationship called for the highest degree of trust and confidence, the court nonetheless held that there was nothing inherent in the relationship which would mandate a blanket preclusion of arbitration *See also, Tuan Pham v. Letney (In re Tuan Pham), supra.*

In *Ernst & Young LLP v. Martin*, 278 S.W.3d 497 (Tex. App. 2009), the Texas Court of Appeals entered an order directing a matter be referred to arbitration, upon the request of Ernst & Young LLP. Ernst & Young had been hired to provide tax advice and included an arbitration clause in its engagement letter. The agreement stated that any disputes that could not be resolved by mediation were to be submitted to arbitration. The court further held that the issue of the contract's alleged unconscionability was one, pursuant to the explicit terms of the agreement, to be determined by the arbitrators.

In the *Ruszala* and *Marmet* cases discussed above, arbitration provisions contained within nursing home contracts were found amenable to enforcement in the context of claims against nursing home professionals. Likewise, arbitration agreements in the medical malpractice arena have been found to be valid. *See, e.g., Moore v. Woman to Woman*, 416 N.J. Super. 30 (App. Div. 2010); *Buraczynski v. Eyring*, 919 S.W.2d 314 (Tenn. 1996); *Beynon v. Garden Grove Med. Group*, 100 Cal. App. 3d 698 (Cal. App. 4th Dist. 1980).

Accordingly, arbitration agreements relating to professional relationships can and should be enforced. Indeed, with this expectation, certain industries have incorporated arbitration agreements into their very business plans having the vision that avoidance of the judicial system will save an enormous amount of time

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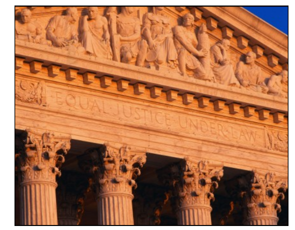

"Rather than admit they are rejecting arbitration outright, state courts often purport to invoke the concept of unconscionability to declare arbitration provisions invalid."

PLDQ's SUMMER 2012 ISSUE

We encourage member submission of articles pertinent to professional liability claims administration, defense trial advocacy, or professional liability substantive law. The manuscript deadline for the next issue is **August 1, 2012.**

D&O BROKER-DEALER LIABILITY, CONT'D

to recover a penalty or forfeiture imposed, or to enforce a liability created by law").

[2]17 C.F.R. 240.3a4-1(a)(2); *see also SEC v. Rabinovich & Assocs., LP*, 2008 U.S. Dist. LEXIS 93595, *15-16, n.5 (S.D.N.Y. Nov. 17, 2008) (noting plaintiff does not qualify for the 3a4-1 exemption "because he received compensation for selling the securities.").

[3]17 C.F.R. 240.3a4-1(a)(4)(i).

[4]17 C.F.R. 240.3a4-1(a)(4)(ii).

[5]17 C.F.R. 240.3a4-1(a)(4)(iii).

[6]California Department of Corporations, Release No. 119-C (Revised), Broker-Dealer Licensure Requirements for Officers and Directors of Issuers, (November 28, 2011) (citing *Advance Transformer Co. v. Superior Court*, 44 Cal.App.3d 127, 135 (1974).

[7]*See Advance Transformer Co.*, 44 Cal. App. 3d at 135; *see also Los Angeles v. Cohen*, 124 Cal. App. 2d 225, 228 (Cal. Ct. App. 1954); *accord Van Der Elst v. Commissioner of Internal Revenue*, 223 F.2d 771, 772 (2d Cir. 1955).

CASE NOTE: EMOTIONAL DISTRESS RECOVERY, CONT'D

underlying action. The facts of the underlying cause of action involved a plaintiff who was conscious during the birth of her infant son, who was born with substantial physical deformities including extremity growth only to the elbows and knees. The plaintiff had undergone an ultrasound approximately four (4) months prior to the birth which had been interpreted by the defendants as normal. The plaintiff claimed to suffer emotional distress with physical manifestations such as insomnia, depression, nightmares, stress and anxiety as a result of the shock incurred during the birth experience. 36 A.3d 83, 85 (Pa. 2011).

