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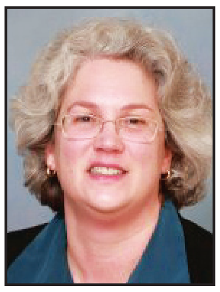
Dusting Off MDL 875: *Reforms Reduce Dormant Cases, Get Viable Cases Moving Again*

BY MIRIAM DOLE AND GAYLENE GORDON PATTERSON
Special to the Legal

In 1991, all land-based asbestos personal injury and maritime (MARDOC) asbestos personal injury cases pending in federal court were transferred to Multi-District Litigation 875 program in the Eastern District of Eastern District of Pennsylvania for pretrial proceedings, with a heavy emphasis on settlement. To this end, the late Judge Charles W. Weiner issued a case management order on Sept. 11, 1991, designating lead counsel and liaison counsel for both plaintiffs and defendants. Multiple pretrial and administrative orders were entered regarding procedural issues, including the scheduling of settlement conferences and the filing of motions for summary judgment and suggestions of remand. Pretrial Orders 5 through 7 specifically addressed pending FELA and MARDOC asbestos personal injury cases.

DOLE **PATTERSON**

MIRIAM DOLE *is a partner at Swartz Campbell, where she manages a toxic tort practice, specializing in the defense of asbestos cases. She earned both her J.D. and her B.A. at the University of Pennsylvania. She can be contacted at mdole@swartzcampbell.com.*
GAYLENE GORDON PATTERSON *is a partner in the firm's Philadelphia office specializing in the defense of asbestos personal injury cases. She earned her B.A. from Pennsylvania State University and her J.D. from Penn State's Dickinson School of Law. She may be reached at gpatterson@swartzcampbell.com.*

On Jan. 15, 2002, in response to a motion for case management order, Weiner issued Administrative Order No. 8, which effectively dismissed all non-malignant asbestos cases initiated on the basis of inherently unreliable mass screenings, in order to prevent the depletion of available settlement funds. The statute of limitations was tolled and the cases remained active for discovery and settlement purposes. A similar procedure had previously been put into place for the MARDOC cases.

The cases then sat dormant for years, likely due to a lack of understanding of Weiner's orders and/or a desire to minimize the advancement of costs in the absence of established trial dates. Because there were approximately 100,000 personal injury cases pending nationwide in 1991, the transferor courts were directed to maintain their paper files and dockets and not physically transfer the case files to Philadelphia. (Administrative Order No. 1). With little likelihood of trial dates being set in federal court and given the favorable rulings and verdicts in the more plaintiff-oriented state courts, all meaningful activity in MDL 875 ceased.

Judge James T. Giles succeeded Weiner in 2005, but little changed for the cases pending in MDL 875. Aside from scheduling relatively unproductive settlement conferences, Giles focused on defendants' allegations of fraudulent reports prepared by plaintiffs' medical experts and screening companies. Giles took the initial steps to computerize MDL 875 dockets and create discovery databases. He also ordered the physical transfer of files and case dockets to the Eastern District of Pennsylvania for handling. (Administrative Order No. 11, filed on Aug. 15, 2006).

On May 31, 2007, Giles issued Administrative Order No. 12, requiring the timely submission by plaintiffs' counsel of lists of pending cases, specifying active, bankrupt and settled defendants in each case. In addition, medical documentation to prove the elements of each claim was to be submitted by Dec. 1, 2007. Administrative Order No. 12 called for the dismissal of any case where plaintiff failed to comply with the court's order. Numerous plaintiffs sought and received extensions of time to comply, while others did nothing. However, no cases were dismissed for failure to comply with the provisions of Administrative Order No. 12.

MDL 875 NOW

Giles retired from the bench on Oct. 3, 2008, and was succeeded by Judge Eduardo C. Robreno, who is addressing MDL 875 in a much more aggressive manner than his predecessors. However, he has faced a number of challenges in attempting to bring order to the chaos.

On Dec. 23, 2008, Robreno issued Administrative Order No. 12A, setting forth the information to be included in motions for rule to show cause to dismiss a case(s) for failure to comply with Administrative Order No. 12. This followed Robreno's Dec. 18 memorandum and order denying defendants' omnibus motion to dismiss all cases where the plaintiff had not complied with the directives of Administrative Order No. 12 because the motion "swept too broadly." At the time that Robreno assumed responsibility for MDL 875, there were approximately 150,000 pending land-based and MARDOC cases.

Robreno first addressed the pending cases originally filed in the Eastern District of Pennsylvania. On Feb. 17, 2009, Robreno held the first in a series of show cause hearings and status and scheduling conferences for cases originally filed in the Eastern District of Pennsylvania. At the first conference, plaintiffs' counsel advised the court as to the remaining active defendants in each case and discovery orders were issued without any assurance that the counsel currently representing the defendants were present.

It was quickly realized that the information on the case dockets regarding the identity of counsel representing plaintiffs

MDL continues on **LIT9**

Exploring Contract Claims in Legal Malpractice Cases

BY MICHAEL LIEBERMAN
Special to the Legal

Not long ago, one of the most astute judges on the Philadelphia Court of Common Pleas was presented with a legal malpractice case in which two counts were pleaded against the defendant attorneys: one for negligence, the second for breach of contract. In discussing whether the breach of contract claim had to be supported by expert testimony — virtually all negligence claims against lawyers do — the court concluded that expert testimony was required because "the contract claim sounds in negligence."

As a doctrinal matter, it is not quite clear what that means. As a practical matter, however, it is perfectly clear why the court reached that conclusion. Under Pennsylvania case law, legal malpractice claims may be brought under both contract and tort theories, and contract claims against lawyers can sound exactly like negligence claims.

Beyond the fact that this is confusing, why should we care? There are a number of reasons. First, the statute of limitations for contract claims usually is four years, but the statute of limitations for negligence claims is only two years. To the extent that our courts have conflated the two causes of action in legal malpractice cases, they have effectively erased the two-year statute. Not only that, but the standards for accrual of contract and tort cases may not be the same.

Moreover, there may be different measures of damages in negligence as opposed to contract cases. In fact, the Supreme Court of

MICHAEL LIEBERMAN *is a shareholder at Hangley Aronchick Segal & Pudlin. Lieberman and his colleagues William T. Hangley and Leslie A. Kramer, both of whom contributed to this article, regularly defend attorneys and law firms in legal malpractice cases. He can be contacted at mlieberman@hangley.com or 215-496-7040.*

Pennsylvania has held that under a contract theory, damages in legal malpractice cases should be limited to the amount the plaintiff paid the defendant lawyers for services rendered. Although there do not appear to be any reported cases following this dictate, it is out there. At the end of the day, of course, this state of the law leaves lawyers and judges scratching their heads when it comes to figuring out how to explain the mess to jurors.

