Civil Litigation UPDATE

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Arbitration: Panacea or Pain?

By Cliff Reiders

The disappearing civil jury trial is not only related to the full-throated embrace of case management by the judiciary, but also to the onset of increased use of arbitration as a dispute resolution mechanism.

Arbitration typically occurs outside of the conventional court system, can be very expensive, and the decision makers may effectively be hand-picked cronies of one litigant. Court-supervised and regulated arbitration can be a less expensive and faster means for adjudicating a dispute. However, predispute arbitration imposed on one party by another may be a violation of the Seventh Amendment right to trial by jury in civil cases.

The United States Supreme Court has been avant garde in its activism in favor of arbitration. Oddly, there has been virtually no discussion by the U.S. Supreme Court as to whether the Federal Arbitration Act may be imposed on litigants in violation of the commerce clause or the Seventh Amendment right to trial by jury.

In *DirectTV, Inc. v. Imburgia*, 136 S.Ct. 463 (2015), the high court considered a California state court's refusal to enforce an arbitration provision in a contract. The Supreme Court noted that the Federal Arbitration Act states that a "written provision" in a contract providing for "settle[ment] by arbitration" of "a controversy…arising out of" that "contract…shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

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The fact that California essentially banned all pre-dispute arbitration clauses in consumer disputes did not sit well with the Supreme Court of the United States.

Pennsylvania courts have looked at arbitration in a variety of contexts, and have been uncomfortable with imposing predispute arbitration clauses on unsuspecting parties. In *Wert v. Manor Care Carlisle*, 12 A.3d 1248 (Pa. 2015), our own high court noted that the policy of the United States Supreme Court does not mandate a conclusion inconsistent with Pennsylvania contract law principles that stand independent of arbitration. *Wert* concerned mandatory arbitration of nursing home disputes. In the nursing home context, the Superior Court has weighed in on a variety of factual scenarios in *MacPherson v. Magee Memorial Hospital for Convalescence*, 128 A.3d 1209 (Pa. Super. 2015) (en banc); *Washburn v. Northern Health Facilities*, 121 A.3d 1008 (Pa. Super. 2015); *Wisler v. Manor Care of*

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limited his testimony to the standard of care necessary to the administration of anticoagulation medication before the procedure and did not go beyond his own expertise when asked to do so during cross-examination. Finally, the court noted that any error in the admission of the hematologist's testimony was harmless because an interventional cardiologist-expert testified to the same standard of care.

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Plaintiff's Failure to Establish Causation Fatal to Negligence Claims Against Former School

In *Krishack v Milton Hershey School,* 145 A.3d 762 (Pa.Super. 2016) (Opinion by Platt, J.), the Pennsylvania Superior Court affirmed the grant of summary judgment in favor of the defendant school in this negligence action involving allegations that the plaintiff contracted "old granulomatous disease consistent with old fungal-related histoplasmosis." The complaint alleged the cause was exposure to hay dust and other substances during farm-related chores the plaintiff performed when he was a student at the school from 1948-1953.

The trial court granted summary judgment due to plaintiff's failure to introduce any evidence that the particular fungus had ever been present at the school, including during the time plaintiff was a student. The court concluded the plaintiff's expert reports were based on "conjecture or surmise" and so determined there was no evidence supporting any causal connection. Further, there was no evidence that the fungus was ever present at the school. Finally, the court also noted that there was no evidence introduced that histoplasmosis resulted in the old granulomatous disease. Ultimately, the court agreed with the trial court that there had been no proof of causation and affirmed summary judgment.

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Economic Loss Doctrine Applies Only When No Claim for Physical Injury or Property Damage

Donaldson v. Davidson Brothers, Inc., 144 A.3d 93 (Pa. Super. 2016), has a very complex procedural history. It arises out of a three-way fatal motor vehicle accident in Centre County. The tractor trailer owned by Davidson Brothers and driven by George Donley was traveling westbound and rear ended the vehicle operated by Sarah Donaldson, which thrust that vehicle into oncoming eastbound traffic where it collided with a vehicle owned by LJF, appellant, and driven by Wilbert Quade. Ms. Donaldson's brother brought the action as administrator of her estate against the Davidson interests, who later joined LJF and Mr. Quade as additional defendants, alleging their negligence caused or contributed to Ms. Donaldson's death. LJF settled property claims with the Davidson interests and the release specifically carved out an exception of any claim for loss of contract, which was preserved.

In its answer and counterclaim to the joinder complaint, LJF asserted a claim for loss of contract against the Donaldson interests and Davidson interests. The Davidson interests filed a motion for judgment on the pleadings, which lead to the appeal. The central issue to all of the questions raised on appeal is whether an otherwise general release, which preserved a "loss of contract" claim, adequately preserved that issue, or whether the economic loss doctrine applies to bar the claim. LJF also argued that the law of the case doctrine should not apply to enforce the economic loss doctrine.