The plaintiff filed a medical malpractice action against the defendants, based on a duty to provide her with skilled and competent medical care. The alleged breach of that duty was defendants negligently misinterpreting her ultrasound as normal. The defendants filed preliminary objections to the claims of NIED, arguing that they did not cause the deformities suffered by the plaintiff's son. The trial court dismissed the complaint on the basis that the cause of action for NIED requires a contractual or fiduciary relationship; that plaintiff must suffer a physical impact; that plaintiff must be in the "zone of danger" and at risk for immediate physical harm; or that plaintiff has a contemporaneous perception of injury to a close relative. 36 A.3d 83, 86 (Pa. 2011). The trial court also determined that the plaintiff must show bodily harm which occurred as the result of the emotional distress. 36 A.3d 83, 86 (Pa. 2011).

As a result of plaintiff's appeal, the Pennsylvania Superior Court reversed the trial court, with the majority in a six to two *en banc* opinion determining that the plaintiff indeed had established a cause of action for NIED. 36 A.3d 83, 87 (Pa. 2011). The Superior Court cited its decision in *Doe v. Philadelphia Community Health Alternative AIDS Task Force,* 745 A.2d 25 (Pa. Super. 2000), referring to the four potential theories of liability for NIED. The Superior Court determined that the defendants owed the plaintiff a pre-existing duty based on the physician-patient relationship. The Superior Court then evaluated whether the breach of the duty resulted in a physical injury that was reasonably foreseeable, concluding that the plaintiff was able to fulfill the physical injury element as long as the emotional distress caused physical symptoms. 36 A.3d 83, 87 (Pa. 2011).

The Supreme Court granted defendants' Petition for Allowance of Appeal for consideration of two issues: whether an NIED claim can be sustained based on a contractual or fiduciary relationship; and whether a physical impact is required for a contractual or fiduciary relationship NIED claim. 36 A.3d 83, 89 (Pa. 2011). With regard to the fiduciary relationship, defendants argued that affirming the Superior Court would allow plaintiffs to recover for damages that are not caused by medical negligence, but are "merely unfortunate events." 36 A.3d 83, 89 (Pa. 2011). Defendants' brief highlighted that the "[t]he law is not the guarantor of an emotionally peaceful life." 36 A.3d 83, 89 (Pa. 2011) (Brief of University of Pennsylvania Defendants citing *Armstrong v. Paoli Memorial Hospital,* 633 A.2d 605 (Pa. Super. 1993)). Defendants delineated the potential issues with the application of the relationship principle, including no scientific measurement for the emotional distress suffered by the plaintiff at the time of the birth as opposed to at the time of the ultrasound. 36 A.3d 83, 90 (Pa. 2011).

Conversely, plaintiff relied on the Superior Court's decision in *Crivello v. Pennsylvania Power and Light Co.*, 491 A.2d 207 (Pa. Super. 1985), which involved claims of emotional distress from alleged negligent operation of a substance abuse rehabilitation facility. Plaintiff's position that liability without limit, raised by defendants as dissuasion, would be curtailed by the specific duty under the Restatement of Torts, section 436(1), which addresses physical harm resulting from emotional distress. 36 A.3d 83, 90-91 (Pa. 2011).

The Supreme Court acknowledged that some breaches of duty may cause severe emotional distress that should be compensable, and referenced by example other states that based NIED claims on such relationships. 36 A.3d 83, 91-95 (Pa. 2011). One of the relationships the Court focused on is the physician-patient relationship, with the acknowledgement

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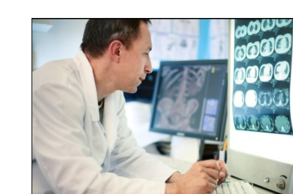

CASE NOTE: EMOTIONAL DISTRESS RECOVERY, CONT'D

that physicians have a pre-existing duty to their patients. 36 A.3d 83, 92 (Pa. 2011). The Court then discussed whether physicians should be responsible for emotional harm in conveying inaccurate information, and cited a preference for the standard in Iowa, where "[t]here must be a close nexus between the negligent action at issue and extremely emotional circumstances." 36 A.3d 83, 94 (Pa. 2011).