How did this happen? Until 1993, a line of Superior Court cases held that breach of contract claims against lawyers could only be sustained if the lawyer failed to follow a specific instruction of the client or breached a specific provision of an agreement with a client. In one case, for example, the client alleged that she had specifically instructed her lawyer to take her criminal case to trial and, after she entered a plea, she sued her lawyer for breaching their contractual agreement. The court treated this as a contract case, but entered summary judgment in favor of the lawyer on the theory that the client's plea modified the contract.

In another case, a court held the plaintiffs had adequately pled a malpractice case under a contract theory by alleging that their lawyer had failed to follow specific instructions to advise them whether there was any possibility that an adversary's patent was valid and whether the plaintiffs' product infringed it. In still other cases, courts held that lawyers had breached their contractual obligations by failing to collect a "due-bill," or by failing to turn over money that had been received for the lawyer's client.

When contract claims against lawyers sounded like negligence claims in disguise and implicated a standard of care, however, courts tended to treat them as negligence claims, applying the two-year statute of limitations and holding plaintiffs to the same proofs that would be required in negligence cases. Thus, for example, when the underlying case involved litigation, the plaintiff still had to prove that he or she would have prevailed in the underlying case — the so called "case within a case" rule.

In one example, a court dismissed a contract claim that a lawyer had failed to discover that land conveyed to his clients consisted of considerably fewer acres than they thought they were acquiring. The court noted the plaintiffs had not alleged that the lawyer had failed to follow specific instructions or averred that there was a breach of a specific provision of their contract, and treated the action as a tort case.

In 1993, however, the Supreme Court of Pennsylvania declared in *Bailey v. Tucker*, a case involving legal malpractice in a criminal representation, that "if any attorney agrees to provide his or her best efforts and fails to do so a [contract] action will accrue." The court explained that a lawyer's implicit contract with a client requires the lawyer "to provide that client with professional services consistent with those expected of the profession at large." Thus, the mischief began.

To prove negligence in legal representation, of course, a plaintiff must demonstrate that the lawyer breached his or her duty of care — that is, "An attorney will be deemed 'negligent' if he or she fails to possess and exercise that degree of knowledge, skill and care which would normally be exercised by members of the profession under the same or similar circumstances."

Now you tell me: What's the difference between the two standards?

• For contract claims under *Bailey*: The duty to provide "professional services consistent with those expected of the profession at large," and;

• For negligence claims: The duty to "possess and exercise the degree of knowledge, skill and care which would normally be exercised by members of the profession under the same or similar circumstances."

Is it any surprise that a judge concluded that "the contract claim sounds in negligence"? Or that the same judge ruled that expert testimony about the standard of care was required to support those contract claims? Or that since *Bailey*, many courts, at least in the initial stages, have sustained legal malpractice claims based upon breach of

Malpractice continues on **LIT9**

The Law of Unintended Consequences: *Did the* Stolt-Nielsen *Decision Inadvertently Invalidate Millions Of Arbitration Provisions?*

BY JOSHUA D. WOLSON
Special to the Legal

When the Supreme Court decided *Stolt-Nielsen v. Animal-Feeds Int'l Corp.* in April, the decision was widely viewed as a victory for arbitration and for many of the businesses that prefer arbitration to litigation. In particular, companies that include arbitration provisions in consumer contracts, such as credit card, cell phone and software companies, or in employment contracts had some assurance from the Supreme Court that they could not be forced into an unappealable class-wide arbitration without their consent.

However, the Supreme Court's decision raises the possibility of an unforeseen and potentially unfortunate outcome — the invalidation of tens of millions of arbitration provisions in consumer and employment contracts on state law unconscionability grounds. It seems unlikely that the Supreme Court had such an outcome in mind, and less than a month after its decision, the court agreed to hear a case next term in which it will have the opportunity to clarify this very question.

At the same time, a bill pending in Congress could, if enacted, could render all of these questions moot by explicitly invalidating all existing consumer and employment arbitration provisions.

JOSHUA D. WOLSON *is a partner in the litigation group at Dilworth Paxson. His practice focuses on complex commercial litigation, including class actions, antitrust, intellectual property, business torts and arbitration. Wolson graduated from Harvard Law School and clerked for Judge Jan E. DuBois of the Eastern District of Pennsylvania before entering private practice. He can be reached at jwolson@dilworthlaw.com.*

THE DECISION

In *Stolt-Nielsen*, the Supreme Court was asked to decide whether an arbitration provision that was silent as to the possibility of a classwide arbitration could require the parties to submit to such an arbitration. The case was one of many that arose in the wake of a criminal price-fixing investigation by the Department of Justice. Animal-Feeds International brought a putative class action antitrust claim, as did many other shippers. Stolt-Nielsen invoked an arbitration provision in its contract with Animal-Feeds, and Animal-Feeds then served a demand for arbitration on a classwide basis. The defendants resisted, arguing that their arbitration provision, which was silent on the prospect of classwide arbitration, could not be read to permit such arbitration.

In a 5-3 decision, the Supreme Court held that a party "may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so."

The court then explained that neither an arbitrator nor, presumably, a court, should infer from an agreement to arbitrate that the parties have agreed to arbitrate on a classwide basis. The court made clear that in its view, classwide arbitration changes the nature of arbitration to such a degree that there can be no presumption that the parties would have agreed to it if the question had been put to them explicitly when they entered into their contract.

This decision appears to apply fully to consumer and employment arbitration contracts, and not just to the specific contracts at issue in the case. Admittedly, some language in the court's opinion could undercut that conclusion. In particular, the court noted that the parties to the agreement were sophisticated business entities and there is no tradition of class arbitration under maritime law.

However, other parts of the court's decision suggest that it does apply more broadly. The court's comments about classwide arbitration fundamentally affecting the nature of the arbitration apply to classwide consumer or employment arbitration just as much as they do to the contract at issue.

In addition, the court noted that its prior decisions compel the conclusion that parties to an arbitration clause may specify with whom they will arbitrate their dispute, and the absent class members in a classwide arbitration dramatically alter who the parties to the proceeding are.

Again, this conclusion applies just as much to consumer and employment contracts as it does to individual contracts among businesses. Thus, it seems likely that the decision in *Stolt-Nielsen* will apply to arbitration clauses in consumer and employment contracts and will bar a court or arbitrator from finding that the parties have impliedly agreed to classwide arbitration.

The decision also seems to be good news for arbitration provisions that expressly bar classwide arbitration, rather than remaining silent on the issue. The court in *Stolt-Nielsen* made clear that it was motivated by an intent to give effect to a private dispute resolution agreement reached by the parties, and it was unwilling to alter that agreement by implying an agreement to arbitrate on a classwide basis. That same logic seemingly compels the conclusion that the court would give effect to an agreement between two contractual parties that expressly addresses — and rejects — the prospect of class-wide arbitration.

Indeed, on May 3, 2010, the Supreme Court vacated a decision of the 2nd U.S.