The Superior Court found that a cause of action for "loss of contract" was not barred by the economic loss doctrine. The court pointed out that the economic loss doctrine provides that no cause of action exists for negligence that results **solely** in economic damages unaccompanied in physical injury or property damage. The court disagreed with the trial court's finding that claims for economic losses, such as "loss of contract" are not a foreseeable result of negligence, and thus allowing the contract claims to proceed would be counter to public policy. Specifically, the Superior Court found that the trial court misplaced its reliance on cases that did not address the issue of whether a claim was **solely** for economic losses. The Superior Court looked to the damages claimed here and found that there was some property damage claimed.

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Pennsylvania Superior Court Rejects Substantive and Procedural Hurdles for UTPCPL Claims

In *Dixon v. Northwestern Mutual*, 146 A.3d 780 (Pa. Super. 2016) (Opinion by Olson, J.), the Pennsylvania Superior Court affirmed and vacated in part an order that sustained preliminary

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objections by a defendant insurer and one of its agents. The suit arose after the insurer and its agent, subsequent to issuing a policy, allegedly failed to properly advise the policy-holders of amounts required to fully fund the policy.

Procedurally, the court confirmed that failing to include a particular issue for appeal in the docketing statement to Superior Court does not waive that issue. The court held that Pa.R.A.P. 3517 (requiring statements) is intended to facilitate internal review, not to create "another issue preservation hurdle."

Substantively, the court held that where an Unfair Trade Practices and Consumer Protection Law ("UTPCPL") claim hinges on statements made after a contract is executed, the UTPCPL claim is not barred by the gist of the action doctrine. Instead, the allegedly negligent misrepresentations can be considered "deceptive conduct" which is actionable under the UTPCPL's catch-all provision.

Finally, the court held that UTPCPL claims are likewise not barred by the economic loss doctrine. The court noted with concern that federal courts in Pennsylvania apply the economic loss doctrine to UTPCPL claims, and seemingly invited the Pennsylvania Supreme Court to weigh in on the conflicting rulings in *Knight v. Springfield Hyundai,* 81 A.3d 940 (Pa. Super. 2013) and *Werwinski v. Ford Motor Co.,* 286 F.3d 661 (3d Cir. 2002).

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"Good Faith" Jury Instruction in Tortious Interference Case Goes to Nature of Conduct and is Proper

In *Salsgiver Communs., Inc. v. Consol. Communs. Holdings, Inc.,* 150 A.3d 957 (PA. Super. 2016) (Opinion by Olson, J.), a case involving tortious interference with contractual relations, the Superior Court held that a jury instruction that included a reference to whether defendants advanced their interest in "good faith" was proper.

In 2008, plaintiffs, who alleged that they qualified as a "cable television system operator" and a "telecommunications carrier" under the Federal Telecommunications Act, sued defendants, utility pole companies, alleging tortious interference with existing and prospective contracts. Plaintiffs requested access to defendants' utility poles to provide telecommunications and cable television services. Defendants denied access and asserted they did so because they believed plaintiffs were ineligible for pole attachments.

The lower court instructed the jury that one of the factors it could consider when determining whether defendants' conduct was proper was "the interest of the defendants, which they sought to advance by their conduct and whether defendants advanced it in good faith." Plaintiffs objected and argued the "good faith" reference was erroneous.

The Superior Court upheld the instruction. The instruction was regarding one factor of a multi-factor balancing test and was consistent with Pennsylvania law. Pennsylvania law requires a plaintiff to prove "the absence of privilege or justification on the part of the defendant" that the court noted it has equated with the term "impropriety" as used in the Restatement (Second) of Torts § 767.

A jury may consider the "nature" of the conduct when determining whether the conduct is improper and the "good faith" instruction went to the nature of the conduct.

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Escrow Agent in Real Estate Loan Has No Duty to Disclose to Lender the Unrecorded Debts of Borrower Despite the Escrow Agent Having Knowledge of the Unrecorded Debts

In *LEM 2Q, LLC et al. v. Guaranty National Title Co. et al.*, 144 A.3d 174 (Pa. Super. 2016) (Opinion by Lazarus, J.), C&V Investments, LLC ("C&V") extended loans to Russell M. Meusy, II and his companies (collectively, "Meusy") in order to fund their purchase of commercial property in Reno, Nevada ("Property").

Defendant Guaranty National Title Company ("Guaranty") performed the duties of settlement agent relative to the C&V loans to Meusy. The loans were not recorded with any public agencies and the closing papers prepared by Guaranty did not disclose that C&V had loaned funds to Meusy.