The Supreme Court ultimately concluded that NIED liability extended to certain cases involving pre-existing relationships based upon the standard elements of negligence, and relied on five factors for determining the imposition of a duty: (1) the relationship between the parties; (2) the social utility of the conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing the duty; and (5) the overall public interest in the solution. 36 A.3d 83, 95 (Pa. 2011). The Court qualified that the breach of the implied duty must result in severe emotional distress (*Id.*)

Defending claims for emotional distress has become more of a fluid concept, necessitating detailed analysis into pre-existing duty based on the above five factors, while attempting to dilute emotionally based damages which no longer require a physical impact.

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THE FAA AND AGREEMENTS TO ARBITRATE PROFESSIONAL NEGLIGENCE CLAIMS: BE CAREFUL FOR WHAT YOU ASK FOR

BY: JANET L. POLETTO, ESQ., AND ADAM G. HUSIK, ESQ.

It is often perceived among the defense bar that, as an alternative to having a lay person jury decide claims involving a professional, submitting such claims to arbitration will yield a more thoughtful and fair result. Of course, the first hurdle to that process is having an arbitration agreement enforced. As discussed below, while this should be a relatively easy undertaking in light of the Federal Arbitration Act ("the FAA"), having an agreement to arbitrate enforced can be challenging. Historically, many state courts appeared to go to great lengths to sidestep the FAA - seemingly concerned that arbitration somehow disfavors the injured claimant. The strength of the FAA, however, has been continually reiterated by the United States Supreme Court. This has rendered efforts to avoid arbitration less and less successful. Yet, state courts continue to find so-called contractual unconscionability around every corner, improperly imposing requirements on contracts with arbitration agreements which are not similarly imposed on other contracts. This approach by the judiciary is in direct contravention of the very heart and intent of the FAA. Accordingly, while it may require appealing a lower court decision, or taking a case all the way to the Supreme Court, any fair contract requiring the arbitration of claims, including claims against professionals, should ultimately succeed in being enforced.

Arbitration Reaches Professional Liability

Courts have compelled the arbitration of claims involving a myriad of professions, including claims against accountants, architects, engineers, and lawyers. Since the damages involved in such claims are typically economic in nature this is, perhaps, not surprising. More recently, however, arbitration provisions have been enforced in the nursing home and medical malpractice context, resulting in personal injury claims falling to the judgments of arbitrators rather than juries of a claimant's peers.

This is certainly great news from the defense standpoint - - or is it? Defense counsel who have succeeded in having arbitration agreements enforced report mixed feelings about whether the arbitration they fought so hard to achieve was all it was trumped up to be – particularly in the context of professional claims. After examining the history of the FAA and its tortuous climb to success, we will take a look at the best and worst of what arbitration can hold for the defense of a professional negligence claim.

Scope of the Federal Arbitration Act

First enacted in 1925, the FAA was touted as a necessary response to "widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). In accordance with this legislative mandate, courts have largely respected and enforced the strong public policy in favor of contractual agreements to arbitrate disputes, however, not without some resistance. As observed by the United States Supreme Court, the FAA reflects the "liberal federal policy favoring arbitration," as well as the "fundamental principle that arbitration is a matter of contract." *Id.* at 1745. The Supreme Court has repeatedly held that state efforts to categorically prohibit arbitration for particular types of claims are invalid; as such state legisla-

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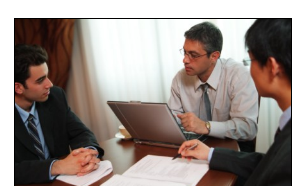

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ARBITRATING PROFESSIONAL NEGLIGENCE CLAIMS, CONT'D

tion is preempted by the FAA. Given this, except where a contract is successfully challenged on a basis of unconscionability or other contract-law defenses discussed within – such agreements will generally be deemed valid and enforceable.