Arbitration continues on **LIT10**

Imputation and In Pari Delicto Defenses in *AHERF v. PWC*

Supreme Court Clarifies Scope, But Leaves Key Questions Unanswered

BY MICHAEL S. DOLUISIO
AND STUART D. STEINBERG
Special to the Legal

When a once high-flying company suddenly fails amid accusations of fraud and mismanagement by company insiders, litigation is sure to follow. The company — or others standing in the shoes of the company, such as trustees or receivers – will often file claims against accountants, banks, attorneys and other professional service providers alleging that these entities caused the destruction of the company. The stakes in such cases can be high, with the company claiming hundreds of millions — if not billions — of dollars in damages.

The third parties targeted with such claims often defend on the ground that the company's own insiders are to blame for the company's demise. They may claim, for example, that the company failed because the insiders cooked the books or stole corporate assets. As a legal matter, they argue that the insiders' wrongdoing should be "imputed" to the corporation itself, and that the corporation's own culpable conduct bars the corporation's claims under the doctrine of in pari delicto, a doctrine providing that where a plaintiff has at least equal fault with the defendant, the plaintiff cannot recover.

Pennsylvania law has been all over the map on when the wrongdoing of corporate insiders can be imputed to the corporation. Pennsylvania courts have also struggled with the application of the in pari delicto doctrine. Recently, however, the Pennsylvania Supreme Court clarified the law in this area in *Official Comm. of Unsecured Creditors of AHERF v. PricewaterhouseCoopers*, a case involving claims against an auditor of a bankrupt company.

First, the court held that imputation is available so long as the defendant has not acted in bad faith. Second, the court held that in pari delicto remains a defense that is available to auditors, even if they acted negligently.

But while the AHERF decision provides much-needed guidance regarding the application of an imputation-based in pari delicto defense, it leaves open several important issues, including what conduct by a defendant constitutes "bad faith," such that the defendant will be precluded from arguing that the insider's misconduct should be imputed to the corporation; when is an insider's conduct sufficiently adverse to the corporation such that it will not be imputed to the corporation; and under what circumstances can a defendant assert that the wrongdoing of its own agents should not be imputed to it.

OVERVIEW OF THE AHERF ACTION

Allegheny Health, Education, and Research Foundation (AHERF) is a nonprofit corporation that operated hospitals, medical schools and physicians' practices. For many years, AHERF pursued an aggressive growth strategy fueled by a series of acquisitions. Ultimately, however, AHERF's strategy was a

DOLUISIO

STEINBERG

MICHAEL S. DOLUISIO *is a partner in the white-collar and securities litigation department at Dechert. He has significant experience with securities litigation, actions brought against directors and officers, actions involving mergers and acquisitions, contract and business tort actions, class actions, and accounting malpractice and fraud actions. He can be contacted at 215-994-2325.*

STUART D. STEINBERG *is counsel in the firm's white-collar and securities litigation department. He has litigated class actions under the federal securities laws, accounting malpractice and fraud actions, derivative actions alleging breaches of fiduciary duty, contract and business tort actions, and actions arising out of mergers and acquisitions. He can be contacted at 215-994-2521.*

failure, and it collapsed into bankruptcy amid accusations of accounting fraud.

The Official Committee of Unsecured Creditors of Allegheny Health, Education, and Research Foundation, standing in the shoes of AHERF, then sued AHERF's auditor, PricewaterhouseCoopers, in the U.S. District Court for the Western District of Pennsylvania for breach of contract, professional negligence, and aiding and abetting a breach of fiduciary duty.

The committee alleged that PwC colluded with AHERF officers to falsify financial records, concealing the corporation's deepening insolvency and keeping AHERF's board of trustees from intervening to stop the ruinous business strategy. The committee sought damages of over one billion dollars.

PwC moved for summary judgment. It argued that the officers' misconduct in falsifying financial statements should be imputed to AHERF, and because the committee (standing in the shoes of AHERF) was at least as responsible for the alleged fraud as PwC, its recovery should be barred by in pari delicto. In opposing the motion, the committee argued that the officers' interests were adverse to the corporation, thus triggering the "adverse interest exception" to the general rule of imputation.

The district court found in favor of PwC. The committee appealed to the 3rd U.S. Circuit Court of Appeals, which in turn certified two questions to the Pennsylvania Supreme Court: whether a third party, such as PwC, is permitted to use imputation as a "shield" against liability when the third party is allegedly not an innocent actor; and whether in pari delicto is available as a defense to an auditor if the auditor allegedly conspired with company officers to falsify financial records.

THE COURT'S DECISION

The court first examined whether the in pari delicto defense can apply in the auditor liability setting. The court discussed the policy behind the defense: in pari delicto "deters illegal conduct" and "serves the public interest by relieving courts from lending their offices to mediating disputes among wrongdoers ... ." Nevertheless, the court cautioned that public policy may also be relevant in determining whether the defense should apply in a given case. Thus, the court held that the defense should not be "woodenly applied" in every situation where both sides committed wrongs.

The court then focused on the policy concerns specific to the auditor liability context. The court discussed various policy considerations, including the need to incentivize corporations to monitor management, the need to provide fair compensation and deter wrongdoing, the role of independent accountants as a check against potential management abuses, and the impact on the accounting profession of "breathtaking malpractice claims ... in the corporate insolvency setting."

After weighing these competing considerations, the court refused to adopt "any general rule which would uniquely disable auditors, as a class, from asserting an in pari delicto defense." Thus, the in pari delicto defense remains available to auditors, although its application is subject to a number of competing policy concerns.

The court then went on to examine the circumstances under which an insider's wrongdoing will be imputed to the corporation. The court explained, "[T]he imputation doctrine recognizes that principals generally are responsible for the acts of agents committed within the scope of their authority."

It further explained that imputation is motivated by dual policy concerns. First, because principals pick their agents, imputing the agent's actions to the principal gives principals an "incentive" to pick agents "carefully and responsibly." Second, imputation "protect[s] those who transact business with a corporation through its agents believing the agent's conduct is with the authority of his principal."

However, imputation is not without its limits. It may not apply depending upon the type of misconduct in which the agent engaged. Under the adverse interest exception, imputation generally will not apply where an agent acts in his own interest, and to the corporation's detriment. The court explained that the issue with this "adverse interest" exception "concerns the degree of self-interest required, or conversely, the quantum of benefit to the corporation necessary to avoid the exception's application ... ."

The court explained that in "close cases," there may be a question of fact as to whether the adverse interest exception should apply to bar imputation, and, in those cases, whether or not the company has received a benefit will be assessed according to a "reasonable perspective of a third party in its dealings with the agent."

Imputation also will not apply if the third party acted in bad faith. Looking to the policy behind imputation, the court held that if the third party acts in good faith towards the principal — even if there are allegations that the third party acted negligently — imputation is available. In stark contrast, the court held that where the third party acts in bad faith, the rationale for imputation breaks down because "both the agent and the third party know very well that the agent's conduct goes unsanctioned by one or more of the tiers of corporate governance." Thus, the court held that imputation will not be available as a matter of law where the insider and auditor collude.

The court explained that a "knowing, secretive, fraudulent misstatement of corporate financial information" is not a benefit to the company because it is "in the best interests of a corporation for the governing structure to have accurate (or at the very least honest) financial information." Accordingly, after AHERF, the ultimate question in determining whether an accountant will be able to raise an imputation-based in pari delicto defense is whether or not it acted in good faith toward the corporation.