Shortly after the closing on the property, plaintiff LEM 2Q, LLC and its affiliates (collectively, "LEM") agreed to provide additional funding to Meusy relative to the property. Guaranty served as the escrow agent in the transaction. At closing, Guaranty did not disclose to LEM the existence of C&V's prior unrecorded loans to Meusy.

Meusy defaulted on the loans from C&V and LEM. LEM thereafter filed suit against Guaranty claiming that Guaranty had a duty to disclose to LEM the unrecorded C&V loans under contract and/or tort theories.

On a motion for summary judg-

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adopted a written policy setting forth its non-commercial ban. The NAACP filed a lawsuit challenging the constitutionality of the city's policy.

As the city's policy affected fundamental First Amendment rights, the city had the burden to prove that its ban on non-commercial content at the airport was reasonable. The court laid out a two-step test for reasonableness: (1) that evidence or commonsense inferences must allow the court to "grasp" alleged purpose; and (2) the evidence or commonsense inferences must demonstrate that the restriction is reasonably connected to the purpose.

The court found that the city met the first step by establishing that maximizing revenue was the purpose for the policy. However, the city failed to meet the second step as it was unable to demonstrate with record evidence or commonsense inferences that the ban was reasonably connected to maximizing revenue.

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Third Circuit Signals Subject Matter Jurisdiction Elusive under FAA, FINRA

In *Goldman v. Citigroup Global Markets,* 834 F.3d 242 (3d Cir. 2016) (Opinion by Jordan, K.), the Third Circuit dismissed a motion to vacate an adverse arbitration award by investors who alleged that their financial advisors violated the Securities Exchange Act of 1934. The Third Circuit held that it lacked subject matter jurisdiction to reverse the decision of an arbitration panel convened under the Financial Industry Regulatory Authority ("FINRA").

The court confirmed that section 10 of the Federal Arbitration Award ("FAA") does not create federal subject matter jurisdiction. The court likewise rejected the argument that it should "look through" a motion to vacate to consider whether the subject matter of the underlying arbitration creates jurisdiction. The court discredited its prior panel decision in *Goldman, Sachs & Co. v. Athena Venture Partners, LP*, 803 F.3d 144 (3d Cir. 2015), and held that federal jurisdiction must exist apart from the FAA and be apparent on the complaint's face. The "look through" approach is acceptable, however, when considering a motion to compel arbitration, in accordance with *Vaden v. Discover Bank,* 556 U.S. 49 (2009).

Finally, the investors did not establish jurisdiction under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing,* 545 U.S. 308 (2005) and its progeny, which provide federal jurisdiction for state questions in narrow circumstances. While the investors argued that the panel manifestly disregarded federal law, they were actually alleging that the panel erred in a factual determination, which is not a federal question. Likewise, the court refused to hold that violations of the FINRA rules creates federal subject matter jurisdiction.

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Section 303(i) of the Bankruptcy Code Does Not Preempt State Law Claims of Non-Debtors

In *Rosenberg v. DVI RECEIVABLES XVII, LLC, et al.*, 835 F.3d 414 (3d Cir. 2016) (Opinion by Ambro, J.), the U.S. Court of Appeals for the Third Circuit held that Section 303(i) does not preempt state law tortious interference claims, based on the filing of an involuntary bankruptcy petition.

Plaintiff Sara Rosenberg, wife of alleged debtor Maury Rosenberg ("Rosenberg"), the principal of National Medical Imaging, LLC ("NMI") and National Medical Imaging Holding Company, LLC ("NMI Holding"), affiliated with various limited partnerships ("NMI LPs"); and real estate limited partnerships associated with Rosenberg but not named in the bankruptcy (hereinafter the "Rosenberg Affiliates"), brought a tortious interference claim for damages allegedly caused by the filing of involuntary petitions by DVI Funding, LLC and DVI Receivables entities (the "Defendants") against Rosenberg, NMI and NMI Holding, after the Bankruptcy Court dismissed the involuntary petitions, and Rosenberg recovered attorney's fees, costs, and damages for bad faith filing of the petitions.

Defendants successfully moved to dismiss the complaint arguing that plaintiffs' state law claim was preempted by the involuntary bankruptcy provisions of the code. The appeal followed.

The Third Circuit reversed this District Court ruling, reasoning that in this case of alleged field preemption, §303(i) was silent as to potential remedies for non-debtors harmed by an involuntary bankruptcy petition. Field preemption requires clear and manifest congressional intent, which is lacking when Congress is silent on what courts are to do with state law remedies. *In Re Fed.-Mogul Glob. Inc.*, 684 F.3d 355, 365 (3d Cir. 2012).

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