Fundamentally, the FAA provides that written contracts to arbitrate controversies within a contract "evidencing a transaction involving commerce," "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 USCS § 2. The requirement to show that a contract with the arbitration provision involves "commerce" (which is defined by the FAA as "commerce among the several States," frequently referred to as "interstate commerce") is generally not a burdensome hurdle. As recognized by the District of New Jersey, "This is not a rigorous inquiry; in fact, the contract 'need have only the slightest nexus with interstate commerce.'" *Crawford v. West Jersey Health Systems*, 847 F. Supp. 1232 (D.N.J. 1994) (citations omitted). Put another way, "the FAA will reach transactions 'in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice subject to federal control.'" *Estate of Anna Ruszala, ex rel. Mizerak v. Brookdale Living Communities, Inc.*, 415 N.J. Super. 272, 289 (App. Div. 2010). Upholding the fundamental concept of the freedom of contract, courts have also declared that – even where interstate commerce may not be "involved in or impacted" by a given contract – an agreement to arbitrate under the FAA will control. *See, e.g., Tuan Pham v. Letney (In re Tuan Pham)*, 314 S.W.3d 520, 525 (Tex. App. Houston 14th Dist. 2010) (where the court compelled arbitration of a professional negligence claim against an attorney in accordance with the FAA, enforcing an arbitration clause contained in an attorney-client representation agreement).

The FAA leaves "no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to arbitration on issues as to which an arbitration agreement has been signed," save for any grounds to rescind the contract. *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 218 (1985). The edict to arbitrate is sufficiently strong such that, even where some claims are arbitrable while others are not, a court will be required to split resolution of the issues between arbitration and litigation.

The Supreme Court in *Dean Witter* held that the validity of an arbitration agreement is not affected when the practical result will involve some claims being adjudicated in arbitration, with other non-arbitrable claims remaining to be decided in court. Despite the potential for inefficiency and piecemeal adjudication of claims, the Supreme Court has instructed that the FAA's primary legislative intent, e.g. to ensure the enforcement of privately made arbitration agreements (and not to promote the expeditious resolution of claims) is the paramount interest. *See also KPMG LLP v. Cocchi*, 132 S. Ct. 23 (2011) ("a court may not issue a blanket refusal to compel arbitration merely on the grounds that some of the claims could be resolved by the court without arbitration").

Given the impermissibility of state legislative efforts to prohibit agreements to arbitrate certain types of claims, several decisions of note have issued with respect to arbitration agreements in contracts involving professional medical, legal and other services. Earlier this year the United States Supreme Court reversed West Virginia's highest state court which had declared unenforceable all predispute agreements to arbitrate claims of personal injury or wrongful death asserted against nursing homes. *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012). At issue in *Marmet* were three claims where family members of deceased West Virginia residents asserted negligence theories against nursing homes. The family members in each of the matters executed contracts which included a clause requiring the parties to arbitrate virtually all disputes.

The matters were consolidated by the West Virginia Supreme Court of Appeals after the state trial court dismissed two of the cases based upon the patient agreements' inclusion of arbitration clauses. The West Virginia court, claiming that Congress had not intended for the FAA to be "in any way, applicable to personal injury or wrongful death suits that only collaterally derive from a written agreement that evidences a transaction affecting interstate commerce […]" held that the FAA did not preempt state public policy against arbitration agreements in that context.

The United States Supreme Court firmly rejected the West Virginia court's interpretation of the FAA, characterizing the opinion as "both incorrect and inconsistent with clear instruction in the precedents of this Court." *Id.* at 1203. The Court noted that the FAA contains no carve-outs for personal injury or wrongful-death claims.

While summarily rejecting West Virginia's rule against predispute agreements to arbitrate personal-injury or wrongful death claims against nursing homes, the Court nonetheless acknowledged that the state court had proposed an "alternative holding" to the effect that that the arbitration agreement was unconscionable and, hence, not enforceable. The Court therefore remanded the matters back to West Virginia for a determination as to whether the con-

> "The edict to arbitrate is sufficiently strong such that, even where some claims are arbitrable while others are not, a court will be required to split resolution … between arbitration and litigation."

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