OPEN QUESTIONS

While the AHERF decision clarified the law surrounding in pari delicto in the imputation context, it also leaves several important questions unanswered.

• What constitutes bad faith?

The court did not apply the standards it enunciated to the facts in AHERF to determine whether the committee had presented sufficient evidence of bad faith to defeat PwC's summary judgment motion. Accordingly, the decision provides somewhat limited guidance on what constitutes "bad faith." It is clear that knowingly fraudulent conduct by a third party will suffice, while mere negligence will not. It remains to be seen whether conduct failing somewhere in between those two extremes — such as recklessness — will be enough to prevent a third party from raising an imputation-based in pari delicto defense.

• What benefit to the corporation will defeat the adverse interest exception?

The court made clear that an imputation-based defense remains available to a negligent auditor; however, there are still open questions regarding the application of the adverse interest exception. The court held that the "traditional, liberal test for corporate benefit should apply," citing to prior decisions that seem to suggest that any benefit to the corporation would be sufficient to defeat the exception. In other places, however, the court cautioned against applying "too liberal a litmus for benefit" and noted that, "[i]n closes cases, adverse interest and the associated inquiry into benefit may be questions steeped in fact and open to legitimate differences among reasonable minds." It remains to be seen exactly how courts will apply the adverse interest exception after AHERF.

• How do the imputation rules apply when agents on both sides of a transaction are engaged in unauthorized conduct?

Finally, the court flagged as an issue, but failed to resolve, how the imputation rules

Defenses continues on **LIT10**

Increased Scrutiny of Reverse Payment Settlements

Recent Cases in E.D. of PA and 2nd Circuit Suggest Change May Be Ahead for Pharma Clients

BY FRANCIS P. NEWELL
AND JONATHAN M. GROSSMAN
Special to the Legal

Two recent opinions suggest a greater willingness on the part of the federal judiciary to scrutinize more closely so-called "reverse payment settlements" that have once again become prevalent in the pharmaceutical industry.

Reverse payment settlements are entered into by a brand-name drug manufacturer and one or more generic drug manufacturers to resolve patent litigation triggered by the generic manufacturers' prospective entry into the market. These settlements have been widely criticized as unlawful restraints of trade by, among others, the Federal Trade Commission, which refers to them as "pay-for-delay settlements."

Until recently, however, the courts have generally held such agreements lawful. U.S. District Court Judge Mitchell S. Goldberg's recent decision in *King v. Cephalon* and a 2nd U.S. Circuit Court of Appeals panel's unusual invitation for en banc review of its decision in the *Cipro* litigation, however, may suggest increased skepticism by courts to these settlements.

Ironically, reverse payment settlements, which many critics now suggest anticompetitively raise prices for pharmaceuticals, could be viewed as a natural result of a law commonly known as the Hatch-Waxman Act, the intent of which, inter alia, was to lower pharmaceutical prices by bringing generic pharmaceuticals to market more quickly.

Enacted in 1984, Hatch-Waxman significantly shortened the FDA approval process for generic versions of brand-name drugs, allowing generic manufacturers to file an Abbreviated New Drug Application (ANDA) with the FDA. It also provided a process whereby the first ANDA filer is granted a 180-day exclusivity period, during which the FDA may not approve the ANDA of any other generic manufacturer.

Importantly, this exclusivity period does not begin until the drug is first commercially marketed, so if the generic manufacturer delays entry for any reason, other potential generic manufacturers are blocked from entering as well. Additionally, if the brand-name manufacturer initiates patent litigation against the generic while the ANDA is pending, the FDA is prohibited from approving it for 30 months or until a final decision by a district court that the patent is invalid or not infringed.

One result of this regulatory scheme is that many brand-name and generic manufacturers have chosen to settle patent litigation between them through reverse payment settlements. A typical settlement involves the brand-name manufacturer paying the generic manufacturer cash in exchange for an agreement by the generic

NEWELL **GROSSMAN**

FRANCIS P. NEWELL *is co-chair and* **JONATHAN M. GROSSMAN** *is a member of the antitrust & trade regulation practice group at Cozen O'Connor. Both have extensive experience in the health care industry, including representing providers, insurance companies and pharmaceutical companies in antitrust and trade regulation litigation and transactional matters. Newell can be reached at fnewell@cozen.com and Grossman at jgrossman@cozen.com.*

manufacturer to: delay entering the market until an agreed-upon point in time; and retain the right to the 180-day exclusivity period, thereby preventing other generic manufacturers from entering the market for that period as well.

Critics of such settlements describe them as nothing more than payoffs by brand-name manufactures to maintain their monopolies and maximize profits at the expense of consumers. Supporters, on the other hand, argue that such agreements are an efficient way for both parties to reduce uncertainty and avoid the costs of protracted litigation.

The FTC has been among the leading critics of reverse payment settlements, and beginning in 1999, it began to challenge them in court as per se violations of the antitrust laws. Initially, the FTC's aggressive enforcement brought reverse payment settlements to a halt — none were entered into between 1999 and 2004 — but these settlements have again become en vogue as decisions in three federal circuits have upheld their legality.

Interestingly, the first appeals court to weigh in on a reverse payment arrangement struck down the agreement as a per se unlawful restraint on trade. *In re Cardizem* involved an agreement between a brand-name manufacturer (Hoescht Marion Roussel or HMR) and a generic manufacturer (Andrx) that had already obtained conditional ANDA approval to take effect upon expiration of the statutory 30-month stay. Because the 30-month stay would have expired prior to the conclusion of the patent litigation between the parties, Andrx could have begun selling a generic version of Cardizem in competition with HMR.

Before doing so, however, HMR and Andrx entered into an agreement under which HMR agreed to pay Andrx $10 million per quarter and Andrx agreed to not market generic Cardizem until there was a final, unappealable decision in Andrx's favor in the patent litigation. Andrx also agreed to retain its 180-day exclusivity period, but notably did not withdraw from the patent litigation.

In 2003, the 6th Circuit held that the settlement agreement was a "classic example of a per se illegal restraint of trade" under the Sherman Act. Because the parties did not settle the underlying patent litigation, however, *Cardizem* has largely been distinguished from the later holdings of three other circuits.

The 11th Circuit was the first circuit to uphold the legality of reverse payment settlements, first in *In re Valley Drug* (2003) and then in *In re Schering-Plough* (2005). The *Schering-Plough* decision was particularly noteworthy because it overturned an FTC decision following a lengthy administrative trial.

The 11th Circuit specifically rejected the FTC's contention that reverse payment settlements are per se illegal, instead emphasizing that patents, which explicitly grant exclusionary rights to the patent holder, are by definition anticompetitive (i.e., a legal monopoly) and are therefore not normally subject to the antitrust laws. It therefore held that antitrust scrutiny of reverse payment settlements should be limited to an examination of: the scope of the exclusionary potential of the brand-name patent; the scope of the settlement agreement; and the resulting anticompetitive effects.

Notably absent from this analysis is an objective assessment of the validity of the patent claims, other than to confirm that the litigation is not a sham, and whether the settlement reasonably reflects the expected outcome of the patent litigation. Therefore, the essence of the 11th Circuit holding is that as long as the scope of a reverse payment settlement does not exceed the scope of the brand-name patent, it is not subject to challenge under the antitrust laws. In *Schering-Plough*, the FTC filed a petition for certiorari, which was opposed by the Bush-era Department of Justice, but the Supreme Court declined to review the case.

In 2006, the 2nd Circuit, in a 2-1 decision, upheld the legality of a reverse payment settlement under facts significantly unfavorable to the defendants. In *In re Tamoxifen*, the generic manufacturer (Barr Laboratories) had already obtained a district court order declaring AstraZeneca's brand-name patent invalid. While AstraZeneca's patent appeal was pending, the parties entered into an agreement under which AstraZeneca paid Barr $61 million and Barr agreed to: delay its entry into the market until after the expiration of AstraZeneca's patent; and take procedural steps to ensure that the offending patent order would be vacated.

The majority in *Tamoxifen* outlined a test under which a reverse payment settlement would violate the antitrust laws only if the scope of the settlement exceeded the scope of the patent or if the patent claims of the brand-name manufacturer were "objectively baseless" or a "sham." The majority further concluded that the district court's order declaring AstraZeneca's patent invalid was insufficient evidence that the claim was baseless or a sham and therefore upheld the lower court's granting of the defendants' motion to dismiss. Because *Tamoxifen* was dismissed on the pleadings notwithstanding the questionable validity of the brand-name manufacturer's patent, some commentators have suggested the law of the 2nd Circuit is that reverse payment settlements within the scope of the claimed patent are per se legal.

In 2008, the Federal Circuit endorsed the reasoning of the 11th and 2nd Circuit decisions in upholding the district court's grant of summary judgment against indirect purchasers in the *Cipro* litigation. It started and ended its analysis with the conclusion that the settlement at issue was within the "exclusionary zone" of the brand-name manufacturer's patent.

In doing so, the Federal Circuit rejected the FTC's argument that the district court should have assessed the validity of the patent, holding that such an inquiry was unnecessary unless there was evidence that the patent was obtained fraudulently or that the patent litigation was a sham. It

***Reverse** continues on* **LIT10**

Joint Defense Agreements: A Primer

BY SETH L. LAVER
Special to the Legal

SETH L. LAVER *is an associate practicing in the area of commercial litigation. He focuses his practice within business litigation on bankruptcy, employment and labor law, and professional liability defense, including the representation of lawyers, doctors and particularly accountants. He can be reached at slaver@margolisedelstein.com.*

The carefully worded joint defense agreement (JDA) can be a necessary tool for attorneys involved in multi-defendant civil proceedings. A JDA is bolstered by the so-called "joint defense privilege," which has evolved from the oldest privilege for confidential communications, the attorney-client privilege. Despite its deep roots, practitioners may still question whether a JDA is enforceable and, if so, how a written agreement between co-defendants can shield otherwise unprivileged communications.

This article will examine the history of this privilege along with the underlying justification for its acceptance in the Commonwealth. Moreover, this article will suggest some practice pointers to make effective use of the JDA in the civil context.

EVOLUTION

The "joint defense" or "common interest" privilege is essentially an extension of the attorney-client privilege, which is intended to foster a trusting, open attorney-client dialogue. In Pennsylvania, the attorney-client privilege has been codified by 42 Pa.C.S. sections 5916 and 5928 and applies in both criminal and civil matters to confidential communications made between a client and his or her attorney in connection with legal services, according to *Slusaw v. Hoffman*.

At the core of the attorney-client privilege is confidentiality. Accordingly, the presence of a third party during such attorney-client communications generally will waive the privilege. Likewise, the attorney-client privilege is lost if the client discloses an otherwise privileged communication to a third party, according to *Executive Risk Indem. Inc. v. Cigna Corp.*

This general rule does not apply, however, and the privilege is not waived, when the third party is counsel for a co-defendant participating jointly in the defense of a case pursuant to a JDA.

In *Commonwealth v. Scarfo*, the Superior Court stated that criminal defendants have the right to prepare a group defense and the right to communicate privately with counsel. It stated, "Constitutional principles forbid requiring a party to waive one of these rights in order to exercise the other," in *In re Condemnation by City of Philadelphia*, citing *Scarfo*. These principles have since been extended in Pennsylvania to civil cases, as per *Young v. Presbyterian Homes*.

In order to establish the existence of a joint defense privilege, the party asserting the privilege must show that the communications were made in the course of a joint defense effort; the statements were designed to further that effort; and the privilege has not been waived, according to *In re Bevill, Bresler and Schulman Asset Management Corp*. Importantly, the joint defense privilege will apply only to co-defendants with common interests in defending a pending or threatened civil or criminal proceeding.

THE THEORY BEHIND ENFORCING JDAS

In most circumstances, the attorney-client privilege may be lost where statements are made to counsel in the presence of a third party. This theory derives from the presumption that a client has no intention of maintaining confidentiality if a third party is present. On the other hand, it is logical to assume that conversations shared with mutual defendants battling a common adversary would also remain confidential.

Based on similar principles, it has been held in *Young v. Presbyterian Homes Inc.* that communications made by a client to investigators, paralegals, secretaries or other employees of the client's attorney for the purpose of assisting in the representation of a client are considered confidential, privileged communications. Likewise, the attorney-client privilege is not waived where the third party shares a common interest in developing a legal strategy against identical claims, according to *Executive Risk*.

The opinion in *Young* states, "Where the third party is assisting in the defense of the litigation, either as an agent or employee of the client's attorney or as counsel for a co-defendant under a joint defense agreement, the only reasonable presumption is that the client intends the communication to be confidential."

Although there should be no question that a JDA is enforceable in Pennsylvania, there may be room to debate whether the joint-defense privilege promotes justice. Those opposed to the privilege may believe that it provides defendants with an unfair advantage by permitting them to "gang up" on a plaintiff, or lead to concerted efforts to increase plaintiff's counsel's fees, or otherwise improperly bully a lone, defenseless plaintiff.

> *Although there should be no question that a JDA is enforceable in Pennsylvania, there may be room to debate whether the joint-defense privilege promotes justice.*

To some plaintiffs, a JDA is inherently suspicious, conjuring images of defense attorneys meeting in hideouts and conspiring to thwart discovery. Moreover, opponents of the joint defense privilege may point out that the privilege conflicts with the core principles of the attorney-client privilege, i.e. confidential communications between an attorney and his or her client.

HOW AND WHEN TO UTILIZE A JDA

Generally, the defense bar should be aware of the availability of JDAs pursuant to the joint defense privilege whenever the following fact pattern emerges: a multi-defendant litigation in which each defendant has retained separate counsel and the defendants maintain a common interest in defending against the plaintiff's claims.

In this context, so long as a JDA is in place, all communications between the defendants and their counsel, which would otherwise be protected by the attorney-client privilege but for the presence of the third party, will remain confidential. Pooling resources and developing joint strategy, particularly during the discovery phase, may streamline and economize the process for the defendants.

IS A WRITING NECESSARY?

Although it is not necessary to enter into a written JDA, it is good practice to do so. A written JDA provides counsel with the opportunity to add or subtract additional parties to the agreement during the course of the proceedings. Moreover, a written JDA increases clarity and reduces the risk of potential conflict of interest issues.

While a JDA may take many forms, the following recitations may promote its goals while reducing the likelihood of some potential pitfalls:

- The defendants have agreed to implement common defenses;
- The defendants seek to protect and preserve the confidentiality of communication and documents between and among them and their counsel;
- The defendants wish to preserve all other applicable privileges;
- The JDA shall not create an attorney-client relationship between the defendants' respective attorneys and the other defendants;
- The JDA will in no way affect or limit the right of any defendant to enter into a settlement agreement;
- The JDA shall not be the basis to attempt later to disqualify counsel by virtue of a perceived conflict of interest;
- The JDA does not create any cost-sharing responsibility; and,
- The JDA does not create any agency relationship between or among the defendants.

Hopefully this article has explained the structure, function and utility of the JDA and will assist practitioners in reaching desired results in multi-defendant litigation. •

MDL

continued from **LIT2**

and defendants was incorrect or missing. Notices of hearings were sent to individuals who were no longer involved in the practice of law, no longer involved in representing plaintiffs or defendants in asbestos personal injury litigation, or deceased. It was difficult for plaintiffs' counsel to locate plaintiffs and family members. The procedures followed at the status and scheduling conferences evolved over time to meet the challenges presented by cases that had remained dormant over the last 20 years.

The conferences continued on a biweekly basis through Nov. 4, 2009, with each conference addressing hundreds of cases. During the conferences, plaintiffs' counsel were required to identify their active cases and the identity of defendants they intended to pursue. Scheduling orders were issued two weeks after the hearing for each pending case, thereby giving defense counsel an opportunity to identify the active cases needing to be addressed.

The scheduling orders that have been issued establish deadlines that leave only 120 days for completion of fact discovery. Deadlines for dispositive motions, expert reports and pretrial motions follow in quick succession. However, the court has demonstrated flexibility in the administration of the discovery deadlines and has extended deadlines upon a showing of good cause. A final pretrial conference is then held,at which time a trial date is established and pretrial motions are argued and ruled upon.

After the issuance of scheduling orders, plaintiffs' counsel began to contact defendants concerning possible group settlement of the active cases. The majority of active cases are now represented by less than a handful of plaintiffs' law firms. However, almost no basis for liability has been established in these claims.

Typically, only minimal discovery has been performed in these cases and, in many cases, there are no discovery responses or product identification depositions. Due to the fact that many of these cases were filed prior to 1991, many original plaintiffs are now deceased, as are potential witnesses. Typically, only a handful of the named defendants remain viable.

Settlement demands appear to have produced little response other than requests for dismissals and motions for summary judgment. It became apparent that, even if witnesses were still alive and available to identify the remaining defendants in a case, discovery would need to be completed quickly to have the cases ready for trial. As a result, one Philadelphia plaintiffs' counsel began to voluntarily dismiss his non-malignancy claims, with the stated intention of pursuing only "true" asbestosis and malignancy claims. The most recent caseload statistics issued by the Clerk of Courts dated April 30, 2010, indicates that of the 8,190 cases filed in the Eastern District of Pennsylvania, 7,334 cases have been terminated (either through dismissal or transfer to the bankruptcy only docket) and only 856 cases remain pending.

CASES TRANSFERRED

To accurately account for the cases originally filed outside the Eastern District of Pennsylvania, an Eastern District docket number was assigned to each out-of-state plaintiff. The court clerk's office has spent and continues to spend large amounts of time organizing the cases, determining the parties involved, and updating the dockets for all of the cases transferred to MDL 875. At first, it was difficult to even determine which counsel represented which defendant, as the litigation landscape has changed over the ensuing decades. In addition, many of the cases that were filed in the transferor courts were multi-plaintiff complaints. Robreno, in Administrative Order No. 17 (filed on Feb. 11, 2009), directed that plaintiffs re-file any claims that they intended to pursue as single-plaintiff Complaints and pay the filing fee for each claim being pursued.

Administrative Order 19, filed on July 17, reactivated those mass screening cases previously dismissed pursuant to Administrative Order No. 8, since the mass filings of cases were no longer a problem and the efficient administration of justice was no longer served by the order. Robreno also issued Administrative Order No. 18 on Feb. 11, specifying the information to be provided in motions for suggestion of remand to the transferor court. It is clear that Robreno intends to remand only trial-ready cases that cannot be resolved.

In 2009, Robreno began scheduling status conferences for cases originally filed in other courts. The initial hearings did not significantly reduce the number of pending cases so Robreno adopted the same procedures that had been used with great success for the Eastern District of Pennsylvania cases. This second round of conferences, which are to be completed by June 30, has reduced the number of pending land-based cases from 95,004 to 40,114 as of April 30.

One of the innovations introduced by Robreno is the utilization of Eastern District of Pennsylvania Magistrate Judges to handle pretrial discovery, motions practice and settlement conferences.Assignments to a magistrate are made at the request of counsel. The magistrates have developed uniform discovery and are doing much to facilitate the smooth administration of these cases.

Further information on MDL 875, including copies of all pretrial and administrative orders, can be found on the court's Web site at www.paed.uscourts.gov/mdl875.asp.

MARDOC CASES

On Dec. 17, Robreno scheduled the first of the monthly status and scheduling conferences for the approximately 44,000 pending MARDOC cases. After two conferences, only 102 cases, approximately 10 percent of the cases scheduled for conference, had been dismissed or transferred to the bankruptcy only docket.

As a result, at the March 25 conference, the court directed the parties to develop a different approach to reducing the pending caseload, not only against individual land-based and shipowner defendants, but also to the litigation in general. Plaintiffs' counsel stated that they intended to dismiss all but 17 land-based defendants and the shipowner defendants from the MARDOC litigation. Numerous motions have been filed by the defendants so that issues involved in the litigation can be narrowed and non-meritorious cases can be dismissed or placed on the bankruptcy-only dockets. At the same time, the parties continue to search for mutually agreeable ways to significantly reduce the number of active cases in MARDOC.

Robreno continues to seek creative solutions to the challenges presented in dusting off cases that have lain dormant for decades in MDL 875. Significant progress has been and continues to be made in clearing out the detritus of cases where no valid claims remain, moving along viable cases, and promoting the efficient administration of justice.

This article was prepared with the considerable assistance of firm partner Edmund K. John. •

Malpractice

continued from **LIT3**

contract, particularly with respect to statutes of limitations, even when those claims were indistinguishable from tort claims?

Last year, in *Steiner v. Markel*, a legal malpractice case involving property erroneously described in a deed, the Pennsylvania Supreme Court was faced with a statute of limitations issue. The court's decision focused upon other issues, but in a dissent, Justice Thomas G. Saylor asserted that the court should have taken the opportunity to clarify the "disordered area of the law" in which legal malpractice claims may be stated under either contract or tort theories. His dissent hit the nail on the head:

"[A] substantial, underlying, conceptual problem in this case is that this court has not detailed the elements of a contract-based cause of action for legal malpractice in a fashion which would meaningfully distinguish them from those necessary to support a tort-based cause. Indeed, the discussion of a contract-based case in *Bailey v. Tucker* suggests the elements of tort- and contract-based causes of action in this setting overlap substantially, if not completely. See generally 3 West's Pa. Prac., Torts: Law and Advocacy § 6:29 (2008) (suggesting that, if *Bailey* is adhered to on its terms, 'any distinction between contract and tort claims is practically meaningless' and plaintiffs, by mere 'skillful pleading' may avail themselves of the longer limitations period.). A counter-position has developed in the federal courts, which have effectively predicted this court would require averment of a breach of some particular provision of the agreement of representation, or a failure to follow specific client instructions, to support a contract-based claim. In light of such enhanced requirement for contract-based pleading, these courts have admonished, 'a plaintiff may not repackage a negligence-based malpractice claim under an assumpsit theory to avoid the statute of limitations.' In my view, the preferable approach to clarifying this disordered area of the law would be to delineate the elements of a contract cause of action for legal malpractice, compare them to those pertaining to a tort cause, and isolate any distinguishing factors."

As Saylor noted, a number of federal courts have ignored *Bailey* and harkened back to the line of cases that held that a legal malpractice case will sound in contract "only if the attorney fails to follow the client's specific instructions or, by his negligence, breaches a specific provision of the contract."

A number of Pennsylvania courts have strained to reconcile *Bailey* with prior case law. For example, in a case in which a lawyer represented both the buyer and seller in the sale of a business, and the seller ended up not receiving all of the purchase price, after addressing the plaintiff's negligence claims, the court concluded the plaintiff/seller had pled a viable breach of contract claim because he had alleged his lawyer did not follow his specific instruction to get him all of the money owed to him for the sale of the business.

In another case, the court noted that the starting point of the *Bailey* court's analysis was "the terms of the contract," and held that plaintiffs must show "breach of a specific contract or terms" in order to state a claim for legal malpractice under a contract theory. The court concluded, "the contract analysis in *Bailey* is compatible with the prior precedent requiring an allegation that an attorney has breached a specific contract term or instruction."

There are at least two problems with these efforts. First, *Bailey*'s contract analysis, pursuant to which claims for breach of contract against lawyers may be based upon a lawyer's failure to perform "professional services consistent with those expected of the profession at large," simply is incompatible with those prior precedents.

Second, in any event, those prior precedents really only work in the easy cases. To make an analogy to medical malpractice, it is easy to characterize a failed tubal ligation as a breach of a specific contractual undertaking. When typically something far more complex is involved, however, contract characterizations become much more difficult to make, and standard of care becomes the only appropriate benchmark.

Under *Bailey*, we should expect to see cases in which courts dismiss a malpractice plaintiff's tort claims as time-barred but allow the plaintiff's contract claims to proceed based upon *Bailey*'s failure-to-perform standard. Although this has not yet been documented in a reported case, given the current state of the law, it is very likely to occur. And this suggests that plaintiffs with garden variety "standard of care" tort claims against lawyers will be able to dodge the two-year statute with a contract claim label.

Of course, if *Bailey* is holding that damages in such cases are limited to fee regurgitation, this may be a non-issue. To date, however, no reported cases indicate whether such a limitation will either be imposed or disregarded.

The current state of Pennsylvania law suggests that legal malpractice claims should not "sound" in contract at all. All legal malpractice claims can and should ultimately implicate a professional standard of care, even when a lawyer is engaged to perform a specific task, and therefore should be analyzed as torts. There should be one statute of limitations, not two, and the proofs that are required in negligence cases, and the damages available in such cases, should apply in all legal malpractice cases.

Pennsylvania should consider following the lead of those jurisdictions in which, whether pled under contract or tort theories, the cases are said to "sound in legal malpractice," and the standards applied to them are uniform and derived from the standards generally applied to professional negligence cases. •

Arbitration

continued from **LIT5**

Circuit Court of Appeals that held that an express waiver of class arbitration in an arbitration provision was unenforceable and remanded the case for further consideration in light of the court's *Stolt-Nielsen* decision.

POSSIBLE UNINTENDED CONSEQUENCE

Although the court's decision in *Stolt-Nielsen* appears to be a victory for businesses that employ arbitration provisions in consumer and employment contracts, it could have a dramatic, unforeseen consequence as a result of state laws that make class action waivers in arbitration provisions unconscionable. Section 2 of the FAA provides that arbitration provisions are enforceable except upon the grounds that exist for the revocation of any contract. Courts have understood this provision to mean that any generally applicable contract defense, such as unconscionability, can render an arbitration provision unenforceable.

To be unconscionable under most state laws, a contract must be both procedurally and substantively unconscionable. Many courts have held that consumer or employment contracts that are presented on a take-it-or-leave-it basis are contracts of adhesion and are therefore procedurally unconscionable.

Moreover, in several states, including New Jersey, California, Georgia and Washington, a bar on class arbitration has been held to render an arbitration provision substantively unconscionable, at least in some circumstances, because potential damages will be very small, leaving a small incentive for an aggrieved party to pursue his or her rights.

(One possible way to save these contracts is to offer consumers or employees a meaningful opportunity to opt out of the arbitration provision. Doing so could prevent a court from concluding that the contract was one of adhesion and was procedurally unconscionable.)

These state law decisions create a tension with *Stolt-Nielsen*, which holds as a matter of federal law that an arbitration clause cannot be read to permit classwide arbitration unless it does so explicitly. In attempting to resolve this tension, a court could well conclude the following:

- The overwhelming majority of arbitration clauses in consumer and employment arbitration clauses do not permit classwide arbitration because they either bar it or are silent on the subject; and
- Those clauses are therefore invalid in a state in which a class action waiver is substantively unconscionable.

Invalidating tens, or even hundreds, of millions of arbitration clauses is almost certainly not what the majority of the Supreme Court had in mind in *Stolt-Nielsen*. Rather, this seems to be a potential case of the law of unintended consequences at work.

PROSPECTS FOR RESOLUTION NEXT YEAR

We will likely not have to live with this uncertainty for too long, as the issue could be resolved next year in one of two ways. The Supreme Court agreed to hear a case next term that suggests it is aware of this possible consequence of its decision in *Stolt-Nielsen* and will look to clarify it. Specifically, the court granted certiorari in *Laster v. AT&T Mobility*, to address the question of whether the FAA pre-empts states from conditioning the enforcement of an arbitration agreement on the availability of particular procedures, such as classwide arbitration.

The court's decision to accept the *Laster* case less than a month after it decided *Stolt-Nielsen* suggests that it might be poised to address this issue.

Laster, however, adds a twist that might limit the scope of its decision. In that case, AT&T Mobility had an arbitration provision that barred classwide arbitration but provided that, if a plaintiff obtained an arbitration award greater than AT&T Mobility's last settlement offer before invoking the arbitration clause, then AT&T Mobility would pay the customer $7,500, regardless of the size of the award. AT&T Mobility argued that the potential for an award that size means that its customers would have an incentive to pursue their legal rights even in the absence of a class action or class arbitration.

The 9th Circuit held that that provision did not save the class action waiver in the arbitration clause under California unconscionability law. If the Supreme Court did find that the possibility of a $7,500 award gives potential litigants enough of an incentive to pursue their rights, it might avoid altogether the question of whether class action waivers without such provisions are permissible under the FAA.

Assuming that the court does reach the broader question in *Laster*, the outcome is far from certain. On the one hand, the five justices in the majority in *Stolt-Nielsen* — the court's so-called "conservative" block — seem to have rendered a pro-arbitration decision that will force more individual claims, including consumer claims, out of court and into arbitration.

On the other hand, despite its favorable attitude toward arbitration, the FAA specifically preserves generally applicable state contract law defenses that might bar the enforcement of such a contract. The same justices who formed the majority in *Stolt-Nielsen* are generally viewed as justices with some predisposition to preserve states' rights. Here, that predisposition could lead one or more justices to defer to state laws, even where the effect of those laws is to invalidate provisions that the justices otherwise view favorably.

At the same time that the court is digging into these issues, a bill pending in Congress would resolve this matter and swing the pendulum dramatically the other way by explicitly invalidating all consumer arbitration clauses. The bill, titled the "Arbitration Fairness Act of 2009," proposes to make Congressional findings that mandatory arbitration undermines the development of consumer rights, is a poor system for protecting those rights, and is unfair in part because it often strips consumers of the right to pursue a class action.

Thus, the bill proposes to render unenforceable all pre-dispute arbitration agreements requiring arbitration of, among other things, employment or consumer disputes. A version of this bill has been introduced in at least each of the last two Congresses, and it has not yet become law.

It is unclear what its prospects are going forward into a new Congress next year, but at a minimum, it raises one more question about the possible future of consumer arbitration and the effect of class action waivers in arbitration clauses. •

Defenses

continued from **LIT6**

should apply where agents on both sides of a transaction are alleged to have engaged in fraud. The court noted in such scenarios, "to some extent both the audit firm and the corporation may be regarded as victims" and "[s]orting through the respective rights and obligations of the litigants in such scenarios is, by its nature, difficult and complex … ."

However, because the "vicarious aspect of any liability against PwC" was "outside the scope of these certification proceedings," the court did not reach the issue. Thus, courts will need to determine whether bad faith conduct by a corporate insider toward an accounting firm will prevent the corporation from imputing the fraudulent conduct of the accounting firm's own agents to the accounting firm. That is, it remains to be seen whether the "bad faith" bar to imputation is a two-way street.

Brielle M. Rey, an associate in the firm's litigation department, also contributed to this article. •

Reverse

continued from **LIT7**

also cited the long-standing policy in the law in favor of settlements and concluded that this policy applies even where it may have some adverse effects on competition.

Faced with a largely hostile judiciary, and in the wake of the 2008 elections, opponents of reverse payment settlements began to focus on achieving their objectives through legislation. For much of the past 18 months, the prospects of such legislation being enacted seemed excellent. After all, as a senator, President Obama had co-sponsored bipartisan legislation to prohibit reverse payment settlements.

As the president and Congress negotiated a health care reform bill, the inclusion of a ban on reverse payment settlements, which was proffered as a cost-savings tactic to both consumers and the government, seemed a natural fit. Indeed, such a ban was in the health care reform bill passed by the House and may have very well been included in the final legislation if not for the complicated rules related to the budget reconciliation process that the Democrats used to avoid a Republican filibuster. Stand-alone bills to ban reverse payment settlements have significant support in both the House and the Senate, but with a crowded legislative agenda, and strong opposition by the pharmaceutical industry, passage in the near future seems unlikely.

Particularly in light of this legislative defeat, the recent decisions in the Eastern District of Pennsylvania and the 2nd Circuit have been welcome news to reverse payment opponents. On March 29, in the first reverse payment settlement case within the 3rd Circuit, Goldberg denied the defendants' motions to dismiss in *King* and three related suits, including one brought by the FTC.

On its face, the court's discussion of the relevant case law and conclusion that the appropriate test is whether the settlement exceeded the exclusionary patent rights held by the brand-name manufacturer would suggest that it was adopting the pro-defendant standards of the 2nd, 11th and Federal circuits. In applying this test to the defendants' motion to dismiss, however, the court carefully reviewed the plaintiff's allegations regarding the invalidity of the underlying patent and concluded the allegations were sufficient to raise factual questions that could only be resolved through discovery.

This decision may indicate a willingness by the court to evaluate the merits of the patent claim, which stands in marked contrast to the holdings of the 11th and Federal Circuits and, in particular, to the 2d Circuit's *Tamoxifen* decision, where a motion to dismiss was upheld even though the underlying patent had previously been held invalid.

One month later, a 2nd Circuit panel issued a decision in the *Cipro* direct purchaser appeal. Acknowledging that *Tamoxifen* was controlling law, the panel affirmed a grant of summary judgment to the defendants. After doing so, however, the unanimous panel noted the "exceptional importance of the antitrust implications of reverse exclusionary payment settlements" and therefore "invite[d]" the plaintiffs to petition for rehearing en banc.

The panel then went on to outline a number of reasons that *Tamoxifen* might be re-examined including: the Department of Justice in its amicus brief urged repudiation of *Tamoxifen*, which was a reversal of the Bush-era DOJ position on reverse payment settlements; reverse payment settlements increased in the wake of *Tamoxifen*; reverse payment settlements are contrary to the policy objectives of the Hatch-Waxman Act and that both sponsors of the legislation, Sen. Orrin Hatch, R-Utah, and Rep. Henry A. Waxman, D-Calif., have criticized them; and *Tamoxifen* "relied on an unambiguous mischaracterization" regarding the particulars of the Hatch-Waxman Act.

So where does this leave us? As articulated in its amicus brief in *Cipro*, the DOJ now advocates an analysis that would treat reverse payment settlements as "presumptively unlawful," but afford defendants an opportunity to rebut that presumption. Clearly, at least three 2nd Circuit judges seem ready to overturn or significantly modify *Tamoxifin*. If their colleagues agree, a new more plaintiff-friendly standard in the 2nd Circuit could impact the holding of the 3rd Circuit in the likely event that *King* is ultimately appealed.

And of course, a significant change in 2nd Circuit law would create a circuit split that did not exist when the Supreme Court declined to grant cert in *Schering-Plough* and could justify Supreme Court review.

So in other words, stay tuned. •